

2002

Lutheran High School Association of the Greater
Salt Lake Area, dba Salt Lake Lutheran High School
v. Woodlands III Holdings, Woodlands IV
Holdings, Bedford Property Investors, JDJ
Properties, The Woodlands Business Park
Association, Wasatch Property Management, and
John Does 1-1000 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LUTHERAN HIGH SCHOOL
ASSOCIATION OF THE GREATER
SALT LAKE AREA, a Utah non-profit
corporation, d.b.a. SALT LAKE
LUTHERAN HIGH SCHOOL,

Plaintiff and Appellant,

vs.

WOODLANDS III HOLDINGS, LLC, a
Utah limited liability company,
WOODLANDS IV HOLDINGS, LLC, a
Utah limited liability company,
BEDFORD PROPERTY INVESTORS,
INC., a Maryland corporation, JDJ
PROPERTIES, INC., a Utah corporation,
THE WOODLANDS BUSINESS PARK
ASSOCIATION, a Utah non-profit
corporation, WASATCH PROPERTY
MANAGEMENT, INC., a Utah
corporation, and JOHN DOES 1-1,000,

Defendants and Appellees.

Case No. 2002 0808 - CA

Argument Priority No. 15

BRIEF OF THE APPELLANT

Appeal from the Third Judicial District Court, Salt Lake County, Utah
Honorable Sandra N. Peuler, Presiding

P. Bruce Badger, Diane H. Banks, and
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LLT

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LIST OF ALL PARTIES

Plaintiff/Appellant:

Lutheran High School Association of the Greater Salt Lake Area, a Utah non-profit corporation, which does business under the assumed name: “Salt Lake Lutheran High School” and which also does business under the assumed name “Lutheran High School”.

Defendant/Appellees:

Woodlands III Holdings, LLC, a Utah limited liability company,
Woodlands IV Holdings, LLC, a Utah limited liability company,
Bedford Property Investors, Inc., a Maryland corporation,
JDJ Properties, Inc., a Utah corporation,
The Woodlands Business Park Association, a Utah non-profit corporation,
Wasatch Property Management, Inc., a Utah corporation, and
JOHN DOES 1-1,000

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to §78-2a-3(2)(j), Utah Code Annotated, 1953, as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Lutheran High School Association of the Greater Salt Lake Area (“Lutheran”) has appealed from, and seeks review by the court of, rulings of the trial court on cross-motions for summary judgment. The trial court granted summary judgment for Respondents, and denied summary judgment for Lutheran. On September 30, 2002, Lutheran filed its Notice of Appeal from the Order Granting Defendants’ Motion for Summary Judgment and Denying Plaintiff’s Motion for Summary Judgment. R. at 676-677. The issues are as follows:

1. What is the rule in Utah regarding easements where there has been an expansion of the dominant estate or a connection of the easement to a non-dominant parcel?
2. Did the trial court err in granting Respondents’ Motion for Summary Judgment and in its determinations that there is no genuine issue of material fact; and, as a matter of law, that the easement has not been overburdened by overuse or by improper uses?
3. Did the trial Court err in its application of law and material facts in denying Appellant’s Motion for Summary Judgment and its determination that an expansion of the dominant estate had not occurred, and/or that the easement was not overburdened?

STANDARD OF REVIEW

The standard of appellate review is as follows: Summary Judgment should be upheld only if the pleadings, depositions, Answers to Interrogatories and Admissions on file, together with Affidavits, if any, show that there is no genuine issue of material fact and that the moving party is

entitled to judgment as a matter of law. A trial court's decision to grant or deny a Motion for Summary Judgment is a legal one, and will be reviewed for correctness. The appellate court views the facts in the light most favorable to the losing party. The appellate court does not defer to the legal conclusions of the trial court. Utah R. Civ. P. 56(c); Alder v. Bayer Corp., 2002 UT 115, ¶20, 61 P.3d 1068, 1075; Warburton v. Va. Beach Fed. Sav. and Loan Ass'n, 899 P.2d 779, 781 (Utah App. 1995).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, AND RULES**

There are no constitutional provisions, statutes, ordinances, or rules which determine the outcome of this matter.

STATEMENT OF THE CASE

Nature of the Case. This is a matter in which Lutheran sought relief from misuse of an easement. The misuse results from Respondents' expansion of the dominant estate and/or connection of the easement for the benefit of an adjacent non-dominant parcel.

Course of Proceedings. In 1996, this action was commenced by Lutheran to complain that Respondents had acquired additional adjacent land to the north of the dominant estate; had improperly expanded the dominant estate or the use of the easement over Appellant's servient tract to benefit the acquired parcel; had connected and integrated the additional land to the dominant estate's roadway system; and, as a result, had improperly extended the use of the easement to non-dominant property and misused the servient estate.

Lutheran and Respondents each presented Motions for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure. The trial court granted Respondents' Motion for Summary

Judgment, and denied the Motion for Summary Judgment of Lutheran. Lutheran has appealed from the Order.

Disposition by Trial Court. Both parties submitted Motions for Summary Judgment. [R. at 213; 414.] The trial court granted summary judgment for the Woodlands Owners. [Minute Entry R. at 588-591. Addendum, Ex. D.] The court's Order stated, over Lutheran's objections:

5. The Easement, which is for the benefit of the dominant estate, has not been overburdened by the use of the Easement, by the owners, tenants, subtenants and concessionaires of Tract B and their customers, invitees and guests, including their use of the Easement to access parking on Tract C.

6. The owners, tenants, subtenants and concessionaires of Tract B and their customers, invitees and guests, may continue to use the Easement to access parking on Tract C.

7. The owners, tenants, subtenants and concessionaires of Tract C and their customers, invitees and guests, may not use the Easement. Accordingly, Woodlands IV Holdings, LLC, shall take all steps necessary to restrict use of the Easement by the Tower IV tenants, subtenants and concessionaires and their customers, invitees and guests, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate. [R. at 664.]

STATEMENT OF FACTS

1. **Foundation.** a. In 1983, certain real property in Salt Lake County, Utah, situated at approximately 4000 South, between 700 East and 900 East (property which had previously been owned and operated as the Woodland Drive-In Theaters by Eugene Woodland, aka "Captain Nemo"¹) was essentially divided into two adjacent (abutting) tracts. Woodland Investment Co., a Utah limited partnership (of which Eugene Woodland was the general partner) retained "Tract A",

¹ The historical use of the property as the Woodland Drive-In, by Eugene Woodland is not established by the record, but is a matter of notoriety and common knowledge for long-time residents in the community, and among the parties, of which the court of appeals may take judicial notice. That history was acknowledged in oral argument by Respondents' counsel. See hearing transcript, R. at 694, transcript pages 3 and 4.

the eastern parcel which was situated along 900 East. The Woodlands Associates, a joint venture, acquired "Tract B", the western tract situated along 700 East. [Compl., ¶9, 10, and 11, record ("R") ¶3; Decl. of Easements, Covenants & Restrictions attached to the Compl. as Ex. "C" thereto R. at 14, 22-24; Answer of named Defendants other than Bedford Property Investors, Inc. ("Bedford")², Admis., R. at 77-78.

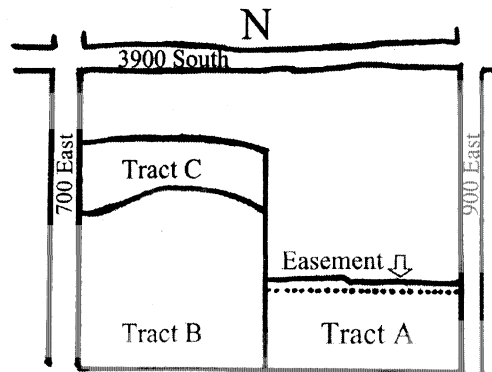
b. On October 27, 1983, in connection with the contemporaneous acquisition of Tract B by the joint venture, the parties entered into an agreement known as the Declaration of Easements, Covenants & Restrictions (the "Declaration"). [Id.] Tract A and Tract B were specifically identified and more particularly described by legal description.³ [R. at 3, 12 and 13; Admis. on R. at 77, R. at 138. The Declaration, as amended, is attached as Exhibit A in the Addendum.]

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² Throughout its Answer, Bedford claimed to lack sufficient information to answer most allegations.

³ It is to be noted that the legal descriptions attached as Exhibits to the Declaration were reversed. An Amended Declaration of Easements, Covenants & Restrictions was recorded on June 20, 1984, as Entry No. 3957731, Book 5566, Page 2146, to correctly set forth the respective parcels. A copy of the Amended Declaration is attached to the Memorandum in Support of Motion for Summary Judgment submitted by Defendants. It is noted at R. at 163, and found at R. at 188-193.

c. The following diagram is offered for illustration:



2. The Declaration. a. Pursuant to the Declaration, the owners of Tracts A and B granted non-exclusive appurtenant easements to one another, each specifically for the benefit of the grantee's parcel as the dominant estate thereof. [R. at 18-19.] The dispute in this matter concerns the use of and burden placed on the easement ("Easement") across Tract A, as the servient estate, by the owners and users of Tract B, as the dominant estate. In the Declaration, the then-owner of Tract A, or "Woodland", granted to the then-owner of Tract B, or "Associates", an easement as follows:

(a) Woodland grants to Associates a non-exclusive easement appurtenant to and across Tract A for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes situated on Tract B; provided, that the foregoing right of access shall be limited to use for such purposes and to such extent as may be customary for use of Tract B for commercial purposes (including, but not limited to, reasonable and customary deliveries). . . . [Decl., Section 4(a) on ¶5 thereof. R. at 18.]

(d) The easements granted pursuant to this Section 4 shall benefit each of the Parties and their respective tenants, concessionaires, customers, invitees and guests, and the concessionaires, invitees, customers and guests of any tenant or subtenant of the respective parties. [*Id.* R. at 19.]

b. The Declaration and the Easement to continue for ninety-nine (99) years unless sooner terminated. [Decl. ¶5. R. at 19-20.] The Declaration cannot be extended, modified or amended except by agreement of the parties [Decl. ¶6. R. at 20.] It was expressly provided that the

Declaration shall not be deemed to be a gift or a dedication to the public, “. . . it being the intent of the Parties that this Declaration be strictly limited to and for the purpose expressed herein.” [Decl. ¶7. R. at 20.] The Declaration also made clear that the tract benefitted was intended to constitute the dominant estate, and that the tract burdened was to constitute the servient estate. [Decl. ¶8(a). R. at 20.]

c. The Easement is an easement appurtenant. [Undisputed fact presented by Respondents, ¶6, R. at 163; Decl. ¶4(a), R. at 18.] The Respondents have no “special” knowledge of the negotiations which relate in any way to the Declaration other than that which is expressed in the Declaration. [Answer to Interrog. 7, attached to Appellant’s Memo. R. at 272-273.]

3. Development of Tract B. a. Tract B, the dominant parcel, was approved and developed as a commercial planned unit development known as “Woodlands Business Park”. [S.L. County Planning Comm’n Mins. 11/22/83, R. at 187. Declaration of CC&R for Woodlands Business Park (“CCR”) R. at 438, Sixth Amendment to CCR, beginning at R. at 486, attached, Legal Description of Woodlands Business Park (acknowledging the PUD) R. at 498. Letter to S.L. Co. R. at 576.]

b. Prior to 1992, Woodlands Business Park had been developed to include a parking structure, two office towers, two “strip center” type buildings for retail commercial establishments and some open parking. [Compl. ¶15. R. at 4. Admis. in Answer: R. at 78, R. at 278.]

4. The Parties Acquire Tracts A and B. a. In 1992, Tract A was sold to Lutheran. [Compl. ¶12. R. at 4. Defs.’ recitation of undisputed facts. R. at 165.]

b. From 1993 through 1999, Woodlands III Holdings, LLC (“Woodlands III”) and JDJ Properties, Inc. (“JDJ”) acquired all of Tract B and became the owner of the Woodlands Business Park Planned Unit Development (the “PUD”). [Defs.’ Answers to Pl.’s Interrogs., Answer to

Interrog. No. 4. R. at 269-271. Regarding the PUD, see Minutes of Planning Commission, 11-22-83 acknowledging that the Woodlands Associates filed their application “as a PUD”. R. at 224. See also Decl. of Covenants, Conditions & Restrictions of the Woodlands Business Park, beginning at R. at 438, and Ex. “C” thereof, at R. at 484, 485.]

5. Acquisition and Development of Tract C. a. Beginning in 1996, certain parcels adjacent to Tract B called the “Northern Tract” and the “Northern Northern Tract” were acquired by Woodlands III and Woodlands IV Holdings, LLC (“Woodlands IV”). [R. at 269-270.] Those parcels as assembled have, collectively, been referred to by the parties and the trial court as Tract C or the Expansion Property. [R. at 4; R. at 25-26. Supplemental Compl. ¶3(d), R. at 402. Woodlands Business Park CC&R’s, Sixth Amendment, R. at 486, 488. As to reference as Tract C, see various pleadings in R., see page 3 of Order at R. at 663, Minute Entry, R. at 668.]

b. Woodlands III, Woodlands IV, JDJ, and The Woodlands Business Park Association (the “Woodlands Owners”) constitute all of the owners of Tracts B and C. Wasatch Property Management, Inc. (“Wasatch”), by agreement with the Woodlands Owners, manages the PUD. [R. at 373-377.]

c. Over the objection of Lutheran, Woodlands III sought and obtained a permit to construct Woodlands Tower III (“Tower III”). [R. at 4-5, 78, 270.] To satisfy Salt Lake County parking requirements relative to Tower III, a parking facility has been constructed on Tract C providing 453 parking stalls for Tower III and Tract B, and Grants of Easement have been made to provide for use of the parking facility for Tract B tenants and invitees. [R. at 217, 271, 664; Grant of Easement, R. at 503-509, see 504; Grant of Easement, R. at 511-518. R. at 577.]

d. A fourth office tower (“Tower IV”) has been constructed by Woodlands IV on Tract C. [R. at 271, 563, 664.]

6. County Required Access, Parking. a. Salt Lake County required, for the construction of Tower III on Tract B, that sufficient parking to support Tower III be available, and the Developers proposed or agreed that it be provided specifically through the construction of the parking structure on Tract C. [By inference from Grant of Easement 3/12/97, ¶¶1 and 4 referring to approval by S.L. County. R. at 503-504; 511-512; Parking requirements acknowledged on 6/7/96 R. at 577; 9/26/95 S.L. County letter R. at 578.] The County also required, when it approved Tower III that access be available to the parking facility from 900 East over the Easement. [R. at 578.]

b. The Woodlands Business Park has been expanded to include Tract C. The multi-level parking facility and Tower IV are integrated into the PUD through a roadway system which is easily accessible from 900 East. [R. at 217, 468-469, 486, 488, 563, 584, 586.] As a condition to the approval of Tower IV, Salt Lake County required that parking in the multi-level facility on Tract C be provided, and that access to 900 East be left open from the parking structure. [R. at 577-578, 580.]

7. Tract C is Integrated into the PUD, and the Easement is Accessible from Tract C.

a. Wasatch is the manager of the PUD. John A. Dahlstrom, Jr., Executive Vice President and General Counsel of Wasatch, stated in his Affidavit that the PUD has two parking structures, including that on Tract C. He said: “Access to the parking structure which is situated northeast of Office Tower III is via 700 East, 3900 South or the right of way from 900 East along the north boundary of the Lutheran High School property.” [quoting from ¶8 thereof. R. at 217-218.] He also referred to attached photographs of the right of way on Tract A leading to the PUD, and of the

parking structure on Tract C. [R. at 220, 221. For the court's convenience, the Affidavit and its attached pictures are provided in the Addendum, as Exhibit C.]

b. Tract C is integrated into the PUD, is a part thereof, and the tenants and occupants of Tower IV on Tract C are able, by virtue of the integrated and indivisible system of roadways, to access Tract C by use of the Easement. [R. at 217, 220, 221, 420, 468-469, 486, 488, 536, 538-539. See Plat map showing roadways prior to expansion, R. at 530. Addendum: Ex. B. (A map of the PUD showing the roadway system as it is today was used at argument for demonstrative purposes, but was not made part of the record).]

8. Actual Use of Easement to Access Tract C. Persons using Tower III and Tower IV do in fact utilize the Easement to access the parking structure on Tract C, and to enter Tower III and/or Tower IV. [Davis Aff. and Swanson Aff., R. at 583-586.]

SUMMARY OF ARGUMENTS

Lutheran, as the owner of Tract A, contends that the Easement is being misused by the Woodlands Owners, the owners of Tract B, and the tenants and subtenants of the Woodlands Owners as well as their customers, invitees and guests. Tract B is the dominant estate. It abuts and is appurtenant to Tract A, the servient estate. Tract B was developed as a Planned Unit Development as permitted by Salt Lake County.

After acquiring the various planned unit parcels during the 1990's, the Woodlands Owners acquired and/or joined with related entities to acquire property adjacent to and north of Tract B, known as Tract C. Due to the various benefits (size, additional acreage, room for parking, etc.) afforded by the adjacent property, Tract C was added to the PUD. Two new office towers, one on Tract B (Tower III) and one on Tract C (Tower IV), and a multi-level parking facility on Tract C

have been constructed and joined into the PUD. Access is provided over the roadway system of the expanded PUD to the parking facility on Tract C, for the benefit of both Tower III and Tower IV, as well as the rest of the PUD. The roadway system provides access to the Easement. As a result, the authorized uses of the Easement have been so intertwined with the unauthorized uses (attributable to the non-dominant, non-appurtenant Tract C), that the wrongful activities cannot be separated from the appropriate uses.

This is a matter involving legal issues of first impression in the state of Utah. Because this case involves indivisibly intertwined authorized and unauthorized uses of an easement, we are confronted by a fact circumstance which arises infrequently.

The law of other jurisdictions in the United States reveals a “bright line” rule which appears to govern all but one jurisdiction. The bright line rule has been succinctly stated as follows:

The dominant owner may not use an appurtenant easement to benefit any property other than the dominant estate. An attempted extension of the easement to serve non-dominant land represents an overburden of the servient tenement, regardless of the amount of usage. Jon W. Bruce & James W. Ely, Jr. The Law of Easements and Licenses in Land, §8:11, ¶832 (2001).

Lutheran submits that the facts in the light most favorable to it, as responding party, do not support a judgment as a matter of law for Respondents. Furthermore, if Utah does not adopt the bright line rule, Lutheran submits that there remain the numerous material questions of fact, which would include, *inter alia*, the intent of the parties who created the Easement, whether an expansion of the dominant estate has occurred, whether expansion was anticipated, what would constitute normal development for Tract B, what the resulting burden on the Easement would be, and what burden is actually being borne by Tract A. Even if the law of Utah is that which is set forth by the Supreme Court of Connecticut (which recognized an exception to the bright line rule), there are

obvious material questions of fact which must be resolved in a trial. These factual issues include the parties' intent, the nature and extent of the burden on the Easement, and the character of the Tract B development.

Lutheran also submits that, if the Court chooses to apply the bright line rule, there are no material fact questions, and a misuse of the servient estate exists, as a matter of law. On that basis, Lutheran is entitled to summary judgment, and the Woodlands Owners, and each of them, should be enjoined from using the Easement, or their easement rights should be extinguished.

ARGUMENT

Introduction. Woodlands Business Park is so designed that there is no practical way to separate the use of the Easement derived from the dominant Tract B, from that derived from the expansion Tract C. The construction of Tower III on the Tract B dominant estate would not have been legally or practically possible but for the additional parking available on Tract C. By design, the parking facility and Tower IV on Tract C are integrated into the PUD and its roadway system and, therefore, the occupants and invitees of those buildings have unrestricted access to the Easement through the common roadways of the PUD.

I. SINCE THIS IS A CASE OF FIRST IMPRESSION, ALL APPLICABLE LAW SHOULD BE EXAMINED.

The law in Utah is silent in respect to expansion of the dominant estate, and/or extension of an easement to non-dominant land. The issues presented on this appeal will therefore be a matter of first impression for the appellate courts of the state of Utah. It is relevant and appropriate to consider the law which does exist in the state of Utah regarding planned unit developments and easements, and how courts in other jurisdictions have dealt with the issue at hand.

obvious material questions of fact which must be resolved in a trial. These factual issues include the parties' intent, the nature and extent of the burden on the Easement, and the character of the Tract B development.

Lutheran also submits that, if the Court chooses to apply the bright line rule, there are no material fact questions, and a misuse of the servient estate exists, as a matter of law. On that basis, Lutheran is entitled to summary judgment, and the Woodlands Owners, and each of them, should be enjoined from using the Easement, or their easement rights should be extinguished.

ARGUMENT

Introduction. Woodlands Business Park is so designed that there is no practical way to separate the use of the Easement derived from the dominant Tract B, from that derived from the expansion Tract C. The construction of Tower III on the Tract B dominant estate would not have been legally or practically possible but for the additional parking available on Tract C. By design, the parking facility and Tower IV on Tract C are integrated into the PUD and its roadway system and, therefore, the occupants and invitees of those buildings have unrestricted access to the Easement through the common roadways of the PUD.

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A. Planned Unit Developments in Salt Lake County. The term, “planned unit development (PUD)” is defined by Black’s Law Dictionary (5th Ed. 1979) as “an area with a specified minimum contiguous acreage to be developed *as a single entity according to a plan*, containing one or more . . . commercial or industrial areas.”

The Salt Lake County Ordinances in effect in 1983 when the Declaration was created defined planned unit development to “mean an *integrated design* for development of residential, commercial, or industrial uses, or combination of such uses, in which one or more of the regulations, other than use regulations, . . . is waived or varied to allow flexibility and initiate site and building design and location in accordance with an approved plan and imposed general requirements as specified in this Chapter.” Salt Lake County, Utah, Ordinance §22-31-3(3) (1981). It further provided in §22-31-3(4) “. . . A planned unit development permit shall not be granted unless the planned unit development meets the use limitations of the zoning district in which it is to be located and meets the density and other limitations of such districts. Compliance with the regulations of this Ordinance in no sense excuses the developer from the applicable requirements of the Subdivision Ordinance, except as modifications thereof are specifically authorized in the approval of the application for the planned unit development.”

Section 22-31-3(5) sets forth the “Required Conditions”, among which are the following:

3. The development shall be in single, partnership, or corporate ownership, or under option to purchase by an individual or a corporate entity at the time of application or the application shall be filed jointly by all owners of the property.

4. The Planning Commission shall require such arrangement of structures and open spaces within the site development plan, as necessary, to assure that adjacent properties will not be adversely affected.

a. Height and intensity of buildings and uses shall be arranged, around the boundaries of the planned unit development, to be compatible with existing adjacent developments or zones.

...

c. Density of dwelling units per acre shall be the same as allowed in the zone in which the planned unit development is located.

See also §22-31-3(6) in which the applicant is required to submit a plan for the total area which will show, among other things,

1. The use or uses, dimensions, sketch elevations, and *locations of proposed structures*.

2. Dimensions and locations of areas to be reserved and developed for vehicular and pedestrian circulation, parking, . . . and other open spaces.

A copy of §22-31-3, from the Salt Lake County Ordinances which were in effect in 1983, is attached to the Addendum as Exhibit E. Amendments to Salt Lake County's Ordinances were adopted in 1984, with no changes which are material to the issues addressed above. Nonetheless, a copy of the ordinances as changed in 1984 is also attached for the court's easy reference, as part of that Exhibit.

B. Easement Case Law in Utah. The parties agree that the Easement is an easement appurtenant. "An easement appurtenant is a privilege whereunder the owner of one tenement (the dominant estate) has rights to enjoy, in respect to that tenement, in or over the tenement of another person (the servient estate)." Ernst v. Allen, 184 P 827, 829 (Utah 1919). An appurtenant easement "inheres in the [grantee's] land, concerns the premises, and pertains to its enjoyment. *It is incapable of existence separate from the particular land to which it is annexed*" (emphasis added). Johnson v. Higley, 1999 UT App. 278, 989 P.2d 61, 67, quoting 25 Am. Jur. 2d *Easements and Licenses* ¶10 (1996).

It is settled in Utah that, when an easement is created by an express grant, the interpretation or analysis is governed by that grant. The grant defines the extent of the burden which will be permitted.

Ordinarily the purpose of granting a right of way over land, rather than making an outright conveyance of it, is to retain the ownership in the servient estate . . . and to allow a privilege of limited use to the dominant estate *The accepted rule is that the language of the grant is the measure and the extent of the right created; and that the easement conveyed should be so construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant.* (emphasis added, footnote omitted) Weggeland v. Ujifusa, 14 Utah. 2d 364, 365-366, 384 P.2d 590, 591 (Utah 1963). See also Wade v. Dorius, 52 Utah 310, 173 P. 564 (1918).

In 1982, in the matter of Wykoff v. Barton, 646 P.2d 756 (Utah 1982) the court said:

This Court has on a number of occasions considered and defined easements based on deeds and grants, and it is clear that a right-of-way founded on a deed or grant is limited to the uses and extent fixed by the instrument. Id., at 758.

See also Wood v. Ashby, 122 Utah 580, 253 P.2d 351 (1952), and Nielson v. Sandburg, 105 Utah 93, 141 P.2d 696 (1943).

The owner of a servient estate may use the servient estate in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with that use. See Stevens v. Bird-Jex Co., 81 Utah 355 18 P.2d 292 (1933). Also in Stevens, the Utah court acknowledged the rule that “. . . in construing instruments creating easements in land, the court will look to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained, to ascertain and give effect to the intention of the parties.”

Stevens was cited favorably in Wood, a case in which the court was considering a reservation of a right of way in a warranty deed and the later partition of the dominant estate. The court also said:

It is true, as stated by Appellant, that a right of way appurtenant to an estate is appurtenant to every part of it and inures to the benefit of the owners of every part. “Nevertheless, the partition of the dominant tenement cannot create a further or additional easement across a servient tenement, and an easement of way does not inure to the benefit of the owner of a parcel which after the division does not abut on the way; and where the resulting use will increase the burden upon the servient estate, the right to the easement will be extinguished.” Wood, 253 P.2d at 354 (Utah 1952). citing 28 C.J.S., Easements, §65(b), at 732.

The Wood court found that the parcel which had been partitioned from the dominant estate and which did not abut the servient estate *was not appurtenant on its own*, and therefore the use of the servient estate to provide access to the non-abutting partitioned estate would result in a substantial increase in the use of the servient estate, and that use was contrary to the use contemplated by the parties at the time of the grant. Use by the partitioned parcel would be a misuse of the easement.

In June, 2002, the Utah Court of Appeals favorably cited the Wood language in Alvey v. Mackelprang, 2002 UT App. 220, 51 P.3d 45, 49 (2002). It affirmed the rule that “. . . *an easement is extinguished when, after the division of the dominant tenement, a newly created parcel does not abut the servient tenement.*” (emphasis supplied, footnote omitted. Id., at ¶15, 51 P.3d at 50.)

The law of Utah demonstrated in these opinions relates to, but is not directly determinative of, the issues in this matter. Has the dominant estate been expanded to include Tract C, or has Tract C been improperly provided access to the Easement? In either case, has the Easement been misused? Those issues have been addressed in cases in numerous other jurisdictions. It is prudent to consider how those jurisdictions have dealt with the issues, and how treatises have explained the legal principles.

C. The Bright Line Rule in Most Jurisdictions. The Law of Easements and Licenses in Land, at §8:11 states:

The dominant owner may not use an appurtenant easement to benefit any property other than the dominant estate. An attempted extension of the easement to serve non-dominant land represents an overburden of the servient tenement, regardless of the amount of usage. (footnotes omitted)

In respect to expansion of the dominant estate, that treatise reports:

An easement appurtenant to one parcel cannot be used in connection with another parcel. The owner of a dominant estate may not extend the easement to accommodate land that the servitude was not originally intended to serve. Hence, an easement appurtenant does not benefit nondominant land that the easement holder now owns or property that the easement holder may subsequently acquire. The purpose of this rule is to prevent an increase of the burden on the servient estate. (footnotes omitted) Id., at §2:8.

The Restatement (Third) of Property (Servitudes) §4.11 (2000) provides as follows:

§4.11 Use of Appurtenant Easement or Profit to Serve Property Other Than Dominant Estate.

Unless the terms of the servitude determined under §4.1 provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate.

Comment:

...

b. *Appurtenant easement cannot be used to serve non-dominant estate.*

Under the rule stated in this section, unless otherwise provided an appurtenant easement cannot be used to serve property other than the dominant estate. The rationale is that use to serve other property is not within the intended purpose of the servitude. This rule reflects the likely intent of the parties by setting an outer limit on the potential increase in use of an easement brought about by normal development of the dominant estate, permitted under the rules stated in §4.10. Where it applies, the rule avoids otherwise difficult litigation over the question whether increased use unreasonably increases the burden on the servient estate.

... Under the rule stated in §2.5, a servitude can be created to benefit any land, but if the intent to benefit land owned by another, or land to be acquired in the future, is not clearly apparent, the usual presumption, embodied in the rule stated in this section, is that the dominant estate is limited to land owned by the grantee at the time the easement or profit is created.

Unless the easement or profit was intended to benefit land to be acquired in the future, the easement beneficiary is not entitled to use it to serve land that is subsequently acquired even if no additional use of the easement or burden on the servient estate would ensue.

In respect to the above Comment b, it is noted:

Appurtenant easement cannot be used to serve non-dominant estate, Comment b. The rule stated in this section is widely supported by modern authority: (citations omitted) [Restatement, §4.11 Reporter's Note (2000)]⁴

See also 7 Thompson on Real Property, §60.04(a)(1)(ii) (David A. Thomas, ed., 2d ed., 1994).

Ohio. Prominently referred to in the treatises for articulation of the bright line rule is State ex rel. Fisher v. McNutt, 597 N.E.2d 539 (Ohio Ct. App. 1992). That court said:

. . . it is well known that the law in Ohio, and undoubtedly in every State of the United States, is that one having an easement by grant may assign that easement with the dominant estate, and the easement goes to every portion of the dominant estate assigned, *but can go no further*. . . .

It is universal and well known that if one acquires a right-of-way to one lot or parcel of land, he or she *cannot use it to gain access to that parcel and thence over his or her own land to other lands belonging to him or her*. (emphasis added) Id., at 543 (quoting from App., Assignments of Error Nos. 1 and 2.)

McNutt involved the claim of the State of Ohio that it could “. . . use its easement located on appellants' property to provide forest management not only for the 77.7 acres owned by the original grantor of the easement, but also for the additional 4,764.6 acres of adjacent property.” Id., at 541. The easement was for road purposes, and the state claimed that the use to access the additional

⁴ After a review and discussion of seventeen (17) cases demonstrating that “wide support”, the Reporter acknowledged that “[a] few recent cases may indicate a shift from the rule stated in this section, which essentially creates a presumption that after-acquired property was not intended to benefit from the easement, to one that is neutral where no material increase in use of the easement will result.” The Reporter then referred to the Connecticut cases discussed below.

property would not constitute an unreasonable increase in burden to the servient estate. The court quoted the general rule of law from a previous Ohio case (citation omitted) as follows:

An easement can be used only in connection with the estate to which it is appurtenant and cannot be extended by the owner to any other property which he may then own or afterward acquire, unless so provided in the instrument by which the easement is created, and the fact that such property is within the same enclosure as the lot to which the easement is appurtenant makes no difference in the application of the rule. Accordingly, a right of way cannot be used by the owner of the dominant tenement to pass to other land or premises adjacent to or beyond that to which the easement is appurtenant Id., at 542.

It also favorably quoted two treatises as follows:

“No man can impose a new restriction or burden on his neighbor by his own act, and for this reason. An owner of an easement cannot, by altering his dominant tenement, increase his right.”

. . .

“The law is perfectly settled, if one man has a right of way over land of another, . . . to go to a particular place, he cannot use it for the purpose of going to a place beyond it, because the servient tenant is only subject to a certain inconvenience.”

(citations omitted) Id.

In McNutt, the trial court had found for the State on the basis that the easement was ambiguous because it did not say whether it was for the sole benefit of the property belonging to the original grantee. The Ohio appellate court overruled stating that, “[c]ontrary to the court’s finding of silence, *we find the grant speaks loudly as to which property was to benefit from the easement.*” Id., at 542-543.

Arizona. Another frequently cited case is DND Neffson Co. v. Galleria Partners, 745 P.2d 206 (Ariz. App. 1987). Its facts are strikingly similar to those before this court. The Defendant in DND Neffson was constructing a shopping mall on two parcels of land. One parcel fronted Oracle Road. The other, referred to by the court as the “Foster parcel”, was adjacent to the first parcel and

accessible by an easement over Tucson Mall Ring Road, which easement was granted to the mall owner's predecessor by the Plaintiff. The plans permitted access to the entire mall by use of the easement which had been granted for the benefit of the Foster Parcel only. "The trial court granted summary judgment and entered an injunction prohibiting use of the easement until such time as the mall was altered to prevent use of the easement by those utilizing that portion of the mall not on the dominant estate." Id. at 207. The mall developer contended that questions of fact remained and that the injunction was inappropriate as premature. The Arizona Court of Appeals disagreed, saying:

The law is clear that an easement appurtenant to a parcel of land, the dominant parcel, may not be used to benefit another parcel of land to which the easement is not appurtenant even though the two parcels are adjacent and under common ownership. Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc., 179 F.2d 64 (D.C. Cir. 1949); McCullough v. Broad Exch. Co., 101 App. Div. 566, 92 N.Y.S. 533 (1905), *aff'd*, 184 N.Y. 592, 77 N.E. 1191 (1906). The only building plans before this court show clearly that *patrons from the non-dominant parcel will have access to the easement through the dominant parcel, thus benefitting from the easement improperly.* Id.

The mall owner argued that a question of fact existed regarding the extent of the burden. The court said:

. . . However, we are not here concerned with the extent of the burden, i.e. with the actual amount of pedestrian and automobile traffic using the easement. *An easement can be overburdened either by overuse or by improper use.*

It is elementary law that an easement cannot be extended by the owner of the dominant tenement to the other land owned by him adjacent to or beyond the land to which it is appurtenant, for such an extension would constitute an unreasonable increase of the burden of the servient tenement.

[citing] Kanefsky v. Dratch Constr. Co., 376 PA. 188, 195, 101 A. 2d 923, 926 (1954) (footnote omitted). The easement granted to appellant was expressly "for the benefit of the Foster Parcel. . .". Having planned the mall to permit unrestricted access to the easement by the non-dominant parcel, appellant is in no position to

contend that that which it planned, a plain misuse, will not be used. Accordingly, injunctive relief was not premature. (emphasis added) 745 P.2d at 207.

District of Columbia. See also Penn Bowling, 179 F.2d 64. The facts in that case involved a development by the owner of the dominant estate upon the dominant estate and adjacent property which could be accessed by the easement. The court ruled:

So where it cannot be ascertained whether the easement of a right of way is being used solely for the enjoyment of the dominant tenement, or for additional property also, an injunction may be granted against further use of the easement until such time as it may be shown that only the dominant tenement is served by the easement. (citation omitted) Id., at 67.

Illinois. In McCann v. R. W. Dunteman Co., 609 N.E. 2d 1076 (Ill. App. Ct. 1993), the trial court enjoined use of the easement in question to access parcels beyond the dominant estate. The dominant estate owner contended that it was entitled to the use of the easement to access its other parcels in order to enable it to fully enjoy the dominant estate. After reciting the basic principles regarding appurtenant easements, and the law that the easement may not be extended to accommodate other lands for which the easement was not originally intended, the court found that the proposed use of the easement would not enhance the normal development of the dominant parcel, and that carrying traffic to other parcels was not necessary for the dominant parcel's normal development.

Tennessee. The Tennessee Court of Appeals, considering use of an easement over farm land to access adjacent land, ruled that:

The owner of an easement "cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." . . . *Enlarging an easement to include adjoining tracts does increase the burden.* "An easement for the benefit of one land cannot be enlarged and extended to other adjoining lands to which no right is attached." (emphasis added) McCammon v. Meredith, 830 S.W.2d 577, 580 (Tenn. Ct. App. 1991).

Massachusetts. In a case involving an attempt by the town of Amherst, Mass., to connect an easement to another roadway, the Massachusetts Supreme Court held

It also is the long established rule in the Commonwealth, as elsewhere, that after-acquired property, such as the locus, may not be added to the dominant estate . . . without the express consent of the owner of the servient estate . . . [and] absent such consent, the use of an easement to benefit property located beyond the dominant estate constitutes an overburdening of the easement. (citations omitted) McLaughlin v. Bd. of Selectmen, 664 N.E. 2d 786, 790 (Mass. 1996).

Other Jurisdictions. There are numerous other jurisdictions in which the rule applies. See also the following cases of other jurisdictions consistent with the bright line rule: Hunt v. Pole Bridge Hunting Club, 631 N.Y.S. 2d 711 (N.Y. App. Div. 2d Dep’t 1995); Schadewald v. Brule, 570 N.W. 2d 788 (Mich. Ct. App. 1997); Soergel v. Preston, 367 N.W. 2d 366 (Mich. Ct. App. 1985) [in Soergel, an injunction was granted, and the defendants argued that a permanent injunction was an abuse of the trial court’s discretion. The appellate court recognized that the injunction would cause expense and hardship, but observed that “. . . plaintiffs’ advance written and verbal warnings to defendants should have put defendants on notice as to the possible consequences. . .”. Id., at 590]; Lyons v. Lyons, 371 S.E. 2d 640 (W. Va. 1988); Ratcliff v. Cyrus, 544 S.E. 2d 93 (W. Va. 2001); Walton v. Holland, 385 S.E. 2d 609 (Va. 1989); Smith v. Combs, 554 S.W. 2d 412 (Ky. Ct. App. 1977); Leffingwell Ranch, Inc. v. Cieri, 916 P.2d 751 (Mont. 1996); Selvia v. Reitmeyer, 295 N.E. 2d 869 (Ind. Ct. App. 1973); Holmstrom v. Lee, 26 S.W.3d 526 (Tex. Ct. App. 2000); Watson v. Lazy Six Corp., 608 So.2d 389 (Ala. 1992); Kanefsky, 101 A.2d 923; Wall v. Rudolph, 198 Cal. App. 2d 684, 695 18 Cal. Rptr. 123, 3 ALR 3d 1242 (Cal. App. 2d. Dist. 1961); Knotts v. The Summit Park Co., 126 A. 280 (Md. Ct. App. 1924); and Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229, see dicta at 1234, 1238 and 1241 (Colo. 1998).

D. Connecticut: the exception to the rule. The Connecticut Supreme Court, while it acknowledges the general bright line rule described above and that the rule is followed by most jurisdictions, has decided to carve out an exception. See Il Giardino, L.L.C. v. The Belle Haven Land Co., 757 A.2d 1103 (Conn. 2000) and Abington Ltd. P’ship v. Heublein, 778 A.2d 885 (Conn. 2001). The Connecticut Supreme Court observed:

We previously have departed from that general rule [referring to §4.11, and comment b., thereof, of Restatement] where the purpose of the rule would not have been served by disallowing the use of an easement appurtenant. *Thus, we carved out an exception where the dominant estate was simply being enlarged by the subsequent acquisition of an adjoining parcel by the owner of the dominant estate.* (explanation and emphasis supplied) Il Giardino, at 1111.

The Connecticut court went on to explain that it had decided to permit the addition of land to the dominant estate, without extinguishing the easement or giving rise to a right to an injunction, if it is a “mere addition of other land to the dominant estate”, and “where the extended use of the easement to the benefit of the non-dominant estate would not result in a material increase in the use of the servient estate, in other words an additional burden to the servient estate.” Id., at 1112-1113.

The court in Il Giardino dealt with facts involving a third party, which did not own the dominant estate, and concluded “. . . that the expanded use of an easement appurtenant by the dominant estate to benefit a non-dominant estate, not owned by the dominant estate owner, constitutes, as a matter of law, an impermissible overburdening of the servient estate.” Id., at 1113. In Connecticut, therefore, the exception applies only if the owner of the dominant parcel owns the expansion parcel.

In Heublein (the second of two opinions in the same matter), the court considered at length the factual background pertaining to the use of a mountain near the town of Avon, Connecticut,

where a science center had been constructed. The easement in that case provided access to the mountain property, which had been acquired by the science center from the United States Government (the “federal parcel”). Later, the science center acquired a parcel of adjacent land on the mountain from the state (the “state parcel”). The state parcel had historically been associated with the federal parcel pursuant to a written lease agreement. The science center had constructed a building on the state parcel, and the court pointed out that the building contained broadcasting equipment to enable the science center to create and broadcast educational programs. It observed that, as a result, the new building actually served to reduce the amount of traffic over the easement, because students would no longer need to visit the science center in person to benefit from its facilities. See Heublein, 778 A2d at 888-895. The Connecticut court reviewed the principles which it had adopted regarding the application of the established bright line rule. It said that it had rejected the rule of a *per se* exclusion of the after-acquired property from a dominant estate, and that they had

... adopted instead the principle that the construction of an easement requires inquiry into the intent of the parties when the easement was created To determine that intent, we held, a court reasonably may take into account the proposed use and the likely development of the dominant estate. (citations omitted) *We cautioned, however, that, “under no circumstances . . . could an easement be construed to encompass after acquired property if the result would be a material increase in the use of the servient property.”* (emphasis supplied, footnote omitted, citations omitted) Id., at 892-893.

In the Heublein matter, the court considered the complex history of interrelations between the state parcel and the federal parcel and facts which led to its conclusion that the easement does not overburden the servitude, and further concluded that it was “. . . persuaded that it necessarily was within the reasonable contemplation of the parties at the time of the creation of the easement over

Montevideo Road that the benefits of that easement might accrue to adjacent property not formally within the terms of the easement.” Id., at 893.

The Connecticut court, as demonstrated above, is not bound strictly to the written grant of the easement, but will instead consider indicators that expansion might have been contemplated, although not stated in the grant, and the effect of expansion on the burden placed upon the servient estate, in the course of making a decision as to whether an injunction should be issued. If the court is able to find that the extension to additional property was anticipated, and that the burden on the servient estate would not materially be increased, in Connecticut the use will not be enjoined, despite the limitation in the grant.

E. Remedy: Injunctive Relief or Extinguishment. As is apparent from the foregoing, almost all of the courts in other jurisdictions have generally held that the use of an easement to access a non-appurtenant, non-dominant parcel would be enjoined. Whereas, in the DND Neffson and Penn Bowling matters, the expansion or extension is so integrated that it cannot effectively be enjoined, all use of the easement in question has been enjoined, or the right to the easement extinguished. DND Neffson, 745 P.2d at 207; Penn Bowling, 179 F.2d at 67. Where the court finds that use can be restricted to the dominant estate, the courts have enjoined the particular expanded use. See McNutt, 597 N.E.2d at 543; Schadewald, 570 N.W.2d at 796-797.

The remedy in the event of a breach of the established bright line rule of law is set forth in The Law of Easements and Licenses in Land, §10:26, as follows:

If the easement holder misuses the servitude, the servient estate owner may generally obtain an injunction restraining the overburden. However, an easement holder may misuse an easement in such a way that a court cannot separate the wrongful activity from appropriate usage for purposes of issuing an injunction. In such unusual cases,

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a court may declare the easement terminated in order to eliminate the overburden on the servient estate.

...

An easement may also be lost by misuse when the owner of the dominant estate acquires adjacent property not entitled to enjoyment of the easement and constructs a building occupying both parcels. If use of the easement related to the portion of the building on the non-dominant property cannot be separated from use related to the part of the structure on the dominant estate, the easement may be terminated. However, a court may choose instead to grant an injunction against any use of the easement pending alteration of the building to eliminate the overburden. [Citing, in a footnote, Penn Bowling, 179 F.2d, at 67 and DND Neffson, 745 P.2d, at 207.]

Although the concept that an easement may be extinguished by misuse has been recognized by many courts and commentators, it has rarely been employed to terminate a servitude. Nonetheless, the doctrine is founded on sound equitable principles and should not be ignored or rejected merely because cases calling for its application arise infrequently.

II. UTAH SHOULD ADOPT THE BRIGHT LINE RULE.

The law in Utah is consistent with that of all other jurisdictions in the United States which prohibit the overburdening of a servient estate. The Utah courts have historically provided for the protection of the rights of the owner of the servient estate. In fact, only recently, the Utah Court of Appeals has reaffirmed the notion, established 50 years ago, that a parcel partitioned from a dominant estate, which does not abut the servient estate, shall not retain an interest in the easement which had previously served the dominant estate. Alvey, 2002 UT App. 220, 51 P.3d 45.

In Wood, quoting a principle from Corpus Juris Secundum, the court pointed out that the partitioning of the dominant estate, unless anticipated by the parties, would create a “further or additional easement across a servient tenement”, and referred to the “resulting use [which] will increase the burden upon the servient estate”. Id. In stating the standard in Alvey, the Court of Appeals noted:

First, after the division of the dominant tenement, an additional or further easement cannot be created across the servient tenement. See Wood, 253 P.2d at 354. Second, there cannot be any increase in the burden upon the servient tenement after the division. [citation omitted] Third, the easement must be reasonably necessary for use and convenient enjoyment of the dominant tenement. See Id. Finally, upon the division of the dominant tenement, the newly created parcel must “abut on the way.” Wood, 253 P.2d at 354. Alvey, 2002 UT App. at ¶13, 51 P.3d at 50.

By virtue of the foregoing, the Utah court has provided guidance and certainty to property owners in the state of Utah. The court has established a bright line rule – for all cases where the dominant estate has been partitioned – reducing the need for litigation regarding the reasonableness of the proposed use, and minimizing speculation regarding the use which may result. The lack of a bright line rule would, it is submitted, invite unnecessary litigation, and contribute to crowding of the courts, as parties try to persuade courts of the merits of their interests, and adduce evidence regarding various manners in which a burden might theoretically be measured.

For the same legal and policy reasons which validate the Alvey holding, the Utah courts should adopt a bright line rule in cases where the dominant estate has been expanded. The rule should be that which is followed by most jurisdictions and is consistent with the standards already established by Utah courts for the protection of the interests of the servient estate. That rule would likewise provide certainty to landowners. A good discussion regarding the precedential merits of the rule may be found in a Washington Law Review article. The author argues essentially three points:

1. “The reasonableness test diminishes the rights of servient owners”. By not using the classic rule, courts deny protection to the servient parcel owner by permitting parties to litigate about the extent and reasonableness of the change and the effect on the

burden. To not use the bright line rule essentially emphasizes “the rights of the dominant parcel.”

2. Failure to apply the classic rule as a bright line increases litigation and uncertainty.

3. “Bright line” application of the classic rule protects legitimate expectations and property rights. Pamela McClaran, Extending the Benefit of an Easement: A Closer Look at a Classic Rule, 62 Wash. L. Rev. 295, at 307-310 (1987).

The Law of Easements and Licenses in Land acknowledged the issue as discussed in the McClaran article, and an article in the Santa Clara Law Review⁵, (in which the author asserts that the rule should be abandoned for a standard which focuses on the reasonableness of the increased burden). The Bruce treatise commented in a footnote that “[S]uch a change, however, *would substitute an imprecise standard for a clear and easily applied rule.*” (emphasis added) Bruce §2:8, n.1.

It is readily apparent that the Connecticut courts’ abandonment of the strict rule has already resulted in numerous appeals in Connecticut. In each case, the court finds it necessary to review, at length, the factual circumstances and issues and to weigh the equities and burden. Furthermore, it is apparent from those cases that, at trial, the parties have found it necessary to adduce a great deal of evidence before the court to attempt to establish changes in the burden which would result or have resulted, and then to argue about, essentially, the reasonableness of those changes. It is observed that

⁵ Kratovil, Easement Law and Service of Non-Dominant Tenements: Time for a Change, 24 Santa Clara L. Rev. 649 (1984).

the other jurisdictions, having applied the classic rule as a “bright line”, seldom see appeals on the issue again.

It would be consistent with Utah’s law regarding appurtenant easements, and its history of providing clear and strict guidance for the protection of servient estates (see Wood, 122 Utah 580, 253 P.2d 351, and Alvey, 2002 UT App. 220, 51P.3d 45), if Utah were to adopt the so-called classic rule as set forth in the Restatement, supra, in Bruce, supra, and as clearly enunciated by the Arizona court in DND Neffson, 745 P.2d 206.

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS’ MOTION FOR SUMMARY JUDGMENT.

In order for Respondents to be awarded judgment, the trial court must determine that there is no material question of fact, that, based upon the record before it: (a) there has been no connection of a non-dominant parcel to the Easement and that the dominant estate has not been expanded; or, (b) if such a connection or expansion was made, (i) it was permitted; or (ii) the connection or expansion, resulting in an extension of the easement to a non-dominant parcel has been made, but is permitted by an exception to the rule of law. Lutheran submits that, in this matter, one cannot draw any of the those conclusions.

The Trial Court’s Analysis. The key provisions of the trial court’s Order are set forth above, in Disposition by Trial Court. A copy of the Order, together with the Minute Entry dated April 26, 2002, (R. at 661-671) is attached to the Addendum, at Exhibit D. Using the same terms as those which are defined and used in this brief, the trial court described its analysis as follows:

The current dispute revolves around a contiguous parcel of land owned by Woodlands IV and located immediately north of Tract B (“Tract C”). Tract C is an expansion of the original development and contains both a high-rise office building (“Tower IV”) and a multi-level parking facility. Currently, Tract B tenants, working

at Tower III, are permitted to use Tract C's parking facility. In order to reach the parking facility, Tract B workers use the easement over Tract A. . . .

As an initial matter, both parties agree that the benefit of the easement may not be enlarged to include Track [sic] C. Therefore, the tenants of Tower IV, located on Tract C, may not use the easement to access that property. Accordingly, Defendants are ordered to take all necessary steps to restrict use of the easement by Tower IV tenants, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate.

As to the remaining issue, the court concludes that the easement is not overburdened by the Tract B tenants' use of the easement to access parking on Tract C.

Minute Entry of the trial court, R. at 668-669.

A. The Facts in the Light Most Favorable to Lutheran do not Support a Judgment.

When considered in the light most favorable to Lutheran, the facts are insufficient to support a judgment as a matter of law that the dominant estate has not been expanded, or that its use has not been improperly extended to a non-dominant, non-appurtenant parcel, or even that the burden has not unreasonably increased (if that is the standard to be applied in Utah).

Those facts, in the light most favorable to Lutheran as more fully set forth in the Statement of Facts, can be summarized as follows: The Easement was created by the Declaration solely for the benefit of Tract B. The Declaration is not ambiguous. At the time the Easement was created, the owners of the dominant parcel Tract B did not have an interest in Tract C. The PUD has been expanded onto Tract C. Tower IV and a multi-level parking facility have been constructed on Tract C. The Easement is accessible from Tract C as part of the PUD roadway system.

Furthermore, Tower III would not have been approved for construction, and would therefore not have been constructed on Tract B, if the PUD had not been expanded to Tract C, and if the multi-level parking facility had not been constructed thereon. (The court must draw that inference from

the requirements of Salt Lake County for parking, from the arrangements that the parking facility be constructed on Tract C to provide parking for Tower III, and the County's requirement that access be available from 900 East over the Easement. It is evident that the owners of Tract B could not have gained approval for such density of use, if they had not obtained the ability to expand to Tract C. There is no evidence in the record to the contrary.)

1. There Has Been a Connection or Expansion. Whether it is characterized as a connection or an unauthorized expansion of the dominant estate, there is no question that Tract C has access to the Easement. There is clear, undisputed evidence of use of the Easement by persons occupying or visiting Towers III and IV, who also utilize the parking facility on Tract C. [See Statement of Facts, 7.] It is further evident, from the record, that Salt Lake County, in granting approval for construction of the multi-level parking structure, also required that there be access to the structure from 900 East over the Easement. [Statement of Facts, 6.] Accordingly, and by design, the PUD has a system of integrated and interconnected roadways on the expanded development, which provide access from Tract C, as well as Tract B, to the Easement.

2. No Evidence or Claim that the Connection has Been Permitted. There is no evidence before the Court that the connection to Tract C has been permitted. The trial court noted, in the Minute Entry, that both parties agree that the benefit of the Easement may not be enlarged to include Tract C.

3. If the Utah Court Recognizes an Exception to the Rule that There Can be No Such Connection or Expansion Extending the Benefit of the Easement to Non-Dominant Property, There are Numerous Material Questions of Fact. An exception to the bright line rule, such as that recognized by Connecticut, would require an examination of factual issues, which would necessarily

be material to the determination of whether the connection or expansion may be permitted as a matter of law. The use, itself, might be a question. The court might permit an examination of the unexpressed intent of the creators of the easement. Whether there has been or will be a material change or increase in the burden might be a question. In the light most favorable to Lutheran, the record is insufficient to support a judgment that an exception to the rule applies, as a matter of law.

Are There Material Questions of Fact?

The development of the PUD, especially that portion which includes Tower III, Tower IV, and the multi-level parking structure, and the resulting use, or availability for use, of the Easement, are so intermingled that there is no way to separate authorized uses from unauthorized uses of the Easement. The “tenants, concessionaires, customers, invitees and guests, and the concessionaires, invitees, customers and guests of any tenant or subtenant” [Decl. §4(d), on page 6, R. at 19] have clear, unrestricted access to the Easement, without regard to which building in the PUD they may have business. In the light most favorable to Lutheran, the inference of misuse is clear.

The trial court correctly concluded that the tenants, concessionaires, and others associated with Tower IV are not entitled, as a matter of law, to use the Easement. Then, without evidentiary basis, the trial court apparently concluded that these persons would not use the Easement if they were advised not to do so. There is no credible evidence in the record from which the court might conclude that persons associated with Tower IV can effectively be prohibited from using the Easement.

The facts before the court, with inferences in the light most favorable to Lutheran are that Tower III would not have been permitted to be constructed, but for the expansion of the development to include Tract C, and the construction of the parking facility thereon. See Statement of Facts, 6.

From Mark Brenchley's letter to Salt Lake County, it is clear that the County had required the provision of a certain number of parking stalls, based on a formula, for each building, including prospective Towers III and IV. See also the County Ordinances, cited and summarized above. See especially §22-31-3(6), in which it is required that each phase of a planned unit development be of such size, composition and arrangement that its "... operation is feasible as a unit independent of any subsequent phases." It goes on to require that the plan show where parking will be provided. By reference to the Grant of Easement, it may reasonably be inferred, and must certainly be inferred in the light most favorable to Lutheran, that the Woodlands Owners proposed and the County accepted a plan that parking would be provided on Tract C. In fact, by the terms of the Grant of Easement, it was agreed between those parties that the required parking could not be moved to another location without the approval of Salt Lake County. [R. at 503-504; 511-512.] Salt Lake County also required that access be available from the multi-level parking facility to 900 East and that access thereto be open. [R. at 578.] Finally, it is evident that, in fact, tenants, concessionaires, and others do use the Easement to access the parking facility on Tract C, and from there Towers III and IV. See Swanson Aff. and Davis Aff., R. at 583-586.

There is no evidence in the record that Salt Lake County would have permitted either Tower III or IV to be constructed, but for:

- (a) the association with the PUD,
- (b) the access to the parking on Tract C,
- (c) by inference, the additional density of use permitted due to the additional acreage represented by Tract C, and, finally, but very significantly,
- (d) access to 900 East over the Easement.

The facts, in the light most favorable to Lutheran, are that the dominant estate has been improperly expanded, or that the use of the Easement has been provided for the benefit of Tract C.

B. There are Material Questions of Fact in Dispute, No Matter Which Law is Applied.

The trial court, apparently concluding that no expansion had occurred, applied §4.10 of the Restatement, which states that “. . . the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency and intensity of the use may change over time to take advantage of developments and technology *and to accommodate normal development of the dominant estate or enterprise benefitted by the servitude.*” (emphasis supplied) Lutheran respectfully submits that, based upon the foregoing examination of the law, the trial court applied the wrong rule.

1. If Restatement §4.10 governs. Even if §4.10 was the standard of law to be applied by the court, and assuming *arguendo* there was no material question of fact in respect to expansion or providing access to non-dominant Tract C (see above), a material question of fact would still remain, *to wit*: what is the “normal development” of the dominant Tract B?

There is no evidence in the record to support a conclusion that Tower III might have been constructed on Tract B as part of the normal development of that tract.⁶ Comment: a. to the above-

⁶ Lutheran acknowledges and is cognizant of the argument of the Woodlands Owners that a notation was made in 1983, in a minute record of the County Planning Commission, regarding the intent of the then-dominant owner. It is submitted that the intent of the then-dominant owner, which did not own or, so far as we know, even contemplate owning, Tract C, is not material. Further, there is no evidence that Eugene Woodland was present, nor that he had agreed with or contemplated, on behalf of the Tract A owner, such development. If expansion was contemplated by both sides, they had a second “bite at the apple” when they amended the Declaration in 1984. They did not use the opportunity to address expansion. Finally, there is no evidence that the County would have permitted the sort of development which was being preliminarily considered. For purposes of a Motion for Summary Judgment, the inference in the light most favorable to Lutheran is that the owner of Tract A did not know, and that the county

referenced §4.10 states: “The rules stated in this section apply only as an aid to determining the intent or expectations of the parties under the rules stated in §4.1 and to supply terms omitted by the parties in creating a servitude.” Restatement, §4.10. The best evidence is the Declaration. The Declaration clearly sets forth the intent and expectations of the parties, especially when it and its inferences are considered in the light most favorable to Lutheran. Section 4(a) of the Declaration provides:

Woodland (owner of Tract A) grants to Associates (owner of Tract B) a non-exclusive easement appurtenant to and across Tract A for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes *situated on Tract B*; provided, that the foregoing right of access shall be limited to use for such purposes and to such extent as may be customary *for use of Tract B* for commercial purposes (including, but not limited to, reasonable and customary deliveries. . . . [R. at 18.]

See also Declaration §8(a):

Each and all of the easements, covenants, restrictions, rights and provisions granted or created herein are appurtenances to the Tracts and *none of the easements, covenants, restrictions, rights and provisions may be transferred, assigned or encumbered except as an appurtenance to such Tracts*. For the purposes of the easements, covenants, restrictions, rights and provisions created by this Declaration, *the tract benefitted will constitute the dominant estate*, and the Tract burdened by such easements, covenants, restrictions, rights and provisions will constitute the servient estate. [R. at 20.]

As is evident, there is no indication that “normal development” of Tract B would include after-acquired property. At least, in the light most favorable to Lutheran, the Declaration did not contemplate expansion of Tract B. Therefore, there is not a factual basis upon which the 4.10

would not have permitted such development. (In fact, the inference is also that Tract B’s development, as of the time that the Woodlands Owners acquired it, had completed its normal permitted development.) Besides, that is not the way that the historical events unfolded. Tract C was acquired, and was used to expand the PUD. The dreams of the prior owner of Tract B are irrelevant.

Standard could be satisfied. If that is the law of Utah, the Woodlands Owners are not entitled to judgment.

2. The Bright Line Rule. Section 4.11 of the Restatement as noted above, sets forth the rule which should have been applied by the court for purposes of considering the Woodlands Owners' Motion for Summary Judgment:

Unless the terms of the servitude determined under Section 4.1 provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate.

In comment b, it is noted

. . . this rule reflects the likely intent of the parties *by setting an outer limit on the potential increase in use of an easement brought about by normal development of the dominant estate*, permitted under the rules stated in §4.10. Where it applies, the rule avoids otherwise difficult litigation over the question whether increased use unreasonably increases the burden on the servient estate.

. . . under the rule stated in §2.5, a servitude can be created to benefit any land, but if the intent to benefit land owned by another, or land to be acquired in the future, *is not clearly apparent*, the usual presumption, embodied in the rule stated in this section, is that the dominant estate is limited to land owned by the grantee at the time the easement or profit is created. Id., cmt.b.

In the light most favorable to Lutheran, the facts are that after-acquired property has been connected, by use thereof, to the dominant estate. See above. Those facts, alone, require application of the law as stated in §4.11, as well as that stated in §4.10.

3. If Utah Applies the Connecticut Exception. If Utah law is to mirror the law announced by the Connecticut court, it is clear that there remain material questions of fact which would prevent summary judgment for the Woodlands Owners. As noted above, the Connecticut court in Heublein, adopted a principle “. . . that the construction of an easement requires inquiry into *the intent of the parties when the easement was created*. . . . To determine that intent . . . a court

reasonably may take into account the proposed use and the likely development of the dominant estate.” (emphasis supplied) 778 A.2d. at 830.

There is no evidence in the record regarding “the intent of the parties when the easement was created”, other than that which is set forth in the Declaration. In discovery, the Woodlands Owners advised Lutheran that they had no special knowledge regarding the intent of the parties at the time the Declaration was entered into. (See Statement of Facts 3c.) See also the foregoing discussion regarding the normal development of Tract B. Based thereon, there is no evidence, especially considering the facts in a light most favorable to Lutheran, to support a conclusion that the parties to the Declaration intended or even contemplated expansion of the business park onto Tract C when they created the Easement.

Furthermore, even if those issues were resolved, under the Connecticut exception, material questions of fact would remain regarding the burden on the servient estate. There is no evidence in the record which would support a finding regarding what an acceptable burden on Lutheran’s servient estate would be, much less a finding of the extent of the burden which has resulted from the development of the PUD onto Tract C. The issues before the trial court centered upon the expansion or use of the Easement, and not upon the extent of the use. If the Connecticut exception is applied, there is no basis at law for summary judgment for the Woodlands Owners.

The evidence is of misuse of the Easement. As is evident by reference to the Salt Lake County ordinances, the PUD is viewed by the County as an integrated parcel. The PUD development must be owned by one person or entity. [Salt Lake County Ordinance, §22-31-3(5)3.] The placement of structures is determined by the plan of development of the entire parcel. [Id., subsection (6).] As acknowledged by the trial court, Tract C has been added to the PUD. The

placement of Tower III, Tower IV, and the multi-level parking facility have each therefore been determined by the plan. Such a plan must provide for “vehicular and pedestrian circulation, parking . . . and other open spaces.” [Salt Lake County Ordinance, §22-31-3(6)2.] It is therefore undisputable that Tract C has been incorporated into that integrated design, and further that the development of Tract B, specifically Tower III thereon, has been permitted in reliance upon the expansion of the PUD. If there is any material question about that fact, it is respectfully submitted that that question is a material question of fact which would prevent a ruling of summary judgment in favor of the Woodlands Owners.

It therefore cannot be determined, as a matter of law, based upon the facts and inferences in the light most favorable to Lutheran, that the dominant estate has not been expanded and/or that the benefit associated with the use of the Easement has not been extended to Tract C. Such an expansion or extension, under the law, is improper, and should be enjoined. Furthermore, if the law of Utah is the Connecticut exception, that is, that the trial court should inquire into the intent of the parties and the extent of the burden which would result from the expansion or connection of a roadway to a non-dominant parcel, then material questions of fact clearly exist and remain to be tried.

If not for the expansion, how could Tower III have been constructed?

How can it be expected that the tenants, concessionaires, customers, invitees and guests, associated with Tower IV will not use the easement? The parties and the court agree that they have no right to such use. Does not the mere connection of Tower IV to the easement through the PUD’s integrated roadway system, in the light most favorable to Lutheran, create material questions of fact?

The trial court erred in its conclusion that the Woodlands Owners were entitled to summary judgment as a matter of law.

IV. IF THE LAW IN UTAH FOLLOWS THE BRIGHT LINE RULE, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

Lutheran respectfully submits that, if the Court of Appeals agrees that that law in the state of Utah follows the bright line, classic rule set forth in §4.11 of the Restatement, and described in The Law of Easements and Licenses in Land, §2:8, and §8:11, then the facts in dispute are immaterial to the legal issues. All material facts necessary for the application of the bright line rule are undisputed.

A. The Easement Cannot Benefit Non-Dominant Tract C.

1. The Rule. The Restatement, at §4.11 provides:

Unless the terms of the servitude determined under Section 4.1 provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate.

Comment b, explains

b *Appurtenant cannot be used to serve non-dominant estate. . . . if the intent to benefit land owned by another, or land to be acquired in the future, is not clearly apparent, the usual presumption, embodied in the rule stated in this section, is that the dominant estate is limited to land owned by the grantee at the time the easement or profit is created.*

Unless the easement or profit was intended to benefit land to be acquired in the future, the easement beneficiary is not entitled to use it to serve land that is subsequently acquired even if no additional use of the easement or burden on the servient estate would ensue. Id., cmt.b.

By application of that rule, the court cannot find an intent to benefit Tract C; and where the Tract C land was not owned by the owners of Tract B at the time of the Declaration, the classic rule serves to establish a *presumption* that the Easement was not intended for that use.

2. The Express Grant Solely for Tract B. The Easement across Tract A was created by an express grant in the provisions of the Declaration. Accordingly, any interpretation or analysis of the Easement should be governed by the Declaration.

The accepted rule is that the *language of the grant is the measure and the extent of the right created*; and that the easement conveyed should be so construed as to burden the servient estate *only to the degree necessary* to satisfy the purpose described in the grant. (emphasis added) Weggeland, 14 Utah. 2d at 364, 365-366, 384 P.2d at 590, 591.

See also Wade, 52 Utah 310, 173 P. 564; Wykoff, 646 P.2d 756; and Wood, where the court said that “. . . a deed should be construed so as to effectuate the intentions and desires of the parties, *as manifested by the language made use of in the deed.*” (emphasis added) 122 Utah at 585, 253 P.2d at 353.

The language which created the Easement has been examined previously in this Brief. Begging the court’s indulgence for repetition, a few of the provisions bear amplification for the purpose of this argument. The Declaration provides:

4. Grant of Easement.

(a) Woodland grants to Associates a non-exclusive easement appurtenant to and across Tract A for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes *situated on Tract B* provided, that the foregoing right of access shall be limited to use for such purposes and to such extent as may be customary *for use of Tract B* for commercial purposes (including, but not limited to, reasonable and customary deliveries. . . .

6. Modification. This Declaration and any easement, covenant, restriction or undertaking contained herein may be terminated, extended, modified or amended as

to the whole of the Tracts of any portion of them, with the unanimous consent of the parties.

7. Not a Public Dedication. Nothing contained in this Declaration will be deemed to be a gift or a dedication . . . , it being the intent of the parties that this Declaration *be strictly limited to and for the purpose expressed herein* [emphasis added].

8. Mutuality; Benefits and Burdens Run with Land.

(a) Each and all of the easements, covenants, restrictions, rights and provisions granted or created herein are appurtenances to the Tracts and *none of the easements, covenants, restrictions, rights and provisions may be transferred, assigned or encumbered except as an appurtenance to such Tracts*. For the purposes of the easements, covenants, restrictions, rights and provisions created by this Declaration, *the tract benefitted will constitute the dominant estate*, and the Tract burdened by such easements, covenants, restrictions, rights and provisions will constitute the servient estate. (emphasis added) Decl., pages 5 and 7, R. at 18, 20.

There can be no question about the purpose and intent of the parties to the Declaration, nor should there be any doubt about the scope and extent of the easement rights provided for the benefit of the dominant Tract B. The scope of the Easement and extent of the rights are clearly defined in the written provisions of the Declaration, as exhibited above. The owners of Tract B are permitted to have vehicular access across the easement on Tract A between the public streets and “*parking areas or roadways and lanes situated on Tract B*”. Decl., ¶4(a). That access right is strictly limited to that purpose. Decl., ¶7.

There is no ambiguity in the Declaration.

The interpretation of an unambiguous deed is a question of law, which we review for correctness. [citations omitted] Because the parties have not pointed to any ambiguity in the [deeds] granting the original easement, and – like the trial court – we see none, the interpretation of the [deed] presents a question of law. Johnson, 278, ¶11 989 P.2d at 66.

The trial court found that the expression of intent in the Declaration is clear. Minute Entry, page 2, R. at 668. There is no ambiguity.

3. Expansion of PUD; Connection to Easement. The trial court found (Minute Entry, page 2, R. at 668) that the Woodlands Business Park PUD has been expanded to include Tract C. It is further clear that the buildings and parking facilities in the PUD are connected to one another for integrated circulation by internal roadways, and that access can be obtained from any parking facility within the PUD, including Tract C, to the Easement, and over the Easement to 900 East. See Statement of Facts 5, 6, 7, 8.

4. Tract C (Whether Separate or a Part of the PUD) Benefits From the Easement. The uncontroverted facts on the record establish that Tract B was developed as a planned unit development. Salt Lake County treated the development and construction of Tower III and Tower IV, and the parking facility, as part of the integrated district, developed according to an approved plan. Approval was granted for the parking facility to serve Tower III. Approval for Tower IV also relied on the parking facility. The County required that there be access to 900 East over the Easement. The PUD was expanded accordingly, by design, to include Tract C. As a result of the expansion, two high-rise office towers (Tower III and Tower IV) and a multi-level parking facility to service them were added to the PUD development. Any occupant of or visitor to the PUD, including Tower III, Tower IV and the multi-level parking facility, is able to access the Easement, and over the Easement, 900 East. [Statement of Facts 5, 6, 7, 8.]

Although the Woodlands Owners have submitted arguments and questions concerning the extent to which Tract B might have been developed without the addition of Tract C, that is not how the development of the PUD has occurred. What might have been dreamed of, or even intended by

the then owner of Tract B, and what that owner might claim it could have done on Tract B are not material issues of fact under the bright line rule. Restatement, §4.11.

There is therefore no material question that the uses of Tracts B and C have been intertwined. It is undisputed that Tower III would not exist but for its reliance upon the parking facility on Tract C. It is also undisputed that Tower IV would not exist but for its inclusion in the PUD. Clearly the benefits of the Easement have been extended to Tract C. There is therefore no material question of fact that there has been either:

1. An improper expansion of the dominant estate (considering Tract C as part of the integrated and partnership-owned PUD, which, in turn, is considered as a whole for development purposes by Salt Lake County, and should be so considered by this court as a matter of law), or
2. An improper connection of the Easement by roadways over and through the dominant estate for the benefit of a non-dominant, non-appurtenant parcel through shared use and an integrated roadway system.

The fact that Tower III is technically situated on Tract B does not change those facts. The construction of Tower III would not have been legally or practically possible, but for the additional parking available on Tract C. Tract B has therefore been developed by inclusion of and reliance upon a non-dominant parcel. Occupants of and visitors to Tower III occupy space on Tract C when they park their cars there. Furthermore, Tower IV has been constructed on Tract C. The occupants and invitees of Tower IV have unrestricted access to the Easement over the common roadways of the PUD, by design and requirement of Salt Lake County.

5. Application of the Law. Following the bright line rule, the amount of use is not a material question of fact. The dominant estate has been indivisibly intertwined with Tract C, and the authorized uses have accordingly improperly been expanded to include inseparable unauthorized uses.

The factual situation in DND Neffson, 745 P.2d 206 is directly analogous. See discussion of case on page 18-20.

The Arizona Court of Appeals said:

The law is clear that an easement appurtenant to a parcel of land, the dominant parcel, may not be used to benefit another parcel of land to which the easement is not appurtenant even though the two parcels are adjacent and under common ownership. The only building plans before this court show clearly that patrons from the non-dominant parcel will have access to the easement through the dominant parcel, thus benefitting from the easement improperly. (citations omitted) Id., at 207.

In the instant case, just as in the DND Neffson matter, unrestricted access is provided to non-dominant Tract C according to plan. It actually exists. Given such facts, the Arizona court said:

. . . however, we are not here concerned with the extent of the burden, i.e. with the actual amount of pedestrian and automobile traffic using the easement. An easement can be overburdened either by over use or by improper use. . . .

Having planned the mall to permit unrestricted access to the easement by the non-dominant parcel, appellant is in no position to contend that that which it planned, a plain misuse, will not be used. Accordingly, injunctive relief was not premature. Id.

See also Penn Bowling, 164 F.2d 64. The facts involved the development of the dominant estate and adjacent property, both of which could be accessed by the easement. The court ruled that the use of the easement should be enjoined, and said:

. . . so where it cannot be ascertained whether the easement of a right of way is being used solely for the enjoyment of the dominant tenement, or for additional property also, an injunction may be granted against further use of the easement until such time

as it may be shown that only the dominant tenement is served by the easement. (citation omitted) Id. at 67.

See also Knotts v. The Summit Park Company. There, the court dealt with an expansion or extension to adjacent property, and the development of a road system providing easy access over the easement in question to all lot holders, including lot holders outside of the dominant estate. Although the court had found that an abandonment had occurred, it concluded that, had not that abandonment occurred, the easement would be extinguished by that misuse. It said:

It is not a satisfactory answer to say that the use of this right of way must be only for the benefit of the lots within the dominant estate. A condition has been created by the act of appellee which makes it impossible, as a practical proposition, for appellant to confine the use to such lots. (citation omitted) Id., at 283.

6. The Remedy. The remedy is clear. See Law of Easements and Licenses, §10:26.

If the easement holder misuses the servitude, the servient estate owner may generally obtain an injunction restraining the overburden. *However, an easement holder may misuse an easement in such a way that a court cannot separate the wrongful activity from appropriate usage for purposes of issuing an injunction. In such unusual cases, a court may declare the easement terminated in order to eliminate the overburden on the servient estate.*

...

An easement may also be lost by misuse when the owner of the dominant estate acquires adjacent property not entitled to enjoyment of the easement and constructs a building occupying both parcels. If use of the easement related to the portion of the building on the non-dominant property cannot be separated from use related to the part of the structure on the dominant estate, the easement may be terminated. However, a court may choose instead to grant an injunction against any use of the easement pending alteration of the building to eliminate the overburden. [Citing, in a footnote, Penn Bowling, supra, at 67 and DND Neffson, supra, at 207.]

Although the concept that an easement may be extinguished by misuse has been recognized by many courts and commentators, it has rarely been employed to terminate a servitude. Nonetheless, the doctrine is founded on sound equitable principles and should not be ignored or rejected merely because cases calling for its application arise infrequently. (emphasis added, footnotes omitted.) Bruce, §10:26.

On the basis of the foregoing, if the bright line rule is applicable to Utah, there is no material question of fact. The trial court not only erred in granting summary judgment to the Woodlands Owners, but erred in refusing to grant summary judgment to Lutheran.

CONCLUSION

An Easement across servient Tract A, now owned by Lutheran, was created by Declaration in 1983 for the benefit of dominant Tract B. The owners of Tract B did not, at that time, own or even contemplate owning the adjacent property to the north. The limited scope of the Easement over Tract A is clearly set forth in the Declaration. Tract B was developed as a PUD, improved with two office towers, two retail strip mall buildings, a parking facility and a roadway system for circulation. It was then sold to the Woodlands Owners in 1993.

The Woodlands Owners expanded the Woodland Business Park PUD to include Tract C, and on that basis, constructed two more high-rise buildings and one multi-level parking structure, all of which were connected by the integrated roadway system. Tract C is not part of the dominant estate for purposes of the Easement. The roadway system provides access, to all users, authorized and unauthorized, to and over the Easement across Tract A. In fact, its very integration, including access from Tract C to 900 East through the interconnected roadways on the PUD, is required by Salt Lake County. The development of Tract B and Tract C has been so indivisibly intertwined that the authorized uses of the Easement cannot be separated from the unauthorized uses.

If the law of Utah would permit an examination of the reasonableness of the use which has resulted, there are numerous material questions of fact. If the law would permit an examination of the intent of the parties to determine whether the expansion was contemplated, there are material

questions of fact. If the actual change in the burden, compared to that which would be reasonably anticipated in respect to “normal” development of Tract B, is to be considered, material questions of fact exist. The ruling of the trial court, in which it granted summary judgment in favor of the Woodlands Owners, should be reversed. At the least, the matter should be remanded to the trial court for trial.

If the law of Utah is the bright line rule, then the issues are narrowed and there is no material question of fact. The ruling of the trial court should be reversed with instructions to award judgment to Lutheran. The expansion of the dominant estate to inextricably envelope Tract C, or the connection of the Easement to and for the use of a non-dominant parcel (Tract C) is a misuse, and an improper overburdening of the servient estate, as a matter of law. There is no reason to examine the intent of the creators. The amount of such use, under those circumstances, is immaterial. Because the authorized and unauthorized uses are so indivisibly intertwined, Lutheran has no adequate remedy at law. Use of the Easement across Tract A should therefore be enjoined indefinitely, or extinguished, entirely.

RESPECTFULLY SUBMITTED this 14 day of March, 2003.

TAYLOR, ADAMS, LOWE & HUTCHINSON



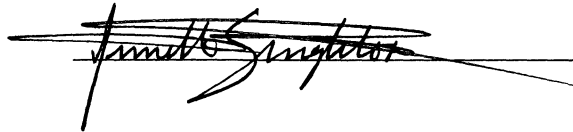
ROBERT M. TAYLOR
Attorney for Plaintiff and Appellant

MAILING CERTIFICATE

I hereby certify that on this 14th day of March, 2003, two (2) true and correct copies of the foregoing Brief of Appellant were mailed, postage pre-paid to the following persons:

P. Bruce Badger
Diane H. Banks
Matthew L. Anderson
Fabian & Clendenin
215 South State Street, 12th Floor
Salt Lake City, UT 84111

Ronald G. Russell
Parr, Waddoups, Brown, Gee & Loveless
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, UT 84147-0019

A handwritten signature in black ink, appearing to read "James H. Singleton", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'J' and a long, horizontal stroke extending to the right.

ADDENDUM

- Exhibit A Declaration of Easements, Covenants and Restrictions and Amendment to Declaration of Easements, Covenants and Restrictions
- Exhibit B Highlighted copy of Salt Lake County plat map
- Exhibit C Affidavit of John A. Dahlstrom, Jr., with exhibits
- Exhibit D Trial Court's Order, together with the Minute Entry
- Exhibit E Salt Lake County Ordinance §22-31-3, which were in effect in 1983, followed by the same ordinance as changed in 1984

SLL031003-116

Exhibit A

11

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David E. Gee
UTAH TITLE & TRUST
DEPT.

OCT 27 2 45 PM '93

KATIE L. URSUN
RECORDER
SALT LAKE COUNTY
UTAH

Attachment No. 2

WHEN RECORDED MAIL TO:

David E. Gee, Esq.
ROOKER, LARSEN, KIMBALL & PARR
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

67-89976

3862259

DECLARATION OF EASEMENTS,
COVENANTS AND RESTRICTIONS

THIS DECLARATION (the "Declaration") is made and entered into this 27 day of October, 1983, by and between WOODLAND INVESTMENT CO., a Utah limited partnership ("Woodland"), and THE WOODLANDS ASSOCIATES, a joint venture organized pursuant to the Utah Uniform Partnership Act ("Associates").

RECITALS

A. Woodland owns a tract of real property ("Tract A") located in Salt Lake County, State of Utah, the legal description of which is set forth on Exhibit "A."

B. Associates, contemporaneously with the execution of this Declaration, is acquiring a tract of real property ("Tract B") located in Salt Lake County, State of Utah, the legal description of which is set forth on Exhibit "B."

C. The parties desire to create certain cross easements and rights between and impose certain covenants and restriction on Tracts A and B.

THEREFORE, for TEN DOLLARS (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

0025502 REC 1559

1. Definitions. As used in this Declaration:

(a) "Party" means each person executing this instrument and its heirs, assigns and successors in interest with respect to Tract A or Tract B, as the case may be, as the same may be shown by the records of Salt Lake County, State of Utah, as of the date of the exercise of powers granted hereunder or the performance of or failure of performance by such Parties of the obligations created by this Declaration. Without limiting the generality of the foregoing, the term Party refers to the persons who fit the following classifications:

(i) The person or persons holding fee title to all or any portion of Tract A or Tract B; and

(ii) The lessee or lessees under a ground lease of all or a portion of any Tract for a fixed minimum term of thirty (30) years, or longer, in which event the fee owner of the real property covered by such lease will not be deemed to be a Party as to such Tract or portion of such Tract for the purposes of this Declaration during the duration of such ground lease.

(b) "Parties" means every person who is a Party, taken in the aggregate.

2. Covenants and Restrictions with Respect to Tract B.

(a) No party shall attempt to obtain or consent to any change or variance in zoning of Tract B if such change would jeopardize the right of Woodland, its successors and assigns, to retain and maintain any sign described in Section 3 of this Declaration.

(b) The official name of any building complex located on Tract B will contain the word "Woodland" or "Woodlands" unless the use of such word is not permitted by applicable laws, regulations or ordinances. The owner of Tract B shall have the right to relieve Tract B of the obligation imposed by this Section 2(b) by paying to the owner of Tract A, in a lump sum, the amount of \$100,000 for the express and sole purpose of obtaining such relief.

(c) No part of Tract B shall, for a period of twenty-five (25) years following the date of this Declaration, be used as a Theater-Restaurant; provided, that this restriction

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shall be void if no Theater-Restaurant is operated on Tract A for a continuous period of sixty (60) months. For purposes of this Section 2(c), the term "Theater-Restaurant" shall mean a public or private dining facility, operated for profit, having 20 or more tables, where live vocal, theatrical or comedy entertainment is regularly provided.

(d) If construction of a Health Club on Tract A is commenced before the latter of one (1) year from the date of this Declaration or nine (9) months after the commencement of construction of the first building on Tract B, then for as long as such Health Club is completed within a reasonable time and continuously available to the Parties with respect to Tract B and all tenants of such Parties and all of the personnel of such tenants, at prices competitive with or less than those being charged by Health Clubs open to the general public, no Health Club will be operated on Tract B or directly or indirectly by Associates (but not its successors) within a radius of 5/8's of a mile of Tract A. For purposes of this Section 2(d), the term "Health Club" shall mean a public or private facility containing a jogging facility, exercise and weight room, a sauna, swimming pool, tennis or racquetball court, a jacuzzi or similar significant exercise facility.

3. Signs on Tract B. Subject to the limitations set forth below, Associates grants to Woodland the right to erect and operate on Tract B, at any time and from time to time, one free-standing double-sided sign (the "Woodland Sign"), which may be a "pylon" sign. The design and operation of the Woodland Sign shall comply with the following conditions:

(a) Any Woodland Sign may be electrically lighted and may display lighted, electronically activated messages. The dimensions, height and style of any Woodland Sign shall be designated by Woodland but shall be subject to the approval of a licensed building architect. Such architect shall be chosen by the Party owning Tract B from a list of three licensed building architects selected by Woodland. The face or faces of any Woodland Sign shall be located within a square or rectangle, and said square or rectangle shall not exceed 275 square feet per side.

(b) Any Woodland Sign shall be erected on a parcel of land located in the Southwest corner of Tract B and described on Exhibit "C" (the "Woodland Sign Location"). To the

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extent feasible the Woodland Sign shall be located on the southern ten (10) feet of the Woodland Sign Location. The Woodland Sign may be altered or replaced from time to time as long as the alteration or replacement complies with the limitations set forth in this Section 3.

(c) The Woodland Sign may not be used to advertise or refer in any way to an office or offices for rent.

(d) The design and operation of any Woodland Sign will comply with all applicable laws, ordinances and regulations.

(e) Woodland, at its cost and expense, shall maintain any Woodland Sign in good and safe operating condition. If Woodland fails to maintain any Woodland Sign, then, on one hundred eighty (180) days' written notice to Woodland, Associates may either cause such maintenance to be performed or have the sign removed and shall have a lien on Tract A for the amount expended in maintaining (but not removing) any Woodland Sign; plus interest at the rate of twelve percent (12%) per annum from the date of such expenditure.

(f) Notwithstanding any other provision contained in this Section 3, the right of Woodland and its successors and assigns to erect any Woodland Sign and to possess the Woodland Sign Location shall be extinguished if such sign is not erected within five (5) years of the date hereof or if such sign, once erected, is abandoned for a continuous period of one (1) year thereafter.

(g) Woodland and each person constituting a Party with respect to Tract A shall indemnify, defend and hold Associates and each person constituting a Party with respect to Tract B harmless from and against any and all liabilities, losses, actions, proceedings, judgments, controversies, claims, costs or expenses (including attorneys' fees) arising out of the design, use or operation of any Woodland Sign.

(h) No right granted to Woodland by this Section 3 shall limit or restrict in any way the right of Associates to erect and operate (or permit to be erected and operated) signs on Tract B.

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(i) Associates may place on Tract A a sign advertising the office project to be located on Tract B. Such sign may remain until April 30, 1984.

4. Grant of Easement.

(a) Woodland grants to Associates a nonexclusive easement appurtenant to and across Tract A for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes situated on Tract B, provided, that the foregoing right of access shall be limited to use for such purposes and to such extent as may be customary for use of Tract B for commercial purposes (including, but not limited to, reasonable and customary deliveries). The easement granted by this subsection (a) shall be limited to the roadway described on Exhibit "D" (the "Associates Roadway"). At any time before December 31, 1983, by giving written notice to Associates, Woodland may relocate the Associates Roadway up to twenty-five (25) feet to the north or south of the centerline of the Associates Roadway as described on Exhibit "D." Thereafter, Woodland shall not move or relocate the Associates Roadway. In addition to the foregoing, Associates shall have the right to elevate or sink the western twenty (20) feet of the Associates Roadway in order to align the same with the upper and/or lower decks of a parking ramp. On or before November 30, 1984, Woodland agrees to construct a paved roadway twenty-five (25) feet wide on the Associates Roadway in accordance with good construction practices.

(b) Associates grants to Woodland a nonexclusive easement appurtenant to and across Tract B for the purpose of allowing vehicular access between the public streets and any and all parking areas situated on Tract A. The easement granted by this subsection (b) shall be limited to the roadway described on Exhibit "E" (the "Woodland Roadway"). In addition Associates shall provide a twenty-five (25) foot two-way access lane from the Woodland Roadway to the Associates Roadway in such location as Associates may designate (the "Connecting Roadway"). At any time before December 31, 1983, by giving written notice to Woodland, Associates may relocate the Woodland Roadway up to twenty-five (25) feet to the north or south of the centerline of the Woodland Roadway as described on Exhibit "E." Thereafter Associates shall not move or relocate the Woodland Roadway. On or before June 30, 1985 Associates agrees to construct a paved roadway twenty-five (25) feet wide on the Woodland Roadway and

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pg 1563

the Connecting Roadway in accordance with good construction practices. The foregoing notwithstanding the easements granted over the Woodland Roadway and the Connecting Roadway shall be subject to the following conditions:

(i) The easement for the Connecting Roadway is limited to seven (7) feet in height;

(ii) The easements for the Woodland Roadway and the Connecting Roadway are limited to use for such purposes and to such extent as may be customary for use of Tract A for commercial purposes (including, but not limited to, reasonable and customary deliveries consistent with the foregoing height restriction) and to erect and maintain any Woodland Sign;

(iii) A parking ramp or any similar structure may be constructed on Tract B except over the Woodland Roadway, and Associates may route all traffic using the Connecting Roadway through such structure on the upper and/or the lower deck of any such structure; and

(iv) The location of the Connecting Roadway may be altered, relocated or changed in any manner and at any time and from time to time without the prior written consent of Woodland upon sixty (60) days' prior written notice to Woodland.

(c) The Parties agree to keep and maintain at its sole cost and expense the roadways located on its Tract in good condition. If a Party fails to so keep and maintain the roadway for which it is responsible, or to construct the same, the other Party may on thirty (30) days written notice to perform such maintenance and/or construction and the performing party shall have a lien on the Tract owned by the defaulting Party for the amount expended plus interest at the rate of twelve percent (12%) per annum from the date of such expenditure.

(d) The easements granted pursuant to this Section 4 shall benefit each of the Parties and their respective tenants, concessionaires, customers, invitees and guests, and the concessionaires, invitees, customers and guests of any tenant or subtenant of the respective Parties.

5. Duration. This Declaration and each easement, covenant, restriction and undertaking of this Declaration shall

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be for a term of ninety-nine (99) years unless sooner terminated pursuant to Section 2.

6. Modification. This Declaration and any easement, covenant, restriction or undertaking contained herein may be terminated, extended, modified or amended as to the whole of the Tracts of any portion of them, with the unanimous consent of the Parties.

7. Nor a Public Dedication. Nothing contained in this Declaration will be deemed to be a gift or a dedication of any portion of either Tract to the general public or for the general public or for any public purpose whatsoever, it being the intent of the Parties that this Declaration be strictly limited to and for the purpose expressed herein.

8. Mutuality, Benefits and Burdens Run with Land.

(a) Each and all of the easements, covenants, restrictions, rights and provisions granted or created herein are appurtenances to the Tracts and none of the easements, covenants, restrictions, rights and provisions may be transferred, assigned, or encumbered except as an appurtenance to such Tracts. For the purposes of the easements, covenants, restrictions, rights and provisions created by this Declaration, the Tract benefited will constitute the dominant estate, and the Tract burdened by such easements, covenants, restrictions, rights and provisions will constitute the servient estate.

(b) Each and all of the easements, covenants, restrictions, conditions, rights and provisions contained in this Declaration (whether affirmative or negative in nature) are made for the direct, mutual and reciprocal benefit of each Tract; will create mutual equitable servitudes upon each Tract running with the land; will bind and inure to the benefit of every person having any fee, leasehold, or other interest in any portion of the Tracts at any time or from time to time to the extent that such portion is affected or bound by the easement, covenant, restriction, right or provision in question, or that the easement, covenant, restriction, right or provision is to be performed on such portion; and will bind and inure to the benefit of the Parties and their respective heirs, successors and assigns as to their respective Tracts.

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9. Miscellaneous Provisions.

(a) The Parties do not by this Declaration, in any way or for any purpose, become partners or joint venturers of each other in the conduct of their respective businesses or otherwise.

(b) Each Party shall be excused for the period of any delay in the performance of any obligations hereunder when prevented from timely performing by a cause or causes beyond such Party's control, including labor disputes, civil commotion, war, governmental regulations, moratoriums or controls, fire or other casualty, inability to obtain any material or services, or acts of God.

(c) Failure of a Party to insist upon the strict performance of any provision or to exercise any option hereunder shall not be construed as a waiver for future purposes with respect to any such provision or option. No provision of this Declaration shall be deemed to have been waived unless such waiver is in writing and signed by the Party alleged to have waived its rights.

(d) If any provision of this Declaration or the application thereof to any person or circumstance shall to any extent be invalid, the remainder of this Declaration or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby and each provision of this Declaration shall be valid and enforced to the fullest extent permitted by law.

(e) Except as otherwise provided, all provisions herein shall be binding upon and shall inure to the benefit of the Parties, their legal representatives, heirs, successors and assigns.

(f) Each person executing this Declaration for an entity represents and warrants that he is duly authorized to execute and deliver the same on behalf of the entity for which he is signing (whether it be a corporation, general or limited partnership or otherwise), and that this Declaration is binding upon such entity in accordance with its terms.

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(g) This Declaration shall be construed in accordance with the laws of the State of Utah.

(h) All exhibits referred to in this Declaration are hereby incorporated by reference.

IN WITNESS WHEREOF, the parties hereto have executed this Declaration on the day and year first set forth above:

"WOODLAND";

WOODLAND INVESTMENT CO., a Utah limited partnership

By Ernest M. Woodhead
Its General Partner

"ASSOCIATES";

THE WOODLANDS ASSOCIATES, a joint venture organized under the Utah Uniform Partnership Act by its two Venturers:

MHP-WOODLANDS, LTD., a Utah limited partnership, by its sole general partner MHC PROPERTIES, INC., a Utah corporation

By Gary J. Mathan
Its President

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SLC-1 LIMITED PARTNERSHIP, a
Wisconsin limited partnership,
by its sole general partner
JOHNSON WAX DEVELOPMENT
CORPORATION, a Wisconsin
corporation

By James W. Johnson
Its Vice President

STATE OF Utah
COUNTY OF Salt Lake

SS:

On the 17th day of October, 1983, personally
appeared before me James W. Johnson who being by me
duly sworn, did say that he is Vice President of WOODLAND
INVESTMENT CO. a Utah limited partnership, and said
James W. Johnson duly acknowledged to me that the
executed within and foregoing instrument was signed on behalf of
said partnership.

My Commission Expires:

James W. Johnson
Notary Public
Residing at Salt Lake City Utah

STATE OF Utah
COUNTY OF Salt Lake

On the 17th day of October, 1983, personally
appeared before me James W. Johnson who being by me
duly sworn, did say that he is Vice President of MHC
PROPERTIES, INC., a Utah corporation, which is the general
partner of MHC-Woodlands, Ltd., a Utah limited partnership, which
is one of the members of The Woodlands Associates, a joint
venture organized pursuant to the Utah Uniform Partnership Act,
and said James W. Johnson duly acknowledged to me
that the executed within and foregoing instrument was signed on

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behalf of said corporation in its capacity as the sole general partner of MHP-Woodlands, Ltd., on behalf of said partnership in its capacity as one of the venturers of The Woodlands Associates, on behalf of said partnership, by authority of its bylaws or a resolution of its board of directors.

My Commission Expires: 2/28/84

Caroline Pappas
Notary Public

Residing at: Salt Lake City Utah

STATE OF Utah

COUNTY OF Salt Lake

ss.

On the 11th day of October, 1983, personally appeared before me Thomas W. Smith, who being by me duly sworn, did say that he is Vice President of JOHNSON WAX DEVELOPMENT CORPORATION, a Wisconsin corporation, which is the general partner of SLC-1 Limited Partnership, a Wisconsin limited partnership, which is one of the members of The Woodlands Associates, a joint venture organized pursuant to the Utah Uniform Partnership Act, and said Thomas W. Smith duly acknowledged to me that the executed within and foregoing instrument was signed on behalf of said corporation in its capacity as the sole general partner of SLC-1 Limited Partnership, on behalf of said partnership in its capacity as one of the venturers of The Woodlands Associates, on behalf of said partnership, by authority of its bylaws or a resolution of its board of directors.

My Commission Expires: 2/28/84

Caroline Pappas
Notary Public

Residing at: Salt Lake City Utah

Utah 5502 not 1569

David H.
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KATHLEEN L. DIXON
RECORDER
SALT LAKE COUNTY,
UTAH
UTAH TITLE & TRUST
REF. DEF.

3957731
AMENDMENT TO
DECLARATION OF EASEMENTS
COVENANTS AND RESTRICTIONS

THIS AMENDMENT (the "Amendment") is made this 19 day of June, 1984, between WOODLAND INVESTMENT CO., a Utah limited partnership ("Woodland") and THE WOODLANDS ASSOCIATES, a joint venture organized pursuant to the Utah Uniform Partnership Act ("Associates").

RECITALS:

A. On October 27, 1983 the parties executed a certain Declaration of Easements, Covenants and Restrictions which was recorded October 27, 1983, in Book 5502, at Page 1559 with the County Recorder of Salt Lake County, State of Utah (the "Original Declaration").

B. The Original Declaration was amended on February 20, 1984, but such amendment has not been recorded.

C. Certain of the Recitals set forth in the Original Declaration were incorrect.

NOW, THEREFORE, for ten dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Amendment to Recital A. Recital A of the Original Declaration is amended to read as follows:

REC-5566 PR 2146

A. Woodland owns a tract of real property ("Tract A") located in Salt Lake County, State of Utah, the legal description of which is set forth on Exhibit "B."

2. Amendment to Recital B: Recital B of the Original Declaration is amended to read as follows:

B. Associates owns a tract of real property ("Tract B") located in Salt Lake County, State of Utah, the legal description of which is set forth on Exhibit "A."

3. Ratification: In all other respects the Original Declaration, as previously amended is ratified and affirmed.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment on the date first set forth above.

WOODLAND INVESTMENT CO.,
a Utah limited partnership

BY *Edward N. Woodland*
Its *General Partner*

THE WOODLANDS ASSOCIATES, a
joint venture organized under
the Utah Uniform Partnership
Act by its two Venturers:

MHP-WOODLANDS, LTD., a Utah
limited partnership, by its
sole general partner MHC
PROPERTIES, INC., a Utah
corporation

BY *Gary J. Hachman*
Its *President*

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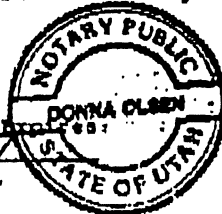
SLC-1 LIMITED PARTNERSHIP, a
Wisconsin limited partnership,
by its sole general partner
JOHNSON WAX DEVELOPMENT
CORPORATION, a Wisconsin
corporation

By Richard K. Miller
Its VICE PRESIDENT

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

On the 19th day of June, 1984, personally
appeared before me EUGENE N. WOODLAND, who being by me duly
sworn, did say that he is the General Partner of WOODLAND
INVESTMENT CO., a Utah limited partnership, and said EUGENE N.
WOODLAND duly acknowledged to me that the executed within and
foregoing instrument was signed on behalf of said partnership.

My Commission Expires:
1-13-87



Donna Olsen
NOTARY PUBLIC
Residing at: 600 Lake Street, Salt Lake City, Utah

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

On the 19th day of June, 1984, personally
appeared before me GARY L. MACHAN, who being by me duly sworn,
did say that he is the President of MHC PROPERTIES, INC., a Utah
corporation, which is the general partner of MHP-WOODLANDS, LTD.,
a Utah limited partnership, which is one of the members of THE
WOODLANDS ASSOCIATES, a joint venture organized pursuant to the
Utah Uniform Partnership Act, and said GARY L. MACHAN duly ac-
knowledged to me that the executed within and foregoing
instrument was signed on behalf of said corporation in its
capacity as the sole general partner of MHP-WOODLANDS LTD., on
behalf of said partnership in its capacity as one of the ven-
turers of THE WOODLANDS ASSOCIATES, on behalf of said

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partnership, by authority of its bylaws or a resolution of its board of directors.

My Commission Expires: 11/28/94

STATE OF UTAH

COUNTY OF SALT LAKE

Cindi Hart
NOTARY PUBLIC

Residing at: Salt Lake City, Utah

On the 14th day of June, 1994, personally appeared before me Michael E. Miller, who being by me duly sworn, did say that he is the Vice President of JOHNSON WAX DEVELOPMENT CORPORATION, a Wisconsin corporation, which is the general partner of SLC-1 LIMITED PARTNERSHIP, a Wisconsin limited partnership, which is one of the members of THE WOODLANDS ASSOCIATES, a joint venture organized pursuant to the Utah Uniform Partnership Act, and said Michael E. Miller duly acknowledged to me that the executed within and foregoing instrument was signed on behalf of said corporation in its capacity as the sole general partner of SLC-1 LIMITED PARTNERSHIP, on behalf of said partnership in its capacity as one of the venturers of THE WOODLANDS ASSOCIATES, on behalf of said partnership, by authority of its bylaws or a resolution of its board of directors.

My Commission Expires: 11/28/94

Cindi Hart
NOTARY PUBLIC

Residing at: Salt Lake City, Utah

REV 5566 M:2149

EXHIBIT "A"

BEGINNING at the Northeast corner of Lot 8, Block 5, Ten Acre Flat "A", Big Field Survey; and running thence South 0°09'59" West 572.84 feet to the Southeast corner of said Lot 8; thence South 0°09'59" West 19.83 feet to the South line of Lot 14A, CLEARVIEW ACRES SUBDIVISION; thence South 89°55' West 106.51 feet to the Southeast corner of Lot 15A; thence North 88°50'40" West 100.01 feet to the Southeast corner of Lot 16A; thence North 89°52'30" West 100.00 feet to the Southeast corner of Lot 17A; thence North 89°59'27" West 100.00 feet to the Southeast corner of Lot 18A; thence North 88°23'10" West 100.03 feet to the Southeast corner of Lot 19A; thence North 89°01' West 100.01 feet to the Southeast corner of Lot 20A; thence North 87°39'20" West 160.11 feet to the Southwest corner of said Lot 20A; CLEARVIEW ACRES SUBDIVISION; thence North 0°14'13" East 6.78 feet to the Southwest corner of said Lot 8; Block 5, Ten Acre Flat "A"; thence North 0°14'13" East 573.07 feet to the Northwest corner of said Lot 8; thence South 89°58'24" East 89.30 feet; thence along the arc of a 622.03 foot radius curve to the right 715.24 feet to the point of BEGINNING, said arc being subtended by a chord of South 89°58'24" East 676.48 feet.

AK5566 RE 2150

EXHIBIT "B"

Real Property Owned by Woodland Investment Company

The following real property located in Salt Lake County,
Utah:

TRACT I

Commencing 145.67 feet South from the Northeast corner of Lot 12, Block 5, Ten Acre Plat A, Big Field Survey; thence South 237.13 feet; West 379.5 feet; North 0°06'10" East 383 feet; East 219.5 feet; South 145.67 feet; East 150 feet to BEGINNING. 2.82 acres.

TRACT II

Commencing North 0°04' East 168.2 feet from the Southeast corner of Lot 12, Block 5, Ten Acre Plat A, Big Field Survey; thence North 0°04' East 23.2 feet; West 23 rods South 0°04' West 23.2 feet; East 23 rods to BEGINNING. 0.2 acres.

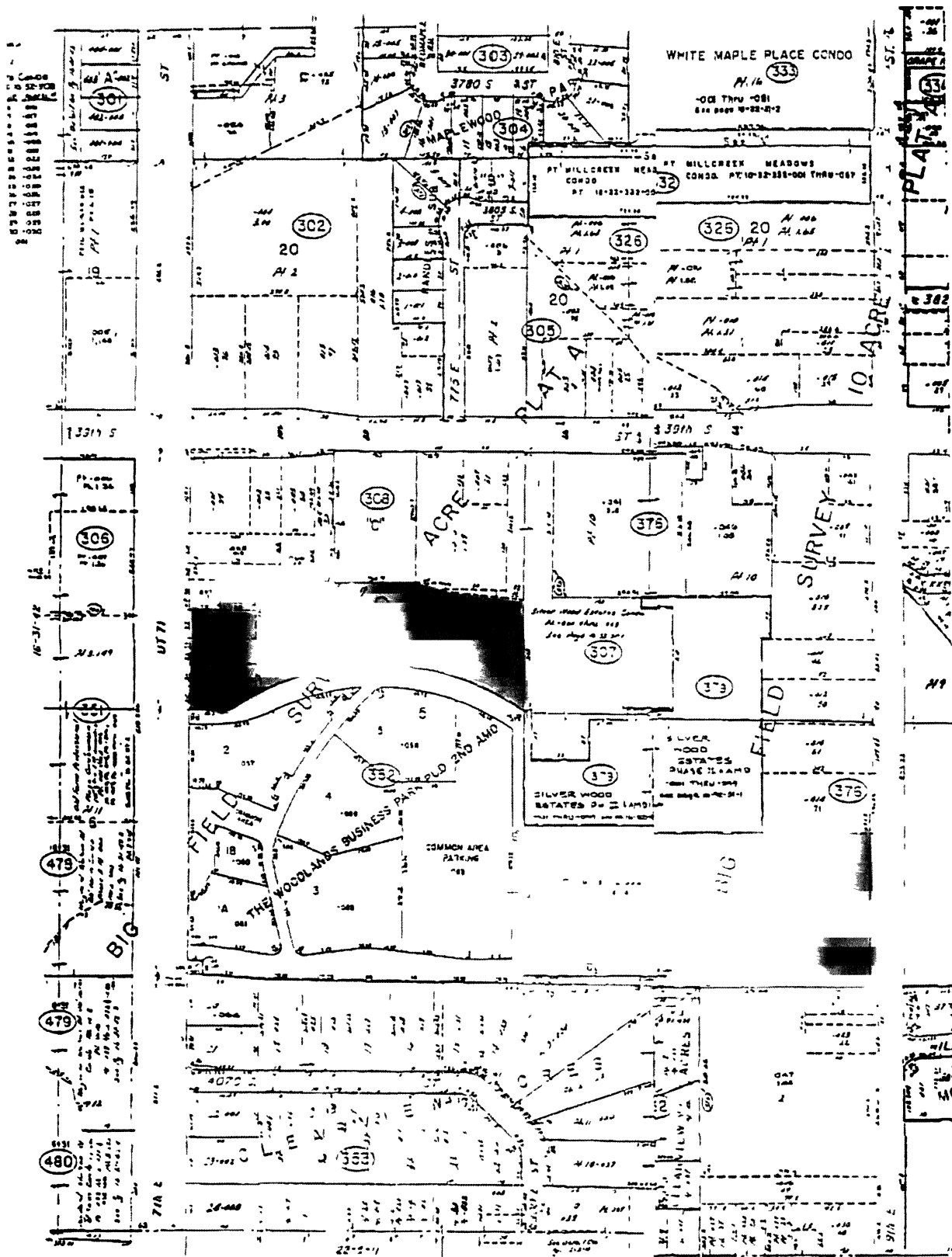
TRACT III

Commencing at the Southeast corner of Lot 11, Block 5, Ten Acre Plat "A", Big Field Survey; thence West 766.09 feet; North 327.21 feet; East 766.09 feet; South 327.21 feet to BEGINNING.

The foregoing notwithstanding Tracts ^{I and II} shall be benefited by the Woodland Easement only so long as its use is limited to use for apartment purposes.

2025566 10/21/51

Exhibit B



SALT LAKE CO.
W. 1/2 S.W. 1/4 SEC. 32 T.1S. R.1E.

SALT LAKE CO.
E. 1/2 S.W. 1/4 SEC. 32 T.1S. R.1E.

LEGEND:

- Tract A
- Tract B
- Tract C

Exhibit C

FILED
JUL 20 2011
DISTRICT COURT

Handwritten signature: J. Greathouse

P. Bruce Badger (A4791)
Diane H. Banks (A4966)
Matthew L. Anderson (A7459)
FABIAN & CLENDENIN,
A Professional Corporation
215 South State Street, 12th Floor
P.O. Box 510210
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Telephone: (801) 531-8900
Facsimile: (801) 531-1716

Attorneys for Defendants Woodlands III Holdings, LLC; JDJ Properties, Inc.; and
The Woodlands Business Park Association

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

LUTHERAN HIGH SCHOOL)
ASSOCIATION OF THE GREATER SALT)
LAKE AREA, a Utah non-profit corporation,)
dba SALT LAKE LUTHERAN HIGH)
SCHOOL,)

Plaintiff,)

vs.)

WOODLANDS III HOLDINGS, LLC, a)
Utah limited liability company, BEDFORD)
PROPERTY INVESTORS, INC., a)
Maryland corporation, JDJ PROPERTIES,)
INC., a Utah corporation, THE)
WOODLANDS BUSINESS PARK)
ASSOCIATION, a Utah non-profit)
corporation, WASATCH PROPERTY)
MANAGEMENT, INC., a Utah corporation,)
and JOHN DOES 1-1,000,)

Defendants.)

**AFFIDAVIT OF
JOHN A. DAHLSTROM, JR.**

Civil No. 960908063 PR

Judge Sandra N. Peuler

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

John A. Dahlstrom, Jr., having been duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of Utah.

2. I am Executive Vice President, General Counsel of Wasatch Property Management, Inc., which is under contract to manage the Woodlands Business Park, located at approximately 4000 South 700 East, Salt Lake City, Utah.

3. Office Tower 1 at the Woodlands Business Park is eight (8) stories in height and is owned by JDJ Properties, Inc., a Utah corporation.

4. Office Tower 2 at the Woodlands Business Park is six (6) stories in height and is owned by Woodlands III Holdings, LLC, a Utah limited liability company.

5. Office Tower 3 at the Woodlands Business Park is four (4) stories in height and is owned by Woodlands III Holdings, LLC.

6. Office Tower 4 at the Woodlands Business Park is not owned by any of the Defendants named in this lawsuit.

7. There are also two retail buildings at the Woodlands Business Park; one is owned by JDJ Properties, Inc., the other is owned by Woodlands III Holdings, LLC.

8. The tenants and customers of the retail space and Office Towers I, II and III park in two parking structures. One parking structure with 2 levels, situated immediately east of the three office towers, is owned by the Woodlands Business Park Association, a Utah non-profit corporation. The second parking structure with 3 levels is situated northeast of Office Tower III, abutting the roadway within the Woodlands Business Park. Access to the parking


structure which is situated northeast of Office Tower III is via 700 East, 3900 South or the right-of-way from 900 East along the north boundary of the Lutheran High School property.

9. An accurate photograph of the right-of-way on the Lutheran High School Property leading to the parking structure situated to the east of Office Towers I, II and III is attached hereto as Exhibit "A".

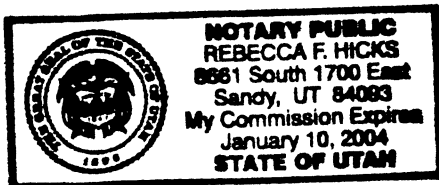
10. An accurate photograph of the parking structure situated to the northeast of Office Tower III is attached as Exhibit "B".

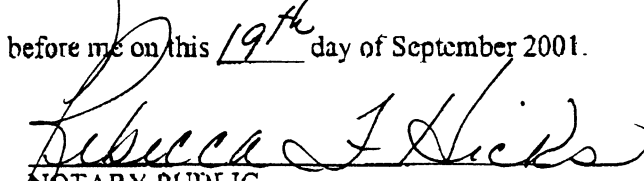
Further affiant sayeth not.

DATED this 19th day of September, 2001.


John A. Dahlstrom, Jr.

SUBSCRIBED AND SWORN TO before me on this 19th day of September 2001.




NOTARY PUBLIC

CERTIFICATE OF SERVICE

On the 25TH day of September, 2001, I hereby certify that I served a true and correct copy of the foregoing **AFFIDAVIT OF JOHN A. DALHSTROM, JR., ESQ.** by depositing said document in the United States mail, postage prepaid, addressed as follows:

Robert M. Taylor
Sue J. Chon
TAYLOR, ADAMS, LOWE & HUTCHINSON
Attorneys for Plaintiff
2180 South 1300 East, Suite 520
Salt Lake City, UT 84106

Janette E. Link

EXHIBIT "A"

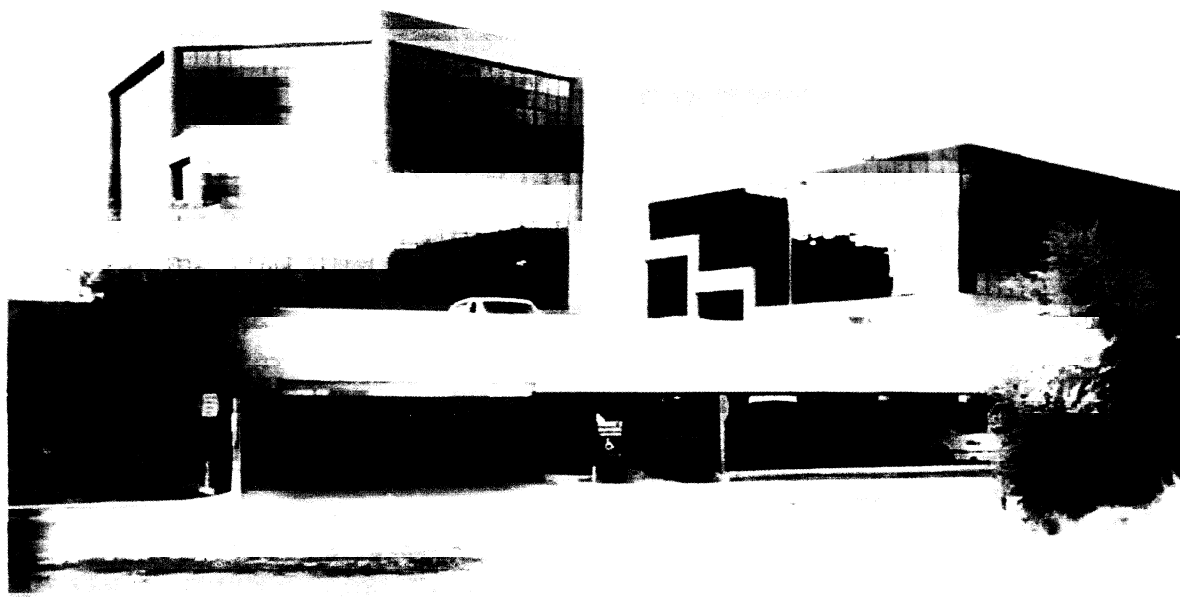


Exhibit "B"

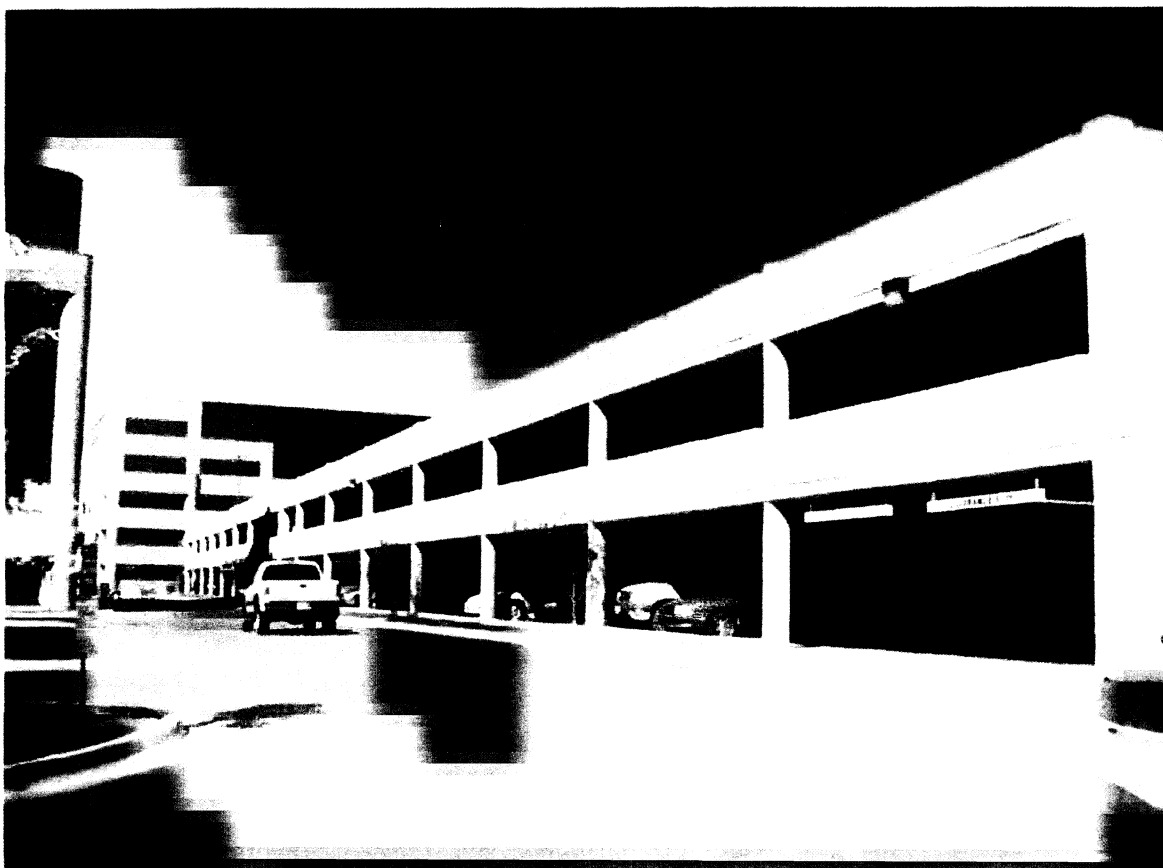


Exhibit D

FILED DISTRICT COURT
Third Judicial District

SEP - 9 2002

By 
SALT LAKE COUNTY
Deputy Clerk

P. Bruce Badger (A4791)
Diane H. Banks (A4966)
Matthew L. Anderson (A7459)
FABIAN & CLENDENIN,
A Professional Corporation
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P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900
Facsimile: (801) 531-1716

Attorneys for Defendants Woodlands III Holdings, LLC; Woodlands IV Holdings, LLC;
JDJ Properties, Inc.; and The Woodlands Business Park Association

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

LUTHERAN HIGH SCHOOL)
ASSOCIATION OF THE GREATER SALT)
LAKE AREA, a Utah non-profit corporation,)
dba SALT LAKE LUTHERAN HIGH)
SCHOOL,)

Plaintiff,)

vs.)

WOODLANDS III HOLDINGS, LLC, a)
Utah limited liability company;)
WOODLANDS IV HOLDINGS, LLC, a)
Utah limited liability company; BEDFORD)
PROPERTY INVESTORS, INC., a)
Maryland corporation; JDJ PROPERTIES,)
INC., a Utah corporation; THE)
WOODLANDS BUSINESS PARK)
ASSOCIATION, a Utah non-profit)
corporation; WASATCH PROPERTY)
MANAGEMENT, INC., a Utah corporation;)
and JOHN DOES 1-1,000,)

Defendants.)

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

Civil No. 960908063 PR

Judge Sandra N. Peuler

Defendants, Woodlands III Holdings, LLC, JDJ Properties, Inc., and The Woodlands Business Park Association, filed their Motion for Summary Judgment (“Defendants’ Motion For Summary Judgment”) on or about September 25, 2001. Plaintiff thereafter filed its Supplemental Complaint on or about February 8, 2002, joining Woodlands IV Holdings, LLC, as a defendant. On or about March 25, 2002, Plaintiff filed its Motion for Summary Judgment. Woodlands IV Holdings, LLC, joined in the motion papers in support of Defendants’ Motion for Summary Judgment and in opposition to Plaintiff’s Motion for Summary Judgment. The motions were fully briefed by the parties and submitted to the court for decision, accompanied by a request for oral argument. Both motions came on for hearing before the Honorable Sandra N. Peuler on April 22, 2002, at 10:00 a.m. The moving Defendants were represented by P. Bruce Badger and Matthew L. Anderson of Fabian & Clendenin. Plaintiff was represented by Stephen F. Hutchinson of Taylor, Adams, Lowe & Hutchinson. Defendant Bedford Property Investors, Inc., was represented by Ronald G. Russell of Parr, Waddoups, Brown, Gee & Loveless

The court heard argument of counsel and having fully considered the parties’ respective moving papers, including affidavits supporting and opposing the motions, and being otherwise fully advised, now enters its order.

IT IS HEREBY ORDERED:

1. Defendants’ Motion for Summary Judgment is granted for the reasons set forth in the Minute Entry dated April 26, 2002 (attached hereto as Exhibit “A” and incorporated herein by this reference) and as set forth in Defendants’ memoranda filed in support of Defendants’ Motion for Summary Judgment.

2. Plaintiff's Motion for Summary Judgment is denied for the reasons set forth in the Minute Entry (Exhibit "A" hereto) and as set forth in Defendants' memorandum opposing Plaintiff's Motion for Summary Judgment.

3. This action involves a non-exclusive easement (the "Easement") appurtenant to and across a parcel of property located in Salt Lake County which is currently owned by the Salt Lake Lutheran High School. The Easement runs west from 900 East at approximately 4000 South and was granted for the purpose of providing vehicular access to a portion of what is now the Woodlands Business Park located on 700 East. The Easement was created by a Declaration of Easements, Covenants and Restrictions (the "1983 Declaration"), which was recorded in the records of the Salt Lake County Recorder on October 27, 1983, as Entry 3862259, Book 5502, Page 1559. The legal descriptions that were attached as exhibits to the 1983 Declaration were reversed, so an Amendment to Declaration of Easements, Covenants and Restrictions (the "1984 Declaration") was recorded on June 20, 1984, as Entry 3957731, Book 5566, Page 2146, to correctly set forth the legal descriptions of the affected parcels. The Easement is referred to in the 1983 Declaration as the "Associates Roadway". The servient estate with respect to the Easement or the Associates Roadway is referred to as Tract A in the 1983 Declaration, and is more particularly described in Exhibit "B" hereto. The dominant estate with respect to the Easement or the Associates Roadway is referred to as Tract B in the 1983 Declaration, and is more particularly described in Exhibit "C" hereto.

4. Since the grant of the Easement, the Woodlands Business Park has expanded to property north of the dominant estate that the parties to this action have referred to variously as

Tract C, or the “Northern Parcel” or “Expansion Property”, which is more particularly described in Exhibit “D” hereto. Tract C contains both a high-rise office building (“Tower IV”) owned by Woodlands IV Holdings LLC, and a multi-level parking facility.

5. The Easement, which is for the benefit of the dominant estate, has not been overburdened by the use of the Easement by the owners, tenants, subtenants and concessionaires of Tract B and their customers, invitees and guests, including their use of the Easement to access parking on Tract C.

6. The owners, tenants, subtenants and concessionaires of Tract B and their customers, invitees and guests, may continue to use the Easement to access parking on Tract C.

7. The owners, tenants, subtenants and concessionaires of Tract C and their customers, invitees and guests, may not use the Easement. Accordingly, Woodlands IV Holdings, LLC, shall take all steps necessary to restrict use of the Easement by the Tower IV tenants, subtenants and concessionaires and their customers, invitees and guests, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate.

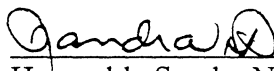
8. This Order is an adjudication of all of the claims in this action notwithstanding that Wasatch Properties Management, Inc., was joined as a defendant and has never appeared. Accordingly, the court expressly determines that there is no just reason to delay entry of final judgment and expressly directs entry of this Order as Final Judgment.

9. **Any person may record a certified copy of this Order in the official records of the Recorder of Salt Lake County, State of Utah. The recording of this Order shall serve**

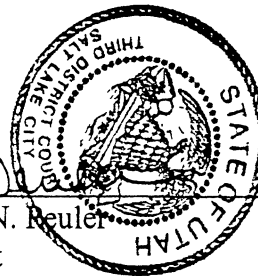
to immediately release the *Lis Pendens* recorded in the records of the Salt Lake County Recorder on November 21, 1996, as Entry 6511599, Book 7540, Page 10, which referenced the real property described in Exhibits "B", "C" and "D" hereto.

DATED this 9 day of September, 2002.

BY THE COURT:



Honorable Sandra N. Reuler
Third District Court



Approved as to form:

Robert M. Taylor
Stephen F. Hutchinson
Sue J. Chon
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

On the 1ST day of August, 2002, I hereby certify that I caused to be served a true and correct copy of the foregoing *Proposed Order Granting Defendants' Motion For Summary Judgment and Denying Plaintiff's Motion For Summary Judgment* by hand delivering said document as follows:

Robert M. Taylor
Sue J. Chon
Taylor, Adams, Lowe & Hutchinson
Attorneys for Plaintiff
2180 South 1300 East, Suite 520
Salt Lake City, UT 84106

Ronald G. Russell
Parr, Waddoups, Brown, Gee & Loveless
Attorneys for Bedford Property Investors, Inc.
185 South State, #1300
Salt Lake City, Utah 84111

Annette E Clark

A

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LUTHERAN HIGH SCHOOL
ASSOCIATION OF THE GREATER
SALT LAKE AREA, a Utah non-
profit corporation, dba SALT
LAKE LUTHERAN HIGH SCHOOL

Plaintiff,

vs.

WOODLANDS III HOLDINGS LLC, a
Utah limited liability
company, et. al.

Defendants.

MINUTE ENTRY

CASE NO. 960908063

JUDGE SANDRA N. PEULER

This matter is before the Court on the parties' cross Motions for Summary Judgment. Oral arguments were held on April 22, 2002. Following the conclusion of the hearing, the Court took the matter under advisement. Now, having fully considered the arguments of counsel, submissions of the parties and the applicable legal authority the Court enters the following ruling.

The relevant facts are as follows. In October 1983 Woodland Investment Company ("Woodland") owned the parcel of land located at 4020 South 900 East, Salt Lake City, Utah ("Tract A") and Woodland Associates ("Associates") owned the land located directly west of Tract A ("Tract B"). On October 27th, 1983 Woodland and Associates entered into a "Declaration of Easements Covenants and Restrictions" (the "1983 Declaration") under which the parties provided for: (1) an easement over Tract A which provided access to Tract B from 900 East; and (2) an easement over Tract B which

provided access to Tract A from 700 East. The language of the Declaration evidences the clear intent of the parties that both tracts would be commercial in nature. Eventually, Tract B developed commercially and currently contains: a parking facility, three high rise office buildings ("Towers I, II and III"), open parking areas and two retail centers. Tract A, on the other hand, was sold in 1992 to the Lutheran High School Association ("Plaintiff").

The current dispute revolves around a contiguous parcel of land owned by Woodlands IV and located immediately north of Tract B ("Tract C"). Tract C is an expansion of the original development and contains both a high rise office building ("Tower IV") and a multi level parking facility. Currently, Tract B tenants, working at Tower III, are permitted to use Tract C's parking facility. In order to reach the parking facility, Tract B workers use the easement over Tract A. Plaintiff objects to this use of the easement by claiming that it overburdens the easement in conflict with the original intention of the parties.

As an initial matter, both parties agree that the benefit of the easement may not be enlarged to include Tract C. Therefore, the tenants of Tower IV, located on Tract C, may not use the easement to access that property. Accordingly, defendants are ordered to take all necessary steps to restrict use of the

easement by Tower IV tenants, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate.

As to the remaining issue, the Court concludes that the easement is not overburdened by the Tract B tenants' use of the easement to access parking on Tract C.

Generally, the holder of an easement is entitled to use that easement in a manner "reasonably necessary for the convenient enjoyment of the servitude." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (2000). Additionally, the terms 1983 Declaration indicate that this easement was specifically designed for the "benefit" of the parties and their tenants. (Declaration of Easements Covenants and Restrictions Sec. 4 ¶ d). Here, the tenants of Tract B, for whom the easement was originally intended, make no greater use of the easement by parking on Tract C, than they would if they parked on Tract B; there is no evidence that the parking arrangement causes any additional vehicle traffic. In addition, although plaintiffs argued that the parking arrangement makes Tract C a beneficiary of the easement, there is no evidence in the record to support that. Rather, it appears that the tenants of Tract B only use the easement for the benefit and enjoyment of the servitude to which they are entitled.

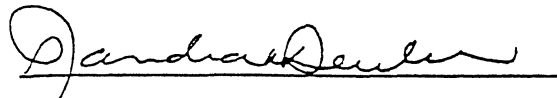
Accordingly,, defendants' Motion for Summary Judgment is

granted, and plaintiffs' Motion for Summary Judgment is denied.

Defendants' counsel is directed to prepare an Order consistent with this Minute Entry and submit the same to the Court for review and signature.

Dated this 26 day of April, 2002.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Sandra N. Peuler", is written over a horizontal line.

SANDRA N. PEULER
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 960908063 by the method and on the date specified.

METHOD NAME

Mail	MATTHEW L. ANDERSON ATTORNEY DEF 215 South State St. Suite 1200 P.O. Box 510210 Salt Lake City, UT 84151
Mail	STEPHEN F HUTCHINSON ATTORNEY PLA 2180 SOUTH 1300 EAST SUITE 520 SALT LAKE CITY UT 841060000
Mail	RONALD G RUSSELL ATTORNEY DEF 185 SOUTH STATE STE 1300 PO BOX 11019 SALT LAKE CITY UT 841470019

Dated this 6 day of June, 2012.

R. C. Anderson
Deputy Court Clerk

Exhibit E

SALT LAKE COUNTY ORDINANCES IN EFFECT IN 1983
Conditional Uses

22-31-2 - 22-31-3

Eff. 3-23-72 (6) Appeals of Decision. Any person shall have the right to appeal the decision of the Planning Director to the Planning Commission by filing a letter with the Planning Commission within five (5) days of the Planning Director's action, stating the reason for said appeal and requesting a hearing before the Planning Commission at the earliest regular meeting of the Commission.

Eff. 8-18-77 Any person shall have the right to appeal to the Board of County Commissioners any decision rendered by the Planning Commission by filing in writing, and in triplicate, stating the reasons for the appeal with the Board of County Commissioners within ten (10) days following the date upon which the decision is made by the Planning Commission.

Eff. 3-20-76 After receiving said appeal the County Commission may reaffirm the Planning Commission decision or set a date for a public hearing.

(a) Notification of Planning Commission. The Board of County Commissioners shall notify the Planning Commission of the date of said review, in writing, at least seven (7) days preceding said date set for hearing so that said Planning Commission may prepare the record for said hearing.

Eff. 12-5-75 (b) Determination of Board of County Commissioners. The Board of County Commissioners after proper review of the decision of the Planning Commission may affirm, reverse, alter or remand for further review and consideration any action taken by said Planning Commission.

(7) Inspection. Following the issuance of a conditional use permit by the Planning Commission the Director of Building Inspection shall approve an application for a building permit pursuant to Chapter 3 of this Title and shall ensure that development is undertaken and completed in compliance with said permits.

(8) Time Limit. Unless there is substantial action under a conditional use permit within a maximum period of one (1) year of its issuance, the conditional use permit shall expire. The Planning Commission may grant a maximum extension of six (6) months under exceptional circumstances.

* Eff. 6-22-73 Sec. 22-31-3. Planned Unit Development.

(1) Introduction. Provision of a planned unit development by this chapter in no way guarantees a property owner the right to exercise the provisions of the planned unit development. Planned unit developments shall be approved by the Planning Commission only if, in its judgment the proposed planned unit development fully meets the intent and purpose and requirements of the zoning ordinance.

(2) Purpose. The purpose of the planned unit development is to allow diversification in the relationship of various uses and structures to their sites and to permit more flexibility in the use of such sites. The application of planned unit concepts is intended to encourage good neighborhood, housing, or area design, thus ensuring substantial compliance with the intent of the district regulations and other provisions of this Ordinance related to the public health, safety, and general welfare and at the same time securing the advantages of large-scale site planning for residential, commercial or industrial developments, or combinations thereof.

(3) Definition. Planned unit development, for the purpose of this Ordinance, shall mean an integrated design for development of residential, commercial, or industrial uses, or combination of such uses, in which one or more of the regulations, other than use regulations, of the District in which the development is to be situated, is waived or varied to allow flexibility and initiative in site and building design and location in accordance with an approved plan and imposed general requirements as specified in this Chapter. A planned unit development may be (1) The development of compatible land uses arranged in such a way as to provide desirable living environments that may include private and common open spaces for recreation, circulation and/or aesthetic uses. (2) The conservation or development of desirable amentities not otherwise possible by typical development standards. (3) Creation of areas for multiple use that are of benefit to the neighborhood.

(4) Planned Unit Development Permit. Planned unit developments may be allowed by Planning Commission approval in any zoning district. An approved planned unit development shall consist of an official planned unit development form approved by the Planning Commission and signed by its chairman, and an approved site plan also signed by the chairman of the Planning Commission. Denial of a planned unit development shall also be indicated on the official form. A planned unit development permit shall not be granted unless the planned unit development meets the use limitations of the zoning district in which it is to be located and meets the density and other limitations of such districts. Compliance with the regulations of this Ordinance in no sense excuses the developer from the applicable requirements of the Subdivision Ordinance, except as modifications thereof are specifically authorized in the approval of the application for the planned unit development. The permit shall be considered in two parts (1) Preliminary approval subject to the public hearing provisions of paragraph 22-31-3-9 this Chapter and (2) Final approval based on construction drawings and specifications in general accord with that granted preliminary approval.

(5) Required Conditions.

1. No planned unit development shall have an area of less than one (1) acre.

2. A planned unit development which will contain uses not permitted in the zoning district in which it is to be located will require a change of zoning district and shall be accompanied by an application for a zoning amendment, except that any residential use shall be considered a permitted use in a planned unit development which allows residential uses and shall be governed by design and other requirements of the planned unit development permit. Provided further that in single family zones, not including the FR Zones, only single family dwellings may be allowed in the planned unit development. Hotels, motels, lodges, mobile home parks, etc., shall not be considered residential uses for the purpose of this Chapter.

3. The development shall be in single, partnership, or corporate ownership, or under option to purchase by an individual or a corporate entity at the time of application or the application shall be filed jointly by all owners of the property.

4. The Planning Commission shall require such arrangement of structures and open spaces within the site development plan, as necessary,

to assure that adjacent properties will not be adversely affected.

a. Height and intensity of buildings and uses shall be arranged, around the boundaries of the planned unit development, to be compatible with existing adjacent developments or zones. However, unless conditions of the site so warrant, buildings located on the periphery of the development shall be limited to a maximum height of two (2) stories.

b. Lot area, lot width, yard and coverage regulations shall be determined by approval of the site plan.

c. Density of dwelling units per acre shall be the same as allowed in the zone in which the planned unit development is located.

5. Preservation, maintenance and ownership of required open space within the development shall be accomplished by:

a. Dedication of the land as a public park or parkway system; or

b. Granting to Salt Lake County a permanent open space easement on or over the said private open spaces to guarantee that the open space remain perpetually in recreational use with ownership and maintenance being the responsibility of the owner or an Owner's Association established with articles of association and by-laws which are satisfactory to Salt Lake County; or

c. Complying with the provisions of the Condominium Ownership Act of 1963, Title 57, Chapter 8, Utah Code Annotated, 1953, as amended, which provides for the payment of common expenses for the upkeep of the common areas and facilities.

6. Landscaping, fencing and screening related to the uses within the site and as a means of integrating the proposed development into its surroundings shall be planned and presented to the Planning Commission for approval, together with other required plans for the development.

7. The size, location, design and nature of signs, if any, and the intensity and direction of area floodlighting shall be detailed in the application.

8. A grading and drainage plan shall be submitted to the Planning Commission with the application.

(6) Planned Unit Development Site Plan Requirements. The applicant shall submit a planned unit development plan for the total area within the proposed development. If the planned unit development is to be developed on a phase basis each phase shall be of such size, composition and arrangement that its construction, marketing and operation is feasible as a unit independent of any subsequent phases. Final approval shall be given only to one phase at a time. The general site plan shall show, where pertinent:

1. The use or uses, dimensions, sketch elevations, and locations of proposed structures.

2. Dimensions and locations of areas to be reserved and developed for vehicular and pedestrian circulation, parking, public uses such as schools and playgrounds, landscaping, and other open spaces.

3. Architectural drawings and sketches outlining the general design and character of the proposed uses and the physical

relationships of the uses.

4. Such other pertinent information including, but not limited to, residential density, coverage and open space characteristics shall be included as may be necessary to make a determination that the contemplated arrangement of buildings and uses makes it desirable to apply regulations and requirements differing from those ordinarily applicable under this Ordinance.

(7) Scope of Planning Commission Action. In carrying out the intent of this Chapter the Planning Commission shall consider the following principles:

1. It is the intent of this Chapter that site and building plans for a planned unit development shall be prepared by a designer or team of designers having professional competence in urban planning as proposed in the application. The Commission may require the applicant to engage such a qualified designer or design team.

2. It is not the intent of this Section that control of the design of a planned unit development by the Planning Commission be so rigidly exercised that individual initiative be stifled and substantial additional expense incurred; rather, it is the intent of this Section that the control exercised be the minimum necessary to achieve the purpose of this Chapter.

3. The Planning Commission may approve or disapprove an application for a planned unit development. In approving an application the Commission may attach such conditions as it may deem necessary to secure compliance with the purposes set forth in Section 22-31-2(5) this Chapter. The Action of the Planning Commission may be appealed to the County Commission.

(8) Construction Limitations.

1. Upon approval of a planned unit development construction shall proceed only in accordance with the plans and specifications approved by the Planning Commission and in conformity with any conditions attached by the Commission to its approval.

2. Amendments to approved plans and specifications for a planned unit development shall be approved by the Planning Commission and shown on the approved plans.

3. The building inspector or any other county department shall not issue any permit for any proposed building, structure, activity or use within the project unless such building, structure, activity, or use is in accordance with the approved development plan and any conditions imposed in conjunction with its approval.

4. The building inspector shall issue a certificate of occupancy signed by the Planning Director for any building or structure upon its completion in accordance with the approved development plan.

(9) Public Hearing. Preliminary development plans including site plan, (buildings, open space, parking, landscaping, pedestrian and traffic circulation) building elevations and general drainage and utility layout with topography shall be submitted for the purpose of public review. A public hearing shall be held after a notice of hearing in a newspaper of general circulation in the area concerned not less than 10 days prior to the date of said hearing. Failure of property owners to receive notice of said hearing shall in no way affect the validity of action taken.

(10) Fees.

1. See Section 22-31-2 (3) for the planned unit development fee, plus subdivision fee, as per lot schedule in the Subdivision Ordinance.

Sec. 22-31-4. Sale of Alcoholic Beverages Special Provisions.

(1) The Planning Commission shall authorize a conditional use permit to sell alcoholic beverages except Class "A" beer outlets and Class "B" beer outlets where it is determined by the Planning Commission:

a. That the use is not in the immediate proximity of any school, church, library, public playground, or park.

b. That the proposed use at a particular location is necessary and desirable to provide said service or facility which will contribute to the general well being of the neighborhood and the community; and

c. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and

d. That the proposed use will comply with regulations and conditions specified in this Title for such use; and

e. That the proposed use will conform to the intent of the Salt Lake County Master Plan.

(2) All conditional use permits for uses dispensing alcoholic beverages to be consumed on the premises are subject to an annual review, and all applications for a conditional use permit for consumption of liquor on the premises must be accompanied by a payment of a twenty-five dollar (\$25.00) fee. Said fees are considered reasonable because of the costs of investigation and studies necessary for the administration hereof.

(3) The granting of any permit by the Planning Commission to dispense alcoholic beverages is subject to review by the Salt Lake County Commission. The denial of any permit by the Planning Commission to dispense alcoholic beverages is subject to review by the District Courts. All appeals of Planning Commission decisions to the Board of County Commissioners or the District Courts must be filed with the appropriate body within thirty (30) days from the date of the Planning Commission Decision.

Conditional uses are listed in each zone of this ordinance, however, they will not be approved for construction if they are incompatible with their neighborhood, or the County Master Plan. If you have questions regarding the meaning of this statement, call 535-7004 or 535-7461, before entering into a financially binding contract on a property.

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(a) Notification of Planning Commission. The Board of County Commissioners shall notify the Planning Commission of the date of said review, in writing, at least seven (7) days preceding said date set for hearing so that said Planning Commission may prepare the record for said hearing.

(b) Determination of Board of County Commissioners. The Board of County Commissioners after proper review of the decision of the Planning Commission may affirm, reverse, alter or remand for further review and consideration any action taken by said Planning Commission. (Eff. 12-5-75)

(7) Inspection. Following the issuance of a conditional use permit by the Planning Commission the Director of Building Inspection shall approve an application for a building permit pursuant to Chapter 3 of this Title and shall ensure that development is undertaken and completed in compliance with said permits.

(8) Time Limit. Unless there is substantial action under a conditional use permit within a maximum period of one (1) year of its issuance, the conditional use permit shall expire. The Planning Commission may grant a maximum extension of six (6) months under exceptional circumstances.

* Sec. 22-31-3. Planned Unit Development. (Eff. 6-22-73)

(1) Introduction. Provision of a planned unit development by this chapter in no way guarantees a property owner the right to exercise the provisions of the planned unit development. Planned unit developments shall be approved by the Planning Commission only if, in its judgment, the proposed planned unit development fully meets the intent and purpose and requirements of the zoning ordinance.

(2) Purpose. The purpose of the planned unit development is to allow diversification in the relationship of various uses and structures to their sites and to permit more flexibility in the use of such sites. The application of planned unit concepts is intended to encourage good neighborhood, housing, or area design, thus ensuring substantial compliance with the intent of the district regulations and other provisions of this Ordinance related to the public health, safety, and general welfare and at the same time securing the advantages of large-scale site planning for residential, commercial or industrial developments, or combinations thereof.

(3) Definition. Planned unit development, for the purpose of this Ordinance, shall mean an integrated design for development of residential, commercial, or industrial uses, or combination of such uses, in which one or more of the regulations, other than use regulations, of the District in which the development is to be situated, is waived, or varied to allow flexibility and initiative in site and building design and location in accordance with an approved plan and imposed general requirements as specified in this Chapter. A planned unit development may be (1) The development of compatible land uses arranged in such a way as to provide desirable living environments that may include private and common open spaces for recreation, circulation and/or aesthetic uses. (2) The conservation or development of desirable amenities not otherwise possible by typical development standards. (3) Creation of areas for multiple use that are of benefit to the neighborhood.

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(4) Planned Unit Development Permit. (Eff. 2-16-84) Planned unit developments may be allowed by the Planning Commission approval in any zoning district. An approved planned unit development shall consist of a final approval letter and a final approved site plan. A planned unit development permit shall not be granted unless the planned unit development meets the use limitations of the zoning district in which it is to be located and meets the density and other limitations of such districts. Compliance with the regulations of this Ordinance in no sense excuses the developer from the applicable requirements of the Subdivision Ordinance, except as modifications thereof are specifically authorized in the approval of the application for the planned unit development. The permit shall be considered in two parts (1) Preliminary approval subject to the public hearing meeting provisions of paragraph 22-31-3-9 this Chapter and (2) Final approval based on construction drawings and specifications in general accord with that granted preliminary approval.

(5) Required Conditions.

1. No planned unit development shall have an area of less than one (1) acre.

2. A planned unit development which will contain uses not permitted in the zoning district in which it is to be located will require a change of zoning district and shall be accompanied by an application for a zoning amendment, except that any residential use shall be considered a permitted use in a planned unit development which allows residential uses and shall be governed by design and other requirements of the planned unit development permit. Provided further that in single family zones, not including the FR Zones, only single family dwellings may be allowed in the planned unit development. Hotels, motels, lodges, mobile home parks, etc., shall not be considered residential uses for the purpose of this Chapter.

3. The development shall be in single, partnership, or corporate ownership, or under option to purchase by an individual or a corporate entity at the time of application or the application shall be filed jointly by all owners of the property.

4. The Planning Commission shall require such arrangement of structures and open spaces within the site development plan, as necessary, to assure that adjacent properties will not be adversely affected.

a. Height and intensity of buildings and uses shall be arranged, around the boundaries of the planned unit development, to be compatible with existing adjacent developments or zones. However, unless conditions of the site so warrant, buildings located on the periphery of the development shall be limited to a maximum height of two (2) stories.

b. Lot area, lot width, yard and coverage regulations shall be determined by approval of the site plan.

c. Density of dwelling units per acre shall be the same as allowed in the zone in which the planned unit development is located.

5. Preservation, maintenance and ownership of required open space within the development shall be accomplished by:

a. Dedication of the land as a public park or parkway system; or

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b. Granting to Salt Lake County a permanent open space easement on or over the said private open spaces to guarantee that the open space remain perpetually in recreational use with ownership and maintenance being the responsibility of the owner or an Owner's Association established with articles of association and by-laws which are satisfactory to Salt Lake County; or

c. Complying with the provisions of the Condominium Ownership Act of 1963, Title 57, Chapter 8, Utah Code Annotated, 1953, as amended, which provides for the payment of common expenses for the upkeep of the common areas and facilities.

6. Landscaping, fencing and screening related to the uses within the site and as a means of integrating the proposed development into its surroundings shall be planned and presented to the Planning Commission for approval, together with other required plans for the development.

7. The size, location, design and nature of signs, if any, and the intensity and direction of area floodlighting shall be detailed in the application.

8. A grading and drainage plan shall be submitted to the Planning Commission with the application.

(6) Planned Unit Development Site Plan Requirements. (Eff. 2-16-84) The applicant shall submit a planned unit development plan for the total area within the proposed development. If the planned unit development is to be developed on a phase basis each phase shall be on such size, composition and arrangement that its construction, marketing and operation is feasible as a unit independent of any subsequent phases. The general site plan shall show, where pertinent:

1. The use or uses, dimensions, sketch elevations, and locations of proposed structures.

2. Dimensions and locations of areas to be reserved and developed for vehicular and pedestrian circulation, parking, public uses such as schools and playgrounds, landscaping, and other open spaces.

3. Architectural drawings and sketches outlining the general design and character of the proposed uses and the physical relationships of the uses.

4. Such other pertinent information including, but not limited to, residential density, coverage and open space characteristics shall be included as may be necessary to make a determination that the contemplated arrangement of buildings and uses makes it desirable to apply regulations and requirements differing from those ordinarily applicable under this Ordinance.

(7) Scope of Planning Commission Action. In carrying out the intent of this Chapter the Planning Commission shall consider the following principles:

1. It is the intent of this Chapter that site and building plans for a planned unit development shall be prepared by a designer or team of designers having professional competence in urban planning as proposed in the application. The Commission may require the applicant to engage such a qualified designer or design team.

2. It is not the intent of this Section that control of the design of a planned unit development by the Planning Commission be so rigidly exercised that individual initiative be stifled and substantial additional expense incurred; rather, it is the intent of this Section that the control exercised be the minimum necessary to achieve the purpose of this Chapter.

3. The Planning Commission may approve or disapprove an application for a planned unit development. In approving an application the Commission may attach such conditions as it may deem necessary to secure compliance with the purposes set forth in Section 22-31-2(5) this Chapter. The action of the Planning Commission may be appealed to the County Commission.

(8) Construction Limitations.

1. Upon approval of a planned unit development construction shall proceed only in accordance with the plans and specifications approved by the Planning Commission and in conformity with any conditions attached by the Commission to its approval.

2. Amendments to approved plans and specifications for a planned unit development shall be approved by the Planning Commission and shown on the approved plans.

3. The building inspector or any other county department shall not issue any permit for any proposed building, structure, activity or use within the project unless such building, structure, activity, or use is in accordance with the approved development plan and any conditions imposed in conjunction with its approval.

4. The building inspector shall issue a certificate of occupancy signed by the Planning Director for any building or structure upon its completion in accordance with the approved development plan.

(9) Public Meeting. (Eff. 2-16-84) Preliminary development plans including site plan, (buildings, open space, parking, landscaping, pedestrian and traffic circulation) building elevations and general drainage and utility layout with topography shall be submitted for the purpose of staff analysis and Planning Commission review at a regularly scheduled meeting.

(10) Fees.

1. See Section 22-31-2 (3) for the planned unit development fee, plus subdivision fee, as per lot schedule in the Subdivision Ordinance.

Sec. 22-31-4. Sale of Alcoholic Beverages Special Provisions.

(1) The Planning Commission shall authorize a conditional use permit to sell alcoholic beverages except Class "A" beer outlets and Class "B" beer outlets where it is determined by the Planning Commission:

a. That the use is not in the immediate proximity of any school, church, library, public playground, or park.

b. That the proposed use at a particular location is necessary and desirable to provide said service or facility which will contribute to the general well being of the neighborhood and the community; and

c. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and

d. That the proposed use will comply with regulations and conditions specified in this Title for such use; and

e. That the proposed use will conform to the intent of the Salt Lake County Master Plan.