

2003

John Holmes Construction, Inc., a Utah corporation, and Coulter and Smith, LTD., a Nevada corporation v. R.A. McKell Excavating, Inc., a Utah corporation, and Rick McKell, an individual : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOHN HOLMES CONSTRUCTION, INC., a  
Utah corporation, and COULTER & SMITH,  
LTD., a Nevada corporation,

Appellees,

v.

R.A. McKELL EXCAVATING, INC., a Utah  
corporation, and RICK McKELL, an  
individual,

Appellants.

Case No. 20030707-CA

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BRIEF OF APPELLANT

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APPEAL FROM THE FINAL JUDGMENT ENTERED ON AUGUST 5, 2003, ORDER  
GRANTING MOTION FOR AWARD OF ATTORNEY'S FEES ENTERED ON AUGUST 5,  
2003 AND THE ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT ENTERED ON OCTOBER 9, 2002 BY THE  
THIRD DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, UTAH,  
THE HONORABLE WILLIAM B. BOHLING

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UTAH APPELLATE COURTS  
MAR - 3 2004

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## **PARTIES**

**Defendants/Appellants:** R.A. McKell Excavating, Inc. and Rick McKell

**Plaintiffs/Respondents:** John Holmes Construction, Inc. and Coulter & Smith, Ltd.

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## **JURISDICTION OF THE UTAH COURT OF APPEALS**

The Utah Court of Appeals has jurisdiction of this appeal under Utah Code Ann. § 78-2a-3(2)(j) (2002).

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

First Issue: Did Judge Bohling err when he interpreted section 38-1-7(1)(a) & (b) of the Utah Code and determined McKell's work was either for "a residence," requiring McKell to record its lien within ninety (90) days after last furnishing labor, materials, equipment or services to the "residence," or that work on the Project ceased or was abandoned, requiring McKell to record its lien within ninety (90) days after cessation or abandonment of work on a project "not involving a residence as defined in Section 38-11-102", rather than "within 90 days from the date of final completion of the original contract not involving a residence" as plainly stated in the statute?

Standard of Review: Judge Bohling's ruling is subject to review under the correction of error standard. *Gerbich v. Numed, Inc.*, 977 P.2d 1205, 1207 (Utah 1999); *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 47 P.3d 92, 94 (Utah Ct. App. 2002) *cert. granted*, 59 P.3d 603 (Utah 2002); *Coulter & Smith v. Russell*, 976 P.2d 1218, 1221 (Utah Ct. App. 1999); *Winters v. Schulman*, 977 P.2d 1218, 1221 (Utah Ct. App. 1999). "In the case of a summary judgment the party against whom the judgment has been granted is entitled to have all the facts presented and all the inferences fairly arising therefrom considered in a light most favorable to him." *Young v. Texas Co.*, 331 P.2d 1099, 1100 (Utah 1958).

Second Issue: Did Judge Bohling err when he ruled as a matter of law that McKell's unjust enrichment claim against Holmes was barred by the existence of an express contract, where McKell furnished labor, material, equipment or services to adjoining subdivisions (one of which was developed by Holmes) under a written contract with Husting Land & Development, Inc. and Eagle Pointe Financial, but where McKell had no express contract with Holmes?

Standard of Review: The issue of unjust enrichment is a mixed question of law and fact. Judge Bohling's legal findings are reviewed for correctness; the trial court is granted broad discretion in applying the law to the facts. *Desert Miriah, Inc. v. B & L Auto, Inc.*, 12 P.3d 580 (Utah 2000); *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998), *cert. denied*, 526 U.S. 1130 (1999). "In the case of a summary judgment the party against whom the judgment has been granted is entitled to have all the facts presented and all the inferences fairly arising therefrom considered in a light most favorable to him." *Young v. Texas Co.*, 331 P.2d 1099, 1100 (Utah 1958).

Third Issue: As the successful parties under Utah Code Ann. §§ 38-1-1, *et seq.*, Holmes filed a Motion for Award of Attorney's Fees. The issue for review is whether the amount of attorney's fees awarded by Judge Bohling (\$25,000 out of a total request of \$30,447) was proper?

Standard of Review: Judge Bohling's ruling is subject to review under the abuse of discretion standard. *Pennington v. Allstate Ins. Co.*, 973 P.2d 932 (Utah 1998); *Baldwin v. Burton*, 850 P.2d 1188 (Utah 1993); *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8 (Utah Ct. App. 1998).

#### **DETERMINATIVE STATUTES**

Utah Code Ann. § 38-1-3):

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or

improvement of any building or structure or improvement to any premises in any manner ... shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise...

(emphasis added).

Utah Code Ann. § 38-1-7(1)(a) & (b) (2002) (excerpted here; included verbatim in the Addendum):

(1) A person claiming benefits under this chapter shall file for record ... a written notice to hold and claim a lien within 90 days from the date:

(a) the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38- 11-102; or

(b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

Utah Code Ann. § 38-11-102 (2) (2002): “Construction on an owner-occupied residence” means designing, engineering, constructing, altering, remodeling, improving, repairing, or maintaining a new or existing residence.

Utah Code Ann. § 38-11-102 (15) (2002): “Owner” means a person who:

(a) contracts with a person who is licensed as a contractor or is exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for the construction on an owner-occupied residence upon real property owned by that person;

(b) contracts with a real estate developer to buy a residence upon completion of the construction on the owner-occupied residence; or

(c) buys a residence from a real estate developer after completion of the construction on the owner-occupied residence.

Utah Code Ann. § 38-11-102 (16) (2002): “Owner-occupied residence” means a residence that is, or after completion of the construction on the residence will be, occupied by the

owner or the owner's tenant or lessee as a primary or secondary residence within 180 days from the date of the completion of the construction on the residence.

Utah Code Ann. § 38-11-102 (19) (2002): "Real estate developer" means a person having an ownership interest in real property who contracts for the construction of a residence that is offered for sale to the public.

Utah Code Ann. § 38-11-102 (20) (2002): "Residence" means an improvement to real property used or occupied, to be used or occupied as, or in conjunction with, a primary or secondary detached single-family dwelling or multifamily dwelling up to two units, including factory built housing.

Utah Code Ann. § 38-11-107 (2002):

(1) A person qualified to file a lien upon an owner-occupied residence and the real property associated with that residence under the provisions of Title 38, Chapter 1, Mechanics' Liens, who provides qualified services under an agreement effective on or after January 1, 1995, other than directly with the owner, shall be barred after January 1, 1995, from maintaining a lien upon that residence and real property or recovering a judgment in any civil action against the owner or the owner-occupied residence to recover monies owed for qualified services provided by that person if:

(a) the conditions described in Subsections 38-11-204(3)(a) and (3)(b) are met; or

(b) (i) a subsequent owner purchases a residence from an owner;

(ii) the subsequent owner who purchased the residence under Subsection (1)(b)(i) occupies the residence as a primary or secondary residence within 180 days from the date of transfer or the residence is occupied by the subsequent owner's tenant or lessee as a primary or secondary residence within 180 days from the date of transfer; and

(iii) the owner from whom the subsequent owner purchased the residence met the conditions described in Subsections 38-11-204(3)(a) and (3)(b).

(2) If a residence is constructed under conditions that do not meet all of the provisions of Subsection (1), that residence and the real property associated with that residence as defined in Section 38-1-4, shall be subject to any mechanics' lien as provided in Section 38-1-3.

## STATEMENT OF THE CASE

### **I. Nature, Proceedings and Disposition Below.**

This case involves a contractor's right to recover from a developer for the reasonable value of furnishing infrastructure improvements (sewer, water, curb, gutter, and roadway) for a residential subdivision. Two developers, Hustings and Holmes and Coulter & Smith, sometimes referred to as Holmes/Mesa<sup>1</sup> ("Holmes" or "Developers") owned adjacent parcels of land in Draper, Utah which each intended to develop as a residential subdivision. Access to Hustings' parcel (Galena Hills) was through Holmes and Coulter & Smith's parcel (Parkway Estates). Consequently, the developers entered into an Adjoining Subdivision Agreement in which they agreed Hustings would contract for the infrastructure improvements for both parcels and be reimbursed pro rata for the cost of improvements furnished for the Holmes' parcel. Hustings terminated the original infrastructure contractor, Construct Tech, and after filing a Chapter 11 bankruptcy petition, contracted with McKell for the improvements. McKell installed improvements for both parcels and sought approval of the bankruptcy court to be paid as an administrative expense, but was denied. At the same time, the bankruptcy Trustee sought approval to complete Hustings' development plans, including Hustings' obligations under the Adjoining Subdivision Agreement. The bankruptcy court authorized the Trustee to contract with Eagle Pointe Financial to complete the subdivision, and Eagle Pointe subsequently contracted with McKell to complete the work. Holmes filed an adversary proceeding against the Trustee which was ultimately settled. Holmes sold the parcel to the City of Draper. McKell now seeks recovery for the reasonable value of the infrastructure work installed on the Holmes parcel.

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<sup>1</sup> Coulter & Smith is the successor in interest to Mesa Development, Inc. (Record 253, ¶4).

McKell's counterclaim in this action seeks recovery for the reasonable value of labor, materials, equipment, and services comprising the culinary and sanitary water system, curb and gutter, storm drain, road base and asphalt McKell furnished to Holmes for the Parkway Estates Subdivision project. McKell asserted two claims for relief. First, the right to recover under the equitable theory of unjust enrichment. Second, the right to foreclose the mechanic's lien McKell recorded against the subdivision on June 7, 2000. (Record 28 – 49).

On November 13, 2000, Holmes filed a complaint against McKell seeking the removal of the mechanic's lien, alleging the lien slandered title to the subdivision, and seeking damages for tortious interference with the prospective economic relationship between Holmes and potential buyers of the subdivision. (Record 1 – 17). On December 8, 2000, McKell answered and counterclaimed. (Record 28 – 49). The Developers replied on December 21, 2000. (Record 50 – 58). Developers filed their Motion for Partial Summary Judgment, supporting memorandum and affidavits on May 20, 2002. (Record 99 -255). McKell filed a memorandum in opposition with supporting affidavits on June 5, 2002. (Record 256 – 317). Developers replied on June 21, 2002. (Record 318 – 333). The court heard argument on August 12, 2002 and granted the motion. (Record 340).

Judge Bohling's Order Granting Motion for Partial Summary Judgment was entered on October 9, 2002. (Record 364 – 366). The court did not articulate any Findings of Fact supporting its ruling, but did reach the legal conclusion that "Defendants failed to record the Notice of Claim of Lien within the time period set forth in Utah Code Ann. § 38-1-7(1)(a) and (b) and that Defendant's *quantum meruit* claim fails as a matter of law because of the existence of an express contract." (*Id.* at 365). McKell contests those conclusions.

On April 25, 2003, Developers filed their Motion for an Award of Attorney's Fees with supporting memorandum and joint affidavit, seeking to recover \$30,447.00 pursuant to Utah's mechanic's lien statute, Utah Code Ann. § 38-1-18. (Record 372 – 397). On May 20, 2003, McKell filed its memorandum in opposition. (Record 399 – 407). Developers replied on May 28, 2003. (Record 408 – 414). The court heard argument on the motion on July 14, 2003, and granted the motion, but reduced the amount of reimbursable fees to \$25,000. (Record 420). The court entered its Order Granting Motion for Award of Attorney's Fees on August 5, 2003. (Record 426 – 427). McKell believes the fee award is excessive notwithstanding the reduction ordered by the court.

The court entered a Final Judgment on August 6, 2003 (Record 423 – 425), the parties having stipulated to dismiss Holmes' remaining claims (Record 418 – 419) and the court having entered its Order Dismissing Second and Third Claims for Relief in Plaintiffs' Complaint on July 14, 2003. (Record 421 – 422). McKell filed its Notice of Appeal on August 27, 2003 (Record 437 – 439), and its Amended Notice of Appeal on September 3, 2003 (Record 446 – 448).

## **II. Statement of Facts.**

1. Husting Land & Development was incorporated in 1994 for the purpose of developing a sixty-one acre, three-phase, sixty-nine lot residential subdivision in Draper, Utah, commonly known as Galena Hills.

Adjacent to Galena Hills was another subdivision development project, Parkway Estates, owned by John Holmes Construction, Inc. and Holmes Mesa Construction, Inc. (Holmes Mesa). Because Galena Hills required access through the Parkway Estates property, and Galena Hills and Parkway Estates shared common areas and roadways, it was necessary to install certain improvements and utilities that would benefit both subdivisions. Thus, Husting and Holmes Mesa entered into an Adjoining Subdivisions Agreement in which Husting agreed to complete certain improvements on Parkway Estates, and Holmes Mesa agreed to reimburse Husting on a pro rata basis for its construction expenses. The Adjoining Subdivisions Agreement provided that reimbursement funds would not be paid to Husting until twenty-four months after final inspection and approval of construction by various municipalities, and then only if certain other conditions were met.

(Record 148-149).

2. Following are excerpts from and summaries of provisions from the Adjoining Subdivisions Agreement (it is reproduced verbatim in the Addendum):

“There are aspects of the development of each subdivision that are common to and shared by both Galena and Parkway. These common characteristics include contribution and development of common areas, installation of utilities to the benefit of both subdivisions, and development of common roadways.”

“By this Agreement, the parties intend to agree upon the allocation of costs and responsibilities associated with these matters of common concern.”

The following costs would be borne equally (50/50) by HLD/Apache and Holmes/Mesa: (1) Sewer Line installed from the trunk line across county land within a 15 foot easement granted by the county...(2) Entrance landscaping, improvements, and signage at the intersection of Galena Park Boulevard and 12300 South Street.

The following costs would be borne 65/35 by HLD/Apache and Holmes/Mesa, respectively: (1) Impact fee to Draper. (2) Costs of improvement of private 20-foot lane ... utility stubs, fencing along railroad tracks, re-routing of irrigation



system within the common area and under Galena Park Blvd. and other improvements as required by Draper. (3) "Because Galena Park Boulevard services and benefits both subdivisions, the parties agree to split the following costs on a 65/35" between HLD/Apache and Holmes Mesa, respectively: (a) full costs of land, surface and underground improvements for curb, gutter, sidewalk, excavation, asphalt, electric power, gas, telephone, and TV cables and storm drain on both sides of Galena Park Blvd. from 12300 South to the north line – extended- of Lot 36 Parkway; and (b) full costs of land, surface and underground improvements for only the east one-half of Galena Park Blvd. along the frontage of the common area south from the north line of Lot 36, to the north lot line of Lot 1 Parkway; (c) one-half the cost of the sewer, water and utility stubs from 12300 South to the north lot line of Lot 1 Parkway...(e) "Except for the items referred to above, Holmes/Mesa shall be responsible to reimburse HLD/Apache for the actual costs for the development of all other portions of Galena Park Blvd. situated within the Parkway Subdivision, including the surface and subsurface improvements. The estimated cost for these improvements is \$200,000.00...(4) Improvements at 12300 South as required by Draper City and UDOT to include removal of trees, relocation of utility poles, lines and water meters, removal of shed and concrete pad, widening of the pavement, installation of fence, and installation of curb, gutter and sidewalks on the south side of the road shall be paid 65% by HLD/Apache and 35% by Holmes/Mesa...(5) Alterations or improvements to Galena Canal and any storm drain line from Galena Canal to Jordan River Canal required by Draper shall be paid 65% by HLD/Apache and 35% by Holmes/Mesa.

HLD/Apache shall have lien rights on the first phase of the Parkway Estates Subdivision which shall secure the payments owed from Holmes/Mesa to HLD/Apache for the improvements.

Successors and assigns bound by the Agreement.

(Record 301-310).

3. Husting and Construct Tech entered into a Development Agreement in February 1996 in which Construct Tech agreed to furnish the infrastructure for the Galena Hills and Parkway Estates subdivision projects. (Record 149).

4. Husting terminated Construct Tech because of late and defective work in November 1996. (Record 150).

5. Husting filed a Chapter 11 bankruptcy case on January 14, 1997, and continued to operate as a debtor in possession. (Record 150).

6. In April 1997, Husting contracted with McKell to remediate and repair Construct Tech's defective work and to complete the project, including work on the Parkway Estates property, on a time and materials basis. Specifically, "[McKell] agreed to correct the defective work performed pre-petition by Construct Tech and to complete the remaining work on Phase II of the Galena Hills and Parkway Estates projects on a time and materials basis." (Record 150-151) (emphasis added).

7. McKell started work on June 30, 1997. (Record 193).

8. "Prior to entering into the Construction Agreement, [McKell] was aware that Husting had filed for relief under Chapter 11 and understood that the only present sources of payment for its work was the approximate \$612,000 in the Escrow Accounts established pursuant to the bonds with Draper City and the Salt Lake County Sewer District. However, ... [Husting] also led McKell to believe that other sources of payment existed, including the Adjoining Subdivisions Agreement, and funds from Castle Homes, L.L.C., a third-party investor that purportedly intended to purchase and build homes on the lots once the underground and surface improvements had been completed by [McKell]..." (Record 151).

9. After starting work, McKell met with Nathan Coulter, President of Coulter & Smith, at least twice. The purpose of the meetings was for Coulter to indicate the location of water and sewer laterals on Parkway Estates lots accessed by Galena Park Boulevard, and to make sure McKell Excavating stubbed in sewer and water mains to future streets in Parkway Estates. Coulter also asked for a bid to complete a cul-de-sac off Galena Park Boulevard and to complete a subsequent phase of Parkway Estates. McKell Excavating installed the water and sewer lines off Galena Park Boulevard and installed the sewer and water mains for future streets

in Parkway Estates. All of this work was inspected and accepted by the Salt Lake County Sewer Improvement District and Draper City. (Record 314, ¶ 3).

10. Holmes knew McKell was performing work on the Parkway Estates project in 1997 because on October 2, 1997, McKell met with Holmes and was told “that the Project was going to be bought out and that Castle Homes would assume liability for payment of McKell’s invoices...” (Record 131, ¶16).

11. “Shortly after RAM began working on the Galena Hills and Parkway Estates projects, it became apparent that neither McKell nor Husting had realized the scope of corrective work that would have to be done. Indeed, rather than simply correcting Construct Tech’s deficiencies, most of the culinary and sanitary water lines and systems previously installed had to be completely removed and replaced...in November of 1997, RAM ceased performing under the Construction Agreement because Husting and/or third parties had failed to pay past-due invoices and because further payment or funding from the Escrow Accounts, the Adjoining Subdivisions Agreement and third-party investors appeared unlikely to materialize in the near future...RAM invoiced \$969,633.08 to Husting for materials and labor supplied for performing corrective work and making improvements to the Galena Hills and Parkway Estates projects.” (Record 152) (emphasis added).

12. On November 4, 1997, McKell stopped work because of non-payment. (Record 152).

13. “...a substantial part of [McKell’s] work was performed on property owned by Holmes Mesa to satisfy Husting’s obligations under the pre-petition Adjoining Subdivisions Agreement.” (Record 163) (emphasis added).

14. On January 20, 1998, F. Wayne Elggren was appointed Trustee. (Record 153).

15. Developers concede that work under the Adjoining Subdivisions Agreement was not complete and that as early as May and June of 1998, and later in 1998, the Trustee informed them that he intended to perform under the Adjoining Subdivisions Agreement. Developers received information from the project engineer regarding the three bids to complete the work, including McKell's bid. (Record 284, ¶¶ 7 & 8; 291-294, ¶¶ 7, 8 & 14 – 16).

16. By February 19, 1999, the Trustee reached a tentative agreement with McKell and Eagle Pointe under which the project could be completed. (Record 315).

17. The Trustee filed a Motion for Order Approving Post Petition Financing With Eagle Pointe Financial Group and Eagle Pointe Realty and Management, Inc., and argument on the motion was heard on July 23, 1999. On September 8, 1999, the bankruptcy court entered its Order Approving Post-Petition Financing. (Record 169). The order states: "Eagle Pointe Financial will complete the construction of the Project and associated improvements..." (Record 171, ¶1).

18. Pursuant to the Order, Eagle Pointe contracted with McKell to complete Phases I, II, and III, plus associated improvements for the Project, including the construction of a road and related improvements through the Parkway Estates project as required by the Adjoining Subdivisions Agreement. (Record 177, 191 & 315).

19. This work started in September 1999 and included construction of a permanent road along Galena Park Boulevard through the Parkway Estates property (curb & gutter, storm drain, road base and asphalt) as required by the Adjoining Subdivisions Agreement. The work cost \$205,534.29, and as of April 2000, was 74% complete. (Record 298-299, ¶¶ 3 – 6).

20. McKell recorded its mechanic's lien on June 7, 2000. (Record 193-194).

21. In August 2000, based on then existing market conditions, Developers made a business decision to sell the Parkway Estates property to the City of Draper rather than continuing to develop it for residential use, believing that market conditions would have limited any “benefit” from the Adjoining Subdivisions Agreement, even if Husting had immediately performed all of its obligations under the Adjoining Subdivisions Agreement. (Record 287, ¶ 19).

22. Eagle Pointe sells lots within the Galena Hills subdivision, and by June 2002, is ready to proceed with completing Phase III of the Project. (Record 316, ¶¶ 9, 10).

23. McKell’s work performed on behalf of the Trustee through Eagle Pointe is substantially the same as the work McKell agreed to perform under the Construction Agreement with Husting. (Record 316, ¶ 11).

24. Developers concede the Parkway Estates property benefited from work performed under the Adjoining Subdivisions Agreement, offering to return the value of the benefit in the adversary proceeding against the Trustee. (Record 287, ¶ 20; 295, ¶ 18).

### **SUMMARY OF ARGUMENTS**

Judge Bohling incorrectly interpreted the plain language of Utah Code Ann. § 38-1-7(1)(a) (2002) when he determined McKell’s work was for “a residence,” (Transcript of Hearing on Summary Judgment Motion at 39), requiring McKell to record its lien within ninety (90) days after last furnishing labor, materials, equipment or services to the “residence.” The plain language of section 38-1-7(1)(a) refers to work performed for “a residence as defined in Section 38-11-102” and, when read in conjunction with Utah’s Residence Lien Restriction and Lien Recovery Fund Act, Utah Code Ann. §§ 38-11-101, *et seq.*, applies to work performed in the construction of an owner-occupied residence, not to infrastructure improvements furnished for an

entire subdivision. In the alternative, Judge Bohling incorrectly interpreted the plain language of Utah Code Ann. § 38-1-7(1)(b) (2002) when he ruled that work on the Project was finally completed upon cessation or abandonment of McKell's contract with Husting (Transcript of Hearing on Summary Judgment Motion at 39-40), and requiring McKell, as a matter of law, to record its mechanic's lien within ninety (90) days after cessation or abandonment of work. The plain language of section 38-1-7(1)(b) requires mechanic's lien claimants to file suit to record their mechanic's lien no later than ninety (90) days after final completion of an original contract not involving a residence. The plain meaning of "final completion" is that a contract is not finally complete until everything required to be done under the contract is complete. McKell's contract was not finally complete when McKell recorded its lien. This interpretation is consistent with the legislature's intent when it enacted amendments to Utah's mechanic's lien statute which became effective in 1994 and 1995, and with Utah law.

Judge Bohling incorrectly applied the law to the facts when he ruled McKell's unjust enrichment claim was barred by the existence of an express contract. There is no dispute there is no express contract between McKell, conferor of the benefit, and Holmes, conferee of the benefit. To the extent Judge Bohling was referring to the Husting – Eagle Pointe – McKell contract, he should have denied the motion because the record, when viewed in the light most favorable to McKell, established all the elements for an unjust claim against Holmes. At a minimum, Judge Bohling should have denied the motion due to the existence of genuine issues of material fact regarding the unjust enrichment claim.

Judge Bohling abused his discretion in evaluating Holmes' request for fees because he did not evaluate the request consistent with Utah law. Holmes' request for fees should have been denied in its entirety because Holmes failed to meet its evidentiary burden to support the request.

Holmes' failure to allocate fees between recoverable claims and non-recoverable claim is fatal. Moreover, the fees awarded remain unreasonable, the difficulty of the litigation did not support an award of fees of \$25,000, and counsel was inefficient in the work which was accomplished.

## **OVERVIEW OF AMENDMENTS TO THE MECHANIC'S LIEN STATUTE**

The mechanic's lien statute in effect before May 2, 1994, required lien claimants to record their mechanic's lien "within 80 days after substantial completion of the project or improvement" and to file suit to foreclose the lien "within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days." Utah Code Ann. §§ 38-1-7(1) & 11 (emphasis added). Case law interpreting the version of section 38-1-7 in effect before May 2, 1994 established a two-part test for determining the timeliness of recording the lien: first, whether the project was substantially complete; and second, whether the project was accepted by the owner. *Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs.*, 827 P.2d 963, 965 (Utah Ct. App. 1992) (emphasis added). In 1994, the legislature amended the statute to distinguish between residential and non-residential projects.

In the 1994 General Session, as part of the Residence and Lien Restriction and Lien Recovery Fund act, Utah's elected representatives amended sections 38-1-7 and 11, changing the triggering events and times for recording and foreclosing a mechanic's lien dependent upon whether the project was residential or non-residential construction. Effective May 2, 1994, lien claimants were required to record their lien "within 90 days from the date the person last performed labor or service or last furnished equipment or material on a project or improvement" and to foreclose the lien within "twelve months from the date the lien claimant last performed labor and services or last furnished equipment or material on an original contract not involving a

residence” or within “180 days from the date the lien claimant last performed labor and services or last furnished equipment or material for a residence...” 1994 Utah Laws Ch. 308 (S.B. 87) (codified as amended at Utah Code Ann. §§ 38-1-7 & 11). These amendments remained effective until April 30, 1995, at which point the legislature changed the statute again.

In the 1995 General Session, the legislature clarified the timing requirement for recording a lien on a residence, and changed the triggering event for recording and foreclosing a mechanic’s lien on a non-residential project. Effective May 1, 1995, lien claimants were required to record their lien “within 90 days from the date the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38-11-102.” For non-residential projects, lien claimants were required to record their lien within “90 days from the date...of final completion of an original contract not involving a residence...” and to foreclose the lien within “twelve months from the date of final completion of the original contract not involving a residence...” 1995 Utah Laws Ch. 172 (S.B. 115) (codified as amended at Utah Code Ann. §§ 38-1-7 & 11) (emphasis added).<sup>2</sup>

## ARGUMENT

**I. Judge Bohling committed reversible error when he ruled McKell’s infrastructure work was “for a residence,” and analyzed the timeliness of McKell’s lien under section 38-1-7(1)(a); or in the alternative, when he ruled McKell was required to record a lien within ninety (90) days after cessation or abandonment of work on the Project.**

A. Judge Bohling incorrectly concluded that McKell’s work was for “a residence as defined in Section 38-11-102,” and therefore applied the wrong subdivision of section 38-1-7 when analyzing whether McKell timely recorded its mechanic’s lien.



Initially, McKell had a right to record a mechanic's lien for work it furnished to the Parkway Estates property under Husting's direction and approval.

Contractors...performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner...shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether *at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise...*

Utah Code Ann. § 38-1-3 (emphasis added). Husting acted as the agent of Holmes when it contracted with McKell to perform work required under the Adjoining Subdivisions Agreement. At no time before November 1997, when McKell stopped work because of non-payment, did Holmes inform McKell that Husting was not authorized to contract for such work. Quite the contrary, McKell met with representatives of Holmes and was assured it would be paid for its work. At this point, and notwithstanding Holmes' purported refusal to have authorized the employment of McKell in writing, Holmes ratified Husting's actions. "It is well-established under Utah law that 'subsequent affirmance by a principal of a contract made on his behalf by one who had at the time neither actual nor apparent authority constitutes a ratification, which in general is as effectual as an original authorization.'" *Bullock v. State*, 966 P.2d 1215, 1218 (Utah Ct. App. 1998) citing *Moses v. Archie McFarland & Son*, 230 P.2d 571, 573 (Utah 1951). Moreover, "A principal's retention of the fruits of a contract can also serve as an implied ratification of the contract." *Bullock v. State*, 966 P.2d at 1219.

Statutory construction requires the court to implement legislative intent in light of the purpose of the statute under review. *Wilcox v. CSX Corp.*, 70 P.3d 85 (Utah 2003). The first

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<sup>2</sup> The 2001 General Session amended section 38-1-11 yet again to add the current subsection (4), but those changes are not relevant to the issues before the court. 2001 Utah Laws 198 (S.B.

step in understanding the intent of the legislature is to consider the plain language of the statute. *Johnson v. Redevelopment Agency*, 913 P.2d 723 (Utah 1996). “According to traditional statutory interpretation methods, we look to the plain meaning of unambiguous statutory language.” *Pickett v. State*, 858 P.2d 187, 191 (Utah Ct. App. 1993). “In construing a statute, we assume that ‘each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.’ ” *Id.*, quoting *Savage Indus. v. Utah State Tax Comm’n*, 811 P.2d 664, 670 (Utah 1991); *Cox Rock Prods. v. Walker Pipeline Constr.*, 752 P.2d 672 (Utah Ct. App. 1998). The court may look to dictionary definitions to determine the plain meaning of statutory language. “Utah courts have a ‘long history of relying on dictionary definitions to determine plain meaning.’ ” *Brixen & Christopher Architects, P.C. v. State*, 29 P.3d 650, 655 (Utah 2001); quoting *State v. Redd*, 992 P.2d 986 (Utah 1999). However, words should not be defined out of context. Consequently, a court “must ‘give meaning, where possible, to all provisions of a statute’ ... and interpret the provisions ‘in harmony with other provisions in the same statute and ‘with other statutes under the same and related chapters.’ ” *Brixen*, supra. at 655. (Citations omitted).

The plain language of section 38-1-7(1)(a) refers to work performed for “a residence as defined in Section 38-11-102” and, when read in conjunction with Utah’s Residence Lien Restriction and Lien Recovery Fund Act, Utah Code Ann. §§ 38-11-101, *et seq.*, applies to work performed in the construction of an owner-occupied residence, not to infrastructure improvements furnished for an entire subdivision. “We analyze the language of a statutory provision in light of other provisions within the same statute or act, and we attempt to harmonize the provisions in accordance with the legislative intent so as to give meaning to each provision.”

*Davis County Solid Waste Management v. City of Bountiful*, 52 P.3d 1174, 1177 (Utah 2002).

The current statutory requirement for a contractor to record a lien for work on a residence was enacted as part of the Residence Lien Restriction and Lien Recovery Fund Act. 1994 Utah Laws Ch. 308 (S.B. 87) (codified as amended at Utah Code Ann. §§ 38-1-7 & 11; §§ 38-11-101, *et seq.*) The Act creates an administrative remedy and process for unpaid subcontractors and suppliers who furnish labor and materials for improvement of an owner-occupied residence in lieu of a mechanic's lien, but only if the owner of the residence complies with requirements of the Act. Utah Code Ann. § 38-11-107 (2002). "Residence" means "an improvement to real property used or occupied, to be used or occupied as, or in conjunction with, a primary or secondary detached single-family dwelling or multifamily dwelling up to two units, including factory built housing." Utah Code Ann. § 38-11-102 (20) (2002). The Act distinguishes between an "owner," Utah Code Ann. § 38-11-102 (15) (2002), an "owner-occupied residence," Utah Code Ann. § 38-11-102 (16) (2002), and a "real-estate developer," Utah Code Ann. § 38-11-102 (19) (2002), extending protection against residential mechanic's liens to owners for work done on an "owner-occupied residence." But no such protection is extended to developers. This result is consistent with the purpose of the Residence Lien Restriction and Lien Recovery Fund Act as expressed by its sponsor, Senator Scott Howell, which was to protect individual homeowners from mechanic's liens. On February 3, 1994, in debate upon the floor of the Utah State Senate, Sen. Howell stated:

...SB 87 is a consumer bill that is designed to protect homeowners from mechanics liens being filed against their homes where the homeowner has already paid for the work. Without this protection, our existing law subjects the homeowner to liability not once but twice, for the work. Besides protecting the consumers, a lien recovery fund will be created in which subcontractors, suppliers, and laborers may file claims for payment for their work where the general contractor has failed to pay or – pay for them after having been paid by the homeowner.

Senate Office Tape 16 at 973 (emphasis added). See, Affidavit of Leslie McLean, ¶3, reproduced verbatim in the Addendum. Because the amendment to section 38-1-7(1)(a) was included in S.B. 87, whose purpose was to protect homeowners from mechanic’s lien, the time limit included in section 38-1-7(1)(a) for recording a lien should not be applied to protect developers from liens for work furnished to an entire subdivision.

McKell’s work – installation of water, sewer, storm sewer, utilities, roads, and curb and gutter for a multi-lot subdivision – is plainly not work for “a residence as defined in Section 38-11-102.” McKell’s work cannot be occupied by an owner, and should not be classified as the type of work to which the protections afforded by the Residence Lien Restriction and Lien Recovery Fund Act apply. In *First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521 (Utah 1979), the court found that the infrastructure work provided by the lien claimant benefited the entire 44 acre subdivision, could not be characterized as “off-site” work which would not impart notice of the existence of lienable work to a lender, and hence, the lien claimant had priority over the lender’s blanket mortgage covering the entire subdivision. The court wrote:

It is not necessary to the attachment of a mechanics’ lien that the material or labor be furnished solely on a building structure or that the work be performed solely on the lot on which a building is being erected. We agree ... that a contractor should not be barred from enjoying the benefits of the mechanics’ lien statute where his work not only enhances the value of the developer’s land, but is also necessary to make residences to be built on such property habitable ... where a developer engages the contractor to install a sewer system for a subdivision project, the contractor, if he complies with required statutory procedures, is entitled to a mechanics’ lien against the developer’s property for the cost of labor and materials furnished.

600 P.2d at 525 (citations omitted). Similarly, McKell’s work benefited the entire Parkview Estates subdivision, not just individual lots; and therefore cannot be characterized as work for “a

residence.” Judge Bohling erred when he analyzed the timeliness of the recording of McKell’s mechanic’s lien under section 38-1-7(1)(a). This court should reverse.

B. The plain language of section 38-1-7(1)(b) does not require mechanic’s lien claimants to record the lien within ninety (90) days after a cessation or abandonment of the work. Judge Bohling committed reversible error when he read this requirement into the statute.

Judge Bohling incorrectly interpreted the plain language of Utah Code Ann. § 38-1-7(1)(b) (2002) when he ruled that work on the Project was finally completed upon cessation or abandonment of McKell’s contract with Husting (Transcript of Hearing on Summary Judgment Motion at 39-40), and requiring McKell, as a matter of law, to record a mechanic’s lien within ninety (90) days after the cessation or abandonment of work.

In establishing legislative intent, the court may look to dictionary definitions to determine the plain meaning of statutory language. “Utah courts have a ‘long history of relying on dictionary definitions to determine plain meaning.’ ” *Brixen & Christopher Architects, P.C. v. State*, 29 P.3d 650, 655 (Utah 2001); quoting *State v. Redd*, 992 P.2d 986 (Utah 1999); see also, *McBride v. Huard*, 2004 UT 21 (Utah 2004) (referring to dictionary to define “condition precedent” for purposes of interpreting Utah Health Care Malpractice Act).

The legislature intended for the time period to record a mechanic’s lien on a non-residential project to begin to run when the original contract between the contractor and owner is at its end.<sup>3</sup> “Final” means “being the last of a series, process, or progress; of or relating to the ultimate purpose or result of a process.” *Webster’s Ninth New Collegiate Dictionary* 463 (1984). “Completion” is defined as “the act or process of completing; the quality or state of being complete.” *Id.* at 269. “Complete” means “fully carried out.” *Id.* Applying these definitions to section 38-1-7(1)(b), all of the requirements under the original contract must be accomplished

before the time to file suit to foreclose the lien on a non-residential project begins to run. The Indiana Court of Appeals reached the same conclusion in *Moduform, Inc. v. Harry H. Verkler Contractor, Inc.*, 681 N.E.2d 243 (Ind. Ct. App. 1997). There, the court was required to determine the legislative intent expressed in the Indiana statute requiring claimants on a public project payment bond to file their action on the bond “within sixty (60) days after the date of the final completion and acceptance of the public work.” *Id.* at 247; quoting Ind. Code. § 36-1-12-13.1(d)(e). Looking to the plain language of the statute, the court concluded that final completion and acceptance “requires the project to be at its end. That is, all of the work under the original project must be finished before ‘final completion and acceptance’ can occur.” *Id.* at 248. Similarly, this court should apply the plain language test to section 38-1-7(1)(b) and conclude that the time for a mechanic’s lien claimant to record a mechanic’s lien on a non-residential project does not begin to run until all of the actions required by the original contract are finished. Because the McKell – Hustings – Eagle Pointe contract was not finally complete when McKell recorded its lien, McKell’s lien was timely recorded.

This court should strictly construe the phrase “final completion of the original contract.” In *Reliance Ins. Co. v. Utah Department of Transportation*, 858 P.2d 1363 (Utah 1993), this the court upheld the validity of a liquidated damages clause which imposed a \$600.00 per day assessment if “any work shall remain” under the contract beyond the contract completion date. *Id.* at 1370. The court reviewed the plain language of the contract and concluded it authorized UDOT to assess liquidated damages until the project was finally complete, rejecting the performance bond surety’s contention that liquidated damages could not be assessed after the project was substantially complete. The court wrote “The contract between the parties does not

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<sup>3</sup> McKell is unaware of any legislative history pertaining to the language at issue here.

consider substantial completion; rather, it considers final completion as determined by the UDOT engineer. There is no ambiguity about this point. [The contractor] and UDOT could have easily included the term and concept of ‘substantial performance’ if they so intended.” *Id.* In *Decca Design Build, Inc. v. American Automobile Ins. Co.*, 77 P.3d 1251 (Ariz. Ct. App. 2003) the Arizona Court of Appeals interpreted a statute of limitations in a subcontractor’s performance bond requiring actions on the bond to be filed “within two years of when the final payment under the subcontract comes due.” *Id.* at 1252. The court used a dictionary definition of “final” to interpret the language of the performance bond and the subcontract, finding “[T]he meaning of ‘final’ is unambiguous. ‘Final’ means: ‘not to be altered or undone being the last in a series, process or progress of or relating to the ultimate purpose or result of a process relating to or occurring at the end or conclusion.’ ” *Id.* at 1253 (citations omitted). Final payment was not due until final completion of the entire project, not just the subcontractor’s work. Although the architect had issued a certificate of substantial completion, no certificate of final completion had been issued as required by contract. Consequently, the limitations period under the performance bond had not yet begun to run, and the contractor’s action against the performance bond surety was timely, even though the subcontractor’s work had been completed years before. In the present case, had the legislature wanted to start the time within which to record a lien on a non-residential project at any time other than upon the “final completion of the original contract,” it would have done so, as it did for residences. The trial court should not, through a strained interpretation of section 38-1-7(1)(b), be allowed to do what the legislature specifically elected not to do. This court should reverse and remand for further proceedings.

Judge Bohling committed reversible error when he interpreted section 38-1-7(1)(b) contrary to the plain language of the statute. The statute makes no mention of cessation,

abandonment or suspension of work as being synonymous with final completion. In fact, the legislature specifically deleted suspension of work as a triggering event for foreclosing a mechanic's lien when it amended section 38-1-11 in 1994. 1994 Utah Laws Ch. 308 (S.B. 87) (deleting requirement for lien claimant to foreclose lien within twelve months after suspension of work for a period of at least 30 days). Judge Bohling's interpretation of section 38-1-7(1)(b) reinstates a concept Utah's Legislature specifically eliminated from the statute in 1994. Utah law prohibits a court from adopting an interpretation which rewrites a statute contrary to legislative intent. *Brixen*, 29 P.3d 650, 655.

McKell's mechanic's lien recorded June 7, 2000, may properly impose a lien for work performed under the McKell – Husting Construction Agreement dated April 3, 1997, because the work was never finally completed and the project was not materially abandoned. “For priority of a mechanic's lien to relate back to the beginning of the work for which the lien is claimed, the work must all be a part of the same project; in other words, the work must have a continuity of purpose such that a reasonable observer of the site would be on notice that work was underway for which a lien could be claimed.” *Nu-Trend Elec., Inc. v. Deseret Fed. Savs. & Loan Assoc'n.*, 786 P.2d 1369, 1381 (Utah Ct. App. 1990). “The determination of what constitutes material abandonment is a factual issue.” *Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 1225 (Utah Ct. App. 1989) (summary judgment remanded for a determination whether project was materially abandoned precluding architect's lien from relating back to visible work on site). The *Ketchum* court noted with approval that a project was not materially abandoned despite “a significant cessation of work...due to reasons not unheard of in construction – loss of financing, failure to get a bond, and state approval” when combined with the fact that “the project went ahead with little change in the original plans.” *Id.*, citing



*Frank J. Klein & Sons, Inc. v. Laudeman*, 311 A.2d 780, 786 (Md. 1973). “In summary, what constitutes a ‘material abandonment’ sufficient to prevent relation back of mechanics’ liens under section 38-1-5 is a complex inquiry. A court must examine the facts and make findings. A key concern is whether third parties would be on notice that work was continuing or, rather, would believe that work on the initial project had ceased.” *Id.* at 1226.

Hustings and Holmes entered into the Adjoining Subdivision Agreement so that both parcels could be developed. Hustings encountered difficulty in completing financing for the Project, and filed a Chapter 11 petition. Hustings, while operating as a debtor-in-possession and under the supervision of a Trustee, continued to insist on developing the infrastructure for both parcels. Although the process was delayed, the Project proceeded “with little change in the original plans.” Holmes knew the Trustee intended to continue performing under the Adjoining Subdivisions Agreement, and that work required under that document was, in fact provided to the Parkway Estates property by McKell under the initial contract with Hustings, and under the replacement contract with Eagle Pointe. The nature and scope of the work was substantially the same over the duration of the Project, and although Holmes protested to the Trustee, Holmes apparently did not seek to restrain or enjoin McKell, the Trustee or Eagle Pointe from completing the improvements to the Parkway Estates property. At a minimum, genuine issues of material fact remain regarding the continuity of work and whether the Project was materially abandoned. Judge Bohling should have denied the motion for summary judgment due to the existence of genuine issues of material fact. This court should reverse and remand for further proceedings.

**II. Judge Bohling committed reversible error when he ruled that the existence of an express contract barred McKell's *quantum meruit* claim against Holmes, as there is no express contract between McKell and Holmes.**

Unjust enrichment is an equitable remedy, *Desert Miriah, Inc. v. B & L Auto, Inc.*, 12 P.3d 580 (Utah 2000), the elements of which are: “(1) a benefit conferred on one person by another, (2) an appreciation or knowledge by the conferee of the benefit, and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value ... Thus, unjust enrichment is a claim between a conferor and a conferee.” *Smith v. Grand Canyon Expeditions Co.*, 2003 WL 22950137, \*7 (Utah 2003) (citations omitted.) The general rule is that the existence of an express contract between a conferor and a conferee defeats the conferor's unjust enrichment claim. *Five F, L.L.C. v. Heritage Sav. Bank*, 81 P.3d 105 (Utah Ct. App. 2003) (directed verdict dismissing unjust enrichment claim affirmed; a deed of trust is an express contract providing legal remedies for breach); *Wood v. Utah Farm Bureau Ins. Co.*, 19 P.3d 392 (Utah Ct. App. 2001) (summary judgment dismissing unjust enrichment claim affirmed; written Career Agent Contract between plaintiffs and defendant was an express contract governing the parties' relationship). There are numerous exceptions to the rule, motivated by the court's effort to fashion an equitable remedy based on the facts of each case. *J & M Constr., Inc. v. Southam*, 722 P.2d 779 (Utah 1986) (an express oral contract did not bar an unjust enrichment claim where the purpose of the contract was frustrated and defendants admittedly received the benefit of contractor's performance without tendering payment); *Richards Contracting Co. v. Fullmer Bros.*, 417 P.2d 755 (Utah 1966) (the terms of a written contract requiring written authorization for extra work did not bar contractor's recovery in *quantum meruit* where the party seeking to enforce the contract verbally encouraged the contractor to perform extra work with the express or

implied promise to pay for such work); *McCarren v. Merrill*, 389 P.2d 732 (Utah 1962) (an express contract did not bar plaintiff's unjust enrichment claim where defendant abandoned the contract); accord, *Parrish v. Tahtaras*, 318 P.2d 642 (Utah 1957); *Wilson v. Salt Lake City*, 174 P. 847 (Utah 1918) (written contract did not bar contractor's unjust enrichment claim for work performed outside the contract under owner's direction); *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421 (Utah Ct. App. 1994) (while an enforceable written contract between plaintiff and defendant will typically bar plaintiff's claim for unjust enrichment, a contract is not enforceable if not substantially performed).

Absent an express contract between a contractor and owner, the contractor is entitled to recover on the quasi-contract theories of contract implied in fact or contract implied in law. *Davies v. Olson*, 746 P.2d 264 (Utah Ct. App. 1987). However, a third party who benefits from contractual performance is not liable under unjust enrichment theory absent circumstances showing that the third party's retention of the benefit without tendering payment is inequitable. *Commercial Fixtures & Furnishings, Inc. v. Adams*, 564 P.2d 773 (Utah 1977); *Knight v. Post*, 748 P.2d 1097 (Utah Ct. App. 1988). Ultimately, "[w]hether a claimant has been unjustly enriched is a mixed question of law and fact." *Desert Miriah*, supra at 582; *Groberg v. Housing Opportunities, Inc.*, 68 P.3d 1015 (Utah Ct. App. 2003).

Judge Bohling made no findings of fact in support of his ruling, but said "As to the issue of *quantum meruit*, I'm persuaded that the motion made by Mr. Badger is meritorious. I'm going to grant that motion. I don't believe that when there's a contract that you can come back and make a separate claim." Transcript of Hearing on Motion for Summary Judgment at 39. This court should reverse and remand for further proceedings because there is no dispute that there is no express contract between McKell, the conferor of the benefit, and Holmes, the

conferee of the benefit. While the existence of an express contract between the conferor and conferee of a benefit may bar a claim for unjust enrichment, *Five F, L.L.C.*, supra, where there is no express contract, the confereor of the benefit may pursue an unjust enrichment claim against the conferee. *Davies*, supra. To the extent Judge Bohling was referring to the McKell – Husting – Eagle Pointe contract, this court should still reverse and remand because of the existence of genuine issues of material fact regarding McKell’s unjust enrichment claim.

This court should reverse Judge Bohling’s ruling because genuine issues of material fact remain regarding McKell’s unjust enrichment claim. The facts, when viewed in the light most favorable to McKell, show that McKell satisfied all of the elements of an unjust enrichment claim. First, McKell conferred a benefit upon Holmes by furnishing at least \$132,824.18 in labor, services, equipment and materials to the Parkway Estates property in 1997 and subsequently installing road base, asphalt and curb and gutter to complete Galena Park Boulevard. McKell respectfully submits that absent this work, Holmes’ conveyance of the property to Draper City is of little value. Second, Holmes clearly knew of and appreciated the benefit furnished by McKell. Holmes has previously acknowledged receiving a benefit under the Adjoining Subdivisions Agreement by virtue of McKell’s performance. Husting acted as Holmes’ agent under the Adjoining Subdivision Agreement for purposes of the infrastructure improvements to the Parkway Estates parcel, and as a matter of law, Holmes ratified Husting’s contract with McKell. *Bullock v. State*, 966 P.2d 1215 (Utah Ct. App. 1998). The Adjoining Subdivision Agreement anticipated Holmes would pay its pro rata share of the cost of those improvements. The fact Holmes later elected to sell the property to Draper City as “unimproved” property reflects a business decision made by Holmes for which McKell should not be penalized. Holmes’ decision to throw away the value of McKell’s work based on a belief

the property was not suitable for development as a residential subdivision<sup>4</sup> is a risk assumed by the developer, not McKell. Third, under the circumstances, McKell submits it is inequitable and unjust to allow Holmes to retain the benefit of McKell's work without payment. Under the Adjoining Subdivisions Agreement, Holmes was obligated to reimburse Husting for the value of improvements furnished by McKell to the Parkway Estates property. Holmes acknowledged Husting had the right to record a mechanic's lien to secure payment for the improvements furnished to Parkway Estates. Holmes never reimbursed either Husting or McKell, despite having specifically directed McKell as to the location of water and sewer stub-ins for Parkway Estates lots accessed off Galena Park Boulevard. McKell had direct dealings with Holmes, and was assured Castle Homes was taking over the project and would pay for McKell's work on the Parkway Estates property. Finally, after McKell installed the improvements, Holmes then elected to sell the property to Draper City, a voluntary decision which is now asserted as justification to deprive McKell of its equitable remedy. These facts, when viewed in the light most favorable to McKell, are sufficient to support a claim for unjust enrichment. This court should reverse and remand for further proceedings on McKell's unjust enrichment claim.

**III. Judge Bohling abused his discretion in evaluating Holmes' request for fees because he did not evaluate the request consistent with Utah law; Holmes was only entitled to an award of fees related to its defense of McKell's mechanic's lien claim, Holmes did not meet its evidentiary burden to support such an award, and the fees incurred were unreasonable.**

Holmes sued on three theories: 1) to remove McKell's mechanic's lien; 2) for slander of title; and 3) for tortious interference with prospective economic relations. Holmes subsequently moved for summary judgment on McKell's claim to enforce the mechanic's lien, and on McKell's unjust enrichment claim. Judge Bohling granted the motion, ruling the lien was not

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<sup>4</sup> Holmes' position is curious in light of the fact lots were sold and homes constructed in the

timely recorded and that the existence of an express contract precluded the unjust enrichment claim. Holmes sought its attorney's fees pursuant to section 38-1-18 of Utah's mechanic's lien statute which authorizes the successful party to recover a reasonable fee. Holmes initially submitted a request for fees of \$30,447 (164 hours of work) and requested the court to award the entire amount<sup>5</sup>, not just the portion attributable to defeating McKell's mechanic's lien claim. After considering the complexity of the case, the experience, competence and efficiency of counsel, the reasonableness of the hourly rates and whether there was duplication of effort between Holmes' two attorneys, Judge Bohling awarded \$25,000 in fees. Transcript of Hearing on Motion for Award of Attorney's Fees at 12-14. "What I'm going to do is make an adjustment based on my own sense that there's always a little inefficiency and when there are two lawyers involved, there's going to be perhaps a little more." *Id.* at 13.

Utah courts have broad discretion in determining the reasonableness of a fee, *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988), but attorney's fee awards must be based on evidence in the record. *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990); *Hoth v. White*, 799 P.2d 213, 219 (Utah Ct. App. 1990). While the moving party may file supporting affidavits, the court need not accept self-serving testimony, and should instead base its determination on specific factors to determine the reasonableness of the award. *Govert* at 173. The court must justify the award on the record and enumerate the factors considered in reaching its conclusion. *Regional Sales Agency, Inc. v. Reichert*, 784 P.2d 1210 (Utah Ct. App. 1989). Factors used to evaluate the reasonableness of a request for award of attorney's fees are

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Galena Hills subdivision. (Record 316, ¶ 9).

<sup>5</sup> Holmes' application for fees did not include fees incurred in preparing the complaint, and fees incurred in evaluating whether to proceed on Holmes' remaining claims for relief after the court granted Holmes' motion for summary judgment. With these exceptions, the application for fees

the difficulty of the litigation; the efficiency of the attorney presenting the case; the number of hours billed; the customary amount of fees charged; the amount at issue and the result obtained; and the expertise of the attorneys involved. *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1995).

As an initial matter, Holmes had the burden of presenting evidence supporting its requested award, *Foote v. Clark*, 962 P.2d 52 (Utah 1998), and was only entitled to the reasonable fee incurred in defeating McKell's mechanic's lien claim; there was no other basis for an award of fees in this case. *Kurth v. Wiarda*, 991 P.2d 1113 (Utah Ct. App. 1999). Attorney's fees may only be awarded for those fees incurred that are directly related to the mechanic's lien claim, unless there are other overlapping claims. *Id.* at 1116. A claim overlaps if it is closely related and requires the same proof of facts as the primary claim. *Brown v. David Richards & Co.*, 978 P.2d 470 (Utah Ct. App. 1999). "[A] party seeking fees must allocate its fee request according to its underlying claims," that is, "successful claims for which there may be an entitlement to attorney's fees ... unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful ... and claims for which there is no entitlement to fees." *Foote* at 55 (citations omitted). "The court must make an independent evaluation of the reasonableness of the fees in light of the parties' evidentiary submissions," and must "document its evaluation of the requested fees' reasonableness through findings of fact" which "mirror the requesting party's allocation of fees" and "detail the factors considered dispositive ... in calculating the award." *Id.* (citations omitted). Failure to evaluate a request for attorney's fees in the manner required by Utah law constitutes an abuse of discretion. *Foote*, supra.

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included all of the time incurred on this case. Transcript of Hearing on Motion for Award of Attorney's Fees at 7-8.

Judge Bohling abused his discretion in evaluating Holmes' request for fees because he did not evaluate the request consistent with Utah law. Holmes' request for fees should have been denied in its entirety because Holmes failed to meet its evidentiary burden to support the request. Holmes' failure to allocate fees between recoverable claims and non-recoverable claim is fatal. Judge Bohling made no attempt to apportion the fees attributable to the lien claim and those attributable to the remaining claims. But Judge Bohling was not assisted in his task by Holmes, who made no attempt to segregate fees according to claims. This defect alone would have justified denying the request. *Id.* at 57 citing *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998).

Holmes argued that its failure to allocate should be ignored because of the interrelated nature of the claims and because it submitted counsel's billing records. But, this approach is acceptable only if the claims are so complicated and intertwined that work on one claim cannot be segregated from work on the other claims. *Winters v. Schulman*, 2001 WL 357124 (Utah Ct. App. 2001) (unpublished); *Dejavue, Inc. v. U.S. Energy Corp.*, 993 P.2d 222 (Utah Ct. App. 1999). Holmes' claims are not so complicated as to prevent it from at least attempting to segregate fees according to the various claims, but this it did not do, relying instead on counsel's billing records as a substitute for allocating fees. The submittal of billing records alone is not a substitute for allocating fees. An allocation of fees is sufficient "if the substance of the process results in separating recoverable from non recoverable fees." *Keith Jorgensen's Inc. v. Ogden City Mall Co.*, 26 P.3d 872 (Utah Ct. App. 2001). In *Jorgensen*, the court ruled that the submission of billing records, with testimony at an evidentiary hearing on fees and a proffer of records, all accompanied by a memorandum, sufficiently allocated fees between recoverable and non-recoverable claims. No such process was followed in this case. In *Dejavue*, the court found an award of attorney's fees memorialized in the trial court's written findings of fact was



supported by the evidentiary record consisting of billing records accompanied by three expert affidavits from local attorney's specializing in civil litigation attesting to the reasonableness and necessity of the request. No such process was followed in this case. "Nothing in the record indicates that the trial court performed an independent evaluation of the reasonableness of the requested fees. The trial court did not enter any findings of fact setting forth the steps of its evaluation or supporting its fee award." *Foote* at 56. Consequently, the court should reverse and remand.

Holmes is not entitled to an award of \$25,000 because those fees remain unreasonable when the factors typically considered in evaluating a fee request are applied to Holmes' request. See, *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1995). For example, the difficulty of the litigation does not support an award of fees on the order of magnitude granted by Judge Bohling. Holmes' records show counsel spent only 1.9 hours researching the motion for summary judgment, and counsel was intimately familiar with the facts of the case due to extensive involvement in the bankruptcy proceedings which preceded the filing of Holmes' complaint. Although Judge Bohling arbitrarily adjusted Holmes' fees for perceived inefficiency, McKell submits the adjustment was insufficient in light of the hours billed. Holmes billed a total of 164 hours, a number which McKell suggests is excessive for the issues in this case. Counsel spent almost 9 hours on initial disclosures, 28 hours on interrogatories and request to produce documents, 96 hours researching, drafting revising and arguing the motion for summary judgment (32 hours drafting, 38.7 hours reviewing and revising, 6.2 hours discussing the motion among counsel, and 1.9 hours researching the issues). Further, the motion was drafted over eight months, inviting inefficiency. In light of the above, Judge Bohling should have dramatically pared down Holmes' request, but did not. The fees awarded remain unreasonable, the difficulty

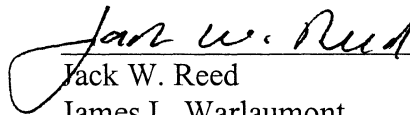
of the litigation did not support an award of fees of \$25,000, and counsel was inefficient in the work which was accomplished. This court should reverse and remand.

### **CONCLUSION**

McKell respectfully requests the court to reverse Judge Bohling and to remand the case for further proceedings.

**DATED** this 3 day of March 2004.

**PETERSON REED & WARLAUMONT L.L.C.**



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Jack W. Reed  
James L. Warlaumont  
Mark S. Middlemas  
Counsel for R.A. McKell Excavating, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of March 2004, I mailed two true and correct copies of the foregoing Brief of Appellant, postage prepaid to:

Douglas J. Payne  
P. Bruce Badger  
FABIAN & CLENDENIN  
P.O. Box 510210  
Salt Lake City, UT 84151

Counsel for Respondent  
John Holmes Construction, Inc. and Coulter & Smith, Ltd.

A handwritten signature in black ink, reading "Brittany Van Gorder", is written over a horizontal line.

## ADDENDUM

38-1-7 Notice of claim --Contents --Recording --Service on owner of property.

(1) A person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days from the date:

(a) the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38-11-102; or

(b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

(2) The notice required by Subsection (1) shall contain a statement setting forth:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom the lien claimant was employed or to whom the lien claimant furnished the equipment or material;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification;

(e) the name, current address, and current phone number of the lien claimant;

(f) the signature of the lien claimant or the lien claimant's authorized agent;

(g) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and

(h) if the lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.

(3) Notwithstanding Subsection (2), an acknowledgment or certificate is not required for any notice filed after April 29, 1985, and before April 24, 1989.

(4) (a) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail a copy of the notice of lien to:

(i) the reputed owner of the real property; or

(ii) the record owner of the real property.

(b) If the record owner's current address is not readily available to the lien claimant, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.

(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

(5) The Division of Occupational and Professional Licensing shall make rules governing the form of the statement required under Subsection (2)(h).

38-1-11 Enforcement --Time for --Lis pendens --Action for debt not affected --Instructions and form affidavit and motion.

- (1) A lien claimant shall file an action to enforce the lien filed under this chapter within:
  - (a) 12 months from the date of final completion of the original contract not involving a residence as defined in Section 38-11-102; or
  - (b) 180 days from the date the lien claimant last performed labor and services or last furnished equipment or material for a residence, as defined in Section 38-11-102.
- (2) (a) Within the time period provided for filing in Subsection (1) the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.
- (b) The burden of proof shall be upon the lien claimant and those claiming under him to show actual knowledge.
- (3) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.
- (4) (a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence:
  - (i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and
  - (ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.
- (b) The lien claimant may file a notice to submit for decision on the motion for summary judgment. The motion may be ruled upon after the service of the summons and complaint upon the nonpaying party, as defined in Section 38-11-102, and the time for the nonpaying party to respond, as provided in the Utah Rules of Civil Procedure, has elapsed.
- (c) The instructions and form affidavit and motion required by Subsection (4)(a) shall meet the requirements established by rule by the Division of Occupational and Professional Licensing in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
- (d) If the nonpaying party, as defined by Section 38-11-102, files for bankruptcy protection and there is a bankruptcy stay in effect, the motion for summary judgment and the action to enforce the lien shall be stayed until resolution of the related claim under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.
- (e) If a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.

Prior Versions of Utah Code Ann. §§ 38-1-7 & 11

Version effective from April 24, 1989 to May 2, 1994:

38-1-7. Notice of claim--Contents--Recording--Service on owner of property.

(1) Each contractor or other person who claims the benefit of this chapter within 80 days after substantial completion of the project or improvement shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien.

(2) This notice shall contain a statement setting forth the following information:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the equipment or material;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent and an acknowledgment or certificate as required under Title 57, Chapter 3. No acknowledgment or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

38-1-11. Enforcement--Time for--Lis pendens--Action for debt not affected.

Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action and the burden of proof shall be upon the lien claimant and those claiming under him to show such actual knowledge. Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

Version effective May 2, 1994

1994 Utah Laws Ch. 308 (S.B. 87)

Ch. 308

S.B. No. 87

REAL PROPERTY--MECHANICS' LIENS--RESIDENCE LIEN RESTRICTION AND LIEN  
RECOVERY  
FUND ACT

38-1-7. Notice of claim--Contents--Recording--Service on owner of property.

(1) A person claiming benefits under this chapter shall within 90 days from the date the person last performed labor or service or last furnished equipment or material on a project or improvement file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien.

(2) This notice shall contain a statement setting forth:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;  
(b) the name of the person by whom he was employed or to whom he furnished the equipment or material;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent and an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents. No acknowledgment or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

38-1-11. Enforcement--Time for--Lis pendens--Action for debt not affected.

(1) A lien claimant shall file an action to enforce the lien filed under this chapter within:

(a) twelve months from the date the lien claimant last performed labor and services or last furnished equipment or material on an original contract not involving a residence as defined in Section 38-11-102; or

(b) 180 days from the date the lien claimant last performed labor and services or last furnished equipment or material for a residence, as defined in Section 38-11-102.

(2)(a) Within the time period provided for filing in Subsection (1) the lien claimant shall file for

record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

(b) The burden of proof shall be upon the lien claimant and those claiming under him to show actual knowledge.

(3) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.



Version effective May 1, 1995

1995 Utah Laws Ch. 172 (S.B. 115)

Ch. 172

S.B. No. 115

LIENS--RESIDENCE LIEN RESTRICTIONS--LIEN RECOVERY FUND

Section 1. Section 38-1-7 is amended to read:

38-1-7. Notice of claim--Contents--Recording--Service on owner of property

(1) A person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days from the date;

(a) the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38-11-102; or

(b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

(2) This notice shall contain a statement setting forth:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the equipment or material;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent and an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents. No acknowledgment or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

38-1-11. Enforcement--Time for--Lis pendens--Action for debt not affected

(1) A lien claimant shall file an action to enforce the lien filed under this chapter within:

(a) twelve months from the date of final completion of the original contract not involving a residence as defined in Section 38-11-102; or

(b) 180 days from the date the lien claimant last performed labor and services or last furnished equipment or material for a residence, as defined in Section 38-11-102.

(2)(a) Within the time period provided for filing in Subsection (1) the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

(b) The burden of proof shall be upon the lien claimant and those claiming under him to show actual knowledge.

(3) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

**AFFIDAVIT OF LESLIE McLEAN**

## AFFIDAVIT OF LESLIE MCLEAN

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

COMES NOW your affiant, Leslie McLean, who deposes and states that

1.     I am a legislative aide for the Utah State Senate.
2.     As a legislative aide, it is my duty to assist in the custodial tasks associated with the records containing the floor debates and discussions of the Utah State Senate.
3.     The following, in pertinent part, is a true and authentic verbatim record of the discussion of Senate Bill 87 which occurred in the Senate during the fiftieth general legislative session on February 3, 1994, as recorded on Tape No. 16 in the Senate office:

Senator Howell:

. . . For the last thirty-six months, literally thirty-six months, I've been working to try and come up with a solution to a problem that continues to happen in the state of Utah. When you look at our gross, uh, uh, nat—, uh, gross state product, about fourteen percent, fourteen-and-a-half percent of that comes through construction. Primarily that's in the residential arena. It's projected in 1995 that that will double to almost twenty-five percent of our gross product here. SB 87 is a consumer bill that is designed to protect homeowners from mechanics liens being filed against their homes where the homeowner has already paid for the work. Without this protection, our existing law subjects the homeowner to liability to pay not once, but twice, for the work. Besides protecting the consumers, a lien recovery fund will be created in which subcontractors, suppliers, and laborers may file claims for payment for their work where the general contractor has failed to pay or— pay for them after having been paid by the homeowner. . . .

\* \* \*

Senator Oakey:

. . . A question has come up as to how the suppliers and subcontractors will know that the requirements for accessing the fund have been met by the owner. That is, having a written

contract, a building permit, and, uh, using a licensed contractor. How will they know that so that they will know that they are entitled to file their claim against the fund?

\* \* \*

Attorney John Young: . . . The subcontractor would merely proceed as they do now under existing law. They would attempt to file a lien against the home. It would then be incumbent upon the homeowner to come forward to the subcontractor and demonstrate affirmatively that the con—that the homeowner had entered into a written contract with a licensed contractor, and that the homeowner had indeed paid in full the amount required of the homeowner under the contract. And if the work that was being performed was, uh, required a building permit in the particular, uh, locale that was involved, that a building permit had also been issued. If the homeowner meets those four requirements, then the homeowner has protection from being, having a mechanic's lien against their home or being sued personally for any additional amounts due so that they don't pay twice. That, by doing that, by providing that information to the subcontractor or supplier, they are then able to go forward as against the general contractor.

Senator Oakey: Alright, I think I understand your answer. Let me just follow up with a couple of additional questions. That would mean that the homeowner would have to present to the supplier or the subcontractor the, uh, uh, evidence— show him the written contract, that there was a written contract. Show him a copy of the building permit which the owner would have. And also, show him that the contractor was licensed. Now does the contractor have to be licensed at the time the written contract is signed? Is that the point in time when his license has to be in effect?

Attorney John Young: Well, I believe that's true under existing law, Senator. We did not address that particular issue in this proposal, but I think that's the—

Senator Oakey: How does he show that the contractor is licensed? Does he have to get some certificate from the licensing bureau, agency, to show that, or I mean how does he prove that?

Attorney John Young: Yes. You can go down to the department of Occupational and Professional Licensing and get a certificate from that department, uh, indicating the status and condition of any contractor's license in the state.

Senator Oakey: Both at the time that he asked for it and at the time the contract was signed?

Attorney John Young: Yes.

Senator Oakey: Thank you.

\* \* \*

Senator Beattie: On the \$75,000 amount, was that discussed about— I don't know what the average lien is, uh, on these issues. I know that there are several, that once you get a bad apple it seems like there are a whole bunch on one house, that, that seems to be the problem. But, but, the average lien by a particular subcontractor or supplier, is much smaller than \$75,000.

Attorney John Young: Yes. The, the discussion that was held with respect to the \$75,000 cap was essentially that in most instances, uh, the problems tend to occur during the latter part of the construction of any given project. The contractor is doing fine half way through the work he's paying his bills. As you start nearing completion, the contractor has either failed to bid the job properly or is getting strapped on other projects. So it's in that last half of the project that things start to happen. . . .

\* \* \*

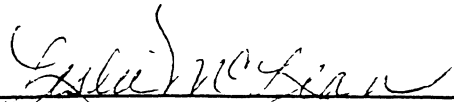
Senator Beattie: My point, and somebody just came down, Senator Howell mentioned to me that the someone thought that the average lien was about \$2500. So in reality this bill should take care of the majority of the, uh, liens.

\* \* \*

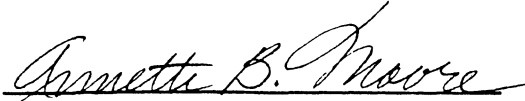
Senator Howell: Mr. President, I'd sum up by, uh, telling you that I believe this bill will finally provide a means for, uh, and protection for the

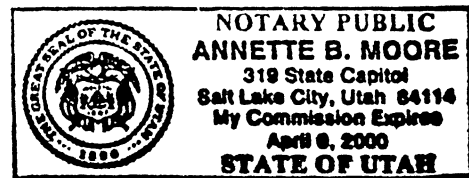
homeowners, subcontractors, and, most importantly, from unscrupulous contractors who take advantage of their most important resource and those are the consumers. I'd urge your support on it. . . .

DATED this 28<sup>th</sup> day of October, 1997.

  
\_\_\_\_\_  
Leslie McLean

Subscribed and sworn to before me this 28<sup>th</sup> day of October, 1997.

  
\_\_\_\_\_  
NOTARY PUBLIC



## **FINAL JUDGMENT**



IMAGED

FILED DISTRICT COURT  
Third Judicial District

AUG 05 2003

SALT LAKE COUNTY

By [Signature]  
Deputy Clerk

Douglas J. Payne, A4113  
P. Bruce Badger, A4791  
FABIAN & CLENDENIN,  
A Professional Corporation  
215 South State Street, 12<sup>th</sup> Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151  
Telephone: (801) 531-8900  
Facsimile: (801) 531-1716

Attorneys for Plaintiffs

ENTERED IN REGISTRY  
OF JUDGMENTS

DATE 08/06/03

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOHN HOLMES CONSTRUCTION,  
INC., a Utah corporation and COULTER  
& SMITH, LTD., a Nevada corporation,

Plaintiffs,

vs.

R.A. McKELL EXCAVATING, INC., a  
Utah corporation and RICK McKELL, an  
individual,

Defendants.

FINAL JUDGMENT

Civil No. 000909210

Judge William J. Bohling

Plaintiffs John Holmes Construction, Inc. and Coulter & Smith, Ltd., are collectively awarded judgment in their favor and against Defendant R.A. McKell Excavating, Inc., 165 N. 1330 West, Suite B1, Orem, Utah 84057, in the amount of \$25,000 as an award of their reasonable attorneys' fees pursuant to Utah Code Ann. § 38-1-18. This Judgment shall bear interest from the date hereof at the statutory rate.

Final Judgment (against R.A. McKell Exca



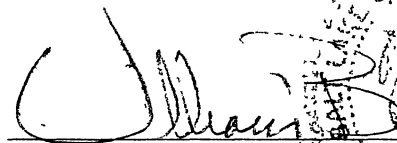
JD13056381

Further, R.A. McKell Excavating, Inc.'s Notice of Claim of Lien recorded in the official records of the Salt Lake County Recorder, State of Utah, on June 7, 2000, as Entry 7654861, Book 8366, Pages 6121-6122, with respect to Parcels # 27-25-351-017, 27-25-351-024 and 27-25-376-002, as more fully described in Exhibit A hereto, is hereby released. The *Lis Pendens* recorded in the official records of the Salt Lake County Recorder on September 13, 2002, as Entry 8352958, Book 8648, Pages 878-880, with respect to Parcels # 27-25-351-017, 27-25-351-024 and 27-25-376-002, as more fully described in Exhibit B hereto, is also hereby released.

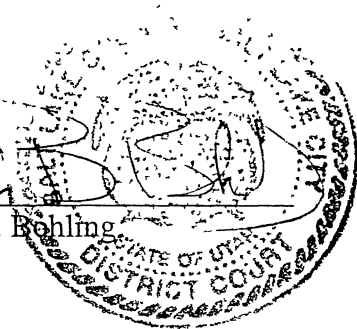
**A certified copy of this Final Judgment may be recorded in the official records of the Recorder of Salt Lake County, State of Utah, with respect to Parcels # 27-25-351-017, 27-25-351-024 and 27-25-376-002, as more fully described in Exhibits A and B hereto.**

DATED this 4<sup>th</sup> day of August, 2003.

BY THE COURT:



Honorable William J. Bohling  
Third District Court



Approved as to form:

Jan W. Reed 7.30.03  
Jack W. Reed  
Peterson Reed LLC  
Attorneys for Defendants

**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Douglas J. Payne, A4113  
P. Bruce Badger, A4791  
FABIAN & CLENDENIN,  
A Professional Corporation  
Twelfth Floor  
215 South State Street  
P.O. Box 510210  
Salt Lake City, Utah 84151  
Telephone: (801) 531-8900

Attorneys for Plaintiffs

**FILED DISTRICT COURT**  
Third Judicial District

OCT 09 2002

By                       
SALT LAKE COUNTY  
Deputy Clerk

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IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

---

JOHN HOLMES CONSTRUCTION, )  
INC., a Utah corporation and COULTER )  
& SMITH, LTD., a Nevada corporation, )

Plaintiffs, )

vs. )

R.A. McKELL EXCAVATING, INC., a )  
Utah corporation and RICK McKELL, an )  
individual, )

Defendants. )

**ORDER GRANTING MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Civil No. 000909210

Judge William J. Bohling

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Plaintiffs' Motion for Partial Summary Judgment came on for hearing before the Honorable William Bohling, on August 12, 2002 at 10:30 a.m. Plaintiffs were represented by P. Bruce Badger. Defendants were represented by Jack W. Reed. The court, having considered the parties' moving papers, and having heard argument of counsel, and being otherwise fully advised, determines that there are no genuine issues of material fact and that Plaintiffs are entitled to partial summary judgment as a matter of law. Specifically, the court concludes as a

matter of law that Defendants failed to record the Notice of Claim of Lien within the time period set forth in Utah Code Ann. § 38-1-7(1)(a) and (b) and that Defendants' quantum meruit claim fails as a matter of law because of the existence of an express contract. Accordingly, it is hereby

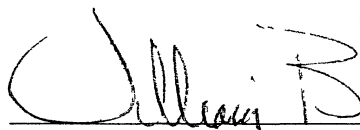
**ORDERED, ADJUDGED AND DECREED** that Plaintiffs' Motion for Partial Summary Judgment is granted.

Defendants' Counterclaim is dismissed with prejudice for no cause of action and R.A. McKell Excavating, Inc.'s Notice of Claim of Lien is hereby declared to be null and void.

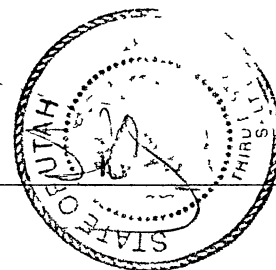
At such time as all of the remaining claims against the Defendants have been finally and fully adjudicated, Plaintiff shall be entitled to an order that may be recorded in the records of the Salt Lake County Recorder which releases the Notice of Claim of Lien recorded on June 7, 2000, as Entry 7654861, Book 8366, Pages 6121-6122, in the records of the Salt Lake County Recorder, State of Utah.

DATED this 9 day of October, 2002.

BY THE COURT:



William J. Bohling  
Third District Court



Approved as to form:

---

Jack W. Reed  
PETERSEN REED, LLC  
Attorneys for Defendants

CERTIFICATE OF SERVICE

On the 4<sup>TH</sup> day of September, 2002, I hereby certify that I caused to be served a true and correct copy of the foregoing *Proposed* **ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT** by hand delivering said document as follows:

Jack W. Reed  
Jerald V. Hale  
PETERSON REED L.L.C.  
321 Boston Building  
9 Exchange Place  
Salt Lake City, UT 84111

Annette E. Clark

**ORDER GRANTING MOTION FOR AWARD OF ATTORNEY'S FEES**

IMAGED

FILED DISTRICT-COURT  
Third Judicial District

AUG 05 2003

SALT LAKE COUNTY

By

Deputy Clerk

Douglas J. Payne, A4113  
P. Bruce Badger, A4791  
FABIAN & CLENDENIN,  
A Professional Corporation  
215 South State Street, 12<sup>th</sup> Floor  
P.O. Box 510210  
Salt Lake City, Utah 84151  
Telephone: (801) 531-8900  
Facsimile: (801) 531-1716

Attorneys for Plaintiffs

Order Granting Motion for Award of Attor  
JD13051305  
000909210 R A MCKELL EXCAV JD

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

---

JOHN HOLMES CONSTRUCTION,  
INC., a Utah corporation and COULTER  
& SMITH, LTD., a Nevada corporation,  
  
Plaintiffs,

vs.

R.A. McKELL EXCAVATING, INC., a  
Utah corporation and RICK McKELL, an  
individual,

Defendants.

**ORDER GRANTING MOTION FOR  
AWARD OF ATTORNEYS FEES**

Civil No. 000909210

Judge William J. Bohling

---

Plaintiffs' Motion for Award of Attorneys Fees came on for hearing before the Honorable William J. Bohling on July 14, 2003, at 10:15 a.m. Plaintiffs were represented by P. Bruce Badger and Douglas J. Payne of Fabian & Clendenin. Defendants were represented by Jack W. Reed of Peterson Reed, LLC.

Plaintiffs are, by virtue of the Order Granting Partial Summary Judgment, dated October 9, 2002, the successful parties in this action to enforce a mechanic's lien under Utah Code Ann. § 38-1-1 *et. seq.*, and are, therefore, entitled to an award of their reasonable attorneys' fees pursuant to Utah Code Ann. § 38-1-18.

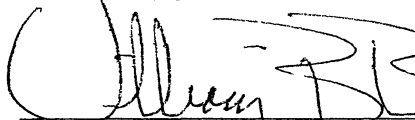


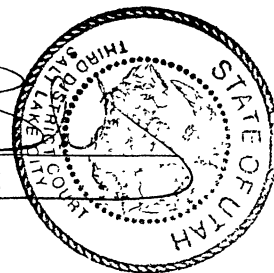
The court has considered the respective motion papers in favor of and opposing an award of attorneys' fees, including the Joint Affidavit of P. Bruce Badger and Douglas J. Payne In Support Of Motion For Award Of Attorneys' Fees, and has heard argument of counsel, and has reviewed the record in this case including plaintiffs' Motion for Partial Summary Judgment and related papers. The court finds that the Motion for Partial Summary Judgment presented complex issues relating to defendant's mechanic's lien. The court further finds that plaintiffs' counsel are experienced lawyers and that their hourly rates are justified based on their years in practice, their reputations, and the customary rates in the community, but that there was some duplication of effort. Based on these findings and the amount at issue and the result obtained, the court finds that \$25,000 (not \$30,447.00 sought by plaintiffs) is a reasonable attorney's fee. Accordingly,

**IT IS HEREBY ORDERED** that Plaintiffs' Motion for Award of Attorneys Fees is granted. Plaintiffs are collectively entitled to reasonable attorneys' fees in the amount of \$25,000, which shall be reflected in a separate Final Judgment in favor of plaintiffs and against defendant R.A. McKell Excavating, Inc..


DATED this 5 day of August, 2003.

BY THE COURT:

  
Honorable William J. Bohling  
Third District Court



Approved as to form:

  
Jack W. Reed  
Peterson Reed LLC  
Attorneys for Defendants

**ADJOINING SUBDIVISION AGREEMENT**

## ADJOINING SUBDIVISIONS AGREEMENT

This Agreement is made this 8<sup>th</sup> day of March 1996, by and between High Country Apache Builders, Inc., a Utah Corporation, and Husting Land and Development, a Utah Corporation (herein jointly and severally referred as "HLD/Apache Builders"); and John Holmes Construction, Inc., a Utah Corporation, and Mesa Development, Inc., a Utah Corporation (herein jointly and severally referred as "Holmes/Mesa").

### RECITALS

- A. HLD/Apache Builders are contracting to purchase real property located in Draper, Utah, known as the Proposed Galena Hills Subdivision ("Galena"). The present design of Galena is shown on Exhibit "A".
- B. Holmes/Mesa owns real property in Draper, Utah, known as the Proposed Parkway Estate Subdivision ("Parkway"). The present design of Parkway is shown on Exhibit "A".
- C. Galena and Parkway are adjoining properties as shown, Exhibit "A".
- D. There are aspects of the development of each subdivision that are common to and shared by both Galena and Parkway. These common characteristics include contribution and development of common areas, installation of utilities to the benefit of both subdivisions, and development of common roadways.
- E. As a condition to recording and approval of either subdivision, Draper City has required that both parties jointly pay to Draper City an "Impact Fee" in the amount of \$60,000.00 to be used by Draper City for the development of the common area.
- F. By this Agreement, the parties intend to agree upon the allocation of costs and responsibilities associated with these matters of common concern.

### AGREEMENT

Based on the foregoing recitals, HLD/Apache Builders and Holmes/Mesa mutually agree, covenant and represent as follows:

1. Dedication of Land for Common Areas. As a condition for approval of Galena and Parkway, Draper City is requiring that both parties collectively contribute

approximately ten acres of adjoining land to be used and developed by Draper City for public use. The land to be dedicated by HLD/Apache Builders is shown in green on Exhibit "A". The land to be dedicated by Holmes/Mesa is shown in blue on Exhibit "A". Said parcels are more particularly described on the final plats which have been given final approval by the City of Draper.

2. Joint Development Projects and Division of Costs.

- (a) 50/50 Projects. The following costs shall be borne equally by HLD/Apache and Holmes/Mesa:
- (i) Sewer Line. The sewer line which shall be installed from the trunk line across county land within a 15 foot easement granted by the County and shall cross into the Galena Subdivision at the apex of the back lot line of Lot 316 ("Connection Point"). For the purpose of servicing Parkway Estates, the sewer line shall be installed along the back lot lines of Lots 316, 317, 318 and 319 of Galena to the point adjoining Lot 217 Parkway; and thence along the West line of Lot 217 Parkway to and along the boundary line between Lots 221 and 222 of Parkway Estates to a manhole to be located near the center of a street to be known as Zion Park Court. For the purpose of servicing Galena hills, the line shall be installed from the Connection Point South along the back lines of Lots 316, 315, 314, 214 and 213 of Galena hills and running thence along an easement between Lots 212 and 213 of Galena Hills to a manhole in Webb Road. This sewer line is partially shown in red on Exhibit "A" attached hereto. Holmes/Mesa shall not be bound by any contract for the installation of this sewer main, in excess of \$100,000.00 without their written approval.
  - (ii) Entrance. Entrance landscaping, improvements, and signage at the intersection of Galena Park Boulevard and 12300 South Street as later agreed by the parties.
- (b) 65/35 Projects. The costs of the following projects shall be borne as follows: Sixty-five percent (65%) of by HLD/Apache Builders and thirty-five (35%) by Holmes/Mesa:
- (i) Impact Fee. Payment of the \$60,000.00 Impact Fee to Draper City shall be split on a 65%/35% basis with HLD/Apache Builders paying \$39,000, and Holmes/Mesa paying the remaining \$21,000.
  - (ii) Improvements to Common Areas. The cost of improvements to common areas including private 20-foot lane from Galena Park Boulevard and running East 262 feet along the south line of Smekens and L.L.W. Property (shown on Exhibit "A"), utility stubs, fencing along railroad tracks, re-routing of irrigation system within the common area and under Galena Park Boulevard to the West line of said street and such and such other improvements as may be required by Draper

City and agreed upon by the parties shall also be shared on the same 65%/35% basis. Each party shall be responsible for the costs involved with its own irrigation system pertaining to the respective subdivisions.

- (iii) Galena Park Boulevard. Because Galena Park Boulevard services and benefits both subdivisions, the parties agree to split the following costs on a 65%/35%. HLD/Apache shall pay 65% and Holmes/Mesa shall pay 35% of the following costs associated with the common entrance portion of Galena Park Boulevard:
- (A) The full cost of the land, surface and underground improvements for curb, gutter, sidewalk, excavation, asphalt, electric power, gas, telephone, and TV cables and storm drain on both sides of Galena Park Boulevard from 12300 South Street to the North line (extended) of Lot 36 Parkway; and
  - (B) The full cost of the land and surface and underground improvements for only the East one-half (1/2) of Galena Park Boulevard along the frontage of the common area South from said North line of Lot 36, to the North lot line of Lot 1 Parkway; and
  - (C) One-half the cost of the sewer, water and utility stubs from 12300 South Street to the North lot line of Lot 1 Parkway;
  - (D) That portion of Galena Park Boulevard which is subject to this provision is shown on Exhibit "A" in orange. The cost of the land shall be calculated to include the following: (1) The Smekens land shall be included at actual cost (presently projected to be \$7,500.00); and the other land shall be based on a cost of \$23,500.00 per acre. The estimated cost is \$90,000.00.
  - (E) Except for the items referred to above, Holmes/Mesa shall be responsible to reimburse HLD/Apache for the actual costs for the development of all other portions of Galena Park Boulevard situated within the Parkway Subdivision, including the surface and subsurface improvements. The estimated cost for these improvements is \$200,000.00. Holmes/Mesa shall not be responsible for any reimbursement in excess of this amount without their written approval.
- (iv) Improvements to 12300 South Street. Improvements at 12300 South Street as required by Draper City and UDOT to include removal of trees, relocation of utility poles, lines and water meters, removal of shed and concrete pad, widening of the pavement, installation of fence, and installation of curb, gutter and sidewalks on the south side of the road shall be paid 65% by HLD/Apache Builders and 35% by Holmes/Mesa. Holmes/Mesa shall not be bound by any contract in

excess of \$135,000.00 for these improvements, together with any other improvements subsequently required by Draper City and/or UDOT without their written approval. Holmes/Mesa shall not be responsible for reimbursement for any improvements subsequently required by Draper City and/or UDOT subsequent to this agreement without their written approval.

- (v) Galena Canal and Storm Drain Line. Any alterations and/or improvements to Galena Canal and any storm drain line(s) from Galena Canal to Jordan River Canal may be required by Draper City shall be paid 65% by HLD/Apache Builders and 35% by Holmes/Mesa. It is anticipated that this work may not be required by Draper City. The maximum estimated cost for such work, if required, is \$25,000.00. Notwithstanding the foregoing, Holmes/Mesa shall not be responsible for reimbursement for any such improvements required by Draper City and/or UDOT subsequent to this agreement without their written approval.

### 3. Contracting for the Performance of the Work.

- (a) Bidding Process Generally. HLD/Apache Builders shall obtain a minimum of three (3) bids from outside/independent contractors for each of the projects and work described in this Agreement. The bid award(s) shall be approved in writing by Holmes/Mesa taking into account the amount of each bid, availability to commence work, quality and other relevant factors. Said approval shall be evidenced by execution of a Contract Ratification Form completed substantially in the form attached hereto as Exhibit "B". Either HLD/Apache or Holmes/Mesa may bid on any portion of the work. Any or all bids which exceed the amount of the estimates given herein may be rejected by Holmes/Mesa at their option, based on cost alone.
- (b) Galena Park and 12300 South. The development of Galena Park Boulevard and the joint improvements contemplated by this Agreement to both Galena Park Boulevard and 12300 South are to be bid separately from the other work contemplated by this Agreement or connected with either subdivision.
- (c) Responsibility for Offsite Improvements.
  - (i) HLD/Apache Builders shall be responsible to award, bond and complete in a timely manner the work as referred to herein.
  - (ii) Delays in construction caused by factors beyond the control of HLD/Apache Builders shall extend the deadlines set forth herein.

- (d) Standards/Specifications.
- (i) All bids and all work shall be completed in accordance with the plans and specifications prepared by Neff Engineering in a workmanlike fashion and in a manner acceptable to Draper City;
  - (ii) HLD/Apache shall be responsible to install the sewer lines, water lines and other utilities that service Parkway Subdivision from or through Galena Park Boulevard, including the underground utilities, pipe, structural fill, irrigation line and subsurface drain pipe etc. together with all surface improvements, including roadbase, curb, gutter and finish asphalt for the completion of Galena Park Boulevard. Further, the side roads extending from Galena Park Boulevard (proposed Hyde Court, Wilkens Court and Kolob Way) shall be completed and extended out from Galena Park Boulevard at least past the end of the radius of the curb and gutter for each of said side streets.
  - (iii) HLD/Apache shall be responsible to install the sewer laterals and all other underground utilities which are to be installed within Galena Park Boulevard in such a manner that the utilities hook-ups for each of the lots shall be well within the lot to a point at least 5 feet beyond the edge of the sidewalk furthest from the street for each lot abutting the street so that the streets and sidewalks will not have to be torn up when the utilities are connected to the new home constructed on each of said lots. HLD/Apache warrants that no portion of the streets and sidewalks, once installed, will have to be torn up or re-installed in order to make the connections for utilities in connection with the construction of a home on any lot along said street.
  - (iv) HLD/Apache and all of its contractors performing any contract shall be duly licensed with the State of Utah and shall maintain adequate liability insurance reasonably acceptable to Holmes/Mesa.
- (e) Estimates. Holmes/Mesa and HLD/Apache has prepared estimate/target amounts for various aspects of the joint development work. Further, HLD/Apache has obtained actual written bids with respect to said work. A schedule of these amounts is attached hereto as Exhibit "C" entitled Contract Estimates. The parties accept and agree to said amounts and agree that Holmes/Mesa shall not be bound to make reimbursement on any separate contract in any amount which exceeds the target/estimate amount as set forth on said Exhibit for said work.
- (f) Payment of Advances. Holmes/Mesa shall reimburse HLD/Apache Builders the amount of Holmes/Mesa's pro-rata share of the development work as provided in this Agreement (herein referred to as the Holmes/Mesa

reimbursement.) The parties acknowledge that HLD/Apache shall have lien rights on the first phase of Parkway Estates Subdivision which shall secure the payments owed from Holmes/Mesa to HLD/Apache hereunder for the improvements set forth herein. HLD/Apache shall, at the request of Holmes/Mesa, execute and deliver to Holmes/Mesa:

- (i) Subordination Agreement(s) from HLD/Apache and all of its Contractors and Subcontractors, satisfactory to Holmes/Mesa, by which HLD/Apache and its Contractors and Subcontractors subordinate their lien rights to a development loan made by Holmes/Mesa on the Parkway Property or any phase thereof in an amount not to exceed \$1,000,000.00.
- (ii) Satisfactory partial lien releases on any lot(s) upon receipt of partial payments from Holmes/Mesa to HLD/Apache Builders in an amount calculated by dividing the balance due to HLD/Apache Builders for the Holmes/Mesa reimbursement by the number of lots remaining in Phase One of Parkway Estates Subdivision. The partial lot release payment to be paid by Holmes/Mesa shall be paid at the time a building permit is issued on that lot in Phase One of Parkway. In any event, the entire remaining balance of the Holmes/Mesa Reimbursement shall be due and payable (subject to offsets for warranty work as set forth below) not later than twenty-four (24) months after final inspection and acceptance of the work by the appropriate governmental agency and upon completion of the performance of all other obligations of HLD/Apache Builders under this Agreement.
- (iii) HLD/Apache Builders shall warrant to Holmes/Mesa all work required to be performed by HLD/Apache Builders under this Agreement for the period extending through the time that HLD/Apache Builders is entitled to reimbursement from Holmes/Mesa under this agreement.
- (iv) HLD/Apache Builder shall provide such lien waivers and lien releases from all parties with lien rights, including partial lien waivers and releases which shall be executed by HLD/Apache, all contractors, sub-contractors, laborers and suppliers for all lienable services, labor and materials furnished on the Parkway property. Further, HLD/Apache shall similarly cause to be delivered to Holmes/Mesa one or more full and final lien releases and waivers from all of the foregoing at such time as HLD/Apache receives a Trust Deed from Holmes/Mesa or its successor or assignee hereunder securing the obligation for the payments set forth herein.
- (v) At or before the time of its request for reimbursement from Holmes/Mesa for any contract work under this agreement, HLD/Apache shall furnish to Holmes/Mesa a copy of the contract ratification form referred to above duly executed by Holmes/Mesa and HLD/Apache approving each contract upon which reimbursement is requested. Holmes/Mesa shall in no wise be responsible for any



reimbursement not pre-approved on the appropriate form.

- (g) HLD/Apache agrees to have each of its contractors and subcontractors who perform any work on the property connected with the Parkway Property duly executed an Affidavit in the form attached hereto as Exhibit "C". Each of said affidavits shall be duly executed, notarized and delivered to Meridian Title Company prior to commencing any work provided for under this Agreement.

4. Protective Easement. Any recoupment of costs by virtue of a protective strip or easement (if permitted by Draper City) from adjoining landowners or developers shall be paid 55% to HLD/Apache Builders and 45% to Holmes/Mesa.

5. Procedure for Payment of Shared Costs to Draper City.

- (a) Impact Fee. Each party shall pay its share of the Impact Fee directly to and as required by Draper City.
- (b) Storm Drainage Fees. Each party will pay its pro-rata share of the Storm Drainage fees for Galena Park Boulevard due to Draper on the same basis as the costs of the improvements are allocated. Said storm drain fees are to be paid directly to and as required by Draper City.

6. Dedication of Galena Park Boulevard.

- (a) Holmes/Mesa shall deliver to Meridian Title Company in escrow a deed dedicating the land included within Galena Park Boulevard to Draper City which shall include the property within the perimeter description of Galena park Boulevard from 12300 South Street to the North line of the proposed Galena Subdivision. The form of said deed is attached hereto as Exhibit "E" and shall be subject to existing liens of record. The parties shall deliver to Meridian the following:
  - (i) An executed original of this Agreement;
  - (ii) Holmes/Mesa shall deliver the duly executed original of the Dedication Deed of Galena Park boulevard;
  - (iii) HLD/Apache Builders shall execute and deliver to Meridian in escrow a duly executed and recordable release/abandonment of the original 50 foot Easement from 12300 South Street to and over any portion of the Holmes/Mesa property (not including any portion of Galena Park Boulevard);
  - (iv) HLD/Apache Builders shall deliver to Meridian its Warranty Deed to One Acre of the Webb parcel as set forth below.
  - (v) HLD/Apache certifies and warrants that the Release of the Right of Way and the Deed to the Webb one acre parcel shall be executed by the vested owner and shall convey marketable title.

- (b) When all of the foregoing instruments have been received in escrow by Meridian, Meridian is instructed to deliver the Dedication Deed to Galena Park Boulevard to Draper City with instructions that said deed shall be recorded only on condition that the Plat of the Galena Subdivision be recorded simultaneously with said deed.
- (c) The Release/Abandonment of the Original Easement and the Deed to the Webb one acre shall be delivered to Holmes/Mesa or recorded when the Galena Subdivision is recorded.
- (d) It is understood that the following conditions precedent must be met prior to the recording of the Plat for Galena Hills Subdivision:
  - (i) HLD/Apache Builders must close on the purchase of the Galena Subdivision Property; and
  - (ii) HLD/Apache Builders must post a good and satisfactory bond with Draper City and the Sewer District for the Galena Subdivision in connection with the recording of the Galena Subdivision Plat and for all other improvements as required under this Agreement; and
  - (iii) HLD/Apache Builders shall cause all sewer easements required for the Galena and Parkway Subdivisions to be duly executed, delivered to and accepted by Salt Lake County Sewer Improvement District No. 1, including specifically, but not limited to, the sewer easement from Salt Lake County from the Connection Point to the Jordan River Sewer Trunk Line.
  - (iv) Holmes/Mesa must close on the Smekens property included in 12300 South Street and in Galena Park Boulevard.

7. **Closing on Webb Parcel.** In connection with the escrow referred to above, HLD/Apache Builders shall deliver to Holmes/Mesa a Warranty Deed to the North one acre of the Webb parcel fronting on 12300 South and abutting the Rail Road on the East and the LLW Property on the West. The purchase price for said acre is \$19,000.00. However, Holmes/Mesa shall be entitled to a credit for the net amounts owed by HLD/Apache to Holmes/Mesa for the amounts owed by HLD/Apache to Holmes/Mesa for Galena Park Boulevard property; Smekens property and 12300 South Street property as set forth herein. Thereafter, Holmes/Mesa shall complete the exchange with LLW and obtain the release of the LLW Trust Deed.

8. **Cancellation.** After this Agreement has been signed by all of the Parties hereto it may nevertheless be cancelled by one party within a period of sixty (60) days from the date it has been signed by all of the parties hereto. In order to cancel under this provision, the party desiring to cancel must give the other parties hereto five (5) days written notice of intent to cancel setting forth the reason for the cancellation. This right of unilateral cancellation may be exercised only if (a) Draper City, UDOT or other governmental entity imposes any additional requirement on either party not contemplated by this Agreement which makes the development of either subdivision unprofitable; or (b) HLD/Apache Builders has not closed on the purchase of the Galena Property; or (c) the Galena

Subdivision has not recorded. From and after sixty (60) days from the date the last party executes this Agreement, this Agreement shall become unconditional, irrevocable and cannot be cancelled. Further, this Agreement shall become unconditional, irrevocable and cannot be cancelled upon the first to happen of the following: (d) The recording of Parkway Phase I Subdivision Plat; or (e) The recording of Galena Subdivision Plat; or (f) The recording of the dedication deed for Galena Park Boulevard from Holmes/Mesa to Draper City.

9. Conditions. Notwithstanding anything herein to the contrary, this Agreement will become effective, binding and enforceable and cannot be cancelled upon the first to happen of the following: (i) the closing and recording of HLD/Apache Builders' purchase of the Galena Property; or (ii) the recording of either the Galena or the Parkway Subdivisions.

10. Remedies upon Default. In addition to the remedies provided by law, if either party fails to perform any obligation arising out of this contract, the other party shall have the right to substitute performance and to recover such damages, losses, costs and expenses associated therewith from the other party. If either party fails to make any payment contemplated by this agreement as set forth herein, the other party shall be entitled to receive interest on any liquidated amount at the rate of 12% per annum.

11. Arbitration. If either party fails to perform any covenant or obligation of this Agreement, the party in default shall pay all costs, expenses, and reasonable arbitration fees which the other party incurs in enforcing this Agreement or in pursuing any remedy provided hereunder or by the applicable law, whether such remedy is pursued by filing suit or otherwise, all per the State Alternative Dispute Resolution Program.

12. Incorporation of Exhibits. The exhibits attached hereto are incorporated herein as part of this Agreement.

13. Modification of Agreement. No amendments or modifications of this Agreement shall be valid unless in writing and signed by all of the parties hereto.

14. Entire Agreement. This Agreement, including all exhibits, constitutes the entire understanding and agreement between the parties and any and all prior agreements, discussions and/or understandings are terminated and are of no force and effect.

15. Successors and Assigns. Except as provided herein, all covenants and terms of the Agreement shall bind the successors and/or assigns of either party hereto. HLD/Apache shall not assign its interest under this agreement without the prior written consent of Holmes/Mesa. The parties hereto shall, except as set forth herein, be liable for the duties, liabilities and obligations set forth herein even though an assignee may assume such liability and such assignor shall be released from liability only by a writing signed by the other party. Notwithstanding the foregoing, Holmes/Mesa shall be released from liability hereunder upon

the following conditions being met: (a) Holmes/Mesa has sold, transferred and conveyed all of their entire interest in the Parkway Property; (b) The buyer/assignee of said property assumes in writing all obligations of Holmes/Mesa hereunder; (c) the Parkway Subdivision Plat has been duly recorded; and (d) Holmes/Mesa or its Assignee has caused a Trust Deed to be recorded securing the performance of the obligations of Holmes/Mesa and/or its assigns hereunder. Said Performance Trust Deed shall cover all of the lots of Parkway Phase One Subdivision and shall be subject to a development loan and bond on said Phase One and shall contain a partial release provision in accordance with the payment schedule and partial lien release provisions as set forth above.

16. Time is of the Essence. Time is of the essence in the performance of this Agreement.

17. Authority of Signer. The persons executing this Agreement warrant their authority to do so in behalf of each party.

18. Quadruplicate Originals. The parties shall sign four originals of this Agreement.

In Witness Whereof, the parties have duly executed this Agreement.

HUSTING LAND AND  
DEVELOPMENT

By:   
Its: 

JOHN HOLMES CONSTRUCTION,  
INC.

By:   
Its: 

APACHE BUILDERS, L.L.C.

By:   
Its: 

MESA DEVELOPMENT, INC., a Utah  
Corporation

By:   
Its: President

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