

1992

Margot de Villiers v. Utah County, Highland City, and John Does 1-3 : Brief of Appellee

Utah Court of Appeals

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920765


IN THE UTAH COURT OF APPEALS

MARGOT de VILLIERS,	:	
	:	Case No. 920765-CA
Plaintiff/Appellant,	:	
	:	
vs.	:	Priority No. 16
	:	
UTAH COUNTY, HIGHLAND CITY,	:	
and JOHN DOES 1-3,	:	
	:	
Defendants/Appellee.	:	

BRIEF OF APPELLEE

APPEAL

From the Judgment of the Fourth Judicial
District Court in and for Utah County
Honorable George E. Ballif, District Judge, (Retired)



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Attorneys for Appellant



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COURT OF APPEALS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
CASES	ii
TABLE OF AUTHORITIES	iii
STATUTES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
DETERMINATIVE STATUTES	1
STATEMENT OF THE CASE	2
A. Nature of the case	2
STATEMENT OF RELEVANT FACTS	3
SUMMARY OF ARGUMENT	5
I. Acceptance of Plat Map	5
II. Inspection and Maintenance of Private Road	5
DETAIL OF ARGUMENT	6
I. HIGHLAND CITY IS IMMUNE FOR CLAIMS ARISING FROM ACCEPTANCE OF THE PLAT MAP	6
II. HIGHLAND CITY HAD NO DUTY, AS A MATTER OF LAW TO MAINTAIN OAKVIEW DRIVE, A PRIVATE ROADWAY	13
III. HIGHLAND CITY HAD NO RIGHT, NOR DUTY TO ERECT SIGNS ON EITHER OAKVIEW DRIVE OR 6000 WEST	14
IV. LACK OF STOP SIGN NOT A PROXIMATE CAUSE	15
V. HIGHLAND CITY IS IMMUNE FROM LIABILITY FOR FAILURE TO MAKE INSPECTIONS	16
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:

	PAGE
Bennett v. Bow Valley Development Corp., 797 P.2d 419 (Ut. 1990)	5, 10
Bennett v. Bow Valley Development Corporation, 797 P.2d at 423	11
Loveland v. Orem City Corp., 746 P.2d 763 (Ut. 1987)	5, 7, 11
Loveland v. Orem City Corp., 746 P.2d at 777	9
Loveland v. Orem City Corp., 746 P.2d at 775	8
Stevens v. Salt Lake County, 478 P.2d 496 (Ut. 1970)	5, 13, 15, 16
Stevens v. Salt Lake County, 478 P.2d at 499	14

TABLE OF AUTHORITIES

STATUTES:

	PAGE
Utah Code Ann. §17-5-38	14
Utah Code Ann. §63-20-2(4) (1988)	1
Utah Code Ann. §63-30-3 (1985)	1
Utah Code Ann. §63-30-3 and 10(3) (1953, as amended).	6
Utah Code Ann. §63-30-8	2, 8, 9, 12, 13
Utah Code Ann. §63-30-9	9
Utah Code Ann. §63-30-10	11, 12, 13
Utah Code Ann. §63-30-10(1)	16
Utah Code Ann. §63-30-10(1)(c)	3, 6, 7, 10, 16
Utah Code Ann. §63-30-10(1)(c)&(d) (1989)	2
Utah Code Ann. §63-30-10(1)(d)	3, 16
Utah Code Ann. §78-2a-3(2)(j)	1

STATEMENT OF JURISDICTION

This is an appeal from an order granting Highland City's Motion for Summary Judgment by the Fourth Judicial District Court of Utah County, State of Utah on June 30, 1992. This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF THE ISSUES

1.) Whether conditions placed on a developer by Highland City, a governmental entity as prerequisites to the acceptance and certification of a subdivision plat map are governmental functions for which no waiver exists.

2.) Whether Highland City, a governmental entity may be held liable for failing to inspect and maintain private roads.

DETERMINATIVE STATUTES

Utah Code Ann. §63-20-2(4) (1988) provides in relevant part:

(a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent or officer of a governmental entity.

Utah Code Ann. §63-30-3 (1985) provides in relevant part:

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmental-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities. . . .

Utah Code Ann. §63-30-10(1)(c)&(d) (1989) provides in relevant part:

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization; or

(d) arises out of a failure to make an inspection or by reason of making an inadequate or negligent inspection or any property; or

See also Utah Code Ann. §63-30-8 attached as Exhibit "1" to the addendum. Both the version in effect at the time of the accident and the present time are attached.

STATEMENT OF THE CASE

A. Nature of the case.

This is a personal injury action. Plaintiff has alleged that Highland City was negligent when it required the developer, as part of the subdivision plat approval process, to move Oakview

Drive further south. Plaintiff also argues that Highland City was negligent with respect to maintenance and inspection on Oakview Drive.

Highland City is immune for its activities encompassing the acceptance and certification of the Oakview PUD. See generally, Utah Code Ann. §63-30-10(1)(c). Highland City is immune from claims alleging a failure to inspect. See generally, Utah Code Ann. §63-30-10(1)(d). Highland City had no duty to maintain or inspect Oakview Drive, due to the fact that it is a private road. The trial court agreed and granted Highland City's Motion for Summary Judgment.

STATEMENT OF RELEVANT FACTS

1). This is a tort personal injury action. The plaintiff was involved in an automobile accident on January 18, 1990 at the intersection of 6000 West and 11500 North (Oakview Drive), Utah County, State of Utah. As a result of that accident, the plaintiff is a paraplegic.

2). 11500 North (hereinafter referred to as Oakview Drive) provides access to Oakview Planned Unit Development. Oakview PUD contains eight lots. It was developed by Paul Frampton. The plat map for Oakview PUD was accepted by the Highland City Council on July 9, 1980. A copy of that plat map is attached at Exhibit "2" to the Addendum.

3). Pursuant to the provisions of the Highland City Planned Unit Development regulations, Oakview Drive remained a private road belonging to Oakview Planned Unit Development. The original

plat map attached as Exhibit "3" to the Addendum. was subsequently amended in December 8, 1988 to reflect the fact that Oakview was a planned unit development.

4). The de Villiers family moved into a home in Oakview PUD in the Summer of 1986. The family lived in Oakview PUD continuously from that time until sometime after the accident on January 18, 1990.

5). The plaintiff received her Utah driver's license in March 1985. Thereafter, she would drive, on the average of four time per day, on Oakview Drive, using the intersection at 6000 West.

6). The plaintiff knew, prior to this accident that she was required to stop at the intersection of Oakview Drive and 6000 West when she was traveling westbound on Oakview Drive, approaching the intersection with 6000 West. [Depo of M. de Villiers at p. 24:8-17.]

7). Maintenance of Oakview Drive was the responsibility of the homeowners in Oakview PUD [Depo of P. Frampton at 17:17-20.]

8). 6000 West, where it intersects with Oakview Drive, is a county road. [Complaint at Paragraph 8.] [Depo of P. Hawker at 13:11-14.]

9). The accident occurred when the 1987 Nissan Pulsar being driven by the plaintiff was struck by a 1970 Datsun 240Z heading northbound on 6000 West being driven by Ryan Boley. The collision occurred on 6000 West. [Complaint at Paragraph 4.]

10). The plaintiff testified that she stopped at the intersection before the accident occurred. She has no memory after proceeding into the intersection. [Depo of M. de Villiers at p. 36:3-10 and p. 50:1-7.]

SUMMARY OF ARGUMENT

I. Acceptance of Plat Map

Highland City's activities relating to the acceptance and certification of the Oakview PUD are immune under the Utah Governmental Immunity Act as a governmental function. No waiver of immunity applies. A specific non-waiver provision exists emphasizing that there is no waiver of immunity.

This appeal, and plaintiff's argument, is controlled by the Utah Supreme Court's decisions in Loveland v. Orem City Corp., 746 P.2d 763 (Ut. 1987) and Bennett v. Bow Valley Development Corp., 797 P.2d 419 (Ut. 1990). Conditioning acceptance of a plat map on the developer making changes in the proposed plan does not remove the cloak of immunity. The conditions do not change the process from one of granting a license or permit to one of designing roads, designing safety enclosures around irrigation ditches, or overseeing funds held in trust. The Planning Commission and City Council do not become highway designers, civil engineers or bankers. They remain the governmental entity accepting a plat map and issuing a permit.

II. Inspection and Maintenance of Private Road

The controlling law is found in §63-30-10(1)(d) and the cases of Loveland, supra, and Stevens v. Salt Lake County, 478

P.2d 496 (Ut. 1970). These cases, in particular, hold that a city or county cannot be held liable for the condition of private roads or private improvements. Oakview Drive is a private road.

If plaintiff's argument is adopted, then every governmental entity in the State of Utah will be liable for any unreasonably dangerous condition existing at any place on any private road or right-of-way. This is not an overstatement of plaintiff's position. She admits in her argument that this should be the law. See excerpts from Appellant's Brief attached as Exhibit "4" to the Addendum. Neither Highland City, nor any other governmental entity can be held liable for unreasonably dangerous conditions existing on private roads or right-of-ways. Otherwise, the State of Utah could be held liable, civilly, for every mudhole, blind corner, single track road on every ranch in the state. This is not, and cannot be the law.

DETAIL OF ARGUMENT

I. HIGHLAND CITY IS IMMUNE FOR CLAIMS ARISING FROM ACCEPTANCE OF THE PLAT MAP

As an affirmative defense, Highland City raised the governmental immunity contained in Utah Code Ann. §63-30-3 and 10(3) (1953, as amended). [All section references hereafter are to Utah Code Annotated.] Section 63-30-10(1)(c) states in pertinent part that:

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(c) arises out of the issuance, denial, suspension or revocation of or by the failure or refusal to issue, deny suspend or revoke any permit, license certificate, approval, order or similar authorization.

Highland City's review and acceptance of the Oakview PUD plat map falls squarely within the provisions of §63-30-10(1)(c). Therefore, Highland City is immune from any claims of liability arising out of the approval process, or acceptance of, the Oakview PUD plat map.

Attached as Exhibit "5" to the Addendum is a copy of the Utah Supreme Court decision in Loveland v. Orem City Corporation, 746 P.2d 763 (Ut. 1987). Loveland was a wrongful death action. Michael Loveland, a minor, drowned in an unfenced, cement-lined canal that bordered on the rear portion of the Loveland home on Lot 16, Plat B, Executive Estates, a subdivision located in Orem City. The facts disclosed that Orem City initially required the developer to enclose the canal in concrete where it crossed Plat A. The developer appealed that decision. The Orem City Council reversed the planning commission, changing the requirement to fencing instead of enclosing the canal in concrete. [Appellant misstates the facts in Loveland in her brief. See excerpts attached as Exhibit "6" to the Addendum]. Neither the Orem City Planning Commission nor the Orem City Council ever required the developer to fence or enclose the canal where it crossed Plat B or C. The developer fenced the canal on Plat A, but did not fence the canal on Plats B or C. Plaintiffs argued that, as a

result of the canal being open and unfenced on Plat B, Michael Loveland drowned.

Michael Loveland's parents sued Orem City, among others. The Lovelands asserted that Orem City was negligent in the following activities:

1. The city planning commission's receipt and analysis of the subdivision plat;
2. The commission's recommendation to approve the plat, subject to the installation of various improvements;
3. The review and approval of the plat by the Orem City Council;
4. The monitoring by Orem City employees of the construction and development of Executive Estates;
5. The Orem City Planning Commission's recommendation (or lack thereof) to the Orem City Council that the canal be fenced in Plat B of Executive Estates; and
6. Assuming such a recommendation was made, the failure of the city engineer or other city employees charged with supervising and monitoring construction of the subdivision to ensure that the fence was in fact constructed as was required.

Loveland v. Orem City Corp, 746 P.2d at 775.

The Supreme Court concluded that the facts in the case did not support claims under Items 4 and 6. The Court concluded that the activities enumerated in Items 1, 2, 3 and 5 fell within the governmental function, and therefore, the City of Orem was immune. See Loveland v. Orem City Corporation, 746 at 776.

The Lovelands asserted that immunity had been waived under the provisions applying to public highways, roads and the like [§63-30-8] and for public buildings, structures, dams and other

public improvements [§63-30-9]. This is the essence of plaintiff's argument in the present case. The Utah Supreme Court rejected the argument, concluding:

The fallacy in Lovelands' reasoning is their assumption that sections 63-30-8 and 63-30-9 apply to defective, unsafe, or dangerous conditions on property which is not in "public use." This assumption is unsound. Although none of our cases have directly dealt with this issue, common sense dictates that adoption of the Lovelands' construction would go far beyond the intended scope of the waivers. And all of our case law is consistent with this decision. For example, in Stevens v. Salt Lake County the plaintiff was injured when he drove his motorbike from a pathway crossing a vacant lot onto an unimproved county road, where he was struck by a passing motorist. The plaintiff claimed that the weeds and brush growing alongside the county road on the vacant lot obscured his vision and caused the accident, thus constituting a "defective, unsafe, or dangerous condition" for which immunity was waived pursuant to section 63-30-8. In affirming the summary judgment in favor of Salt Lake County, the Court noted:

Our concern is with the particular facts shown in this case: Where the pathway upon which plaintiff traveled and entered into Spring Lane was upon private property, and upon which were growing whatever weeds and brush obstructed his view. It would place a wholly impractical burden upon the counties if they had to assume the duty of correcting such conditions with respect to every private right of way that enters upon a public road.

Additionally, none of our cases have suggested that a "public improvement" as is specified in §63-30-9 refers to private developments.

Loveland v. Orem City Corp., 746 P.2d at 777 [emphasis added].

The activities of Highland City with respect to Oakview's planned unit development plat map are no different than Orem City's in the Loveland case. The Orem City Planning Commission conditioned the acceptance of Plat A, initially, on enclosing the irrigation ditch in concrete. If this had been done, the risk of children drowning from falling into the ditch, at least where it crossed the subdivision in Plat A would have been substantially reduced, if not eliminated. The developer appealed the concrete enclosure requirement to the Orem City Council. The city council changed the condition from one of concrete enclosure to fencing. Fencing the ditch, as opposed to fully enclosing it in concrete, probably reduced the effectiveness of the safety measure.

Plat's B & C were presented to Orem City after Plat A. Although the canal bordered on the rear of certain lots on Plat B, including plaintiff's lot, neither Orem City Planning Commission nor the City Council required the canal to be fenced. Failing to insure that the canal was fenced definitely increased the risk of drowning to children in the subdivision. Orem City had notice of this risk from its review and analysis of Plat A. Nevertheless, the Utah Supreme Court held that Orem City was immune under §63-30-10(1)(c) for claims arising out of the review, analysis and acceptance of the plat maps. Orem City did not suddenly become liable for failing to properly design subdivision improvements.

Attached as Exhibit "7" to the Addendum is a copy of the Utah Supreme Court decision in Bennett v. Bow Valley Development

Corp., 797 P.2d 419 (Ut. 1990) in which the Court re-affirmed Loveland. In Bow Valley, the plaintiffs asserted that Provo City was negligent for allowing improvement bonds to be released without requiring the developer to install the improvements. The Supreme Court noted:

The inspection and acceptance of subdivision improvements are governmental functions for which immunity has not been waived.

[Citing §63-30-10 & Loveland v. Orem City Corp., 746 P.2d 763 (Ut. 1987.)

,

In Loveland, this Court concluded that the city planning commission's receipt and analysis of subdivision plat and approval were activities done in exercise of a governmental function.

. . . .

Therefore, the city planning commission's receipt and analysis of subdivision plat and approval were activities in the exercise of a governmental function and therefore were protected by governmental immunity. For the reasons we have heretofore enumerated, there is no waiver of immunity.

Bennett v. Bow Valley Development Corporation, 797 P.2d at 423
[emphasis added].

The burden was on the developer, Paul Frampton, in this case to insure that the intersection of Oakview Drive and 6000 West was reasonably safe. There is no evidence before this Court that the developer ever raised with Highland City or Utah County the issue of whether or not the movement of Oakview Drive further to the south created an unreasonable risk of injury to users of Oakview Drive and 6000 West. Ordinary common law places the burden on the developer to design and build the PUD so that there

are no unreasonable risks of injury from latent defects. See Loveland, id.

If Highland City, as a condition to accepting the plat map requires the developer to place the access road in a potentially unsafe location, then the burden is on the developer either to bring this to the attention of Highland City and ask for reconsideration, or eliminate the potentially unsafe condition while complying with the requirements imposed by Highland City. There is no evidence in this case that the developer did either.

Plaintiff argues, over and over again, that the proper interpretation of §63-30-8 & 10 requires this Court to give preference to the waiver of immunity in §63-30-8 when there is a conflict, whether real or imagined, with §63-30-10. See excerpts from Appellant's Brief attached as Exhibit "8" to the Addendum.

At the time of the accident in this case, §63-30-8 provided as follows:

Immunity from all suits of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

In 1991 the Legislature amended §63-30-8 to read as follows:

Unless the injury arises out of one or more of the exceptions to waiver as set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them.

Copies of both versions of §63-30-8 are attached as Exhibit "1" and "9" to the Addendum. It is not reasonable for plaintiff to argue that §63-30-8 be given preference over §63-30-10. The opposite is true.

POINT II.

**HIGHLAND CITY HAD NO DUTY, AS A MATTER OF LAW
TO MAINTAIN OAKVIEW DRIVE, A PRIVATE ROADWAY.**

The plaintiff next asserts that Highland City breached a duty with respect to the maintenance of Oakview Drive. The planned unit development plat map attached as Exhibit "2" to the Addendum shows that Oakview Drive is and was a private roadway. The roadway was dedicated to the Oakview Homeowner's Association at the time the PUD was created. Paul Frampton, the developer, testified in his deposition that maintenance of the road was the responsibility of the homeowners:

Q. Is this subdivision a PUD?

A. Yes.

Q. Does that mean the owners have responsibility for the road?

A. You'd have to tell me what responsibility for the road means. All of the owners in there have the responsibility to maintain the road and keep weeds down and such things as that. As far as I know, that's all.

[Depo of P. Frampton at 17:13-20.]

Stevens v. Salt Lake County, supra, is controlling. The Court held:

It would place a wholly impractical burden on our counties if they had to assume the duty of correcting such conditions with respect to every private way that enters upon a public road.

Stevens v. Salt Lake County, 478 P.2d at 499. Highland City is in the same position as Salt Lake County in the Stevens case. No duty can be imposed upon it with respect to the inspection or maintenance of Oakview Drive.

POINT III.

**HIGHLAND CITY HAD NO RIGHT, NOR DUTY TO ERECT SIGNS ON
EITHER OAKVIEW DRIVE OR 6000 WEST.**

As set forth above, Oakview Drive was a private road. Maintenance obligations, including that of signing, were placed on the Oakview homeowners.

Oakview Drive intersected with 6000 West. It is undisputed that 6000 West is a county road at the point of this intersection. Highland City had no jurisdiction over the county road. See §17-5-38 which provides in pertinent part as follows:

(1) They [county] may . . . construct,
maintain, control and manage county roads. .
. . .

Paul Hawker testified that it was the county's responsibility to place signs on 6000 West at the intersection of Oakview Drive.

Q. (By Mr. Lund) Let's back up. You did not receive any notification from Highland City that this road was going to be connected to a county road, did you?

A. No.

Q. Yet you still have the responsibility to properly sign that section of the road; is that correct?

A. That's correct.

[Depo of P. Hawker at 30:14-20.]

See also, Stevens v. Salt Lake County, supra.

POINT IV.

LACK OF STOP SIGN NOT A PROXIMATE CAUSE

The fact that there was not a stop sign for traffic on Oakview Drive intending to enter onto 6000 West is not a material issue in this case. The plaintiff testified that she knew that she was required to stop before entering 6000 West from Oakview Drive. She further testified that she did stop on the day of the accident:

Q. Did you know that the people using Oakview Drive planning to go onto 6000 West were required to stop at the intersection before they went onto 6000 West?

A. I know that since I lived there, you know. I always stopped. Not -- you know, it's kind of dangerous, you know, the blind spot kind of -- it's hard not to look, so I assume they would stop. I didn't know they -- I never thought about that they had to -- you know, never thought about it like that, but I assumed that they would have to because I always had to.

. . .

Q. (By Mr. Ferguson) How long were you stopped at the intersection, do you know? Or let me back it up. You definitely stopped at the intersection the day of the accident?

A. I don't remember the whole accident, the whole incident, but I always stop, so I would, you know,

assume that I stopped. I couldn't -- I can't prove that I stopped, but I remember always stopping, so...

[Depo M. de Villiers at p. 24:8-17 and p. 36:3-10.]

POINT V.

HIGHLAND CITY IS IMMUNE FROM LIABILITY FOR FAILURE TO MAKE INSPECTIONS.

To the extent that the plaintiff's Second Amended Complaint seeks to hold Highland City liable for failure to inspect the intersection of Oakview and 6000 West, Highland City is immune from such liability pursuant to the provisions of §63-30-10(1) which provide in pertinent part as follows:

Immunity from suit of all governmental entities is waived for injury which is proximately caused by a negligent act or omission of an employee committed within the scope of the employment except if the injury arises out of:

(d) Failure to make an inspection or by making an inadequate or negligent inspection.

Highland City is immune from any liability arising out of an assertion that Highland City should have inspected this intersection. See also, Stevens v. Salt Lake County, supra.

CONCLUSION

Highland City is entitled to governmental immunity pursuant to §63-30-10(1)(c) for all the allegations made against it by plaintiff regarding the plat map and PUD approval. Highland City owed no duty to maintain Oakview Drive. Highland City is immune under §63-30-10(1)(d) for all claims regarding a failure to inspect. Highland City did not own Oakview Drive nor 6000 West. Oakview Drive was owned by the homeowner's association. 6000


West was owned by the Utah County. Therefore, Highland City had no right, nor duty to maintain, inspect, or sign either of those roads.

Finally, the allegations with respect to signage on Oakview Drive are not material. The plaintiff testified that she knew that she had to stop at the intersection of Oakview Drive and 6000 West. She said that, on the day of the accident, she would have followed her normal practice and stopped at the intersection of Oakview Drive and 6000 West.

Highland City respectfully submits that the trial court's Order granting Highland City's Motion for Summary Judgment should be affirmed.

DATED this 20th day of March, 1993.

WILLIAMS & HUNT


GARY B. FERGUSON
Attorney for Defendant
City of Highland

CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand-delivered on this 2nd day of March, 1993 to the following:

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Tab 3

NOTES TO DECISIONS

Construction and application.

The waiver of immunity from suit "for the recovery of any property real or personal or for the possession thereof" does not include an action for damages for impairment of access to property caused by construction of highway

underpass; this act should be strictly construed to preserve sovereign immunity and to waive it only as clearly expressed therein. *Holt v. Utah State Rd. Comm.*, 30 Utah 2d 4, 511 P.2d 1286 (1973).

63-30-7. Waiver of immunity for injury from negligent operation of motor vehicles — Exception.

Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment during the performance of his duties, within the scope of employment, or under color of authority; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of Section 41-6-14.

History: L. 1965, ch. 139, § 7; 1983, ch. 129, § 5.

COLLATERAL REFERENCES

A.L.R. — Admiralty jurisdiction: maritime nature of tort — modern cases, 80 A.L.R. Fed. 105.

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

History: L. 1965, ch. 139, § 8.

NOTES TO DECISIONS

ANALYSIS

Complaint, sufficiency of allegations.

Construction.

Contributory negligence.

Dangerous objects.

Discretionary function.

Ice and snow on sidewalk.

Manholes.

Negligent construction.

New duties not created.

Nondelegable duty.

Private developments.

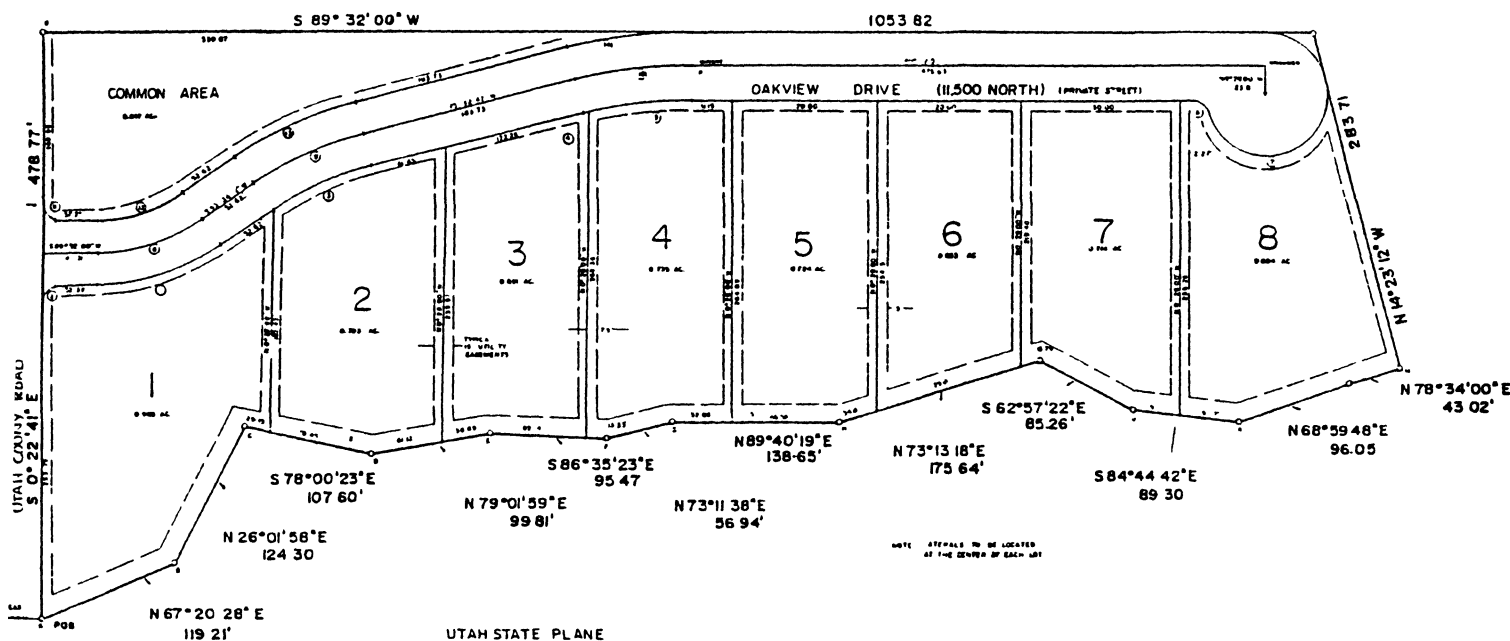
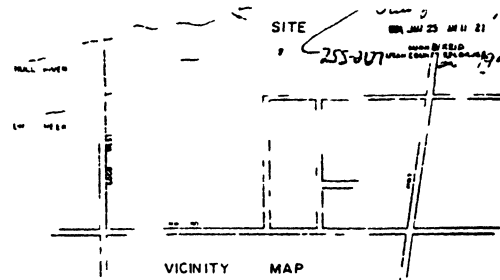
Traffic signs.

Complaint, sufficiency of allegations.

Claim for injuries "sustained on or about January 15, 1902, while walking on the sidewalk along First West street between Seventh and Eighth South, *** through the negligence of the city in suffering *** a fence *** to be on said sidewalk," not having misled the city, was sufficiently definite. *Connor v. Salt Lake City*, 28 Utah 248, 78 P. 479 (1904).

Where plaintiff sustained damages to his automobile on city streets, and presented a claim for "necessary repairs to automobile \$133," he cannot claim and recover additional damages for \$1,000 for its "depreciation in value and

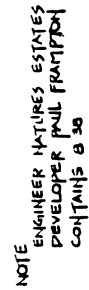
Tab 2

UTAH STATE PLANE
BOUNDARY COORDINATES[illegible]

CURVE DATA

	0	20	40	60	80	100
00 50.2	7.00	6.00	5.12	4.30	3.50	2.70
01 51.0	7.10	6.10	5.20	4.35	3.55	2.75
02 51.8	7.20	6.20	5.30	4.40	3.60	2.80
03 52.6	7.30	6.30	5.40	4.45	3.65	2.85
04 53.4	7.40	6.40	5.50	4.50	3.70	2.90
05 54.2	7.50	6.50	5.60	4.55	3.75	2.95
06 55.0	7.60	6.60	5.70	4.60	3.80	3.00
07 55.8	7.70	6.70	5.80	4.65	3.85	3.05
08 56.6	7.80	6.80	5.90	4.70	3.90	3.10
09 57.4	7.90	6.90	6.00	4.75	3.95	3.15
10 58.2	8.00	7.00	6.10	4.80	4.00	3.20
11 59.0	8.10	7.10	6.20	4.85	4.05	3.25
12 59.8	8.20	7.20	6.30	4.90	4.10	3.30
13 60.6	8.30	7.30	6.40	4.95	4.15	3.35
14 61.4	8.40	7.40	6.50	5.00	4.20	3.40
15 62.2	8.50	7.50	6.60	5.05	4.25	3.45
16 63.0	8.60	7.60	6.70	5.10	4.30	3.50
17 63.8	8.70	7.70	6.80	5.15	4.35	3.55
18 64.6	8.80	7.80	6.90	5.20	4.40	3.60
19 65.4	8.90	7.90	7.00	5.25	4.45	3.65
20 66.2	9.00	8.00	7.10	5.30	4.50	3.70
21 67.0	9.10	8.10	7.20	5.35	4.55	3.75
22 67.8	9.20	8.20	7.30	5.40	4.60	3.80
23 68.6	9.30	8.30	7.40	5.45	4.65	3.85
24 69.4	9.40	8.40	7.50	5.50	4.70	3.90
25 70.2	9.50	8.50	7.60	5.55	4.75	3.95
26 71.0	9.60	8.60	7.70	5.60	4.80	4.00
27 71.8	9.70	8.70	7.80	5.65	4.85	4.05
28 72.6	9.80	8.80	7.90	5.70	4.90	4.10
29 73.4	9.90	8.90	8.00	5.75	4.95	4.15
30 74.2	10.00	9.00	8.10	5.80	5.00	4.20
31 75.0	10.10	9.10	8.20	5.85	5.05	4.25
32 75.8	10.20	9.20	8.30	5.90	5.10	4.30
33 76.6	10.30	9.30	8.40	5.95	5.15	4.35
34 77.4	10.40	9.40	8.50	6.00	5.20	4.40
35 78.2	10.50	9.50	8.60	6.05	5.25	4.45
36 79.0	10.60	9.60	8.70	6.10	5.30	4.50
37 79.8	10.70	9.70	8.80	6.15	5.35	4.55
38 80.6	10.80	9.80	8.90	6.20	5.40	4.60
39 81.4	10.90	9.90	9.00	6.25	5.45	4.65
40 82.2	11.00	10.00	9.10	6.30	5.50	4.70
41 83.0	11.10	10.10	9.20	6.35	5.55	4.75
42 83.8	11.20	10.20	9.30	6.40	5.60	4.80
43 84.6	11.30	10.30	9.40	6.45	5.65	4.85
44 85.4	11.40	10.40	9.50	6.50	5.70	4.90
45 86.2	11.50	10.50	9.60	6.55	5.75	4.95
46 87.0	11.60	10.60	9.70	6.60	5.80	5.00
47 87.8	11.70	10.70	9.80	6.65	5.85	5.05
48 88.6	11.80	10.80	9.90	6.70	5.90	5.10
49 89.4	11.90	10.90	10.00	6.75	5.95	5.15
50 90.2	12.00	11.00	10.10	6.80	6.00	5.20
51 91.0	12.10	11.10	10.20	6.85	6.05	5.25
52 91.8	12.20	11.20	10.30	6.90	6.10	5.30
53 92.6	12.30	11.30	10.40	6.95	6.15	5.35
54 93.4	12.40	11.40	10.50	7.00	6.20	5.40
55 94.2	12.50					

[illegible]



Tab 4

It is beyond dispute that a person may maintain an action against a governmental entity for injuries which are proximately caused by the defective, unsafe, or dangerous condition of a public road. Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Andrus v. State, 541 P.2d 1117 (Utah 1975); Carroll v. State Road Commission, 496 P.2d 888 (Utah 1972). However, 11500 North is a private road which is in the public use. The issue is whether there is any distinction in Utah Code Ann. § 63-30-8 (1989) between governmental negligence in relation to a public road and negligence in relation to a private road.

Plaintiff respectfully asserts that the purpose of Utah Code Ann. § 63-30-8 (1989), as reflected in the statute's plain language, is to provide relief to all motorists for governmental negligence in relation to roads and streets, without respect to whether the road is publicly owned or privately owned but in the public use. Plaintiff asserts that no distinction between public and private roads should be made absent a showing by Highland City that such was the intent of the Legislature.

The definition of "highway" in the Motor Vehicle Act supports this conclusion. "Highway" is defined as any place which "is open to the use of the public, as a matter of right, for vehicular traffic." Utah Code Ann. § 41-2-102 (1988). The definition of "highway" does not focus on the ownership of the

Tab 5

**James B. LOVELAND and Lynette Loveland,
individually and as personal
representatives of the Estate of Michael
Loveland, Plaintiffs and Appellants,**

v.

**OREM CITY CORP.; North Union Irrigation
Co., a Utah corporation; and Brown
Brothers, a partnership, Defendants and
Respondents.**

No. 19942.

Supreme Court of Utah.
Nov. 23, 1987.

Purchasers brought action against land developer, canal operator, and city for wrongful death of child in canal bordering property. The Fourth District Court, Utah County, J. Robert Bullock, J., granted summary judgment in favor of defendants. Purchasers appealed. The Supreme Court, Hall, C.J., held that: (1) developer, that had subdivided land and sold it to house builder, owed no duty to disclose canal to builder or purchasers; (2) canal operator owed no duty to drowning child; and (3) city was immune from liability.

Affirmed.

Stewart, Associate C.J., concurred in part, dissented in part and filed opinion.

Durham, J., concurred in part, dissented in part and filed opinion.

[1] NEGLIGENCE ⇨ 54
272k54

Land developer owed no duty to intermediate owner to disclose canal bordering property and was not liable for drowning of purchasers' child, where intermediate owner knew of canal and its potential hazard and had taken possession of land.

[2] NEGLIGENCE ⇨ 54
272k54

Existence of express agreement was not exception to rule that vendor was not liable for physical harm caused by dangerous condition to vendee and others while upon land after vendee has taken possession, but was simply another relationship out of which duty of care could arise.

[3] APPEAL AND ERROR ⇨ 170(1)
30k170(1)

Purchasers failed to preserve for appeal claim that land developer had entered into express agreement with city to fence canal, where purchasers did not raise issue below.

[4] NEGLIGENCE ⇨ 39
272k39

Land developer, that had subdivided property and sold it to house builder, was not liable on nuisance theory for drowning of purchasers' son in canal bordering property.

[5] FRAUD ⇨ 17
184k17

Land developer owes no duty to purchaser to disclose deficiencies that are easily discernible during ordinary and reasonable investigation, but owes duty to disclose condition of which developer knows or should know and which makes subdivided lots unsuitable for residential building.

[6] FRAUD ⇨ 17
184k17

Land developer, that subdivided property and sold it to builder of house, did not breach duty to disclose existence of canal bordering property, even if canal made lot unsuitable for residential building purposes, where builder knew of canal and danger it posed. U.C.A.1953, 57-11-1 to 57-11-21, 57-11-5(1, 3, 4), 57-11-17, 57-11-17(1)(c).

[7] NEGLIGENCE ⇨ 54
272k54

Land developer, that had subdivided property and had sold it to builder of house, was not liable on strict liability theory for drowning of purchasers' child in canal bordering property. U.C.A.1953, 57-11-1 to 57-11-21, 57-11-5(1, 3, 4).

[8] WATERS AND WATER COURSES ⇨ 260
405k260

Operator of irrigation canal owed no duty to child, who drowned in canal, and was not liable for drowning under attractive nuisance doctrine.

[9] MUNICIPAL CORPORATIONS ⇨ 724
268k724

City planning commission's receipt and analysis of subdivision plat, commission's recommendation to approve plat, city council's review and approval of plat, and commission's recommendation for failure to recommend fencing of canal bordering

residential property were activities done in exercise of "governmental function," and, thus, city was immune from liability for drowning of child, unless immunity was waived. U.C.A.1953, 10-2-401, 10-9-1, 10-9-4, 63-30-1 to 60-30-38.

See publication Words and Phrases for other judicial constructions and definitions.

**[10] MUNICIPAL CORPORATIONS ⇨ 827(2)
268k827(2)**

Waiver of sovereign immunity for injury caused by defective, unsafe, or dangerous condition of any culvert and for injury caused from dangerous or defective condition of public structure or reservoir did not apply to defective, unsafe, or dangerous conditions on private property and did not apply to privately owned and operated canal bordering residential property. U.C.A.1953, 63-30-8, 63-30-9.

See publication Words and Phrases for other judicial constructions and definitions.

**[11] MUNICIPAL CORPORATIONS ⇨ 753(1)
268k753(1)**

City enjoyed sovereign immunity with respect to representations made by city employees that fence would be installed on canal bordering residential property and with respect to approval of subdivision plat, and, thus, city was not liable for drowning of child; injuries arising out of approval of subdivision plat and misrepresentation by employee were excluded from waiver of sovereign immunity for injury proximately caused by negligent act or omission of employee within scope of employment. U.C.A.1953, 63-30-8, 63-30-9, 63-30-10(1), (1)(c, f).

***764** Stephen L. Henriod, Richard K. Hincks, Douglas K. Pehrson, David L. Rasmussen, Salt Lake City, for plaintiffs and appellants.

Allan L. Larson, Salt Lake City, for Orem City Corp.

J. Anthony Eyre, Robert H. Rees, Salt Lake City, for North Union Irr. Co.

Roger H. Bullock, Salt Lake City, for Brown Bros.

HALL, Chief Justice:

Plaintiffs initiated this wrongful death action after

Michael Loveland, their three-year-old son, drowned in an irrigation canal. Plaintiffs seek reversal of three district court orders granting defendants' motions for summary judgment. We affirm.

I

We review the facts of this case in the light most favorable to plaintiffs. [FN1] Defendant North Union Irrigation Company (North Union) was incorporated in April 1883. At that time, it began operating the North Union Irrigation Ditch (canal) in Utah County, and it continues doing so today.

FN1. See Weber v. Springville City, 725 P.2d 1360, 1361 n. 1 (Utah 1986).

In July 1976, defendant Brown Brothers became involved in the development of the Executive Estates subdivision in Orem City, Utah. The subdivision is comprised of three plats: plat A, plat B, and plat C. The canal borders portions of all three plats.

The Orem City Planning Commission originally mandated that the Executive Estates plat A subdivision plan provide for the covering of the canal where it crossed that plat to provide the required setback. Brown Brothers subsequently appealed this decision to the Orem City Council, and eventually the Council changed the specification to require fencing of the canal in plat A. Neither the Planning Commission nor the City Council ever expressly required the covering or the fencing of the canal in plats B or C.

Following the development of lot sixteen in plat B of the subdivision, Brown Brothers sold the lot to John Atkinson, dba Jacor, Inc. Jacor in turn constructed a home on the lot and then put the property up for sale.

In October 1978, plaintiffs (Lovelands) were shopping for a house. At that time, they examined the house built by Jacor on lot sixteen. While at the site, the Lovelands noticed North Union's canal that ran through the lot and parallel to the rear lot line. The Lovelands observed that the concrete ***765** canal had sloping sides and a flat bottom and was about ten feet wide. At the time the Lovelands inspected the property, there was no

(Cite as: 746 P.2d 763, *765)

water flowing in the canal. When the Lovelands voiced their concern about the canal to Atkinson, he told them not to be concerned because a former real estate listing agent had a document showing that the developers were required by Orem City to fence the canal. Mr. Loveland, himself a building contractor, called the agent, and she confirmed that such a document existed. However, the Lovelands never saw the document, which in actuality only referred to plat A of the subdivision.

Thereafter, Mr. Loveland spoke with a neighboring property owner, Gary Starr, who told Mr. Loveland that fencing the canal was a subdivision plat requirement. Starr also informed Mr. Loveland that although he did not know when the fence would be erected, Orem City had said it would be installed before water was allowed in the canal. The Lovelands subsequently purchased the property from Jacor and moved into their new home in December 1978.

During the winter months, the Lovelands were told by Starr that Orem City was claiming it had no obligation to fence the canal, and an ad hoc neighborhood committee was subsequently formed to deal, in part, with concerns about getting the canal fenced. Starr became the committee's spokesman, and the Lovelands claim he had numerous contacts with North Union between January and May of 1979. The Lovelands also claim North Union indicated that the canal was going to be fenced. The committee prepared a petition for presentation to the Orem City Council. The petition sought improvement of the subdivision's roads and Council assistance to get the canal fenced. However, the City Council was never presented with the petition. The petition was subsequently presented to Orem City's mayor. Thereafter, the roads were improved, but nothing was done about the canal. The Lovelands had no direct contact or personal dealings with the City or any of its officers or representatives.

In April 1979, Mr. Loveland had a conversation with a North Union water master and was told that North Union was trying to work with Orem City to get the fence into place. On May 1, 1979, water began flowing in the canal. The Lovelands claim they were not given advance notice that the canal was to be filled. On May 11, 1979, Mr. Loveland again spoke to the same water master and this time

was told that the company was trying to pressure Orem City into installing a fence.

On May 18, 1979, almost three weeks after Mr. Loveland noticed water flowing in the canal, Michael Loveland, while unsupervised, walked out the back door of the Lovelands' home, across the back yard to the cement bank of the canal, and either climbed down or slipped into the water and was drowned. After the incident, the Lovelands requested \$200 that was escrowed when they purchased their home for fencing the canal on their lot and, together with their neighbors' financial help, fenced the canal in plats B and C.

Counts one and two of the Lovelands' amended complaint, directed at all three defendants, were grounded on strict liability and negligence theories, respectively. Count three of the complaint, directed only at Orem City and Brown Brothers, was based upon an implied warranty theory. On appeal, the Lovelands only advance the theories found in the first two counts.

II BROWN BROTHERS

The Lovelands' first point is that factual questions concerning Brown Brothers' obligation to fence the canal should have precluded entry of summary judgment in favor of that defendant. This position, however, presupposes the existence of a duty owed by Brown Brothers to Michael Loveland. It is axiomatic that one may not be liable to another in tort absent a duty. [FN2] *766 The question of whether a duty exists is a question of law. [FN3] As always, resolution of this issue begins with an examination of the legal relationships between the parties, followed by an analysis of the duties created by these relationships.

FN2. See *Moreno v. Marrs*, 102 N.M. 373, 376, 695 P.2d 1322, 1325, 1328 (N.M.Ct.App.1984), cert. quashed sub nom. *Corral, Inc. v. Marrs*, 102 N.M. 412, 696 P.2d 1005 (N.M.1985).

FN3. *Weber*, 725 P.2d at 1363.

In this case, three possible duty-creating relationships are at issue. The Lovelands principally depend on their status as foreseeable

purchasers from Brown Brothers, which, as a land developer, conducted activities to improve raw acreage into residential building lots. Alternatively, a relationship is said to have arisen out of an agreement between Brown Brothers and Orem City whereby the former was to fence the canal. Finally, the relationship between the Lovelands as subvendees and Brown Brothers as a vendor must be analyzed. It is with this latter relationship that we begin our analysis.

The "somewhat murky" development of the law surrounding predecessor landowners' liability has given rise to at least three schools of thought regarding recovery for postconveyance injuries occurring on private property due to natural or artificial conditions existing thereon when the present owner or possessor assumed control. [FN4] The California Supreme Court, although in a different context, recently discussed these three views: The older general rule has been that the seller of realty is not subject to liability for bodily injury suffered by third persons after the vendee has taken possession. This rule has held true even though the vendor may have been responsible for creating a dangerous condition on the land which caused the injury. An intermediate position is that espoused in the Restatement (Second) of Torts and in Professor Keaton and Prosser's text on tort law which provides that the predecessor in title may in certain situations be subject to liability for injuries to third persons that arise after he or she relinquishes title. The scope of this exposure will be examined more thoroughly below. Under the third view, the predecessor in title remains subject to liability until the dangerous condition created by him has been corrected. [FN5]

FN4. *Preston v. Goldman*, 42 Cal.3d 108, 114-15, 720 P.2d 476, 479, 227 Cal.Rptr. 817, 820 (1986) (en banc).

FN5. *Id.* at 115-16, 720 P.2d at 479-80, 227 Cal.Rptr. at 820-21.

[1] In its defense, Brown Brothers, both here and below, advances that portion of the Restatement (Second) of Torts s 352 (1965) which contains the older general rule. That provision provides, in pertinent part: "[A] vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has

taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession." This rule, primarily attributed to the ancient doctrine of caveat emptor, is said to have retained its force for a variety of reasons, including public policy concerns, [FN6] the importance attached to deeds, [FN7] the lack of standards of quality or use of land, and the fact that vendees generally make prepurchase investigations of real estate and therefore are assumed to accept it "as is." [FN8] With respect to this last noted rationale, it has been said:

FN6. *Smith v. Tucker*, 151 Tenn. 347, 362, 270 S.W. 66, 70 (1925).

FN7. *Id.*

FN8. W. Keaton & W. Prosser, *Prosser & Keaton on the Law of Torts* s 64, at 447 (5th ed. 1984).

[I]n the absence of express agreement or misrepresentation, the purchaser is expected to make his own examination and draw his own conclusions as to the condition of the land; and the vendor is, in general, not liable for any harm resulting to him or others from any defect existing at the time of transfer. [FN9]

FN9. *Id.* (footnotes omitted; emphasis added).

Comment a of the Reporter's notes to section 352 of the Restatement (Second) of Torts (1965) states: Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force.... This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer. (Emphasis added.)

(Cite as: 746 P.2d 763, *767)

***767** [2, 3] Despite the varying approaches discussed above and the exceptions discussed more thoroughly below, the Lovelands do not dispute the soundness of the above-quoted portion of the Restatement rule. Instead, they contend that an express agreement existed under which Brown Brothers was required by Orem City to fence the canal. The existence of an express agreement is not, as suggested by the Lovelands, an exception to the Restatement's rule, but simply another relationship out of which a duty of care may arise. In any event, the record does not reflect that the Lovelands raised this issue below. In fact, in their opposition to Brown Brothers' renewed motion for summary judgment, the Lovelands argued that fencing plat B was "implicitly required" by Orem City. The Lovelands may not raise the "express agreement" argument for the first time on appeal. [FN10]

FN10. See, e.g., *Insley Mfg. Corp. v. Draper Bank & Trust*, 717 P.2d 1341, 1347 (Utah 1986).

Nor is the Lovelands' related argument, which attempts to draw analogies to landlord-tenant cases, well taken. They claim that the basis of such cases is the landlord's control of the premises. The Lovelands conclude that since the principle limiting negligence in landlord-tenant and vendor-vendee cases is the same (that is, control), the issue of Brown Brothers' control over the subject property should have gone to the jury. [FN11]

FN11. The retaining of control as a basis for imposing a duty on landlords has been discussed in many cases. E.g., *Williams v. Melby*, 699 P.2d 723, 726 (Utah 1985); *Ayala v. B & B Realty Co.*, 32 Conn.Super. 58, 337 A.2d 330, 332 (Conn.Super.Ct.1974).

[4] Although attempts to establish vendor liability by analogy to landlord-tenant cases have been rejected in the past, [FN12] one of the more pragmatic rationales for the above-quoted portion of the Restatement's rule is that vendor liability should be coextensive with possession and/or control and the corresponding ability to prevent exposure to liability. [FN13] Thus, even where bare legal title has been divested, liability has been imposed where a vendor continued to exercise possession or control. [FN14] Here, however,

there is no reasonable dispute regarding the fact that Brown Brothers had no right to control, supervise, or otherwise enter upon the Lovelands' property. [FN15] ***768** Thus, the claim that a factual question exists is without merit.

FN12. E.g., *Combrow v. Kansas City Ground Inv. Co.*, 358 Mo. 934, 939, 218 S.W.2d 539, 541 (1949); *Sarnicandro v. Lake Dev., Inc.*, 55 N.J.Super. 475, 480, 151 A.2d 48, 51 (N.J.Super.Ct.App.Div.1959).

FN13. See *Brock v. Rogers & Babler, Inc.*, 536 P.2d 778, 782 (Alaska 1975) (Restatement (Second) of Torts s 352 (1965) grounded upon policy which seeks to limit liability to persons in possession and control of property); cf. *Preston*, 42 Cal.3d at 117-20, 125-26, 720 P.2d at 481- 83, 487, 227 Cal.Rptr. at 822-24, 828 (absence of possession and control justifies departure from Cal.Civ.Code s 1714).

FN14. *Marsden v. Eastern Gas & Fuel Assocs.*, 7 Mass.App. 27, 385 N.E.2d 528, 530 (1979); cf. *Ward v. Enevold*, 504 P.2d 1108, 1110 (Colo.Ct.App.1972) (not selected for official publication) (tenant liable for slip and fall on parking lot extending onto unleased property), cert. denied, Jan. 15, 1973.

FN15. The Lovelands' reliance upon *Corcoran v. Village of Libertyville*, 73 Ill.2d 316, 22 Ill.Dec. 701, 383 N.E.2d 177 (1978), is unpersuasive. Unlike this Court, the Illinois Supreme Court has abolished the attractive nuisance doctrine and has established a test of foreseeability in its place. *Corcoran's* extension of a duty to nonowners/nonpossessors was based on the court's new foreseeability test. Compare *Cope v. Doe*, 102 Ill.2d 278, 285-86, 80 Ill.Dec. 40, 43-44, 464 N.E.2d 1023, 1026-27 (1984), with *LaSalle Nat'l Bank v. City of Chicago*, 132 Ill.App.3d 607, 612-14, 88 Ill.Dec. 102, 105-06, 478 N.E.2d 417, 420-21 (1985). The Lovelands' suggestion that liability may be grounded upon nuisance theory is without merit for several reasons, including the fact that Brown Brothers relinquished possession and control long before the incident at hand. See *Ayala*, 337 A.2d at 332; *Sarnicandro*, 55

N.J.Super. at 480, 151 A.2d at 51;
Restatement (Second) of Torts s 373 (1965).

The Restatement (Second) of Torts has recognized two exceptions to the caveat emptor approach embodied in that portion of section 352 quoted above. The first exception involves a vendor's duty to disclose to the vendee any concealed conditions known to the vendor which involve an unreasonable danger. [FN16] The second exception is that a vendor owes a duty for a reasonable time to those outside the land who are injured after the sale by a dangerous condition on the land. [FN17] In this case, we are not dealing with a person who was outside the land at the time of the injury. Nor are we dealing with a concealed condition. Moreover, under both of the above exceptions, knowledge of the defect on the part of the vendee relieves the vendor of any duty or liability. [FN18]

FN16. Restatement (Second) of Torts s 353 (1965) provides: (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if (a) the vendee does not know or have reason to know of the condition or the risk involved, and (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to belief that the vendee will not discover the condition or realize the risk. (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

FN17. Restatement (Second) of Torts s 373 (1965).

FN18. See *Christy v. Prestige Builders, Inc.*, 415 Mich. 684, 694-96, 329 N.W.2d 748,

752 (1982); see also *Higgenbottom v. Noreen*, 586 F.2d 719, 720-21 (9th Cir.1978); *Lake v. United States*, 522 F.Supp. 166, 168 (N.D.Ill.1981); *Aitken v. Starr*, 99 N.M. 598, 601, 661 P.2d 498, 501 (N.M.Ct.App.), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983); Restatement (Second) of Torts ss 12(1), 353 comments b, d (1965). But see *Farragher v. City of New York*, 26 A.D.2d 494, 275 N.Y.S.2d 542 (1966), aff'd, 21 N.Y.2d 756, 288 N.Y.S.2d 232, 235 N.E.2d 218 (1968).

The record reflects that Brown Brothers' vendee, John Atkinson, knew of the canal and its dangerous characteristics. In his deposition, James Loveland testified that when he expressed to Atkinson his and his wife's concern over the exposed canal, Atkinson told him not to worry because the canal would be fenced. Additionally, \$200 was placed in escrow to provide for fencing the canal, and James Loveland testified that these funds may have been withheld from Atkinson's proceeds. This testimony, in conjunction with that concerning the physical dimensions of the canal and the nature of the development of the property, is sufficient to infer that Atkinson knew of the canal and the potential hazard it created. Therefore, Brown Brothers owed no duty pursuant to the exceptions to the general rule found in the Restatement (Second) of Torts. [FN19]

FN19. See *Christy*, 415 Mich. at 694-96, 329 N.W.2d at 753.

The Lovelands contend that they did not sue Brown Brothers in its capacity as a vendor of lot sixteen, but rather as the developer of the property. Brown Brothers, without authority, claims that this distinction is of no legal consequence. We disagree. Although there has been no wholesale importation of the principles underlying products liability into the real estate context, some exceptions have arisen where the prior landowner was a professional developer. [FN20]

FN20. *Preston*, 42 Cal.3d at 117 n. 3, 720 P.2d at 481 n. 3, 227 Cal.Rptr. at 822 n. 3. But see, e.g., *Chapman v. Lily Cache Builders, Inc.*, 48 Ill.App.3d 919, 922-23, 6 Ill.Dec. 176, 179, 362 N.E.2d 811, 814 (1977). That such exceptions might exist is

supported by our cases limiting application of the "accepted-work doctrine." Compare Williams, 699 P.2d at 729, with Leininger v. Stearns-Roger Manf. Co., 17 Utah 2d 37, 41, 404 P.2d 33, 36 (1965).

The Lovelands claim that a developer is subject to liability for physical harm or death resulting from its negligence in the development of real estate. In support of this claim, they cite several cases which *769 recognize that a duty of care arises out of a building contractor's and/or developer's contract upon which an action in tort may lie for negligence which causes personal injury and varying types of property damage. [FN21] These cases state the scope of this duty in many ways. Additionally, the Lovelands rely on Justice Cardozo's opinion in MacPherson v. Buick Motor Co., [FN22] which in essence held that a duty may exist irrespective of a contractual relationship. [FN23]

FN21. E.g., Wright v. Creative Corp., 30 Colo.App. 575, 498 P.2d 1179 (1972).

FN22. 217 N.Y. 382, 111 N.E. 1050 (1916).

FN23. Id. at 389, 111 N.E. at 1053.

[5] Although MacPherson involved the duty of a supplier of chattles, modern courts have held that purchasers of real estate may recover from a contractor for his or her negligence despite the lack of privity. [FN24] However, neither Brown Brothers nor the Lovelands have adequately briefed the Court concerning whether a nonbuilding subdivider owes a duty to subvendees and, if so, the scope of that duty. The Wyoming Supreme Court is one of the courts which have recently dealt with this issue. In Anderson v. Bauer, [FN25] a defendant developer purchased raw acreage and subdivided the same into residential building lots. These lots were in turn sold to defendant builders who constructed houses thereon that were later purchased by eight plaintiff owners. The plaintiffs sued after they experienced water seepage into their basements. [FN26] In reversing the judgment against the defendant developer, the court stated:

FN24. Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1044-45 (Colo.1983) (en banc) (and cases cited therein); Kristek v. Catron, 7 Kan.App.2d 495, 644 P.2d 480

(1982).

FN25. 681 P.2d 1316 (Wyo.1984).

FN26. Id. at 1319-20.

Development of new land into subdivided lots for building, with streets, sewer, water and utilities is a necessary and beneficial activity that ought to be encouraged. The developer ought to also have responsibility for his activities. Yet, he should not be subject to liability for all misfortune that might befall a purchaser. Thus, it is reasonable that, where land is subdivided and sold for the purpose of constructing residential dwelling houses, the developer has a duty to exercise reasonable care to insure that the subdivided lots are suitable for construction of some type of ordinary, average dwelling house and he must disclose to his purchaser any condition which he knows or reasonably ought to know makes the subdivided lots unsuitable for such residential building. He has a further duty to disclose, upon inquiry, information he has developed in the course of the subdivision process which is relevant to suitability of the land for its expected use. [FN27]

FN27. Id. at 1323 (emphasis added).

We do not interpret this duty to extend to deficiencies in residential building lots that are easily discernible during an ordinary and reasonable investigation by a purchaser and that are in fact known of by the purchaser. [FN28] The limitation seems necessary inasmuch as purchasers are often willing to accept known deficiencies in land in exchange for a lower purchase price. This, of course, does not follow with regard to latent defects, those which a buyer cannot reasonably be expected to discover. [FN29]

FN28. The result of applying this interpretation is not inconsistent with the results in cases similar to the one at bar. E.g., Green Springs, Inc. v. Calvera, 239 So.2d 264, 265 (Fla.1970); Village Dev. Co. v. Filice, 90 Nev. 305, 307-08, 526 P.2d 83, 84 (1974).

FN29. Cf. Cosmopolitan Homes, Inc., 663 P.2d at 1045-46 (allowing buyer of used home to recover against builder on negligence

theory only for latent defects).

The duty defined by the Wyoming court and our interpretation thereof is consistent with existing Utah law. Although not raised by the parties, perhaps due to its nonapplicability by reason of reliance on an exemption, Utah has enacted the "Utah Uniform Land Sales Practices Act." [FN30] Although not controlling in the instant case, *770 its provisions are persuasive in fashioning the duty of a subdivider to his vendees. Unless exempted by Utah Code Ann. s 57-11-4 (Supp.1987), Utah Code Ann. s 57-11-5(1), (4) (Supp.1987) requires that subdivided land be registered before it can be sold and that the purchaser receive a "public offering statement" before the disposition of the land. [FN31] Utah Code Ann. s 57-11-7 (1986) provides, in pertinent part: "(1) Every public offering statement shall disclose fully and accurately the physical characteristics of the subdivided lands offered and shall make known to prospective purchasers all unusual and material circumstances or features affecting the subdivided lands." (Emphasis added.) Utah Code Ann. s 57-11-17 (1986) provides in part:

FN30. Utah Code Ann. ss 57-11-1 to -21 (1986 & Supp.1987).

FN31. We are mindful that subsection (3) does not allow civil liability for failing to deliver such a statement.

(1) Any person who: ...; (c) in disposing of subdivided lands, omits a material fact required to be stated in a registration statement, public offering statement, statement of record or public report, necessary to make the statements made not misleading; is liable as provided in this section to the purchaser unless, in the case of an untruth or omission, it is proved that the purchaser knew of the untruth or omission or that the person offering or disposing of subdivided lands did not know and in the exercise of reasonable care could not have known of the untruth or omission. Clearly the imposition of liability pursuant to subsection 57-11-17(1)(c) is limited in part to negligent or intentional omissions made in the course of the disposition of real estate and requires that the vendee did not know or could not have known of the omission. The duty enunciated by the Wyoming court in Anderson is consistent with this scheme.

The above analysis was utilized in *Stepanov v. Gavrilovich*, [FN32] wherein the Alaska Supreme Court discussed the duties subdividers owe to their vendees. Stepanov was in turn relied upon by the court in *Anderson*. [FN33]

FN32. 594 P.2d 30 (Alaska 1979).

FN33. 681 P.2d at 1322.

[6] Assuming that the canal constituted a hazard which made lot sixteen unsuitable for residential building purposes, all the evidence supports the conclusion that Atkinson knew of the canal and the danger it imposed. Moreover, although not necessary to this analysis, the Lovelands were well aware of the problem. We hold that there was no evidence to establish that Brown Brothers breached the above-described duty of care. [FN34]

FN34. The Lovelands' reliance upon *Fisher v. Morrison Homes, Inc.*, 109 Cal.App.3d 131, 167 Cal.Rptr. 133 (1980), is misplaced. That case clearly turned upon the unclear distribution of liability between the public and private developers which arises as a consequence of dedicating land which is part of a subdivision. *Id.* at 136, 167 Cal.Rptr. at 135-36.

The Lovelands alternatively claim that Brown Brothers may be held liable upon a strict liability theory. Specifically, the Lovelands rely upon our adoption of the Restatement (Second) of Torts s 402A (1965) in *Ernest W. Hahn, Inc. v. Armco Steel Co.* [FN35] They claim that the doctrine of strict liability has been repeatedly applied to real estate transactions.

FN35. 601 P.2d 152, 158 (Utah 1979).

[7] The doctrine of strict liability has not been applied to residential subdividers in Utah. Although such a theory has some appeal from a risk-spreading standpoint and because of the obvious reliance house buyers place on developer expertise, we are not persuaded that the doctrine should be applied in this case. The Lovelands' briefing is simply inadequate. They have not provided any serious analysis of the issue, nor have they provided the Court with the necessary underpinnings for such a rule.

*771 All of the cases cited by the Lovelands, with the exception of one, deal only with the mass housing developer or the installation of faulty products into homes. Only in the California case of *Avner v. Longridge Estates* [FN36] did a court rule that a "manufacturer" of a residential lot may be held strictly liable in tort for damage suffered by the owner as a proximate result of defects in the manufacturing process. [FN37]

FN36. 272 Cal.App.2d 607, 77 Cal.Rptr. 633 (1969).

FN37. 77 Cal.Rptr. at 639.

Although the early progeny of *Greenman v. Yuba Power Products, Inc.*, [FN38] which established the doctrine of strict liability in the state of California, held the doctrine inapplicable to real property, more recent California cases have eroded this distinction. In *Kriegler v. Eichler Homes, Inc.*, [FN39] the court of appeals held that the doctrine of strict liability could be applied to a builder/developer of mass-produced homes for defectively installed radiant heating systems. [FN40] In *Avner*, the court relied upon *Kriegler* to extend the doctrine of strict liability in tort to building lot "manufacturers" for damages suffered by an owner as a proximate result of defects in the manufacturing process (cutting, filling, grading, compacting, etc.) causing subsidence. [FN41] Yet *Avner* and *Kriegler* involved injury suffered as the result of latent defects. [FN42] In none of the cases relied upon by the Lovelands has recovery been allowed for obvious deficiencies in the real estate itself. The Lovelands have not advanced a sound reason to make such an extension.

FN38. 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1962).

FN39. 269 Cal.App.2d 224, 74 Cal.Rptr. 749 (1969).

FN40. 74 Cal.Rptr. at 752.

FN41. 74 Cal.Rptr. at 751-53.

FN42. *Avner*, 77 Cal.Rptr. at 639; *Kriegler*, 74 Cal.Rptr. at 752.

We have a further reason for declining the

Lovelands' invitation to extend the doctrine of strict liability to *Brown Brothers* in this case. As noted above, the Utah legislature has adopted the Utah Uniform Land Sales Practices Act. The legislature has thus seen fit to impose controls on the activities of large-scale subdividers. One of these controls is civil liability when subdividers fail to disclose to a purchaser any unusual and material circumstance affecting subdivided lands. [FN43] It would be inappropriate for this Court to circumvent these limits thereon by adopting a new model for liability. [FN44] For the above reasons, the trial court did not err in granting *Brown Brothers'* motion for summary judgment.

FN43. Utah Code Ann. s 57-11-17(1)(c) (1986).

FN44. See *Stepanov*, 594 P.2d at 35.

III NORTH UNION

[8] The Lovelands' second point is that the district court erred by granting summary judgment in favor of North Union. Specifically, the Lovelands contend that a question of fact existed as to whether North Union exercised reasonable care in maintaining its canal. Since we hold that North Union owed no duty to Michael Loveland, we need not reach this issue.

On appeal, the Lovelands claim that North Union may be held liable for negligence. They rely on the attractive nuisance doctrine to provide the required duty of care. In *Weber v. Springville City*, [FN45] we noted that except for the duty to refrain from willful and wanton conduct, generally no duty arises out of the relationship between an owner/possessor and a trespasser. [FN46] The attractive nuisance doctrine evolved as an exception to this rule when a trespassing child is involved. [FN47] Although the parties argue over whether North Union was an owner/possessor and whether Michael Loveland was therefore a trespasser, because of our resolution of this point, *772 we need not decide these issues in this case. [FN48]

FN45. 725 P.2d 1360.

FN46. *Id.* at 1365.

FN47. Id.

FN48. For an example of a case discussing these issues and applying the Restatement of Torts s 339 (1934) to an easement holder, see *Cooper v. City of Reading*, 392 Pa. 452, 140 A.2d 792 (1958).

The Lovelands additionally urge that proof of allurement is no longer a prerequisite to imposition of liability under the attractive nuisance doctrine and invite us to adopt Restatement (Second) of Torts s 339 (1965). However, as in the Weber case, whether this case is analyzed under the attractive nuisance doctrine as enunciated in *Brown v. Salt Lake City* [FN49] or under the Restatement's rule is not outcome determinative. [FN50]

FN49. 33 Utah 222, 93 P. 570 (1908). In *Brown*, the Court stated: [T]he doctrine of the turntable cases should be applied to all things that [1] are uncommon and [2] are artificially produced, and [3] which are attractive and alluring to children of immature judgment and discretion, and [4] are inherently dangerous, and [5] where it is practical to guard them without serious inconvenience and without great expense to the owner. Id. at 240, 93 P.2d at 576. If a trespassing child's injuries are caused by a property owner/possessor's failure to exercise reasonable care to safeguard children from a condition subject to the doctrine, then the child may recover. *Weber*, 725 P.2d at 1365.

FN50. See 725 P.2d at 1365.

We have reviewed all of our cases which discuss the attractive nuisance doctrine. In the main, it is evident from these cases that the rule is to be applied contextually. [FN51] However, we acknowledge that some of our cases have held that certain conditions will not be treated as attractive nuisances. In Utah, these fixed rules have in general been limited to water hazard and construction cases. [FN52] There appears to be a trend to reject all fixed and arbitrary categories and to require each case to be considered in light of its own peculiar facts. [FN53] And as just stated, most of our cases are in accord with this view. Nevertheless, after carefully reviewing our cases and all those cited by the parties, we follow those of

our cases which hold that owners/possessors of canals are not subject to liability under the attractive nuisance doctrine. [FN54] The Court recognizes that those cases did not deal with canals similar in character to North Union's canal. Yet the reasoning underlying those decisions justifies an extension of their precedent in this case.

FN51. E.g., *Peterson v. Farmers' Grain & Milling Co.*, 69 Utah 395, 400- 01, 255 P. 436, 438 (1927); *Payne v. Utah-Idaho Sugar Co.*, 62 Utah 598, 607-09, 221 P. 568, 571-72 (1923); *Bogdon v. Los Angeles & Salt Lake Ry. Co.*, 59 Utah 505, 514-16, 205 P. 571, 575-78 (1922).

FN52. *Featherstone v. Berg*, 28 Utah 2d 94, 95, 498 P.2d 660, 661 (1972); *Taylor v. United Homes, Inc.*, 21 Utah 2d 304, 305, 445 P.2d 140, 141 (1968); *Brinkerhoff v. Salt Lake City*, 13 Utah 2d 214, 215, 371 P.2d 211, 212 (1962); *Charvoz v. Salt Lake City*, 42 Utah 455, 468- 69, 131 P. 901, 906-07 (1913).

FN53. *W. Keaton & W. Prosser, Prosser & Keaton on the Law of Torts* s 59, at 405-08, 408 n. 92 (5th ed. 1984) (and cases cited therein).

FN54. *Brinkerhoff*, 13 Utah 2d at 215, 371 P.2d at 212; *Charvoz*, 42 Utah at 468-69, 131 P. at 906-07.

Our decision to disallow recovery based upon the attractive nuisance doctrine in this case by focusing upon the nature of the physical hazard as opposed to the unreasonableness of the specific risk created is predicated in part upon the fact that the doctrine in Utah is a creature of this Court. We therefore have the responsibility of carefully tailoring the rule's applicability in a manner consistent with the policies of this state.

This Court has previously recognized that agriculture in this state has from the beginning depended to a great extent upon irrigation. [FN55] This is true because Utah is located in a high and arid region of the United States. [FN56] Thus the utility of irrigation canals, not only to the owner/possessor of such canals, but to the public as a *773 whole, is of great significance. In many

areas of this state, the economic livelihood and well-being of its people depend upon the existence of imported waters.

FN55. Erickson v. Bennion, 28 Utah 2d 371, 373, 503 P.2d 139, 140 (1972). The Lovelands' reliance on cases such as Erickson for a duty is misplaced inasmuch as these cases speak to the statutory duty not to cause injury to neighboring property. See Utah Code Ann. s 73-1-8 (1980).

FN56. 28 Utah 2d at 373, 503 P.2d at 140.

The Lovelands do not dispute the importance of irrigation water to this state. Instead, they claim that whether liability should be imposed in this case should be decided by a jury and turn upon the special facts of this case. They further claim that to allow the case to go to the jury based upon the attractive nuisance doctrine given the unique facts at hand would not impede delivery of irrigation waters. We disagree.

It seems inescapable that in certain areas, safety measures to prevent accidents such as the one in this case are necessary. Yet it is equally obvious that it would be inappropriate for this Court to establish some blanket protective measure for all inhabited areas. Because of variations in population density and composition, different areas require that different safety measures be taken. As population centers shift and evolve, the type of measures needed necessarily changes. Given the importance of water to the state, the fact that the burden of providing blanket safeguards for children would unduly hinder, if not prevent, the economical conduct of such a necessary and highly beneficial enterprise (importing water), and the fact that ditches and canals might be rendered sufficiently safe by varying safety measures, it would appear that local governments are best suited to impose fencing or other protective requirements. Local governments have the necessary framework in place for making carefully reasoned and tailored decisions concerning such safety measures. They are best suited to balance all of the interests in their respective communities in a way this Court cannot. Many local governments have already assumed this duty and have imposed fencing requirements on subdividers through the passage of local ordinances. [FN57]

FN57. E.g., Salt Lake County, Utah, Rev. Ord. s 18.24.140 (1986); Salt Lake City, Utah, Rev. Ord. s 42-5-2 (1986).

The potential economic exposure which would be engendered by allowing a cause of action to be brought against irrigation companies in cases such as this could unnecessarily impede the importation of waters since alternative solutions to the problem before us, with substantially less devastating economic and social consequences, exist. If we were to adopt the Lovelands' position, North Union and other irrigation companies would be required to fence or cover, as a practical precautionary measure, or procure liability insurance for all similar canals in proximity to inhabited areas. This burden would necessarily be extremely costly. The Court's concern about the cost of imposing liability was implicit in Charvoz v. Salt Lake City, [FN58] where the Court made the following observations:

FN58. 42 Utah at 468, 131 P. at 906.

It appears from the record in the case at bar, as coming from a witness who was well qualified to testify upon the subject, that in Salt Lake City there were 500 miles of open ditches carrying water along the sides of the streets in a similar manner to that carried by the stream in question at the time of the accident.... If it were held to be negligence, therefore, for the city to maintain the stream in question uncovered, how could it be held that it was not equally negligent in permitting any other streams, whether larger or smaller, to remain uncovered? [FN59]

FN59. Id. at 468-69, 131 P. at 907.

We conclude that, as a matter of law, recovery against North Union cannot be had in this case by resort to the attractive nuisance doctrine. Whether the attractive nuisance doctrine may afford relief in a case not involving the use of canals or canal banks is left to be decided another day. [FN60]

FN60. The Charvoz case relied in part on Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P. 441 (1909). In Harris v. Buckeye Irrigation Co., 118 Ariz. 498, 578 P.2d 177 (1978) (en banc), on remand, 131 Ariz. 540, 642 P.2d 885

(Cite as: 746 P.2d 763, *773)

(Ariz.Ct.App.1982), review denied, Mar. 23, 1982, the Arizona Supreme Court said: We believe that the facts of the instant case can be distinguished from previous cases of this court and the Court of Appeals. In the instant case, the defendant placed a bridge at a point where it could be anticipated that the public would use it to cross the canal. Because of the location of the high school, the baseball field, and the swimming pool, it could reasonably be expected that children as well as adults would use this bridge. The defendant also had ample notice of the fact that the bridge was potentially dangerous. The bridge was, in fact, open to the public generally and the defendants did nothing either to restrict the use of the bridge by the public or to make it safe for the persons they knew were using the bridge. The immunity given to irrigation districts in Salladay, supra, was based in sound public policy at the time. It is sound public policy today as far as the use of canals and canal banks are concerned. Unfortunately, this immunity sometimes leads to the callous "public be damned" policy exemplified by the testimony of the manager of the defendant irrigation company in the instant case. The statement of the manager that it was "not my responsibility to see that everything on our canal system is safe for anybody's use" and that he is only concerned with the safety of his employees and not anyone else's, is the direct result of the belief by the irrigation company that because of Salladay, supra, it had absolute immunity from suit. As this matter was decided on motion for summary judgment, all the facts were not developed. Assuming, however, that the judge or jury finds, after hearing all of the evidence at trial, that Marlon Harris fell from the bridge in question as the result of negligence on the part of the defendants or their employees in the building or maintenance of the bridge, we feel that under the peculiar facts of this case public policy does not require the application of the Salladay immunity doctrine. This, it seems, is the only way that the defendants and others in like situations can be prevented from using a grant of immunity as an excuse not to exercise reasonable care to protect the members of the public from a negligently constructed and maintained bridge they knew was being

used by the public. Id. at 501-02, 578 P.2d at 180-81 (emphasis added).

***774 IV
OREM CITY**

The Lovelands' final point is that Orem City is not immune from suit under the provisions of the Utah Governmental Immunity Act. [FN61] Orem City moved for summary judgment in the district court on the ground that it was immune under the Act. The district court granted that motion and dismissed the complaint as against Orem City with prejudice.

FN61. Utah Code Ann. ss 63-30-1 to -38 (1986 & Supp.1987).

In cases where a governmental entity's right to assert immunity is being challenged, the threshold question generally is whether the claimant's injuries resulted from the exercise of a governmental function. This is so because the right to maintain an action against the state or its political subdivisions may result (1) from a finding that the injury did not result from the exercise of a governmental function, or (2) from a finding that even though the injury resulted from the exercise of a governmental function, the government's immunity has been expressly waived in one of the sections of the Act. [FN62] The Lovelands first contend that their injuries resulted from Orem City activities of a nongovernmental nature

FN62. Cox v. Utah Mortgage & Loan Corp., 716 P.2d 783, 785 (Utah 1986); Madsen v. Borthick, 658 P.2d 627, 630 (Utah 1983).

Section 63-30-3 of the Act provides, in pertinent part: "Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function...." [FN63] In Standiford v. Salt Lake City Corp., [FN64] the Court adopted the following approach for determining whether the activities of a governmental entity were within the exercise of a governmental function: "[T]he test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." [FN65]

FN63. Utah Code Ann. s 63-30-3 (1986). Although the provisions of this section have been amended three times since this incident arose, none of the amendments affect our analysis in this case. See Act of Feb. 25, 1985, ch. 93, s 1, 1985 Utah Laws 170; Act of Jan. 28, 1984, ch. 33, s 1, 1984 Utah Laws 148, 148; Act of March 5, 1981, ch. 116, s 2, 1981 Utah Laws 566, 567.

FN64. 605 P.2d 1230 (Utah 1980).

FN65. Id. at 1236-37.

*775 In *Johnson v. Salt Lake City Corp.*, [FN66] Justice Oaks, writing for a majority of the Court, reaffirmed and clarified the test laid down in *Standiford*:

FN66. 629 P.2d 432 (Utah 1981).

The first part of the *Standiford* test--activity of such a unique nature that it can only be performed by a governmental agency--does not refer to what government may do, but to what government alone must do.... [T]he second part of the *Standiford* test--"essential to the core of governmental activity"--... refers to those activities not unique in themselves (and thus not qualifying under the first part) but [to those activities] essential to the performance of those activities that are uniquely governmental. [FN67]

FN67. Id. at 434 (emphasis in original).

In their brief, the Lovelands rely on several Orem City activities they claim were of a nongovernmental nature, namely, (1) the City Planning Commission's receipt and analysis of the subdivision plat; (2) the Commission's recommendation to approve the plat, subject to the installation of various improvements; (3) the review and approval of the plat by the Orem City Council; (4) the monitoring by Orem City employees of the construction and development of Executive Estates; (5) the Orem City Planning Commission's recommendation (or lack thereof) to the Orem City Council that the canal be fenced in plat B of Executive Estates; and (6) assuming such a recommendation was made, the failure of the city engineer or other city employees charged with supervising and monitoring construction of the

subdivision to insure that the fence was in fact constructed as was required.

Orem City responds that these activities are simply an exercise of its inherent police powers which have been codified by the legislature. [FN68] It claims that since these powers may not be surrendered, their exercise by Orem City can only be performed by a governmental agency and thus are also "essential to the core of governmental activity." However, as was suggested in *Thomas v. Clearfield City*, [FN69] while legislative delegation of certain powers and duties surely establishes that the exercise and performance thereof is a governmental function for purposes of a political subdivision's authority to operate, it does not automatically follow that the function qualifies as a "governmental function" for purposes of governmental immunity analysis under *Standiford*. [FN70]

FN68. Specifically, Orem City relies upon Utah Code Ann. ss 10-2-401, 10- 9-1, -4 (1986); see also *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980).

FN69. 642 P.2d 737 (Utah 1982).

FN70. See id. at 739.

[9] The activities numbered four and six above and relied upon by the Lovelands need not be reviewed. As indicated, there is no evidence in this case that Orem City required plat B to be fenced. The activities numbered one, two, three, and five above all relate to review and approval of plat B of Executive Estates. We therefore direct our attention to these latter activities.

The Lovelands contend that Orem City engaged in the activities to further the health and safety of future Executive Estates residents. The Lovelands claim that the forces of private enterprise demand that certain health and safety considerations be taken into account when developing property. They therefore conclude that such activities are not of a type government alone must do. In *Madsen v. Borthick*, the Court made the following observations: *Standiford*'s reference to activities that "can only be performed by a governmental agency" does not preclude governmental immunity for supervisory functions in some respects similar

(Cite as: 746 P.2d 763, *775)

to those that could be performed by a private association authorized by agreement, such as self-regulation by an industry. *Thomas v. Clearfield City*, Utah, 642 P.2d 737 (1982), is not to the contrary. In that case, we held that sovereign immunity did not protect a municipality from liability for negligent maintenance *776 of its sewer system, noting that the municipality's power to provide sewer service was insufficient to establish sewer service as a "governmental function" where the function could also be performed privately. The difference between *Thomas* and this case is a difference in the nature of the services performed by the governmental unit. Publicly provided sewer services and privately provided sewer services can be essentially the same. But governmental supervision of financial institutions in the public interest, which includes the exercise of discretionary powers delegated by law, and private oversight by voluntary association of businesses are qualitatively different. The former can be performed only by a government agency. Thus, unlike the provision of sewer services, the governmental activity in this case qualifies as a "governmental function." [FN71]

FN71. 658 P.2d at 631.

The difference in the nature of the planning and supervisory services provided by city planners and those provided by private sector developers is qualitatively different. Only governmental agencies such as the Orem City Planning Commission and the Orem City Council can realistically balance all of the competing interests when land is developed. Only they, through their supervisory roles, can impose restrictions which best achieve necessary levels of safety for future residents. [FN72]

FN72. At the time of oral argument, the Lovelands relied upon *Cox*, 716 P.2d 783, in support of their contention that the activity of Orem City was nongovernmental. However, that case is readily distinguishable on its facts because the activity there was an escrow function with no aspects of uniqueness, but was capable of being performed by anyone.

We hold that the activities relied upon by the Lovelands were in the exercise of a governmental function. Since we hold that the activities of Orem City were within the exercise of a governmental

function, the City is immune from suit unless such immunity has been waived.

The Lovelands alternatively contend immunity was waived in this case. Specifically, the Lovelands rely upon the waivers found in Utah Code Ann. ss 63-30-8, -9, -10(1) (1986). Section 63-30-8 provides: "Immunity from suit of all governmental entities is waived for any injury caused by the defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon." Section 63-30-9 provides: "Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions."

The Lovelands urge that this case comes within these waivers of immunity for several reasons. They claim that North Union's canal comes within the definition of a culvert and argue that the minutes of the City Council meetings indicate the City was aware of the canal that ran through the Executive Estates subdivision and the potential danger it presented to that subdivision's residents. Additionally, they claim the Executive Estates subdivision is a "public improvement" which, without adequate implementation of a directive to fence the canal, created a dangerous condition which resulted in their son's death.

[10] The fallacy in the Lovelands' reasoning is their assumption that sections 63-30-8 and 63-30-9 apply to defective, unsafe, or dangerous conditions on property which is not in the "public use." [FN73] This assumption is unsound. Although none of our cases have directly dealt with this issue, common sense dictates that adoption of the Lovelands' construction would go far beyond the intended scope of the waivers. And all of our case law is consistent with this decision. For example, in *Stevens v. Salt Lake County*, [FN74] the plaintiff was injured when he drove his motorbike from a pathway crossing a vacant lot onto an unimproved county road, where he was struck *777 by a passing motorist. The plaintiff claimed that the weeds and brush growing alongside the county road on the vacant lot obscured his vision and caused the accident, thus constituting a "defective, unsafe, or

(Cite as: 746 P.2d 763, *777)

dangerous condition" for which immunity was waived pursuant to section 63-30-8. [FN75] In affirming the summary judgment in favor of Salt Lake County, the Court noted:

FN73. See *Ingram v. Salt Lake City*, 733 P.2d 126, 127 (Utah 1987) (per curiam).

FN74. 25 Utah 2d 168, 478 P.2d 496 (1970).

FN75. Id. at 169, 172, 478 P.2d at 497, 499.

Our concern is with the particular facts shown in this case: Where the pathway upon which plaintiff traveled and entered into Spring Lane was upon private property, and upon which were growing whatever weeds and brush obstructed his view. It would place a wholly impractical burden upon counties if they had to assume the duty of correcting such conditions with respect to every private way that enters upon a public road. [FN76]

FN76. Id. at 173, 478 P.2d at 499 (footnote omitted); see also *Ingram*, 733 P.2d at 127 (section 63-30-6 does not provide immunity to city from suit by plaintiff who fell into water vault located on parking strip); *Richards v. Leavitt*, 716 P.2d 276, 278 (Utah 1985) (per curiam) (section 63-30-8 supported conclusion that city was engaged in governmental function where it maintained trees, bushes, and a sign on a parking strip); *Bigelow v. Ingersoll*, 618 P.2d 50, 53 (Utah 1980) (trial court erred in granting summary judgment in favor of state where trial court failed to rule on whether traffic control system was defective or unreasonably dangerous under 63-30-8); *Gorgoza v. Utah State Road Comm'n*, 553 P.2d 413, 417-18 (Utah 1976) (Ellett, J., dissenting) ("This is not the kind of defect in the highway wherein the State waives immunity from suit in case damages are occasioned. The defect, if any, was on the private land of Gorgoza." (Footnote omitted.)); *Murray v. Ogden City*, 548 P.2d 896, 897, 898 (Utah 1976) (trial court erred in granting city summary judgment since immunity is waived for dangerous conditions on sidewalks; summary judgment in favor of private defendant was proper since it did not own or have duty to maintain sidewalk); *McKay v. Salt Lake City*, 547 P.2d 210, 211

(Utah 1976) (immunity was waived in suit to recover for injury to private property since injury was caused by defective condition of street).

Additionally, none of our cases have suggested that a "public improvement" as is specified in section 63-30-9 refers to private developments. [FN77]

FN77. See *Thomas*, 642 P.2d at 739-40 (Hall, C.J., concurring in the result); see also 13 McQuillan, *The Law of Municipal Corporations* s 37.01, at 8 (1987).

The Lovelands finally rely upon the waiver of immunity found in section 63-30- 10. That provision provides, in pertinent part: (1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury: ...; (c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization; or ...; (f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional.... The briefs of the parties address at length whether Orem City owed the Lovelands a duty in this case. However, we need not reach the issue. Assuming *arguendo* that the waiver of subsection 63-30-10(1) applies and that such a duty exists, it is obvious that one or more exceptions to this waiver are controlling.

[11] The Lovelands claim that they relied upon representations made by Orem City that a fence would be in place before water came into the ditch. Assuming that this representation was made to the Lovelands and that they did in fact rely upon such a representation to their detriment, subsection (f), quoted above, provides an exclusion for such misrepresentations. Moreover, subsection (c), quoted above clearly excludes injuries which arise out of the approval of subdivision plats. As previously indicated in this opinion, the activities of Orem City that most immediately led to the injury sustained by the Lovelands were those surrounding approval of the Executive Estates subdivision plat B without requiring the canal be fenced or covered. Because the Utah Governmental Immunity Act excepts such activities

from *778 the waiver found in subsection 63-30-10(1) and because sections 63-30-8 and -9 are not applicable for the reason discussed above, the trial court did not err in granting summary judgment in favor of Orem City.

V

For the reasons above stated, the trial court did not err in granting defendants' motions for summary judgment. Therefore, the judgments are affirmed. Costs to defendants.

HOWE and ZIMMERMAN, JJ., concur.

STEWART, Associate Chief Justice (concurring and dissenting):

I concur in the majority opinion except for sustaining the summary judgment against Brown Brothers, the developer of the subdivision in question. The issue of liability was decided by the trial court on summary judgment, and, therefore, a record has not been developed which could elucidate such critical issues as the cost of providing protection from the risks presented by the location of the canal, the peculiar risks associated with a canal of this type, the location of the subdivision or development in this case in relationship to surrounding properties and the nature of those properties, and other factors which ought to bear upon the determination of whether Brown Brothers should be held to have a duty running to purchasers of homes and whether they in fact breached such a duty. In my view, it is not appropriate for this Court to decide simply as a matter of law that under no circumstances does a developer of a subdivision have a duty to protect purchasers of a residence from injury or death caused by an artificial waterway or canal located on the premises of a subdivision. Of course, if the case were to go to trial, the parents' negligence, if any, could be at issue. See generally Annot., 62 A.L.R.3d 541 (1975).

I concur with the majority opinion in other respects.

DURHAM, Justice (concurring and dissenting):

I concur in the result as to the liability of Brown Brothers, but write separately in part I of this

opinion about the analysis. I dissent as to the liability of North Union Irrigation Co. in part II.

I.

Although I concur in the result as to the liability of Brown Brothers, I write separately to identify a concern about the legal relationship between an original subdivider and a subvendee. Generally speaking, the doctrine of caveat emptor still applies to sales of land with the result that, in the absence of an express agreement, the vendee and all subvendees cannot hold the vendor liable for injuries that arise out of a dangerous condition on the land. Restatement (Second) of Torts s 352 (1965). Two exceptions to this rule have developed: (1) liability extends to the vendor when he conceals a dangerous condition; and (2) a vendee may hold a builder-developer strictly liable for defects in the construction of a home. Restatement (Second) of Torts s 353 (1965); W. Prosser & W. Keaton, The Law of Torts 721 (5th ed. 1984).

The majority correctly states that treatment of the issue of duty requires an analysis of the legal relations between the parties. W. Prosser & W. Keaton, The Law of Torts 356-57 (5th ed. 1984). Under general negligence analysis, the court would resolve this issue by determining if, as a matter of law, the tort-feasor could have anticipated the harm to the plaintiff. Restatement (Second) of Torts s 281 comment c (1965). Despite this general rule, a vendor of real estate remains totally immune from liability for any injury his conduct in maintaining the land may cause to a subsequent purchaser. It would be preferable, in my view, to apply the foreseeability rule to determine duty in negligence actions by vendees against vendors. In this case, Brown Brothers could have foreseen the harm to plaintiffs; therefore, they would owe a duty to plaintiffs to act with reasonable care under a general duty analysis.

*779 One of the reasons for retaining the doctrine of caveat emptor in the area of real estate transactions is the assumption that the vendee has a reasonable opportunity to inspect the premises; therefore, the vendor has no liability for any injury arising out of dangerous conditions on the land at the time of sale. The purpose of the doctrine apparently is to protect vendors from suits where

the plaintiff presumably knew of the condition. The vendor, however, would receive the same protection under an analysis of the negligence of the parties involved. In this case, for example, a jury could easily decide that plaintiffs' negligence outweighed Brown Brothers' and thereby relieve Brown Brothers of liability. Although this would require Brown Brothers to litigate the suit, it seems a better solution to meeting the competing interests of the vendor and vendee than does permitting the vendor blanket immunity on the theory that he has no duty to the vendee.

II.

With respect to the liability of North Union Irrigation Co., I write to clarify the condition of the canal in question here and to discuss what I perceive as an unjustifiable paradox in Utah law.

The majority opinion does not adequately describe the condition of the canal in which Michael Loveland drowned. North Union Irrigation Co. owns a canal easement running through the Lovelands' back yard about ten feet from their property line and parallel to it. The canal is made of cement and is approximately ten feet wide. The edges of the canal are overgrown with morning glory, which obscures the edges of the canal. The cement sides of the canal are covered in slippery moss.

The majority opinion discusses the attractive nuisance doctrine, under which it declares that North Union has no duty to protect children from its canals. I do not think this doctrine should be applied to a child who has drowned in his own back yard and was not therefore a trespasser, as is ordinarily the case under an attractive nuisance analysis. I think a more apt analysis is found in the duty of care owed by the owners of ditches. We have consistently held that those in control of ditches and similar waterways are bound by a standard of reasonable care and are liable for damages when their conduct falls below that standard. In *Jensen v. Davis and Weber Counties Canals Co.*, 44 Utah 10, 137 P. 635 (1913), we stated: [The] owners of irrigating canals or ditches are liable for injuries or damages which are directly caused by their acts of omission or commission, if such acts constitute negligence and damage follows. In other words, if by the exercise

of ordinary care and prudence, as those terms are ordinarily defined in negligence cases, the damages could have been avoided, a failure to exercise such care and prudence may constitute actionable negligence. 44 Utah at 14, 137 P. at 636. See also *Jenkins v. Hooper Irrigation Co.*, 13 Utah 100, 44 P. 829 (1896) (holding defendant liable for damage to plaintiff's trees and crops which were destroyed when defendant's canal overflowed on plaintiff's land; we stated, "The true standard by which to test the charge of negligence was one of prudence and care"); *Mackay v. Breeze*, 72 Utah 305, 269 P. 1026 (1928) (applying traditional negligence concepts in a case involving liability for harm to property from escaping water); *Lisonbee v. Monroe Irrigation Co.*, 18 Utah 343, 54 P. 1009 (1898) (holding that irrigation companies have a duty to construct and maintain their canals in such a way that they do not harm the property of others). The legislature has also imposed upon the owners of ditches a duty of reasonable care. Utah Code Ann. s 73-1-8 (1980): "The owner of any ditch, canal, flume or other watercourse shall maintain the same in repair so as to prevent waste of water or damage to the property of others...."

I find it deeply ironic that our case law and statutes impose on ditch owners a duty of care which protects the property of others, while we remain unwilling to create a parallel duty to protect human life. The majority opinion justifies its conclusion with policy-based arguments tied to cost analysis. For empirical evidence, the majority *780 relies on *Charvos v. Salt Lake City*, 42 Utah 455, 131 P. 901 (1913), a 1913 case containing a summary of evidence taken as to the condition of Salt Lake's ditches in that year. I am unpersuaded by that evidence. I think the duty of reasonable care found in our previous case law and statutes should be read to require reasonable care in protecting lives as well as property. At least, North Union Irrigation Co. should be required to prove the validity of the cost assumption it has asked the courts to rely on.

Further, I note that whatever force of logic the majority opinion might have in a case in which a trespassing child was harmed by an exposed ditch does not seem to be present in this case. The defendants own an easement through the Lovelands' back yard. It was apparent to defendants when the subdivision containing the Loveland

(Cite as: 746 P.2d 763, *780)

home was constructed that children would have access to the canals. Ironically, the existence of the canal company's easement complicated the ability of the Lovelands to place a fence in their own back yard. In *North Union Canal Co. v. Newell*, 550 P.2d 178 (Utah 1976), North Union Canal Co. sued property owners who had installed a fence on their property (to protect it from North Union Canal's easement) to compel the removal of the fence, which North Union claimed interfered with its use and enjoyment of its easement by making it more difficult for it to use canal maintenance equipment. We held that considerations such as the safeguarding of children allowed the installation of the fence, but required litigation to settle the exact description and placement of gates in the fence. A legal doctrine which imposes no duty on North Union Irrigation Co. to fence or maintain its canal in a manner reasonably safe for children, while simultaneously exposing property owners who attempt to fence canals to potential litigation, is more than ironic; it is unjust.

END OF DOCUMENT

Tab 6

Must the municipality either rely on the developer's engineering plan or, if it chooses to alter these plans, use reasonable care to ensure that the access road from the subdivision to the county road is safe?

In order to appreciate the nature of this case, an analogy is in order using Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987). In Loveland, the developer failed to fence a canal. The City approved the plat without requiring the canal to be fenced. After the plaintiffs' son drowned in the canal, the plaintiffs sued Orem City for failure to require the canal to be fenced. The Utah Supreme Court correctly held that Orem City could not be sued because it simply approved the plat plan submitted and relied upon the engineering of the developer to ensure that the development covered by the plat was safe.

But assume a different set of facts. Assume that the developer, after extensive engineering, submitted a plat with the canal fenced. Assume further that the Orem City Council, without using due care to ensure that the canal would still be safe, would not approve the plat with the canal fenced because it wanted access to the canal. Orem City would then have replaced a safe improvement with an unsafe improvement. Orem City also would fail to apply the standard of reasonable care which would be required if the canal was publicly owned.

Tab 7

**Robert BENNETT, et al., Plaintiffs and
Appellants,**
v.
**BOW VALLEY DEVELOPMENT CORP., aka
Flying Diamond Development Corp., Utah
corporations; City of Provo, a political
subdivision of the State of Utah;
and Stephen G. Stewart, an individual,
Defendants and Appellees.**
No. 870118.
Supreme Court of Utah.
Aug. 16, 1990.

Landowners sued developer and city for damages arising from improper construction of subdivision and faulty city water storage tank. The Fourth District Court, Utah County, Ray M. Harding, J., dismissed city as party defendant, and landowners appealed. The Supreme Court, Howe, Associate C.J., held that: (1) landowners' equitable claim to have city cease leakage of storage tank and remove obstructions to property was not barred by governmental immunity; (2) maintenance of water storage tank system was not unique governmental function and so city could not invoke governmental immunity to bar claim for damages arising from negligent maintenance of tank; (3) material issue of fact as to whether defective public improvements caused landowners' injury and whether notice requirements were met on claim for damages precluded summary judgment; (4) inspection and acceptance of subdivision improvements under ordinance allowing release of performance bond upon inspection and acceptance of improvements was governmental function invoking immunity to bar claim for negligent release of subdivision improvement bonds; and (5) Governmental Immunity Act did not preclude suit against city alleging taking of property without just compensation.

Reversed and remanded.

[1] MUNICIPAL CORPORATIONS ⇌ 847
268k847

Immunity could not be used to defend against equitable action by landowners seeking to make city cease leakage from water storage tanks and remove obstructions to property caused by landslides resulting from leaks. U.C.A.1953, 63-30-1 to 63-30-38.

[2] MUNICIPAL CORPORATIONS ⇌ 857
268k857

Maintenance of water storage tank was not uniquely governmental function or essential to core of governmental activity so that landowners' claim for damages arising from negligent maintenance of water storage tank was not barred by timely filing requirements of Governmental Immunity Act. U.C.A.1953, 60-30-13.

[3] MUNICIPAL CORPORATIONS ⇌ 736
268k736

Immunity for damage arising from claim for private nuisance caused by defective public improvements including streets, curbs, gutters, sidewalks, and utilities, is waived under Governmental Immunity Act. U.C.A.1953, 60-30-9.

[3] MUNICIPAL CORPORATIONS ⇌ 755(1)
268k755(1)

Immunity for damage arising from claim for private nuisance caused by defective public improvements including streets, curbs, gutters, sidewalks, and utilities, is waived under Governmental Immunity Act. U.C.A.1953, 60-30-9.

[4] JUDGMENT ⇌ 181(15)
228k181(15)

Material issue of fact whether defective public improvements caused continuing harm precluded summary judgment for city in suit seeking damages for private nuisance caused by defective public improvements. U.C.A.1953, 60-30-1 to 60-30-38.

[5] MUNICIPAL CORPORATIONS ⇌ 724
268k724

Inspection and acceptance of subdivision improvements pursuant to municipal ordinance that allowed performance bond to be released to developer upon inspection and acceptance of improvements were governmental functions invoking the Governmental Immunity Act, and so barred a claim by landowners against city for negligent release of subdivision improvement bonds prior to compliance by developer with city requirements to complete and maintain serviceable roads, sidewalks, and curb and gutter and to revegetate cut slopes to prevent erosion. U.C.A.1953, 60-30-10(1)(c, d).

[6] ZONING AND PLANNING ⇌ 353

414k353

City planning commission's receipt and analysis of subdivision plat and approval were activities in exercise of governmental function and therefore were protected by Governmental Immunity Act barring claim by landowners that subdivision approval was representation that development was safe and suitable for residential use and that city knowingly withheld information of unstable conditions of development. U.C.A.1953, 63-30-1 to 63-30-38.

[7] MUNICIPAL CORPORATIONS ☞ 753(1)
268k753(1)

Immunity of governmental unit is not waived for acts or omissions of employees acting within scope of employment when injury arises out of deceit or misrepresentation by employee. U.C.A.1953, 63-30-10(1)(b, f).

[8] EMINENT DOMAIN ☞ 267
148k267

Action for taking of property without just compensation brought by landowners prior to amendment to Governmental Immunity Act adding provision covering such claims was not subject to notice requirements of Act. U.C.A.1953, 63-30-10.5, 63-30-13.

***421** Mark O. Van Wagoner, Craig W. Anderson, Salt Lake City, for plaintiffs and appellants.

Gary L. Gregerson, Vernon F. Romney, Robert D. West, David C. Dixon, Provo, and Carman E. Kipp, Robert H. Rees, Salt Lake City, for Provo City.

John P. Ashton, Thomas J. Erbin, Salt Lake City, for Bow Valley Corp. and Stephen G. Stewart.

HOWE, Associate Chief Justice:

Robert Bennett and the other plaintiffs/landowners appeal from the trial court's order dismissing Provo City as a party defendant. The order has been certified as a final order pursuant to rule 54(b) of the Utah Rules of Civil Procedure. The dismissal was based on governmental immunity or, in the alternative, failure by plaintiffs to provide proper notice to the City within one year pursuant to Utah Code Ann. s 63-30-13 (Supp.1985).

In 1974, Provo City sought a location for a water storage tank and found a site at the mouth of Little Rock Canyon, owned by Flying Diamond, which later changed its name to Bow Valley Development. Bow Valley also owned an adjacent tract of land which it planned to develop as a residential subdivision called Sherwood Hills. Plaintiffs allege that in exchange for the tank site and access to it, Provo City officials agreed that Bow Valley would be given permission to develop the subdivision.

Plaintiffs purchased homes in the Sherwood Hills subdivision between 1978 and 1983. They complain that three major landslides, numerous smaller slides, two road closures, property damage, and deterioration of roads, sidewalks, and utilities occurred in the subdivision. They allege that these occurrences were caused by Bow Valley's filling natural drainage channels, failing to comply with grading plans, failing to construct roads in a safe manner and with proper compaction, and failing to revegetate cut slopes. The dates of these events do not appear in the record.

Plaintiffs further assert that despite Bow Valley's alleged negligence, Provo City released improvement bonds furnished by Bow Valley without requiring it to make the necessary improvements in the subdivision and that this constituted negligent release of bonds. Finally, plaintiffs charge that the City failed to safely maintain the storage tank and their property has been damaged by leakage from and landslides created by the tank.

Plaintiff Bennett sent written "notice of claim" to Provo City on May 28, 1985. Approximately fifty other plaintiffs sent a similar notice on January 31, 1986. Plaintiffs filed this complaint on March 6, 1986.

The Utah Governmental Immunity Act, Utah Code Ann. ss 63-30-1 to -38 (Supp.1985), establishes governmental immunity "for any injury which results from the exercise of a governmental function," subject to various statutory waivers. Utah Code Ann. s 63-30-3. In 1987, the legislature enacted its own definition of "governmental function." See s 63-30-2(4)(a) (1989). However, since this case arose prior to that enactment, we

consider the definition of governmental function solely under case law applicable before the 1987 amendment: This Court has held that the test for determining a governmental function for governmental immunity purposes "is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230, 1236-37 (Utah 1980). We later elaborated that the Standiford test "does not refer to what government may do, but to what government alone must do" and includes "activities not unique in themselves ... but essential to the performance of those activities that are uniquely governmental." *Johnson v. Salt Lake City Corp.*, 629 P.2d 432, 434 (Utah 1981) (emphasis in original). *Rocky Mountain Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459, 462 (Utah 1989).

Plaintiffs' claims must be separately examined to determine whether each activity complained of was a governmental function *422 and, if it was, whether a statutory waiver applies. Where waiver applies, a timely notice of claim is required under sections 63-30-11 to -13.

[1] We deal first with plaintiffs' equity claim, which does not involve immunity analysis. See *El Rancho Enters. v. Murray City Corp.*, 565 P.2d 778 (Utah 1977). Plaintiffs contend that Provo City's water storage tanks leaked an undetermined amount of water into their subdivision, causing or adding to landslide problems which obstruct the free use of their property. Plaintiffs are entitled to maintain an action in equity for the cessation of the leakage and the removal of obstructions to their property caused thereby. Immunity is no defense to such an action.

[2] We next consider plaintiffs' claim for damages arising from the negligent maintenance of the water storage tank. Is the operation and maintenance of a water storage tank a governmental function? We held that under the Standiford and Johnson tests, the construction, operation, and maintenance of a city-wide storm drainage system is a governmental function. *Rocky Mountain Thrift Stores*, 784 P.2d at 462. But we held in *Thomas v. Clearfield City*, 642 P.2d 737 (Utah 1982), that the collection and disposal of

sewage is not a governmental function. We reasoned: [W]e do not agree that these functions are uniquely governmental or essential to the core of its activity. It is not even mandatory that a governmental entity perform these functions. In many rural and recreational areas of our state, individual homeowners or small clusters of homes legally provide their own sewer services with septic tanks. *Thomas*, 642 P.2d at 739. The same reasoning is clearly applicable to the operation of a municipal water system. Cities can and do operate water systems on a commercial basis. *Gordon v. Provo City*, 15 Utah 2d 287, 391 P.2d 430 (1964). In many areas of our state, residents maintain wells and provide their own water. Also, there are privately owned companies supplying water to residents. We conclude that the maintenance of a water storage tank is not uniquely governmental or essential to the core of governmental activity. That being so, section 63-30-13, requiring timely presentation of a claim, did not apply on March 6, 1986, when this action was filed. *Dalton v. Salt Lake Suburban Sanitary District*, 676 P.2d 399, 400-01 (Utah 1984).

[3, 4] We next address plaintiffs' claim for a private nuisance caused by defective public improvements, including streets, curbs, gutters, sidewalks, and utilities. Immunity for damage arising therefrom is waived under section 63-30-9, which provides: "Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions." See *Sanford v. University of Utah*, 26 Utah 2d 285, 292, 488 P.2d 741, 745 (1971). Provo City responds that the damages of which plaintiffs complain arose from floods in 1983 and asserts immunity for the management of a natural disaster under Utah Code Ann. s 63-30-3 or, alternatively, that notice of claim was sent to the City too late to satisfy the requirements of section 63-30-13. See *Rocky Mountain Thrift Stores*, 784 P.2d at 461-62, holding that the 1985 amendment to section 63-30-3 is not retroactive. Inasmuch as plaintiffs allege continuing harm that arose from defective public improvements within the year when notice was given, factual questions remain to be developed at a full and adequate evidentiary hearing. We therefore reverse the summary judgment and remand

for such a hearing. In addressing this issue, the parties and the trial court should be guided by our recent decision in *Hansen v. Salt Lake County*, 794 P.2d 838 (1990)

[5] Turning to plaintiffs' tenth claim for relief, they complain that Provo City negligently released the subdivision improvement bonds furnished by Bow Valley. They charge that Bow Valley failed to complete and maintain serviceable roads, sidewalks, and curb and gutter in a safe manner and with proper compaction and failed to revegetate cut slopes to prevent erosion, *423 which caused damage to their property. They argue that the bonds should not have been released until these conditions were remedied, and they seek to interpret *Cox v. Utah Mortgage and Loan Corp.*, 716 P.2d 783 (Utah 1986), as holding that a cause of action will lie for the negligent supervision of funds every time a factual dispute arises out of the making of improvements.

In *Cox*, the developer had placed money in escrow to guarantee construction of the off-site improvements. The funds allegedly were negligently released by the city before the completion of the improvements. Our decision rested on a narrow ground: Pleasant Grove admitted that it was unable to determine for what three releases of money totalling approximately \$61,000 were made in payment. That admission raises a significant factual dispute on the issue of failure to properly supervise disbursements of funds, precluding a judgment in favor of Pleasant Grove as a matter of law. *Cox*, 716 P.2d at 786.

The plaintiffs in *Cox* attacked the negligent supervision of the escrowed funds, which we held not to be a governmental function. The act of releasing funds and being accountable to know for what purpose they are being released is "an escrow function with no aspects of uniqueness, but [is] capable of being performed by anyone." *Loveland v. Orem City Corp.*, 746 P.2d 763, 776 n. 72 (Utah 1987). However, the release of a performance bond by a city pursuant to municipal ordinance that requires release of the bond upon inspection and acceptance of the improvements is qualitatively different. In the instant case, plaintiffs are not attacking the supervision of the disbursement of funds, but the inspection and acceptance of improvements which plaintiffs allege

were never completed. The inspection and acceptance of subdivision improvements are governmental functions for which immunity has not been waived. Utah Code Ann. s 63-30-10(1)(c) & (d); *Loveland*, 746 P.2d at 776.

Plaintiffs allege in their twelfth claim for relief that Provo City engaged in a conspiracy to defraud. This claim also attacks subdivision approval. Plaintiffs argue that subdivision approval was a representation that Sherwood Hills was safe and suitable for residential use and Provo City knowingly withheld information of the unstable conditions. In *Loveland*, this court concluded that the city planning commission's receipt and analysis of subdivision plat and approval were activities done in exercise of a governmental function. *Loveland*, 746 P.2d at 775-76. We stated, "Only governmental agencies such as the Orem City Planning Commission and the Orem City Council can realistically balance all of the competing interests when land is developed. Only they, through their supervisory roles, can impose restrictions which best achieve necessary levels of safety for future residents." *Id.* at 776; see also *Seal v. Mapleton City*, 598 P.2d 1346 (Utah 1979) (city had not abused its discretion in disapproving subdivision plan after balancing competing interests).

[6, 7] It follows that in the instant case only Provo City can balance all of the competing interests when development of land is sought. Therefore, the city planning commission's receipt and analysis of subdivision plat and approval were activities in the exercise of a governmental function and therefore were protected by governmental immunity. For the reasons we have heretofore enumerated, there is no waiver of immunity. In addition, section 63-30-10 provides that immunity is not waived for acts or omissions of employees acting within the scope of their employment when a plaintiff's injury arises out of deceit or misrepresentation by the employee. Utah Code Ann. s 63-30-10(1)(b) & (f) (Supp.1985).

[8] Plaintiffs' last claim is that their property has been damaged or taken for a public use without just compensation by Provo City, including Provo's failure to maintain roads and other public improvements, in violation of amendment V of the United States Constitution and article I, section 22

(Cite as: 797 P.2d 419, *423)

of the Utah Constitution. See our recent opinion in *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990). *Colman* held in effect that such an *424 action can be maintained under article I, section 22 in proper cases. Inasmuch as the instant case was decided in the trial court on a motion to dismiss, we have no factual basis which would enable us to determine whether harms complained of are compensable under the above constitutional provisions. Since we are remanding this case to the trial court for an evidentiary hearing on other claims, the court may need to take evidence and make a determination of plaintiffs' claim for the damaging or taking of their property for a public use if they are not compensated for the same damage on their other claims. We further hold that it was unnecessary for plaintiffs to give notice of this claim to Provo City under section 63-30-13 inasmuch as their claim arose before 1987, when the legislature amended the Governmental Immunity Act by enacting section 63-30-10.5 to provide for such claims and waive immunity from suit on them. We express no opinion on whether timely notice must be given of "taking and damaging property" claims arising after the 1987 enactment, since that issue is not before us.

In sum, we conclude that plaintiffs' equitable claim is not barred by governmental immunity and need not conform to statutory notice requirements. See *El Rancho Enters. v. Murray City Corp.*, 565 P.2d 778 (Utah 1977). Furthermore, the maintenance of a water storage tank system is not a unique governmental function which is essential to the core of government, and thus there is no governmental immunity on the water tank damage claims. See *Gordon v. Provo City*, 15 Utah 2d 287, 391 P.2d 430 (1964). Factual questions need to be resolved before it can be determined whether the defective public improvements of which plaintiffs complain caused their injury and whether notice requirements were met. We hold that immunity bars the claim for negligent release of bonds, as the "precise activity" in question was not the supervision of the disbursement of funds, but the adequacy of the inspection of the subdivision and the "premature" acceptance of the improvements thereon. See *Cox*, 716 P.2d 783. Finally, we conclude that governmental immunity does not preclude the bringing of a suit under amendment V of the United States Constitution and article I, section 22 of the Utah Constitution in a proper

case. See *Colman*, 795 P.2d at 625-627. Timely notice of claim under section 63-30-13 was unnecessary.

We reverse and remand to the district court for further proceedings consistent with this opinion.

HALL, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

END OF DOCUMENT

Tab 8

road, but instead focuses on whether the street is open to public use. The purpose of this broad definition of "highway" seems to be to protect all motorists, whether using a public or private roadway. 11500 North is open to public use. There is no reason to believe that the Legislature intended to expose those using private roads to governmental negligence while offering relief to those injured on negligently designed private roads.

II.B. If Highland City has waived immunity under the provisions of Utah Code Ann. § 63-30-8 (1989), then the city may not recover that immunity if an exception to Utah Code Ann. § 63-30-10(1) (1989) also applies. Instead, where both the exception and Utah Code Ann. § 63-30-8 (1989) apply, the governmental entity is deemed to have waived immunity. Sanford v. University of Utah, 488 P.2d 741, 745 (Utah 1971); Gleave v. Denver & Rio Grande Western R., 749 P.2d 660, 667 n.6 (Utah App. 1988); Provo City Corp. v. State of Utah, 795 P.2d 1120, 1125 (Utah 1990). The trial court erred by failing to consider whether Utah Code Ann. § 63-30-8 (1989) applied after it determined that an exception to Utah Code Ann. § 63-30-10(1) (1989) also applied.

III. Highland City has waived immunity under Utah Code Ann. § 63-30-10(1) (1989), which provides that governmental entities have waived immunity for all negligent acts committed by their employees within the scope of employment. Here, the Plaintiff has alleged

In sum, there is nothing in Utah Code Ann. § 63-30-8 (1989) which suggests that immunity is retained when the governmental entity acts negligently with respect to a privately owned road in the public use. The broad wording of the statute and the apparent purpose of the statute both suggest that the remedy should be the same regardless of whether the government negligently designs a public road or a private road in the public use. In both instances, the negligent act is the same, the injuries are the same, and the public sought to be protected is the same. Only the name on the title differs.

Thus, the Plaintiff respectfully submits that because the statute makes no distinction between public and private roads, this Court should not create one absent a showing by Highland City that the Legislature intended to shield governmental entities from their negligence simply because the title to the road was privately held.

2. UTAH CODE ANN. § 63-30-10(1)(c) (1989) IS SUBJECT TO UTAH CODE ANN. § 63-30-8 (1989).

The trial court ruled that Highland City had retained immunity under the provisions of Utah Code Ann. § 63-30-10(1)(c) (1989), and therefore refused to consider whether Highland City had waived immunity under the provisions of Utah Code Ann. § 63-30-8 (1989). This ruling proceeds from the assumption that Utah Code Ann. § 63-30-10(c)(1) (1989) is not subject to Utah Code Ann. § 63-30-8 (1989). But Utah law consistently holds that if both Utah Code

Ann. § 63-30-8 (1989) and an exception to Utah Code Ann. § 63-30-10(1) (1989) apply, the governmental entity is held to have waived immunity.

For example, in Sanford v. University of Utah, 488 P.2d 741 (Utah 1971), the Utah Supreme Court held that:

Since the waiver of immunity in Secs. 8 and 9 encompasses a much broader field of tort liability that merely negligent conduct of employees within the scope of their employment, the legislature could not have intended than Sec. 10, including its exceptions, should modify Secs. 8 and 9, even though it be conceded that the negligent conduct of an employee might be involved in an action for injuries caused by the creation or maintenance of a dangerous or defective condition.

Id. at 745 (emphasis added).

In Gleave v. Denver & Rio Grande Western R., 749 P.2d 660 (Utah App. 1988), this Court noted that:

In his cross-appeal, Gleave did not challenge the trial court's dismissal of UDOT. Rio Grande, in both its opposition to UDOT's pre-trial motion to dismiss and in its appeal to this court, has not contended that Gleave's injury was caused by UDOT's creation of a dangerous condition on a road, for which immunity is expressly waived in Utah Code Ann. § 63-30-8 (1986). This separate waiver provision is not subject to the "discretionary function" exception in Utah Code Ann. § 63-30-10(1). [citations omitted].

Id. at 667 n.6 (emphasis added). See also Provo City Corp. v. State of Utah, 795 P.2d 1120, 1125 (Utah 1990).

Thus, Utah law in this area is clear. If Utah Code Ann. § 63-30-8 (1989) applies to this matter, then Highland City has waived immunity, even if it is found that Utah Code Ann. § 63-30-10(1)(c) (1989) also applies.

C.

HIGHLAND CITY HAS WAIVED IMMUNITY FOR THE
NEGLIGENT DESIGN OF THE INTERSECTION UNDER
UTAH CODE ANN. § 63-30-10(1) (1989).

Even if Highland City did not waive immunity under Utah Code Ann. § 63-30-8 (1989), it has waived immunity against the allegations in the Second Amended Complaint under the provisions of Utah Code Ann. § 63-30-10(1) (1989), which provides:

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

* * *

Id.

Plaintiff has alleged that Highland City employees, acting within the scope of their employment, negligently designed the Intersection, thereby creating a defective, unsafe, and dangerous condition which was the proximate cause of the Plaintiff's injuries. As such, Highland City has waived immunity from suit.

The trial court did not consider this provision because it found that an exception to this provision, Utah Code Ann. § 63-

Tab 9

63-30-5. Waiver of immunity as to contractual obligations.

(1) Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.

(2) Notwithstanding Subsection (1), the Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

History: L. 1965, ch. 139, § 5; 1975, ch. 189, § 1; 1978, ch. 27, § 4; 1983, ch. 129, § 4; 1985, ch. 82, § 1; 1991, ch. 251, § 1.

Amendment Notes. — The 1991 amend-

ment, effective April 29, 1991, designated the existing provisions as Subsection (1) and added Subsection (2).

NOTES TO DECISIONS

Cited in *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P 2d 141 (Utah 1990).

63-30-6. Waiver of immunity as to actions involving property.

NOTES TO DECISIONS

Scope of section.

This section waives immunity only for actions to recover property, quiet title, clear title, or resolve disputes over mortgages or liens held by a governmental entity; a claim alleg-

ing damage or destruction of private property by a governmental entity does not fall within the grant of immunity in this section. *Hansen v Salt Lake County*, 794 P 2d 838 (Utah 1990).

63-30-7. Repealed.

Repeals. — Laws 1991, ch. 76, § 10 repeals § 63-30-7, as last amended by Laws 1990, ch. 204, § 1, waiving immunity for injury from

negligent operation of motor vehicles, with exceptions, effective April 29, 1991

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them.