

1992

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gary B. Ferguson; Williams & Hunt; attorney for appellee.

Stephen G. Morgan, Randall D. Lund, Joseph E. Minnock; Morgan & Hansen; attorneys for appellant.

Recommended Citation

Brief of Appellant, *Villiers v. Utah County*, No. 920765 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/4762

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH

E. HUNT

K.F.U.

50

.A10

DOCKET NO. 920765

IN THE UTAH COURT OF APPEALS

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

BRIEF OF THE APPELLANT

APPEAL

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

GARY B. FERGUSON
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678

Attorney for Appellee

STEPHEN G. MORGAN
RANDALL D. LUND
JOSEPH E. MINNOCK
MORGAN & HANSEN
Kearns Building, 8th Floor
136 South Main Street
Salt Lake City, UT 84101

Attorneys for Appellant

FILED
Utah Court of Appeals

JAN 28 1993


Mary T. Noonan
Clark of the Court

IN THE UTAH COURT OF APPEALS

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

BRIEF OF THE APPELLANT

APPEAL

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

GARY B. FERGUSON
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678

Attorney for Appellee

STEPHEN G. MORGAN
RANDALL D. LUND
JOSEPH E. MINNOCK
MORGAN & HANSEN
Kearns Building, 8th Floor
136 South Main Street
Salt Lake City, UT 84101

Attorneys for Appellant

II

TABLE OF CONTENTS

II	TABLE OF CONTENTS	i
III	TABLE OF AUTHORITIES	iii
IV	STATEMENT OF JURISDICTION	1
V	STATEMENT OF THE ISSUES	1
VI	DETERMINATIVE STATUTES	2
VII	STATEMENT OF THE CASE	3
	A. Nature of the Case.	3
	B. Course of Proceedings.	5
	C. Disposition in the Trial Court.	6
VIII	STATEMENT OF RELEVANT FACTS	7
IX	SUMMARY OF THE ARGUMENT	12
X	DETAIL OF THE ARGUMENT OVERVIEW	17
A.	STANDARD OF REVIEW FOR STATUTORY INTERPRETATION	20
B.	HIGHLAND CITY HAS WAIVED IMMUNITY FOR DEFECTIVE, UNSAFE, AND DANGEROUS CONDITIONS IN ROADS AND STREETS UNDER UTAH CODE ANN. § 63-30-8 (1989).	21
	1. UTAH CODE ANN. § 63-30-8 (1989) APPLIES WHERE THE GOVERNMENTAL ENTITY NEGLIGENTLY DESIGNS A PRIVATELY OWNED ROAD WITHIN THE PUBLIC USE.	21
	2. UTAH CODE ANN. § 63-30-10(1)(c) (1989) IS SUBJECT TO UTAH CODE ANN. § 63-30-8 (1989).	29
C.	HIGHLAND CITY HAS WAIVED IMMUNITY FOR THE NEGLIGENT DESIGN OF THE INTERSECTION UNDER UTAH CODE ANN. § 63-30-10(1) (1989)	31

D. UTAH CODE ANN. § 63-30-10(1)(c) (1989) DOES NOT APPLY TO
SHIELD HIGHLAND CITY FROM LIABILITY BECAUSE THE INJURY DID NOT
ARISE OUT OF THE APPROVAL OF THE SUBDIVISION PLAT 32

E. HIGHLAND CITY SHOULD NOT BE ALLOWED TO ACT NEGLIGENTLY
WITH RESPECT TO SUBDIVISION DEVELOPMENT WITHOUT WAIVER OF
IMMUNITY 39

XI. CONCLUSION 41

III

TABLE OF AUTHORITIES

Cases

<u>American Coal Co. v. Sandstrom</u> , 689 P.2d 1, 3 (Utah 1984) . . .	20
<u>Andrus v. State</u> , 541 P.2d 1117 (Utah 1975)	13, 22, 23
<u>Bennett v. Bow Valley Development Corp.</u> , 797 P.2d 419 (Utah 1990)	38
<u>Bigelow v. Ingersoll</u> , 618 P.2d 50 (Utah 1980)	13, 22
<u>Board of Educ. of Granite School Dist. v. Salt Lake County</u> , 659 P.2d 1030, 1033 (Utah 1983)	12, 20, 22, 25
<u>Carroll v. State Road Commission</u> , 496 P.2d 888 (Utah 1972) . . .	13, 22, 23
<u>Gleave v. Denver & Rio Grande Western R.</u> , 749 P.2d 660, 667 n.6 (Utah App. 1988)	14, 30
<u>Grant v. Utah State Land Board</u> , 485 P.2d 1035, 1036 (Utah 1971)	25
<u>Ingram v. Salt Lake City</u> , 733 P.2d 126 (Utah 1987) . . .	16, 35
<u>Jones v. Bountiful City</u> , 834 P.2d 556, 560 (Utah App. 1992) . . .	19, 37, 41
<u>Loveland v. Orem City Corp.</u> , 746 P.2d 763 (Utah 1987) . . .	18, 37, 38
<u>Mountain Fuel Supply Co. v. Salt Lake City Corp.</u> , 752 P.2d 884 (Utah 1988)	2
<u>Mountain States Tel. & Tel. Co. v. Garfield County</u> , 811 P.2d 184 (Utah 1991)	2
<u>Olwell v. Clark</u> , 658 P.2d 585 (Utah 1982)	2
<u>Provo City Corp. v. State of Utah</u> , 795 P.2d 1120, 1125 (Utah 1990)	14, 30
<u>Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist</u> , 773 P.2d 1382 (Utah 1989)	2

<u>Sanford v. University of Utah</u> , 488 P.2d 741, 745 (Utah 1971)	14, 30
<u>West Jordan v. Morrison</u> , 656 P.2d 445, 446 (Utah 1982)	. . . 20
<u>Winegar v. Froerer Corp.</u> , 813 P.2d 184 (Utah 1991) 2

Statute and Rules

Utah Code Ann. § 78-2a-3(j) (1992) 1
Utah Code Ann. § 41-6-1(14) (1988) 27
Utah Code Ann. § 41-2-102 (1988) 13, 27
Utah Code Ann. § 63-30-8 (1989) 1, 2, 5, 6, 12-14, 21-25, 28-31, 41
Utah Code Ann. § 63-30-9 (1989) 23
Utah Code Ann. § 63-30-10(1) (1989)	. . 1, 2, 14, 29, 31, 32, 35, 39, 42
Utah Code Ann. § 63-30-10(1)(c) (1989) 5, 6, 15, 21, 29, 31, 32, 42
Utah Code Ann. § 63-30-10(1)(d) (1989) 36

IV.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this case pursuant to Utah Code Ann. § 78-2a-3(j) (1992).

V.

STATEMENT OF THE ISSUES

1. Has Highland City waived immunity under Utah Code Ann. § 63-30-8 (1989), waiving governmental immunity for any injury caused by the defective, unsafe, or dangerous condition of any highway, road, or street, when the injury occurs on a privately owned road in the public use containing a defective intersection which the municipality negligently designed?

2. If Highland City has not waived immunity under Utah Code Ann. § 63-30-8 (1989), has Highland City waived immunity under Utah Code Ann. § 63-30-10(1) (1989) because Highland City employees negligently designed the intersection in the scope of their employment?

3. Did the Plaintiff's injuries arise out of the negligent design of the intersection or did the Plaintiff's injuries arise out of the approval of the plat containing the negligently designed intersection?

Standard of Review: The standard of review is identical for all issues. In deciding whether judgment as a matter of law was proper, the Supreme Court gives no deference to the trial court's view of

the law. Rather, the appellate court reviews it for correctness. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988); Olwell v. Clark, 658 P.2d 585 (Utah 1982). In reviewing a summary judgment, the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to it. Winegar v. Froerer Corp., 813 P.2d 184 (Utah 1991); Mountain States Tel. & Tel. Co. v. Garfield County, 811 P.2d 184 (Utah 1991).

VI.

DETERMINATIVE STATUTES

Utah Code Ann. § 63-30-8 (1989) provides:

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.

Utah Code Ann. § 63-30-10(1) (1989)¹ 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:

¹ A revision of Utah Code Ann. § 63-30-10 (1989) was enacted in 1989 with an effective date of July 1, 1990. This accident occurred on January 18, 1990. Thus, the statute in effect on the date of the accident is provided.

* * *

(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;

* * *

VII.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff brought this action to recover for injuries she suffered in an automobile collision at the intersection of 6000 West and 11500 North (the "Intersection") in Highland City on January 18, 1990. The Intersection was constructed in the early 1980's in connection with the development of the Oakview PUD subdivision in Highland City, Utah County. The Plaintiff lived in the Oakview PUD at the time of the accident.

Originally, the developer of the Oakview PUD designed 11500 North, the PUD access road, to run straight along the northern boundary of the Oakview PUD property line, where it would eventually intersect with 6000 West, the county road. However, the Highland City Planning Commission refused to approve the Oakview PUD until the developer agreed to move a portion of 11500 North to the south such that the PUD's common area would be separated from the residential lots. However, under this arrangement, 11500 North intersected with 6000 West approximately 141 feet closer to the

crest of a hill on 6000 West. (See plat submitted by developer, attached as Exhibit "A", and plat as approved by Highland City, attached as Exhibit "B"). As a result, the ability of motorists entering the Intersection from either 6000 West or 11500 North to see other motorists was, and is, perilously limited. In fact, the Intersection was so close to the crest of the hill on 6000 West that it violated the safety standards for the construction of intersections which are set forth by the American Association of State Highway and Transportation Officials in their publication "A Policy on Geometric Design of Highways and Streets." The publication is uniformly accepted by all traffic engineers in the State of Utah, including Defendant's experts, as the authoritative treatise on road construction safety standards.

On January 18, 1990, the Plaintiff approached the Intersection in her vehicle. The Plaintiff looked both ways before entering the Intersection. However, due to the limited sight distance, Plaintiff was unable to see a vehicle being driven by Ryan Boley because the vehicle was still climbing the hill on 6000 West. Believing it safe to enter the Intersection, the Plaintiff attempted to enter the Intersection. Upon entering the Intersection, Plaintiff's vehicle was struck and she was rendered a paraplegic.

B. Course of Proceedings.

On March 12, 1992, Highland City filed a Motion for Summary Judgment, arguing that it was immune from suit under Utah Code Ann. § 63-30-10(1)(c) (1989) because it merely approved the plat submitted by the developer. R.347. Highland City also contended that it owed Plaintiff no duty because 11500 North was a private road. R.347.

In her memorandum in opposition, the Plaintiff contended that Highland City could be held liable for her injuries because the city waived immunity for injuries caused by the defective, unsafe, and dangerous condition of a road, street or highway. Utah Code Ann. § 63-30-8 (1989). R. 597. Accordingly, Plaintiff contended that Utah Code Ann. § 63-30-8 (1989) controlled this litigation and that this waiver was not modified by the provisions of Utah Code Ann. § 63-30-10(1)(c) (1989), which Highland City relied on in its Motion for Summary Judgment. R. 597.

The Plaintiff also argued that Utah Code Ann. § 63-30-10(1)(c) (1989), reserving governmental immunity for the negligent approval or denial of any permit, did not apply because Highland City rejected the plat as originally submitted and directed or ordered the developer to move the road to the dangerous location before his plat would be approved. R. 597. Highland City did more than merely approve the location of the road. Rather, Highland

City directed and designed the location of the road. Thus, Plaintiff argued Highland City was liable not for approving the plat containing the dangerous and unsafe Intersection, but for negligently designing the Intersection in the first instance. R. 597.

C. Disposition in the Trial Court.

The trial court, by a Ruling dated June 3, 1992, granted Highland City's Motion for Summary Judgment, holding that Utah Code Ann. § 63-30-10(1)(c) (1989) effectively shielded Highland City from liability. R. 382. The Court thus held that Utah Code Ann. § 63-30-8 (1989), relating to the defective, unsafe, or dangerous condition of highways and roads, would not apply. R. 382. The Court also ruled that Highland City had no duty to place signs at the Intersection or otherwise maintain the Intersection because it did not own either road. (6000 West was a Utah County road and 11500 North, which provided access to the county road for the residents of the Oakview PUD, was a private road).

By an Order dated August 26, 1992, the trial court certified the summary judgment in favor of Highland City as a final order pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. R. 687. A Notice of Appeal was filed on September 8, 1992. R. 693.

VIII.

STATEMENT OF RELEVANT FACTS

1. The Plaintiff was involved in an automobile accident on January 18, 1990, at the intersection of 6000 West and 11500 North (the "Intersection"), in Highland City, Utah County, State of Utah. R. 165.

2. As a result of the accident, Plaintiff is a paraplegic. R. 347.

3. 11500 North provides access to the Oakview Planned Unit Development ("PUD"). R. 486 (Deposition of Paul Frampton, Ex. 1). The Oakview PUD was developed in the early 1980's and contains eight lots. R. 347.

4. Plaintiff's family moved to the Oakview PUD in 1986. The family lived in the Oakview PUD continuously until sometime after the accident on January 18, 1990. R. 347.

5. Paul Frampton was the developer of the Oakview PUD. R. 486 (Deposition of Paul Frampton, pp. 5-6).

6. In developing the Oakview PUD, Mr. Frampton hired Richard Clayton to assist him in obtaining approval for the subdivision from the Highland City Planning Commission. Mr. Clayton had previously developed and obtained approval for another Planned Unit Development located immediately to the west of the Oakview PUD

in Highland City. R. 486 (Deposition of Paul Frampton, pp. 6-7) R. 353 (Deposition of Richard Clayton, pp. 6-7).

7. Before a developer can commence construction of a Planned Unit Development in Highland City, the developer must submit a proposed plat of the development to the Highland City Planning Commission for consideration and approval. R. 353 (Deposition of Richard Clayton, p. 10).

8. Mr. Clayton hired Nature's Estates Engineering to prepare a plat for the Oakview PUD and to submit that plat to the Highland City Planning Commission for consideration. R.353 (Deposition of Richard Clayton, p. 11).

9. After the proposed plat for the Oakview PUD had been completed by Nature's Estates Engineering, it was submitted to, but rejected by, the Highland City Planning Commission. R. 353 (Deposition of Richard Clayton, p. 12); R. 486 (Deposition of Paul Frampton, pp. 11-13).

10. In the original plat of the Oakview PUD prepared by Nature's Estates Engineering, 11500 North was designed as a straight road which ran east along the northern boundary of the Oakview PUD property line until it intersected with 6000 West. R. 597 (Exhibit "A" to Plaintiff's Memorandum in Opposition of Highland City's Motion for Summary Judgment, attached as Exhibit

"A" of this Brief); R. 486 (Deposition of Paul Frampton, pp. 11-12); R. 353 (Deposition of Richard Clayton, pp. 12-13).

11. Mr. Clayton and Mr. Frampton were notified by the Highland City Planning Commission that before the City would approve the Oakview PUD plat, Mr. Frampton would have to move part of 11500 North to the south so that the common area in the PUD would be separated from the lots by 11500 North. R. 486 (Deposition of Paul Frampton, pp. 12-13); R. 353 (Deposition of Richard Clayton, pp. 14-15).

12. In accordance with the conditions set forth by the Highland City Planning Commission, the Oakview PUD plat finally accepted by Highland City shows that 11500 North curves to the south and cuts through the property such that the common area is separated from the home lots. 11500 North intersects with 6000 West approximately 141 feet south of where it was originally planned to intersect. R. 597 (Exhibit "B" of Plaintiff's Memorandum in Opposition to Highland City's Motion for Summary Judgment, attached as Exhibit "B" to this Brief); R. 486 (Deposition of Paul Frampton, pp. 11-12); R. 353 (Deposition of Richard Clayton, pp. 12-13).

13. The Intersection designed by Highland City is defective, unsafe, and dangerous because the gradient on 6000 West as it approaches the Intersection is excessive. The Intersection is

also dangerous because southbound vehicles on 6000 West and motorists entering the Intersection from 11500 North do not have adequate sight distance to perceive and react to each other. Motorists entering the Intersection from 11500 North cannot see vehicles approaching the Intersection on 6000 West until the vehicle is only 285 feet away. C. Arthur Geurts, a licensed traffic engineer in the State of Utah, testified by affidavit as follows:

7. Specifically, when Highland City required the developer (Paul Frampton) to move the Intersection from where it was proposed on the original plat approximately 141 feet to the south as a condition precedent to approval of the Oakview plat, the following AASHTO design standards were violated:

a. Approach Gradient: For intersections like the one positioned at 6000 West and 11500 North, AASHTO specifies that the maximum approach gradient is 6 percent. Therefore, because Oakview Drive has an approach gradient of at least 7 1/2 percent, the Intersection violates AASHTO approach gradient standards;² and

² "When the approach gradient of an intersection is greater than that specified by AASHTO, the required sight distance for the intersection must be increased because the excessive gradient negatively effects the acceleration capabilities of vehicles entering the Intersection and such vehicles require more time to enter the intersection and cross the through lanes of traffic. Based on my observations of the land 141 feet to the north of the Intersection (where the original Oakview PUD plat proposed the Intersection be located), if Highland City had approved the original Oakview PUD plat as submitted by the developer (Paul Frampton) and his engineers (Nature's Estates), there would have, in all probability, been no violation of the AASHTO approach gradient standards."

b. Sight Distance: Based on the 85th percentile speed of vehicles traveling on 6000 West and the excessive approach gradients at the Intersection, AASHTO specifies that the Intersection in question should have a sight distance in excess of 500 feet. Therefore, because the sight distance at the Intersection is only 265 feet, the Intersection violates AASHTO sight standards.

8. Based on the results of my traffic study and the specific violations of the AASHTO standards enumerated above, it is my opinion that the Intersection is defective, unsafe and dangerous and that the specified deficiencies were a real and proximate cause of the subject accident.

R. 597 (Exhibit "C" to Plaintiff's Memorandum in Opposition to Highland City's Motion for Summary Judgment).

14. Officer Kerry Evans, the officer from the Utah County Sheriff's office who investigated the accident, stated in his Accident Report that:

The intersection at 6000 West 11500 North is a poorly designed one in my opinion. The north bo[und] traffic and the west bound traffic cannot see each other until the No[orth] Bo[und] vehicle crests the hill. The absence of skid marks of both vehicles in this accident shows this.

R. 597 (Exhibit "D" of Plaintiff's Memorandum in Opposition to Highland City's Motion for Summary Judgment).

15. On January 18, 1990, the Plaintiff approached the Intersection and stopped. R. 347. The Plaintiff looked both ways. She then entered the Intersection. The Plaintiff was hit by a north bound vehicle approaching the Intersection on 6000 West

immediately after she entered the Intersection from 11500 North in an attempt to turn south onto 6000 West. R. 597 (Exhibit "E" of Plaintiff's Memorandum in Opposition to Highland City's Motion for Summary Judgment).

16. As a result of the accident, Plaintiff is a paraplegic. R. 347 (Highland City's Memorandum in Support of its Motion for Summary Judgment).

IX.

SUMMARY OF THE ARGUMENT

I. This matter requires statutory construction. The Utah Supreme Court has stated that "the fundamental consideration in interpreting statutes is legislative intent; and that is determined in light of the purpose the statute was designed to achieve." Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030, 1033 (Utah 1983). Applying these principles, Highland City has waived immunity against the allegations in the Plaintiff's Second Amended Complaint.

II.A. Highland City has waived immunity, pursuant to Utah Code Ann. § 63-30-8 (1989), from allegations that it negligently designed the Intersection. Highland City created a defective, unsafe, and dangerous condition in that motorists entering the Intersection from 11500 North are unable to see motorists entering the Intersection on 6000 West in time to avoid a collision.

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

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

that Highland City employees negligently designed the Intersection while in the scope of their employment. The Plaintiff also presented unchallenged evidence demonstrating that Highland City designed the Intersection in a defective, unsafe, and dangerous manner. Thus, Highland City has waived immunity against the allegations in the Second Amended Complaint.

IV. The trial court ruled that Highland City had retained immunity under Utah Code Ann. § 63-30-10(1)(c) (1989), providing immunity for the negligent issuance of a permit, because Highland City merely approved the subdivision plat. This was error because in order for this provision to apply, the Plaintiff's injuries must "arise out of" the approval of the plat map. However, the Plaintiff's injuries here did not arise out of Highland City's negligent approval of the plat map, but arose out of Highland City's negligent design of the Intersection.

Plaintiff asserts that Highland City should not be allowed to absolve itself and its employees of liability for their negligence by the issuance of a self-serving approval or permit. Instead, in accordance with the Utah Governmental Immunity Act, Highland City should be held accountable for the negligent acts of its employees committed within the scope of their employment.

Highland City has unfairly characterized Plaintiff's claims in order to retain immunity. The Utah Supreme Court has

indicated that municipalities should not be allowed to characterize the facts in such a manner that the case is pigeon holed into a category of activity for which immunity is retained. Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987) ("the city may not rely on section 63-30-10(1)(d) of the Act to torture the facts of this case into the provisions of that section."). Plaintiff respectfully asserts that whether immunity exists should be based on the allegations in the Second Amended Complaint and the facts established at trial and should not be based on Highland City's self-serving characterizations of the Plaintiff's claim.

V. The trial court ruled that Highland City's activities with respect to the Intersection were normal activities of a municipality with respect to a subdivision, and therefore immunity should attach. However, no authority was given for this conclusion. The contention is contrary to the legislative purpose of the Utah Governmental Immunity Act. The Legislature expressly waived immunity for the negligent acts of employees. The Legislature also waived immunity for governmental negligence in relation to both public and private roads. Thus, while Highland City's activities may have been normal, this does not, and should not, lead to the conclusion that the city is immune for negligently carrying out the activities. This is particularly true when there is no dispute that

had Highland City engaged in these activities in relation to a public road, immunity would have been waived.

X.

DETAIL OF THE ARGUMENT

OVERVIEW

The fundamental issue in this case is: Should a municipality have the authority to alter the plat design created by an engineer without using reasonable care to ensure that the changes to the plat are safe? The Oakview PUD plat was engineered by Nature's Estates Engineering, an experienced subdivision planner. The Intersection was located such that there was adequate sight distance for motorists of both 6000 West and 11500 North. Had Highland City approved the plat as engineered, the accident would likely not have occurred.

But Highland City altered the Nature's Estates Engineering plan. The City, without re-engineering the Intersection to ensure that The City's plan was safe, required the developer to move the Intersection closer to the crest of the hill, causing the perilous sight distance problem. The issues are thus posed: What are the limits of a municipality's power to condition subdivision approval? Must the municipality use reasonable care to ensure that any conditions or alterations to the subdivision plat are safe?

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.

A similar situation happened here in the case at bar. Highland City altered the safe and engineered location of the Intersection and moved the Intersection, without using reasonable care, to an unsafe location. Highland city failed to meet the standard of care which would be required if 11500 North was a public road. 11500 North was the access road which the public would use to access 6000 West, the county road.

This entire case focuses on whether a municipality should have the power to place subdivision residents at peril without using due care to ensure that the municipality's subdivision plans are safe. Plaintiff's approach is simply this. If the municipality wishes to rely upon the developer's plans and engineering to assume that reasonable care was used in designing the subdivision, then no liability should attach to the municipality. But if the municipality chooses to disregard the developer's engineering and replace it with its own plans, then it must use due care in doing so. This is consistent with the this Court's recent decision in Jones v. Bountiful City, 834 P.2d 556, 560 (Utah App. 1992), where the Court stated:

Rather than placing a duty on a municipality to erect traffic control devices, the common law requires only that once the municipality takes action to install such devices, it must do so in a non-negligent manner.

Id. at 560 (emphasis added). Plaintiff does not seek to alter the power of municipalities with respect to subdivisions. Plaintiff only asks that the municipality either rely on the engineering of the developer, or use due care in redesigning the plat. Highland City did neither here. Plaintiff only asks that Highland City use the same reasonable care in redesigning subdivision plats and roads contained therein which the law requires that it must use in designing public roads and improvements.

The arguments below focus on legal reasoning and statutory interpretation. Plaintiff respectfully requests that this Court view these arguments in light of the above policy arguments.

A.

STANDARD OF REVIEW FOR STATUTORY INTERPRETATION

This matter requires statutory interpretation. The issue is whether Highland City has retained immunity from suit against allegations that employees of Highland City negligently designed the Intersection in an inherently defective, unsafe, and dangerous manner.

The Utah Supreme Court has held that the "primary responsibility in construing legislation is to give effect to the intent of the legislature." American Coal Co. v. Sandstrom, 689 P.2d 1, 3 (Utah 1984); West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982). The Utah Supreme Court has also stated that "the

fundamental consideration in interpreting statutes is legislative intent; and that is determined in light of the purpose the statute was designed to achieve." Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030, 1033 (Utah 1983).

The Plaintiff respectfully asserts that applying these standards, Highland City has waived immunity for the negligent design of the Intersection.

B.

HIGHLAND CITY HAS WAIVED IMMUNITY FOR DEFECTIVE, UNSAFE, AND DANGEROUS CONDITIONS IN ROADS AND STREETS UNDER UTAH CODE ANN. § 63-30-8 (1989).

1. UTAH CODE ANN. § 63-30-8 (1989) APPLIES WHERE THE GOVERNMENTAL ENTITY NEGLIGENTLY DESIGNS A PRIVATELY OWNED ROAD WITHIN THE PUBLIC USE.

Highland City has waived immunity, pursuant to Utah Code Ann. § 63-30-8 (1989), from allegations that it negligently designed the Intersection. Highland City created a defective, unsafe, and dangerous condition in that motorists entering the Intersection from 11500 North are unable to see motorists entering the Intersection on 6000 West in time to avoid a collision. Utah Code Ann. § 63-30-8 (1989) provides:

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.

Id. The trial court, without discussing the merits of this provision, held that it would not be applicable because Highland City had retained immunity under the provisions of Utah Code Ann. § 63-30-10(1)(c) (1989).

As demonstrated below, there can be little doubt that Highland City has waived immunity when its negligent acts create a defective, unsafe, and dangerous condition in a public highway or road. However, 11500 North is a private road owned and maintained by the Oakview PUD, although 11500 North is within the public use. There is no Utah authority on the issue of whether Utah Code Ann. § 63-30-8 (1989) applies to negligent governmental acts in relation to private roads in the public use. Thus, the goal is to determine the legislative intent, which is to be evaluated in light of the purpose of the statute. Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030, 1033 (Utah 1983).

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). In Bigelow, the plaintiffs alleged that the state negligently designed the traffic control lights at an intersection, causing both lights at the intersection to be green

at the same time. The Utah Supreme Court held that the design and installation of traffic control devices was not a "discretionary function" for which immunity had been retained. Id. at 53. Instead, the provisions of Utah Code Ann. § 63-30-8 (1989) applied and, therefore, the state was not immune from suit. Id. at 53-54.

In Andrus v. State, 541 P.2d 1117 (Utah 1975), the Utah Supreme Court found that the "State created a dangerous condition by its design of the highway project" and that the conduct was within the provisions of Utah Code Ann. § 63-30-9 (1989), waiving immunity for any injury caused by a defective, unsafe or dangerous condition in any public building or structure. Id. at 1120. The Utah Supreme Court rejected the State's contention that its design was a discretionary function, holding that "the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions." Id. Once again, the plaintiffs were allowed to proceed against the governmental entity.

Finally, in Carroll v. State Road Commission, 496 P.2d 888 (Utah 1972), the Utah Supreme Court held that the creation of a highway design which used "berms" instead of signs to protect motorists was not a discretionary function. Id. at 891. Instead, the Court held that the State was not immune from suit for its

negligent design of the highway and the plaintiffs could bring suit. Id.

These cases demonstrate that had 11500 North been a public roadway, Highland City would not have immunity under the provisions of Utah Code Ann. § 63-30-8 (1989) against allegations that it negligently designed the Intersection. The Legislature's clearly expressed intent was to waive immunity for any defective, unsafe, or dangerous condition caused by government in the design and maintenance of highways and roads. The issue becomes whether Highland City has also waived immunity when the governmental conduct occurred in relation to a private road in the public use. Put another way, is there any basis for distinguishing between the negligent design of a public road as opposed to the negligent design of a private road within the public use for purposes of immunity. Plaintiff respectfully asserts the legislative intent would not allow for such a distinction.

Perhaps the most compelling evidence of the legislative intent is the plain language of the statute itself. The statute applies to "any highway, road, [or] street", without distinguishing between public roads and privately owned roads in the public use. The broad language of the statute suggests that the Legislature intended to waive immunity for all governmental involvement in relation to highways, roads, and streets. The statute indicates

that anytime a governmental entity becomes involved in the design, construction, or maintenance of any highway, road, or street, the entity has waived immunity from allegations of negligence regardless of whether the highway, road, or street was publicly owned or privately owned but in the public use.

It is well accepted that in construing statutes, the Court must assume that each term of the statute was used advisedly. For example, in Board of Educ. of Granite Sch. Dist. v. Salt Lake City, 659 P.2d 1030, 1035 (Utah 1983), the Utah Supreme Court stated:

This Court assumes that the terms of a statute are used advisedly and should be given an interpretation and application which is in accord with their usually accepted meanings.

Id. See Grant v. Utah State Land Board, 485 P.2d 1035, 1036 (Utah 1971) ("Foundational rules require that we assumed that each term of the statute was used advisedly.").

Applying this principle, this Court should assume that the Legislature intended no distinction between injuries occurring on a public road and those occurring on a privately owned road in the public use. No such distinction should be created absent a showing by Highland City that the Legislature intended to allow governmental entities to negligently design privately owned roads without being subject to liability.

Highland City will no doubt argue that the Legislature intended the statute to apply to roads which the government controlled and maintained. However, the purpose behind Utah Code Ann. § 63-30-8 (1989) is to provide relief to those who have been injured on a road or street due to the negligence of government in the design or maintenance of the roads. If the Legislature failed to waive immunity, motorists would have no remedy for a defective, unsafe, or dangerous condition on a road because government is responsible for maintaining and designing the roads. There is no one else to provide relief when the government negligently designs a road because only the government was negligent.

The same situation is present here. The developer will argue that Highland City designed the Intersection and, therefore, he cannot be held liable. Highland City argues that it is immune and, therefore, cannot be held liable for designing the Intersection. Thus, the Plaintiff is left without a remedy, even though the Legislature has expressly waived immunity in order to insure that plaintiffs have an adequate remedy for their injuries. Plaintiff respectfully submits that the purpose of the statute was to hold governmental entities liable for their negligent acts in relation to roads and streets, without respect to whether or not the road was publicly owned or privately owned but in the public use.

There is additional support for this contention in the definition of "highway" in the Motor Vehicle Act. (The term "highway" is not defined in the Utah Governmental Immunity Act.) "Highway" is defined in the Motor Vehicle Act as follows:

(8) "Highway" means the entire width between property lines of every way or place of any nature when any part of it is open to the use of the public, as a matter of right, for vehicular traffic.

Utah Code Ann. § 41-2-102 (1988). The same definition is provided in Utah Code Ann. §41-6-1(14)(1988). This definition of "highway" is broad, encompassing both public and private roads, and indeed covers any "way" open for use by the public. The definition of "highway" does not focus upon ownership of the road, but instead focuses on whether or not the public will use the highway. While the Oakview PUD retains responsibility for maintenance of 11500 North, the street is accessible by anyone and is, therefore, "open to the use of the public".

The broad definition of "highway" contained in the Motor Vehicle Act is apparently designed to protect users of all highways open to public use, whether or not these highways are publicly or privately owned. Under this definition of "highway", one could be held liable for traffic violations, such as speeding or running a stop sign, on both 6000 West, a public road, and 11500 North, a private road within the public use. With its broad definition of

"highway", the legislature subjected both public and private roads to the same safety regulations in order to protect the users of these streets and highways. Indeed, in many instances, such as the present one, there is no way to determine without a visit to the county building whether one is travelling on a publicly owned road, for which recovery can be had against the government for its negligence, or a privately owned road used by the public, for which Highland City argues no recovery for governmental negligence can be obtained.

There is no reason to believe that the Legislature, in enacting Utah Code Ann. § 63-30-8 (1989), intended to depart from its purpose of protecting all users of both public and private highways from governmental negligence. There is also no evidence that the Legislature intended to provide a remedy for only those users injured while operating motor vehicles on a public highway, even where the governmental entity negligently designed the private highway within the public use. Instead, the more reasonable interpretation is that the Legislature intended to protect all motorists using highways in the state from governmental negligence, without respect to whether or not these "highways" are public or privately owned, and intended to provide the same remedy for governmental negligence whether the negligence occurred in relation to a public or private road.

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-

30-10(1)(c) (1989), applied and therefore Highland City retained immunity. However, as detailed in Section IV of this Appellant's Brief immediately below, the exception is not applicable because the injuries did not "arise out of" the approval of the subdivision plat, but instead arose out of the negligent design of the Intersection by Highland City. In fact, none of the exceptions to Utah Code Ann. § 63-30-10(1) (1989) apply in this matter. Highland City has, therefore, waived immunity against the allegations in the Second Amended Complaint. Plaintiff respectfully requests that the summary judgment entered in favor of Highland City be reversed.

D.

UTAH CODE ANN. § 63-30-10(1)(c) (1989) DOES NOT APPLY TO SHIELD HIGHLAND CITY FROM LIABILITY BECAUSE THE INJURY DID NOT ARISE OUT OF THE APPROVAL OF THE SUBDIVISION PLAT.

The trial court ruled that Highland City had retained immunity under the provisions of Utah Code Ann. § 63-30-10(1)(c) (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:

* * *

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

Utah Code Ann. § 63-30-10(1)(c)(1989).

In order for the trial court to make this ruling, the court had to find that the Plaintiff's injuries "arose out of" the approval of the subdivision plat. Id. The trial court erred in its ruling because there was no evidence to this effect. Instead, all evidence leads to the conclusion that the proximate cause of the Plaintiff's injuries was Highland City's negligent design of the Intersection. The allegations in the Plaintiff's Second Amended Complaint support this contention:

21. City of Highland had a duty to design, construct, sign and maintain the intersection in a manner which would provide individuals approaching or entering the intersection with a reasonable opportunity to see approaching traffic and act accordingly.

23. The intersection was negligently designed, constructed, signed, and/or maintained by City of Highland and its employees, agents or contractors because motorists approaching the intersection from the South and East do not have a reasonable opportunity to either see each other as they approach and enter the intersection or take necessary evasive action.

R. 165 (Second Amended Complaint, ¶ 21, 23)(emphasis added). Additionally, the Plaintiff presented credible evidence establishing that Highland City negligently designed the Intersection. The developer of the Oakview PUD, Paul Frampton, testified that Highland City "didn't want the common area to be contiguous with any of the lots. They wanted it separate from the

lots, so that it would be an entity in and of itself." R. 486 (Deposition of Paul Frampton, p. 13). Richard Clayton, who submitted the original plat, testified that Highland City "is the one that designed the common area. And as I recall, they made that a stipulation before the approval of the subdivision." R. 353 (Deposition of Richard Clayton, p. 15).

Plaintiff is not attempting to hold Highland City liable for merely approving the subdivision plat without removing the dangerous Intersection. Rather, Plaintiff is attempting to hold Highland City liable for negligently designing the Intersection and requiring that 11500 North be positioned in such a manner that the Intersection is defective, unsafe, and dangerous.

The crux of Highland City's argument seems to be that so long as the final act of government is the approval of the plat map, all negligent acts of employees committed within the scope of their employment are not actionable because immunity is retained. In other words, once the permit is issued or approval is given, all employees are absolved of their negligence and injured victims are left without a remedy. Under Highland City's argument, municipalities are free to act negligently and are then allowed to absolve themselves of liability by issuance of a self-serving approval or permit.

Granting Highland City immunity does not reflect the purpose of the Legislature in enacting Utah Code Ann. § 63-30-10(1) (1989). The Utah Legislature expressly provided that negligent acts committed by governmental employee within the scope of their employment are actionable if they are the proximate cause of the accident. Utah Code Ann. § 63-30-10(1) (1989). The Legislature intended to provide relief for individuals injured by the negligent acts of governmental employees. By allowing municipalities to circumvent this intended purpose by issuance of a self-serving permit or approval, this purpose is defeated. Municipalities can shield themselves from providing that which the Legislature has given--relief to individuals injured by negligent acts of governmental employees.

Before the trial court, Highland City unfairly characterized the Plaintiff's contentions in order to pigeon hole the Plaintiff's claim into a category of activity for which immunity has been retained. Plaintiff respectfully asserts that whether governmental immunity exists should be based on the allegations in the Second Amended Complaint and evidence which is adduced at trial, not on the self-serving characterizations of Highland City.

The Utah Supreme Court has indicated that municipalities should not be allowed to characterize the facts in such a manner

that the case is pigeon holed into a category of activity for which immunity is retained. Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987). In Ingram, plaintiff fell through a defective water meter lid. Plaintiff alleged that Salt Lake City negligently designed the placement of the water meter lid, for which there was no immunity. Salt Lake City argued that its true failing was to inspect the water meter lid after it had been installed, for which immunity had been retained. Utah Code Ann. § 63-30-10(1)(d)(1989). The Utah Supreme Court stated:

Salt Lake City attempts to distinguish Murray and Bowen on the grounds that in the former, the plaintiff fell into a hole on the sidewalk and in the latter, the city's maintenance of a city street was at issue, whereas here the vault was not located on a public street. Both status and case law hold otherwise, and the city may not rely on section 63-30-10(1)(d) of the Act to torture the facts of this case into the provisions of that section.

Id. at 127 (emphasis added).

Like Ingram, Highland City here argues that its true failing was to negligently approve the subdivision plat, even though there is no evidence that this failing proximately caused the Plaintiff's injuries. Highland City seeks to avoid the issue of whether it negligently designed the Intersection by torturing the facts in order to retain immunity under one of the waiver exceptions.

Absolutely all the evidence in this case indicates that the Plaintiff's injuries "arose out of" the negligent design of the Intersection. Thus, there is no provision under which Highland City has retained immunity, and the summary judgment in favor of Highland City should be reversed.

Before the trial court, Highland City placed great reliance upon Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987). For this reason, Plaintiff discusses Loveland in her brief. In Loveland, the Orem City Council approved a plat without requiring the developer to fence a canal running behind the subdivision. The plaintiffs' son drowned in the canal. The plaintiffs claimed that Orem City was negligent in the "review and approval of the plat by the Orem City Council." Id. at 775. The Orem City Council did not alter the developer's plans with respect to the plat. Instead, the Orem City Council relied upon the developer to insure that the subdivision was safe and properly designed.

Here, Highland City went well beyond mere "review and approval" of a plat designed by others. Highland City did not rely upon the developer to insure that the subdivision was safe. Instead, Highland City designed the Intersection and, therefore, accepted the duty to design the Intersection in a reasonable manner. The Utah Supreme Court has recently stated the general rule

as once a municipality undertakes a duty to design or maintain a road, it must exercise due care. Jones v. Bountiful City, 834 P.2d 554 (Utah 1992). In Jones, the Utah Supreme Court stated:

Rather than placing a duty on a municipality to erect traffic control devices, the common law requires only that once the municipality takes action to install such devices, it must do so in a non-negligent manner.

Id. at 560 (emphasis added). The difference between Loveland and the instant case is that in Loveland, the Orem City Council did not accept this duty because it merely approved the developer's plans. Here, Highland City chose to design the Intersection rather than rely upon the developer.

Thus, Loveland and the instant case are qualitatively different. In Loveland, all the claims related to the "review and approval of plat B of Executive Estates." Loveland, 746 P.2d at 775. Here, any claims regarding the approval of the plat are distinct from the primary allegation that Highland City negligently designed the Intersection. Thus, Loveland does not control this matter.

Highland City also relied upon Bennett v. Bow Valley Development Corp., 797 P.2d 419 (Utah 1990), before the trial court. Like Loveland, the Plaintiff's in Bow attacked "the inspection and acceptance of subdivision improvements which were never completed." Id. at 423. In Bow, there was no contention that

the City was negligent apart from the approval of the subdivision plat.

In both Loveland and Bow, the plaintiff was attempting to hold the municipality liable for failing to prevent the negligence of third parties. In neither case was the municipality the party that had acted negligently. Plaintiff has no quarrel with either Loveland or Bow, or the notion that a municipality cannot be held liable simply because it fails to "catch" the negligence of third parties. But Plaintiff does quarrel with the notion that the principles stated in Loveland and Bow would shield a municipality from the negligence of its own employees where no third party is involved.

The Plaintiff respectfully submits that Utah Code Ann. § 63-30-10(1) (1989) focuses on what the injury "arises out of". Here, there can be little dispute that the injury arose out of the design of the Intersection, not the approval of the subdivision plat. Here, there is no dispute that no one other than Highland City designed the intersection. As such, Highland City has waived immunity for its negligent design of the Intersection.

E.

HIGHLAND CITY SHOULD NOT BE ALLOWED TO ACT
NEGLIGENTLY WITH RESPECT TO SUBDIVISION
DEVELOPMENT WITHOUT WAIVER OF IMMUNITY

In the closing paragraph of the trial court's ruling, the court held:

Furthermore, Utah case law supports defendant's position that the granting of immunity in this case is consistent with the need for a municipal government to participate in and have a say in development, without incurring liability therefrom.

R. 382. This statement was made without supporting authority, and is contrary to the principles of governmental immunity in this state.

As outlined above, there can be no doubt the Legislature waived immunity for the negligent design of a public intersection. The Legislature apparently intended to provide relief to those injured by a governmental entity's negligent design. This leads the Plaintiff to ask: Why would the Legislature waive immunity for the negligent design of a road or street, but then except from that waiver the negligent design of a subdivision intersection? Why would the Legislature allow municipalities the freedom to negligently design roads in private subdivisions which would provide access to public roads when it would not allow municipalities to negligently design public roads without accountability? Highland City attempts to create a distinction between public intersections and private intersections, but there is no rational basis for making such a distinction. To create such a distinction destroys the purpose of the Utah Governmental

Immunity Act, which is to provide relief to those injured by the negligent acts of government.

Perhaps there is some merit to the trial court's contention that municipalities must have some freedom to participate in subdivision design. But that freedom should be subject to the same conditions as are imposed when government participates in other activities, such as the design of a public road. Just as the State waives immunity once it decides to design a public highway or road, it should be held that Highland City has waived immunity when it chooses to participate in the subdivision design. This contention has particular merit since Highland City was under no duty to participate in the design of the Intersection.

In sum, Highland City should be held accountable for its actions. Without any legal requirement to do so, Highland City chose to design this Intersection. Therefore, it accepted the duty to design the Intersection in a safe manner. Jones v. Bountiful City, 834 P.2d 556, 560 (Utah App. 1992). Highland City failed in this endeavor. Thus, it should be required to pay the price for its negligence.

XI.

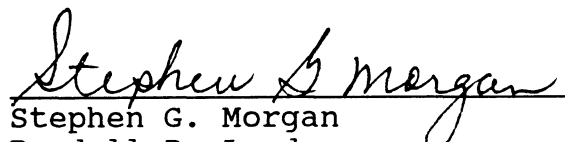
CONCLUSION

Highland City has waived immunity for creating a defective, unsafe, and dangerous Intersection. Utah Code Ann. § 63-30-8 (1989). However, even if this provision does not apply, Highland City has still waived immunity because its employees

negligently designed the Intersection while acting in the scope of their employment. Utah Code Ann. § 63-30-10(1) (1989). The exception to this waiver contained in Utah Code Ann. § 63-30-10(1)(c) (1989) does not apply because the approval of the plat was not the proximate cause of the injury. Instead, the injury was proximately caused by Highland City's negligent design. On the basis of the foregoing, the Plaintiff respectfully requests that this Court reverse the trial court's entry of summary judgment in favor of Highland City, and remand these proceedings to the trial court for a trial on the merits.

DATED this 28 day of January, 1993.

MORGAN & HANSEN


Stephen G. Morgan
Randall D. Lund
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

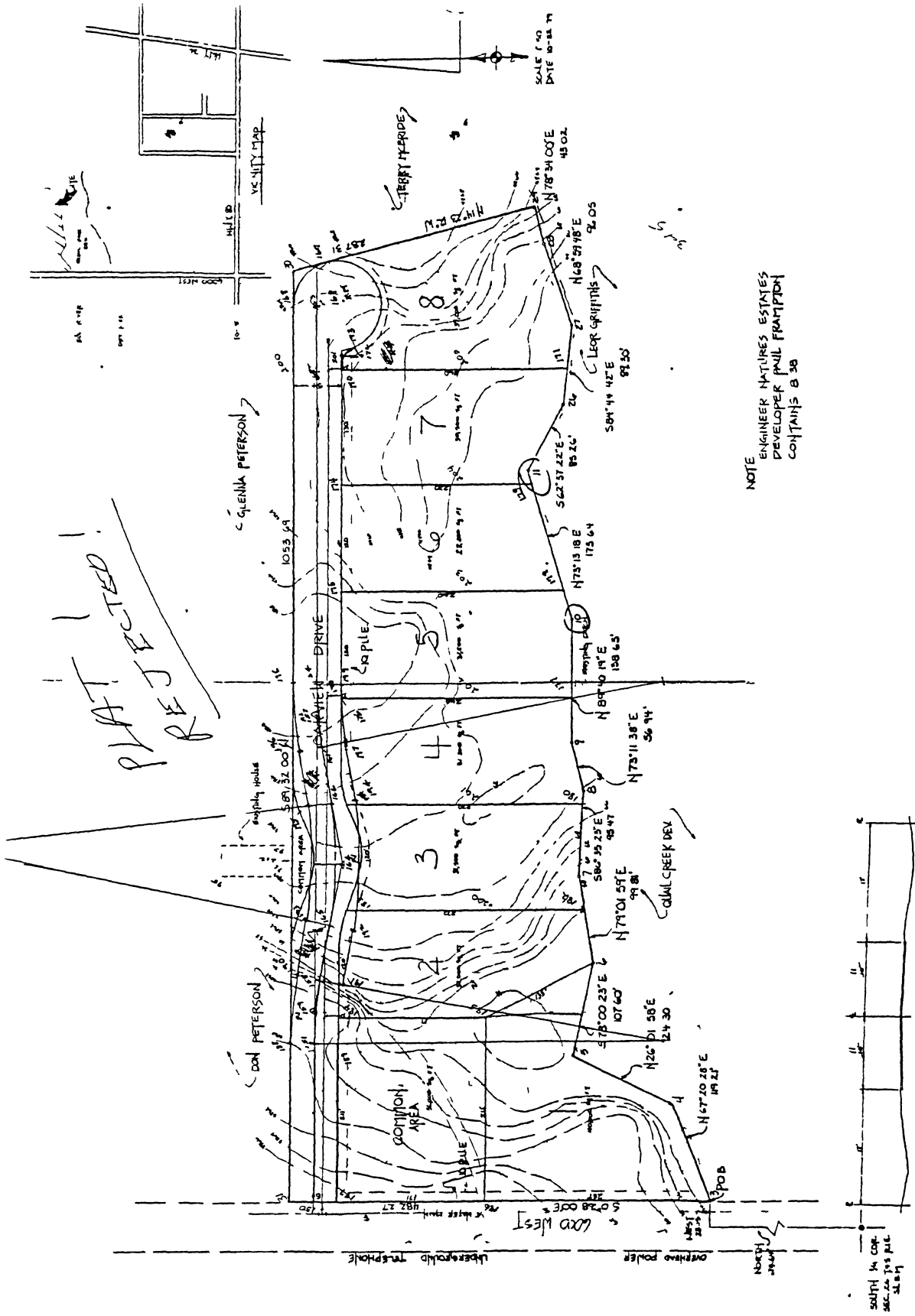
I hereby certify that on the 28 day of
January, 1993, I caused a true and correct copy of the foregoing
APPELLANT'S BRIEF to be mailed, first class to the following:

Gary B. Ferguson
WILLIAMS & HUNT
Attorneys for Defendant Highland City
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678

Lee C. Henning
CHRISTENSEN, JENSEN & POWELL
Attorney for Utah County
510 Clark Leaming Office Center
175 South West Temple
Salt Lake City, UT 84101

Stephen S Morgan

Tab A



OAKVIEW PUD
HIGHLAND, UTAH

Tab B

