

2004

Lynda Jones, Rulon Jones, Scott Sundell, Lila Sundell, Jerry Gilmore and Cathy Gilmore v. Barbara Johnson and David Johnson: Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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LYNDA JONES, RULON JONES,  
SCOTT SUNDELL, LILA SUNDELL,  
JERRY GILMORE, and CATHY  
GILMORE,

Plaintiffs and Appellees,

vs.

BARBARA JOHNSON and DAVID  
JOHNSON,

Defendants and Appellants.

Docket No. 20040612-CA

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**BRIEF OF THE APPELLEES**

---

Appeal from Order of the Third District Court, Salt Lake County  
Judge Denise P. Lindberg

---

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**Oral Argument and Published Decision  
Requested**

**FILED**  
**UTAH APPELLATE COURT**  
**SEP 22 2005**

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## **STATEMENT OF JURISDICTION**

Appellees do not dispute this Court's jurisdiction.

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

### **I. FIRST ISSUE**

Whether the trial court correctly granted Plaintiffs' motion for summary judgment enforcing the terms of the restrictive covenants against Defendants.

Preservation of Issue: This issue was raised in Plaintiff's Motion for Summary Judgment, which was granted by the trial court. (Court Record [hereafter, "R."] at pages 35-152; see Addendum [hereafter "Add."] at 1-10.)

Standard of Review: Correctness. *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 8, 995 P.2d 1237.

### **II. SECOND ISSUE**

Whether the trial court's denial of Defendants' motion under UTAH R. CIV. P. 56(f) was a proper exercise of the trial court's discretion.

Preservation of Issue: This issue was raised by Defendants in their Memorandum in Opposition to Motion for Summary Judgment, Memorandum in Support of Rule 56(f) Affidavit and Memorandum in Support of Scheduling Conference and Entry of Attorney's Planning Meeting Report and Discovery Plan. (R. 96-121.) The issue was addressed by Plaintiffs in their reply memorandum (R. 135-52), and the trial court denied the Rule 56(f) motion (Add. 9-10).

Standard of Review: Abuse of discretion. *Price Dev. Co.*, 2000 UT 26, ¶ 9.

## **DETERMINATIVE PROVISIONS**

The interpretation of the following rules from the Utah Rules of Civil Procedure and Utah Rules of Judicial Administration is determinative of this appeal:

1. Former Utah R. Civ. P. 56. (See Add. 20-21 for full text.)
2. UTAH R. CIV. P. 16(a)(2), (d), and (f). (See Add. 21-22 for full text.)
3. Former Utah Rules of Judicial Administration 4-501(2)(B). (See Add. 22 for full text.)

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This is a case to enforce restrictive covenants requiring the extension of dwellings to be finished with brick, brick and stucco, or rock and stucco. Barbara Johnson and David Johnson (the “Defendants”) purchased a lot in South Jordan Estates which was subject to these restrictive covenants. Despite being informed of the restrictive covenants by neighboring property owners, Defendants installed siding on their home’s exterior in violation of the express provisions of the restrictive covenants.

### **II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

Lynda Jones, Rulon Jones, Scott Sundell, Lila Sundell, Jerry Gilmore, and Cathy Gilmore (“Plaintiffs”) filed a complaint against Defendants seeking to enforce restrictive covenants through declaratory and injunctive relief. (R. 1-21.) The Plaintiffs filed a motion for summary judgment (R. 35-69), and Defendants opposed the motion and requested that determination of the motion be continued under former Utah R. Civ. P. 56(f). (R. 96-134.) The trial court denied Defendants’ former Utah R. Civ. P. 56(f)

motion and granted summary judgment in Plaintiffs' favor. (Add. 1-10.) The Plaintiffs submitted to the trial court a proposed judgment ruling that the Defendants violated the restrictive covenants, ordering Defendants to replace the siding with materials permitted by the restrictive covenants within 90 days, and awarding attorney's fees to Plaintiffs. (R. 192-95)

Defendants objected to the form of the judgment (R. 180-182), but the trial court ruled that the proposed judgment "appropriately incorporates the Court's decision and Order." (R. 191.) The trial court did agree, however, to grant Defendants additional time to replace the siding, noting that the court was "mindful of the substantial, if self-imposed, costs associated with replacement of the non-conforming siding." (R. 191.) On February 9, 2004, the trial court entered a judgment ruling that the Defendants violated the restrictive covenants, ordering Defendants to replace the siding with materials permitted by the restrictive covenants within 180 days (i.e., August 7, 2004), and awarding attorney's fees to Plaintiffs. (R. 192-94.)

Defendants next filed a Motion to Alter or Amend the Judgment. (R. 201-03.) After hearing oral argument, the trial court denied the motion. (R. 221, 254-56.)

Defendants then filed a Motion to Stay Enforcement of Injunction Pending Appeal and Motion for Stay of Money Judgment and for Alternative Security. (R. 240-41.) Defendants' motion sought to stay enforcement of the judgment during appeal and requested that the trial court reduce the supersedeas bond amount to \$1,000.00. (R. 235-38.) The trial court denied Defendants' request but ruled that the trial court would stay the judgment during an appeal if Defendants would post an \$18,000.00 supersedeas bond.

(R. 273-74.) Because Defendants have not posted a supersedeas bond, the underlying judgment is not currently stayed. Nonetheless, Defendants still have not complied with the Court's injunction requiring replacement of the nonconforming siding.

### **III. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW**

The Plaintiffs are owners of residences in Phase 2 of the South Jordan Estates (the "Subdivision"), in South Jordan, Salt Lake County, Utah. (R. 2, 89 & 93.) The Subdivision is comprised of 26 lots-lots 201 through 226. (R. 39 & 52.) Defendants Barbara Johnson and David C. Johnson are individuals who have constructed and own a residence at 11787 South History Drive, which is Lot 226 of the Subdivision (hereafter, "Lot 226"). (R. 2 & 31.)

On December 16, 1996, S K Development recorded a Declaration of Covenants, Conditions and Restrictions (the "CC&Rs") with the Salt Lake County Recorder's Office. (R. 52-60; Add. 11-17.) In the CC&Rs, S K Development, Inc. indicated that it was the owner of Lots 201 through 226 of the Subdivision in Salt Lake County, Utah. (Add. 11.) S K Development declared its intent that lots 201 through 226 of the Subdivision be subject to the "covenants, conditions, and restrictions, reservations, assessments[,] charges and liens herein set forth." (Add. 11.)

The CC&Rs state that restrictive covenants "shall run with the Lots, and be binding on all parties having any right, title, or interest in the Lots" and "shall insure [sic] to the benefit of each Owner thereof." (Add. 11.) The CC&Rs create an architectural control committee (the "Committee") which approves building plans for all buildings and

sheds in the Subdivision. (Add. 11-12.) The CC&Rs provide for the termination of the Committee upon the expiration of five years from the date of the CC&Rs. (Add. 12.) Upon the termination of the Committee, the rights and obligations of the Committee automatically devolve to all of the lot owners in the Subdivision “without the necessity of the filing of any amendment to this Declaration or any other action.” (Add. 12.)

Section 3.1 of the the CC&Rs contains the following requirement regarding the exterior finish of dwellings:

Each dwelling must have a masonry exterior with all brick, or brick and stucco, or rock and stucco. All stucco work must include some popout detail work on all four sides.

(Add. 13.) Each lot owner in the Subdivision is entitled to enforce the CC&Rs through legal action and to recover the litigation expenses arising from the enforcement of the CC&Rs. (Add. 17.)

On or about July 31, 2002, Defendants submitted a building permit application of the Building Department of South Jordan City to construct a residence on Lot 226. The permit indicates that the Defendants would be acting as the general contractor for the construction. (R. 71 & 75.) The Johnsons did not obtain approval of the plans for their building from the lot owners in the Subdivision (the “Lot Owners”) as required by the CC&Rs. (R. 89 & 93.)

The residence constructed by the Defendants is not finished with “a masonry exterior with all brick, or brick and stucco, or rock and stucco” as required by Section 3.1(4) of the CC&Rs. Instead, a significant portion of the Defendants’ residence has been finished with a siding product called Hardi-Plank® Lap Siding. (R. 71, 85, 87,

129-130 & 151.) When it became apparent that the Johnsons would be using siding on the exterior of their residence, many of the owners in the South Jordan Estates signed a petition in November of 2002 indicating their desire that the Johnsons comply with the requirements of the CC&Rs. A copy of this petition was provided to the Johnsons in November of 2002. (R. 71, 77-81, 89 & 93.) Defendant Barbara Johnson admits that, in November of 2002, Jeff Johnson, a resident of the Subdivision, called her and said “the neighborhood did not like the planking on the outside of our home.” [R. 130.] The neighbor also “told us [the Defendants] that we needed to remove it [the planking] and warned that if we did not the courts would get involved, but he would rather give us \$500.00 to remove the product instead of paying for a lawyer.” (R. 130.)

On December 2, 2002, counsel for Plaintiffs drafted a letter to the Johnsons noting the requirements of Section 3.1(4) of the CC&Rs and asking that the Johnsons provide “written assurance that the siding which has been installed on your residence will be promptly removed and replaced with masonry exterior meeting the requirements of the Declaration” on or before December 6, 2002. A copy of this letter was hand delivered to the Johnsons. (R. 71-72 & 83.) In addition, Defendants admit receiving a copy of the CC&Rs in December of 2002 from Jeff Johnson. (R. 130.) Despite receiving the petition, the call from a neighbor, the December 2, 2002 letter, and a copy of the CC&Rs, the Johnsons completed the construction of their residence with siding. (R. 72.) Photographs depicting the siding on the Johnsons’ residence are attached to the Affidavit of Jennifer Isbell. (R. 85 & 87.)

Plaintiffs filed a Complaint against Defendants on December 26, 2002. (R. 1.) The Complaint did not request monetary damages other than the recovery of attorney's fees. (R. 7.) By the time the Plaintiffs filed their motion for summary judgment on July 23, 2003, the Johnsons were living in the residence on lot 26 and had refused to take any action to replace the siding on the exterior of their residence with brick or stucco. (R. 72, 89 & 93.)

### **SUMMARY OF ARGUMENTS**

In the summary judgment proceedings below, Defendants failed to properly dispute Plaintiffs' statement of facts and failed to properly support Defendants' own statement of additional facts. Accordingly, Defendants presented no issue of material fact which would preclude summary judgment. Defendants raise issues regarding the purported ambiguity of the CC&Rs and improper injunctive relief for the first time on appeal. These arguments have been waived because they were not raised below and because Defendants have provided no additional basis for this Court to review these issues. In any event, the relevant provisions of the CC&Rs were unambiguous. Defendants failed to show by clear and convincing evidence that the relevant portions of the CC&Rs had been abandoned. The trial court correctly granted summary judgment in favor of Plaintiffs as a matter of law.

By failing to raise the issue below, Defendants waived their arguments regarding the application of a "balance of injury" test to the injunctive relief requested by Plaintiffs. In any event, Defendants did not provide the trial court with the evidence necessary to

apply the balance of injury test, and the evidence which was presented suggested that the test could not be satisfied. The trial court properly granted injunctive relief to Plaintiffs.

Defendants' Rule 56(f) motion was properly denied because Defendants had adequate opportunities to conduct discovery, Defendants' motion was dilatory, and Defendants failed to identify any material information in Plaintiffs' exclusive knowledge and control which Defendants would seek to discover. The trial court did not clearly abuse its discretion in denying Defendants' Rule 56(f) affidavit.

Because the CC&Rs entitled Plaintiffs to recover their attorney's fees at the trial court, Plaintiffs should be granted their attorney's fees on appeal as well.

### **ARGUMENT**

#### **I. THE TRIAL COURT CORRECTLY GRANTED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants have limited their appeal to the trial court's ruling on Plaintiff's motion for summary judgment. (Brief of Appellants [hereafter, "Appellants' Br.,"] at 1-3.) Defendants have not pursued an appeal on any of the trial court's subsequent rulings. Accordingly, in determining whether the trial court properly granted summary judgment, this Court should limit its consideration to the arguments and documents before the trial court at the time it granted Plaintiffs' motion for summary judgment.



**A. The Trial Court Properly Concluded That No Issues of Material Fact Precluded Summary Judgment**

**1. *Defendants Did Not Properly Dispute Any of the Facts Presented by Plaintiffs***

In the memorandum supporting their motion for summary judgment, Plaintiffs presented seventeen paragraphs of undisputed material facts. (R. 39-42.) Ten<sup>1</sup> of those paragraphs were not contested in any way by Defendants. (R. 98-99.) In response to two other paragraphs (paragraphs 7 and 8), Defendants admitted that Plaintiffs had properly quoted portions of the CC&Rs, but disputed Plaintiffs' interpretation of those provisions. (R. 98.) These twelve paragraphs, which were "set forth in the movant's statement and properly supported by an accurate reference to the record" are "deemed admitted for the purpose of summary judgment" because they were not specifically controverted by Defendants' statement. Utah R. Jud. Admin. 4-501(2)(B) (2003) (repealed November 1, 2003) (Add. 22.).

Defendants claimed that five paragraphs in Plaintiffs' statement of facts (paragraphs 9 through 13) were "disputed," but failed to provide a "verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists." Utah R. Jud. Admin 4-501 (2)(B) (2003) (repealed November 1, 2003) (Add. 22.). In addition, Defendants failed to cite any portions of the record which supported their contentions concerning these factual statements. *Id.* ("Each disputed fact shall specifically refer to those portions of the record upon which the opposing party relies.")

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<sup>1</sup> Defendants stated that they were not contesting Paragraphs 1, 2, 4, 5, 14, 15, 16, or 17 of Plaintiff's statement of facts. Defendants did not respond at all to Paragraphs 3 or 6. (R. 98-99.)

Because these five paragraphs were not properly disputed, they are also deemed admitted for purposes of summary judgment. The trial court recognized this, noting as follows: “Generally this Court construes Defendants[’] failure to comply with Rule 4-501 as a failure to identify material issues of fact in dispute that would preclude entry of summary judgment against them.” (Add. 5.) Defendants’ Memorandum did not establish an issue of material fact which would preclude summary judgment in favor of the Plaintiffs.

**2. *Defendants Did Not Present Proper Evidence of Additional Material Facts***

In their brief, Defendants assert that “Hardi-plank is the same as stucco, and a question of fact remains as to whether Hardi-plank is stucco under the CC&R’s.” (Appellants’ Br. at 15.) However, Defendants provided no admissible evidence to the trial court regarding the composition of the Hardi-Plank® siding installed on their residence or its similarity to stucco. In Defendants’ Memorandum, Defendants made an unsupported allegation that Hardi-Plank® siding is made of “fiber-cement” and is composed of “cement, ground sand, cellulose fiber, and select additives.” (R. 101.) This assertion was not supported by an affidavit or any discovery material. Accordingly, this unsupported factual assertion could not properly be considered by the trial court and was insufficient to create an issue of fact which would preclude summary judgment.

In their brief, Defendants reiterate the unsupported allegation regarding the composition of Hardi-Plank® siding. (Appellants’ Br. at 7.) Clearly, Defendants cannot now rely upon an allegation which they failed to properly support in the summary judgment proceeding before the trial court.

**B. The Trial Court Correctly Determined That the CC&Rs Were Not Ambiguous**

**1. *Defendants Waived Their Arguments Concerning Ambiguity by Failing to Preserve Them in the Trial Court***

“It is a well-established rule that a defendant who fails to bring an issue before the trial court is generally barred for raising it the first time on appeal.” *State v. Irwin*, 924 P.2d 5, 7 (Utah Ct. App. 1996). The ambiguity arguments raised by Defendants in this appeal were not raised in the trial court.

In their appellants’ brief, Defendants argue that “because the CC&R’s do not expand on the definition of stucco and what type of products constitute stucco, an ambiguity exists regarding the type of materials that are allowed under the CC&R’s.” (Appellants’ Br. at 15-16.) Defendants never presented this argument to the trial court. The word “ambiguous” is used only once in Defendants’ memorandum in opposition to Plaintiffs’ motion for summary judgment (“Defendants’ Memorandum”) as follows: “Finally, the guidelines [of the CC&Rs] are ambiguous and have lapsed in accordance with their terms.” (R. 99.) This sentence appeared in the section of Defendants’ Memorandum which responded to Plaintiffs’ statement of facts. Nowhere in the argument portion of Defendants’ Memorandum is ambiguity asserted. (R. 99-104.) Defendants’ Memorandum does not identify any word or passage in the CC&Rs which Defendants claim to be ambiguous. (R. 96-104.)

In addition, Defendants’ Memorandum never asserts that the Hardi-Plank® Lap Siding installed by the Defendants is a type of stucco or shares characteristics with stucco. (R. 96-104.) The idea that the word “stucco” is ambiguous has been raised for

the first time by the Defendants in their Brief of Appellants. (Appellants' Br. 15-16.) Because this issue was not raised below, and because Defendants have provided no additional basis for this Court to review an issue not preserved in the trial court, Defendants have waived their right to present this issue on appeal.

Defendants also argue in their brief that ambiguity exists in the CC&R provisions regarding obtaining approval after the termination of the Committee. (Appellants' Br. at 16-17.) This assertion of ambiguity was never raised before the trial court. Because this issue was not raised below, and because Defendants have provided no additional basis for this Court to review an issue not preserved in the trial court, Defendants have waived their right to present this issue on appeal.

## **2.     *The CC&R Provisions Regarding Home Exteriors Are Not Ambiguous***

Defendants failed to preserve their ambiguity argument regarding the CC&R home exterior provisions. However, even if this ambiguity issue had been duly preserved, it would not have changed the trial court's correct decision to grant summary judgment in Plaintiffs' favor.

In their brief, Defendants incorrectly argue that the CC&Rs' use of the term "stucco" is ambiguous. (Appellants' Br. at 15-16.) Defendants properly indicate that restrictive covenants are not ambiguous unless they "are susceptible to two or more reasonable interpretations." *View Condo. Owners Ass'n v. MSICO, L.L.C.*, 2004 UT App 104, ¶ 19, 90 P.3d 1042. Therefore, to establish ambiguity, Plaintiffs were obligated to present to the court two or more reasonable interpretations of "stucco" which would

have differing impacts on the claims in the present case. Plaintiffs have not presented any reasonable interpretation of the word “stucco” which would encompass the Hardi-Plank<sup>®</sup> siding they installed on their residence. Accordingly, as it applies to the present case, the term “stucco” is not ambiguous and should be construed according to its plain and ordinary meaning. *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 836 (Utah 1998).

While Defendants attempt to couch the alleged ambiguity as a factual issue, the initial determination of whether a contract is ambiguous is a question of law. *Enerco, Inc. v. SOS Staffing Services, Inc.*, 2002 UT 78, ¶ 6, 52 P.3d 1272 (“Whether a contract is ambiguous is a question of law.”); *Wagner v. Clifton*, 2002 UT 109, ¶ 12, 62 P.3d 440 (same) ; *Parduhn v. Bennett*, 2002 UT 93, ¶ 5, 61 P.3d 982; *Plateau Mining Co. v. Division of State Lands and Forestry*, 802 P.2d 720, 725 (Utah 1990) (“Whether a contract is ambiguous is a question of law which must be decided before parol evidence is admitted.”) The trial court, responding to the sole, cryptic reference to ambiguity in Defendants’ Memorandum, ruled as a matter of law that the CC&Rs were unambiguous:

The Court categorically rejects Defendants’ claims that the CC&R provision dealing with home exteriors is ambiguous. It is difficult to fathom more clear and unambiguous language than that which states the exterior finish of homes in the subdivision must be all brick, brick and stucco, or rock and stucco. *See* CC&R section 3.1(4).

(Add. 7.) The trial court’s ruling in this regard is not erroneous.

3. *The CC&R Provisions Regarding Termination of the Architectural Control Committee Are Not Ambiguous*

In their brief, Defendants argue that the CC&R provisions regarding approval of building plans after termination of the Committee are ambiguous. Once again, however, Defendants failed to preserve this issue at the trial court. But even if this issue had been raised before the trial court, it would not have altered the trial court's proper decision to grant summary judgment in Plaintiffs' favor.

Defendants do not identify any language in the CC&Rs regarding the termination of the Committee which Defendants claim is ambiguous. Instead, Defendants argue that the CC&Rs lack direction regarding obtaining approval once the Committee is terminated. (Appellants' Br. at 16-17.) This lack of direction, Defendants argue, constitutes an ambiguity. To the contrary, the CC&Rs are clear about the procedure for obtaining approvals from the Committee or from the Lot Owners to whom the Committee's responsibilities revert after five years.

Prior to termination of the Committee, the CC&Rs require each building or shed to be approved by both the Committee and South Jordan City. (Add. 12 at § 1.4.) A lot owner wishing to construct a residence is required to submit two set of formal plans to the Committee for review. The Committee then has 30 days to provide written approval or rejection of the plans. (Add. 12 at § 1.2.) The entire Committee can made decisions, or a majority of the Committee can designate a representative to act for the Committee. (Add. 11 at § 1.1.)

The Committee “automatically cease[s] to exist” upon the earlier of (1) construction of a residence on each lot in the Subdivision or (2) the passage five years from the date of the CC&Rs. (Add. 12 at § 1.5.) In the present case the expiration of the five-year period triggered the termination of the Committee because no residence was constructed on Lot 226 within five years. (R. 71 & 75.) Upon termination of the Committee, “any and all rights, duties, and/or responsibilities of the Committee shall at that time automatically become the rights, duties, and/or responsibilities of the Lot Owners without the necessity of the filing of any amendment to this Declaration or any other action.” (Add. 12 at § 1.5.) To put it simply, after the expiration of five years, the Committee expanded to include all owners of the 26 lots the Subdivision in what the trial court aptly describes as a “committee of the whole.” (Add. 6.) Like the Committee, the Lot Owners can take action as an entire body or they can designate representatives to act on their behalf. (Add. 11 at § 1.1.)

The approval process under the CC&Rs is the same regardless of whether the approval is sought from the Committee or the Lot Owners. The lot owner seeking to construct a residence is required to submit two sets of plans to the Lot Owners for approval, and approval must be granted or denied in writing within 30 days. (Add. 12 at § 1.2.) There is nothing ambiguous about the procedure, and the trial court properly granted Plaintiffs’ summary judgment motion.

The trial court noted the Defendants’ refusal to seek approval from the Lot Owners as follows:

Having been put on notice relatively early in the building process that there were issues with the proposed exterior of the Defendants' home, Defendants made no effort to address how architectural clearance should be sought from the Lot Owners, to whom the review function devolved. The subdivision at issue is only comprised of 26 lots. Therefore, a committee of the whole could have been organized for purpose of this review issue, especially once Defendants were put on notice of the alleged problems via direct communication, the neighbors' signed petition and the cease and desist letter. This court believes the burden was on Defendants to engage in a dialogue with their neighbors around resolution of the issues. Defendants declined to do so. Instead, they proceeded to complete their home despite the protests of their neighbors.

(Add. 6-7.) Defendants did not seek or obtain permission from any of the Lot Owners prior to constructing the residence on Lot 226. Defendants' refusal to seek approval of their house plans and their use of noncompliant materials on the exterior of their residence constitute clear violations of the CC&Rs. The trial court correctly ruled that the Committee termination provisions were not ambiguous and granted Plaintiffs' motion for summary judgment as a matter of law.

**C. The Trial Court Correctly Ruled that the Covenants Regarding Building Exteriors Had Not Been Abandoned**

In response to Plaintiffs' Motion for Summary Judgment, Defendants argued that there had been a "failure of other residents to comply with the DCC&Rs." An affidavit submitted by Defendants presents several alleged violations of the CC&Rs. (R. 132.) Only one of the alleged violations, however, dealt with the exterior finish of dwellings: Defendants asserted that a particular house "has Hardi-Plank® on the window cutouts . . . ." (R. 132.) To the extent this constituted an argument by Defendants that the CC&Rs provisions had been waived or abandoned, the trial court correctly rejected this argument.



The Utah Supreme Court has given detailed guidance regarding the abandonment of restrictive covenants:

Restrictive covenants are a common method of effectuating private residential developmental schemes. See [9 RICHARD R. POWELL, POWELL ON REAL PROPERTY (Patrick J. Rohan ed., 1998)], *supra*, § 60.06[3], at 60-104 to 60-112. Property owners who purchase land in such developments have a right to enforce such covenants against other owners who violate them. See *Crimmins v. Simonds*, 636 P.2d 478, 480-81 (Utah 1981); POWELL, *supra*, § 60.07[c], at 60-121. Conduct by property owners within a development, however, may terminate and render unenforceable a particular covenant where such conduct so substantially changes the character of the neighborhood as to neutralize the benefit of the covenant, see *Crimmins*, 636 P.2d at 479, or constitutes evidence of the abandonment of the covenant. See *Fink v. Miller*, 896 P.2d 649, 653 (Utah Ct. App. 1995).

The case law is uniform that before an abandonment of a covenant may be found there must be “substantial and general noncompliance” with the covenant. *B.B.P. Corp. v. Carroll*, 760 P.2d 519, 524 (Ala. 1988); *Tompkins [v. Buttrum Constr. Co. of Nev.]* 99 Nev. 142, 659 P.2d 865, 865 (Nev. 1983)]. One court has stated that in order for there to be an abandonment, a covenant must be “habitually and substantially violated.” *Reading v. Keller*, 67 Wn.2d 86, 406 P.2d 634, 637 (Wash. 1965) (internal quotations omitted). The violations must be so substantial as to destroy the usefulness of the covenant and support a finding that the covenant has become burdensome. See *Keller v. Branton*, 667 P.2d 650, 654 (Wyo. 1983). If the original purpose of the covenant can still be accomplished and substantial benefit will continue to inure to residents, the covenant will stand.

*Swenson v. Erickson*, 2000 UT 16, ¶¶ 21-22, 998 P.2d 807.

The trial court noted that the “obvious answer to the waiver argument” is found in the CC&R provision stating that “[f]ailure by any owner to enforce any covenants or restrictions herein contained shall in no event be deemed a waiver of the right to do so hereafter.” (Add. 8 & 17.) Even in the absence of this language, the Court held that the evidence presented by Defendants did not show “such ‘substantial and general

noncompliance with the covenant’ requiring all subdivision homes to be built of all-brick, brick and stucco or rock and stucco as to establish as a matter of law, to a ‘clear and convincing’ standard, that this covenant has been abandoned.” (Add. 9.) The trial court properly considered the requirements of *Swenson* and ruled that there had been no abandonment of the exterior finish covenant. Accordingly, the trial court correctly entered summary judgment in favor of Plaintiffs.

## **II. THE INJUNCTIVE RELIEF GRANTED BY THE TRIAL COURT WAS PROPER**

### **A. Defendants Failed to Preserve Their Injunctive Relief Argument in the Trial Court**

Defendants argue on appeal that the Court failed to properly apply a “balance of injury” test in determining whether to grant injunctive relief. However, in response to Plaintiff’s Motion for Summary Judgment, Defendants never argued that injunctive relief was inappropriate or that the trial court must apply a balancing test. Defendants’ Memorandum does not even contain the words “injunctive” or “balancing.” (R. 96-104.) Defendants presented no legal authorities to the trial court regarding injunctive relief relating to restrictive covenants. Once again, because this issue was not preserved below, Defendants have waived their right to present this issue on appeal.

### **B. Injunctive Relief was Proper Even After Application of a “Balance of Injury” Test**

Defendants failed to preserve at the trial court their argument that a “balance of injury” test should have been conducted by the trial court. But even if this issue had been

raised before the trial court, it would not have altered the trial court's proper decision to grant summary judgment on Plaintiffs' injunctive relief claims.

The Utah Supreme Court has described the "balance of injury" test as follows:

Under [the balance of injury] test, an equity court may exercise its discretion not to grant injunctive relief when the plaintiff is not irreparably harmed by the violation, the violation was innocent, defendants' cost of removal would be disproportionate and oppressive compared to the benefits plaintiffs would derive from it, and plaintiffs can be compensated by damages.

*Crimmins v. Simonds*, 636 P.2d 478, 480 (Utah 1981). In *Crimmins*, the Utah Supreme Court rejected the defendants' balance of injury argument because the defendants' cost of removal would have been about \$7,000.00. The Utah Supreme Court noted that "courts have not found injunctions requiring the removal of river moorage or the disassembly of a building encroachment to be so oppressive that an injunction would be denied." *Id.*

The court further noted as follows:

The fact that the damages suffered by plaintiffs as a consequence of defendants' covenant violation was monetarily minimal does not preclude plaintiff from obtaining an injunction in view of plaintiffs' protectable interest in the residential integrity of their neighborhood and the enforceability of the covenants that help to sustain it.

*Id.*

In the present case, Defendants presented no evidence to the trial court regarding the cost of replacing the prohibited siding with conforming materials. Accordingly, the court could not determine whether the relief sought was disproportionate or oppressive. However, it is certainly unlikely that the replacement of the siding would be more

burdensome than “removal of river moorage or the disassembly of a building encroachment.”

The undisputed record refutes Defendants’ assertion that their violation of the CC&Rs “was not willful.” (Appellants’ Br. at 21.) Defendants began the construction of their home in August 2002. (R. 130) Defendants’ were informed of the CC&R requirements in November of 2002. (R. 130.) Defendants received a copy of the CC&Rs and a cease and desist letter from Plaintiffs’ counsel in December of 2002. (R. 130-131.) Despite all of this, Defendants completed their residence with siding and moved into the residence some time before April of 2003. (R. 85, 87 & 131.) At a minimum, Defendants’ decision to continue construction and finish the home with siding was willful. The trial court noted that “defendants declined to alter their construction plans [to utilize conforming exterior building materials] and proceeded to finish the home . . . .” (Add. 4.) The trial court also noted that the Defendants’ costs associated with replacing the nonconforming siding were “self-imposed.” (R. 191.)

Finally, Defendants presented no evidence that the Plaintiffs could be adequately compensated by damages. The Utah Supreme Court noted that the appropriate remedy under a balance of injury test is “an award of damages in favor of plaintiffs, not the reversal [of the injunction] requested by defendants.” *Crimmins*, 636 P.2d at 480 n.2.

In short, the undisputed facts before the trial court gave no indication of the cost of replacing the siding, gave no support to the argument that the Defendants’ violation of the CC&Rs was innocent, and gave no indication that Plaintiffs could be adequately

compensated by damages. Accordingly, there was no basis for the trial court to exercise its discretion not to grant injunctive relief.

### **III. THE TRIAL COURT'S DENIAL OF DEFENDANTS' RULE 56(f) MOTION WAS NOT A CLEAR ABUSE OF DISCRETION**

Defendants contend that the trial court abused its discretion in denying Defendants' Rule 56(f) motion requesting a continuance of the summary judgment proceedings to allow Defendant to conduct discovery. To the contrary, Defendants failed to identify any material facts in Plaintiffs' exclusive control which could have been revealed by discovery and which would enable Defendants to more effectively oppose the summary judgment motion. Accordingly, the denial of the Rule 56(f) motion was not a clear abuse of the trial court's discretion.

The Utah Supreme Court has noted that "we review [rulings under Rule 56(f)] under an abuse of discretion standard: Does the grant or denial exceed 'the limits of reasonability.'" *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237 (*quoting Crossland Sav. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994.)) The trial courts may properly deny Rule 56(f) motions when they are dilatory or lacking in merit. *Id.*; *American Towers Owners Assoc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1195 (Utah 1996). This Rule 56(f) determination is left to the sound discretion of the trial court, *Cox v. Winters*, 678 P.2d 311, 313 (Utah 1984), and the trial court's ruling "will not be disturbed absent a clear abuse of discretion." *Energy Management Servs., L.L.C. v. Shaw*, 2005 UT App 90, ¶ 14, 110 P.3d 158 (*quoting Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1265 (10<sup>th</sup> Cir. 1984.)) Therefore, the trial court's denial of

Defendants' Rule 56(f) request should not be overturned unless the denial exceeded the limits of reasonability and constituted a clear abuse of discretion.

**A. Defendants Were Not Precluded from Conducting Discovery Because the Action is Exempt from Rule 26(f)**

In the affidavit supporting Defendants' Rule 56(f) motion, Defendants' counsel indicates that he was precluded from conducting discovery by Plaintiffs' failure to submit an attorney's planning meeting report or discovery plan. (R. 125.) As a result, Defendants argue, the trial court should have granted a Rule 56(f) continuance of the motion for summary judgment to allow Defendants an opportunity to conduct discovery. In fact, Defendants could have conducted discovery at any time after answering the Plaintiffs' Complaint.

Rule 26(d) provides as follows: "Except for cases exempt under Subdivision (a)(2), a party may not seek discovery from any source before the parties have met and conferred as required by Subdivision (f)." UTAH R. CIV. P. 26(d). Thus, in those cases which are not exempt, the parties are prohibited from conducting discovery until after they have conducted a Rule 26(f) attorney's planning meeting. However, the present action is exempt from the requirements of Rule 26(d).

Rule 26(a)(2) provides as follows:

(a)(2)(A) The requirements of Subdivision (a)(1) and Subdivision(f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is \$20,000 or less. . . .

UTAH R. CIV. P. 26(a)(2)(A)(i). Plaintiffs' complaint was based entirely on the enforcement of the CC&Rs. (R. 1-8.) Restrictive Covenants, such as the CC&Rs, constitute a contract between the Plaintiffs and the Defendants: "Restrictive covenants that run with the land and encumber subdivision lots *form a contract* between subdivision property owners as a whole and individual lot owners . . . ." *Swenson*, 2000 UT 16, ¶ 11 (emphasis added). In addition, the Complaint which sought declaratory and injunctive relief, did not demand damages in excess of \$20,000. (R. 7-8.) The only monetary relief sought by Plaintiffs' Complaint was the recovery of reasonable attorney's fees. (R. 8.) Because the present action was based on contract and demanded less than \$20,000 in damages, Rule 26(f) did not apply, and the parties were free to conduct discovery at any time after filing their pleadings. Defendants could have begun discovering any issues they felt were significant once they filed their answer on March 7, 2003. Plaintiffs did not preclude Defendants from conducting discovery.

**B. Defendants' Rule 56(f) Motion Was Dilatory**

If Defendants believed that discovery could not start until an attorney's planning meeting had occurred, Defendants could have taken steps to arrange an attorney's planning conference. Alternatively, Defendants could have filed a motion for a scheduling and managing conference pursuant to UTAH R. CIV. P. 16. Neither Plaintiffs' affidavit in support of their Rule 56(f) motion (R. 124-25) nor any other portion of the court record indicates any efforts by Defendants to arrange an attorney's planning meeting or to request a scheduling conference. Plaintiffs filed their Motion for Summary Judgment on July 23, 2003, more than four months after Defendants filed their answer on

March 7, 2003. There was certainly adequate time for Defendants to conduct any discovery they felt necessary during this time.

In *Crossland Savings v. Hatch*, 877 P.2d 1241 (Utah 1994), the Utah Supreme Court upheld a denial of a Rule 56(f) motion for continuance when the Defendant failed to conduct discovery during the four months between the filing of the complaint and the filing of the summary judgment motion. *Id.* at 1243-44. In the present case, Defendants' summary judgment motion was filed almost seven months after the complaint was filed and sent to Defendants' counsel with an acceptance of service form. (R. 23, 25, 27 & 29.) Defendants were dilatory in failing to take any steps to obtain discovery for almost seven months.

**C. Defendants Did Not Identify Information in the Plaintiffs' Exclusive Knowledge and Control**

A key purpose of Rule 56(f) is to ensure that a diligent party opposing summary judgment has an opportunity to discover information which is in the sole control of the adverse party:

[With regard to a Rule 56(f) motion,] the mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are in the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures.

*Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 840 (Utah Ct. App. 1987) (quoting 2 J.

MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE, ¶ 56.24 (2d ed.

1987)); *see also Salt Lake County v. Western Dairymen Cooperative, Inc.*, 2002 UT 39,



¶ 28, 48 P.3d 910 (noting as a basis for overturning the denial of defendant’s Rule 56(f) motion that “the information the County was seeking . . . remained in the exclusive control of an adverse party . . . .”); *Energy Management Servs.*, 2005 UT App 90, ¶ 13 (noting as a basis for overturning the denial of plaintiff’s Rule 56(f) motion that “the [relevant] information . . . is in the exclusive possession and control of Shaw and Del-Rio [the two defendants]”).

In the present case, Defendants’ Rule 56(f) affidavit did not identify any material information which was in the exclusive control of Plaintiffs. The only explanation given by Defendants was as follows:

[T]he Court should enter a scheduling order to permit further affidavits to be obtained, depositions to be taken, and necessary discovery undertaken in order to obtain a full record and permit these defendants on that full record to further controvert the ultimate issues of fact and of the validity of the DCC&Rs, the issue of waiver, the issues of impossibility of performance, the issue of estoppel.

(R. 125.) Defendants did not identify the individuals whose affidavits were sought and did not explain why Defendants could not obtain those affidavits in time to oppose the motion for summary judgment. Defendants did not identify the individuals they would depose or what information Defendants anticipated obtaining from those depositions. Finally, Defendants did not identify any material evidence or information which was allegedly in the exclusive control of the Plaintiffs.

It is difficult to imagine material evidence or information in the present case which would be in the exclusive control of the Plaintiffs. The present case involves restrictive

covenants which may be obtained by the public from the county recorder. Defendants acknowledge receiving a copy of the CC&Rs in December of 2002. (R. 130.)

A certified copy of the CC&Rs was attached to the Memorandum in Support of Motion for Summary Judgment. (R. 52-60.) Clearly, Defendants had adequate access to the CC&Rs both before and after this litigation was commenced.

Defendants raised four potential issues in their Rule 56(f) affidavit: (1) validity of the CC&Rs; (2) waiver of CC&R provisions; (3) impossibility of performance; and (4) estoppel. None of these issues implicated information which was in Plaintiffs' exclusive control. The validity of the CC&Rs is a legal question. Defendants' waiver argument, although never clearly articulated, was apparently based upon certain alleged violations of the CC&Rs throughout the Subdivision. (R. 132.) Defendants never alleged any violations of the CC&Rs which were not visible to a person walking through the neighborhood. Defendants could have presented photographs, or at a minimum descriptive affidavit testimony, regarding any asserted violations of the CC&Rs. In fact, Barbara Johnson's affidavit recounted several items which she believed to be in violation of the CC&Rs. (R. 132.) Nothing prevented Defendants from adequately documenting and submitting any perceived violations of the CC&Rs.

Defendants' argument that compliance with the CC&Rs was impossible because the Committee had terminated was a legal issue which was argued by Defendants in their opposition memorandum. (R. 100-101.) There is no indication that this argument was dependent upon factual information in the possession of the Plaintiffs. This argument

was addressed and rejected by the trial court. (Add. 6.) Finally, Defendants did not articulate any alleged grounds for estoppel in their affidavits or opposing memorandum.

In short, Defendants' Rule 56(f) affidavit did not identify any facts in the sole and exclusive control of the Plaintiffs which would aid Defendants' opposition to summary judgment. *See Callioux*, 745 P.2d 841 (requiring the party opposing summary judgment to "explain how the continuance will aid his opposition to summary judgment"). In the absence of this identification, the trial court properly denied the Rule 56(f) motion.

#### **IV. PLAINTIFFS ARE ENTITLED TO RECOVER THEIR ATTORNEY'S FEES ON APPEAL**

The CC&Rs provide that "[a]ny Owner shall have the right to enforce . . . the provisions of this Declaration [and] [l]itigation costs arising from noncompliance of these restrictive covenants will be borne by the losing party." (R. 58.) Based upon this provision, Plaintiffs requested an award of attorney's fees in their Complaint and their Motion for Summary Judgment. (R. 7-8, 36, 47-48.) Defendants acknowledged in their opposition that an "action to enforce the covenants [is] also subject to a provision for attorney's fees in enforcement." (R. 103.) The trial court awarded attorney's fees to Plaintiffs. (Add. 9; R. 191 & 193.)

When a party who is entitled to recover attorney's fees at the trial court prevails on appeal, that party is entitled to an award of attorney's fees incurred in the appeal. *R&R Energies v. Mother Earth Indus., Inc.*, 936 P.2d 1068, 1081 (Utah 1997) (where party entitled to attorney fees below prevails on appeal, award of attorney fees on appeal is proper); *Salmon v. Davis County*, 916 P.2d 890, 896 (Utah 1996) ("a contractual

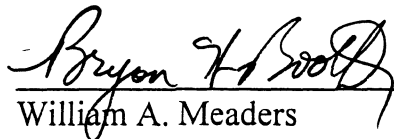
obligation to pay attorney fees incurred in enforcing a contract should also include fees incurred on appeal”); *Management Servs. Corp. v. Development Assocs.*, 617 P.2d 406, 409 (Utah 1980) (holding that contract provision allowing for attorney fees includes those fees incurred on appeal as well as at trial). Accordingly, Plaintiffs are entitled to an award of reasonable attorney’s fees they have incurred on appeal.

### CONCLUSION

Based on the foregoing, this Court should affirm the district court’s grant of Plaintiff’s Motion for Summary Judgment, affirm the district court’s denial of Defendants’ Rule 56(f) Motion, and award Plaintiffs the attorney’s fees they have incurred on appeal.

DATED this 22<sup>nd</sup> day of September, 2005.

KIRTON & McCONKIE

A handwritten signature in cursive script, appearing to read "Bryan H. Booth", is written over a horizontal line.

William A. Meaders

Bryan H. Booth

Attorneys for Plaintiffs/Appellees

**CERTIFICATE OF MAILING**

I hereby certify that on this 22<sup>nd</sup> day of September, 2005, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE** to be mailed through United States mail, postage prepaid, to the following:

John A. Snow (#3025)  
Stephen K. Christiansen (#6512)  
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## Addenda

## **Index to Addendum**

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

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	:	
LYNDA JONES, RULON JONES,	:	
SCOTT SUNDELL, LISA SUNDELL,	:	
JERRY GILMORE and CATHY	:	
GILMORE,	:	DECISION AND ORDER GRANTING
	:	PLAINTIFFS' MOTION FOR SUMMARY
Plaintiffs,	:	JUDGMENT, DENYING DEFENDANTS'
	:	RULE 56(F) MOTION
 vs.	 :	
BARBARA JOHNSON and DAVID	:	Case No. 020915089
C. JOHNSON,	:	
Defendants.	:	Judge Denise Posse Lindberg
	:	

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¶1 This matter is before the Court on Plaintiffs' Motion for Summary Judgment, filed July 23, 2003. Defendants filed an untimely Opposition and Rule 56(f) request on August 25, 2003 along with a request for a scheduling conference. Plaintiff's Reply was filed September 3, 2003 along with a notice to submit pursuant to Utah R. Jud. Admin. 4-501. Plaintiffs requested oral argument on the summary judgment motion; Defendants did not. Argument was scheduled for November 25, 2003, along with Defendants' requested scheduling conference.

¶2 After further review of the parties' submissions, the Court believes that oral argument is unnecessary because the Utah courts have authoritatively addressed the enforceability of



restrictive covenants that run with the land. Accordingly, the Court DENIES Plaintiffs' request for argument and strikes the motion hearing. The Court further concludes that Defendants' Rule 56(f) request fails to establish a basis for delaying decision on Plaintiff's summary judgment motion. The Court GRANTS Plaintiffs' Motion for Summary Judgment. Moreover, because the grant of summary judgment disposes of all issues in the case, the Court also strikes as unnecessary the previously set scheduling conference.

#### UNDISPUTED FACTS

¶3 The facts of the case are straightforward and undisputed. Plaintiffs are neighbors in the Jordan Estates subdivision in South Jordan, Salt Lake County. Plaintiffs' seek declaratory judgment and injunctive relief in connection with a house built by Defendants in the subdivision, which Plaintiffs claim does not conform with the requirements in the Declaration of Covenants, Conditions and Restrictions ("CC&Rs") of South Jordan Estates, Phase 2 (Amended).

¶4 The CC&Rs were established by the original owner and developer of the subdivision and were duly recorded with the Salt Lake County Recorder on 12/26/96. The CC&Rs recite that the "Declarant intends that the Lots and each of them, together with the Common Easement as specified herein, shall hereafter be subject to the covenants, conditions, and restrictions, reservations, . . . herein set forth." Further, "for the purpose of protecting the value and desirability of the Lots," Declarant declared that "all of the Lots shall be held, sold and conveyed subject to the . . . restrictions, and covenants and conditions, which shall run with the Lots, and be binding on all parties having any right, title or Interest in the Lots or any part thereof, their heirs, successors and assigns . . . ."

¶5 Of particular relevance to the present dispute are the following provisions of the CC&Rs:

(1) Provisions establishing an Architectural Control Committee (“ACC”) required to grant approval in writing to construction in the subdivision. CC&R sections 1.1, 1.2.;

(2) A provision terminating the tenure of the ACC upon occurrence of certain events and/or time period, but expressly providing that thereafter “[a]ny and all rights, duties and/or responsibilities of the [ACC] shall at that time automatically become the rights, duties and/or responsibilities of the Lot Owners without the necessity of the filing of any amendment to this Declaration or *any other action.*” CC&R section 1.5 (emphasis added);

(3) Provisions requiring each dwelling to have a masonry exterior that is (a) all brick, (b) brick and stucco, or (c) rock and stucco. Any other materials must be approved by the ACC. CC&R section 3.1(4), (5);

(4) Provisions stating that “[a]ny Owner shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, reservations . . . imposed by the [CC&Rs],” and further providing that “[f]ailure by any Owner to enforce any covenants or restrictions herein contained shall in no event be deemed a waiver of the right to do so thereafter. Litigation costs arising from noncompliance of [*sic*] these restrictive covenants will be borne by the losing party. CC&R section 4.1; and

(5) A provision declaring that the covenants and restrictions of the CC&Rs “*shall* run with and bind the land” for an initial 40 year period, and thereafter be automatically extended for successive 10 year periods. CC&R section 4.3.

¶6 Defendants began building a home in the subdivision, the exterior of which was

comprised of brick and Hardiplank® lap siding. Construction began on or about August 2002. By at least late November-early December 2002 Defendants were on notice (through personal contact from neighbors, a cease and desist letter from an attorney retained by the neighbors, and by a petition signed by a significant number of subdivision residents) that they were in violation of the CC&R provision limiting the types of exterior building materials that could be used in construction. Nevertheless, Defendants declined to alter their construction plans and proceeded to finish the home on or about April 2003.

#### LAW

¶17 Summary judgment may be granted only when there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). In evaluating a summary judgment motion the Court draws all inferences in favor of the non-moving party. All motions, memoranda and affidavits submitted in support or opposition to a summary judgment motion must comply with the requirements of Rule 4-501. *Id.*

¶18 Rule 56(f) requires the party seeking relief to file an affidavit showing that there are specific reasons why the requester is unable at the present time to secure facts essential to justify the opposition [to the summary judgment motion], and “must explain how the requested continuance will aid his or her opposition to summary judgment.” *Sandy City v. Salt Lake County*, 794 P.2d 482, 488 (Utah Ct. App. 1990), *rev’d in part on other grounds*, 827 P.2d 212 (Utah 1992). While normally such Rule 56(f) motions should be “granted liberally,” the party seeking the delay has an affirmative obligation to act in accordance with the rules and cannot avoid summary judgment if the Rule 56(f) request is “dilatory or lacking merit.” *See e.g., Salt Lake County v. Western Dairymen Coop., Inc.*, 43 P.3d 910, 917 (Utah 2002).

¶9 “Restrictive covenants that run with the land and encumber subdivision lots form a contract between subdivision property owners as a whole and individual lot owners . . . [g]enerally, unambiguous restrictive covenants should be enforced as written.” *Swenson v. Erickson*, 2000 UT 16 ¶11, 998 P.2d 807, 810-11. “[I]t is not for [the] court to second-guess the judgment of covenanting parties. . . It is [the] court’s duty to enforce the intentions of the parties as expressed in the plain language of the covenants.” *Id.* at ¶19 (p. 812) (citation omitted). “Restrictive covenants are a common method of effectuating private residential developmental schemes. Property owners who purchase land in such developments have a right to enforce such covenants against the owners who violate them.” *Id.* at ¶21 (p. 813) (citations omitted).

## ANALYSIS

### Summary Judgment motion

¶10 As a preliminary matter the Court notes that Defendants’ Opposition does not strictly comply with the requirements of Utah R. Jud. Admin. 4-501(2)(B). The Court expects all parties before it to comply fully with all applicable rules of the Court. Generally this Court construes Defendants failure to comply with Rule 4-501 as a failure to identify material issues of fact in dispute that would preclude entry of summary judgment against them. In this case the Court has also reviewed the affidavit filed in support of the Opposition to Plaintiffs’ motion and, independent of how the Court construes the failure to comply with 4-501, the Court also finds the Johnson affidavit to be insufficient to create material issues of fact in dispute.

¶11 Substantively, Defendants claim that (a) they were unaware of the CC&Rs when they purchased their lot, (b) it was impossible to comply with the CC&Rs because the ACC had been disbanded and there was no subsequent entity organized to take over the architectural review

function, and, (c) in any event, the exterior finish of their home is in “substantial compliance” with the intent of the CC&Rs. Each of their arguments is unavailing.

¶12 Recorded CC&Rs are deemed to be notice to the world of the contents, requirements, covenants and conditions associated with the recorded document. Utah Code §57-4a-2 (2002). Whether or not Defendants were actually told by sellers of the CC&R requirements is irrelevant; the law declares that they had constructive notice of those requirements.

¶13 The impossibility argument is similarly unpersuasive. In unambiguous language the CC&Rs expressly provide that upon the dissolution of the ACC, “[a]ny and all rights, duties and/or responsibilities of the Committee shall at that time *automatically* become the rights, duties and/or responsibilities of the Lot Owners without the necessity of filing any amendments . . . or [taking] any other action.” CC&R section 1.5. Essentially, the ACC became a “committee of the whole” of the Lot Owners. Having been put on notice relatively early in the building process that there were issues with the proposed exterior of Defendants’ home, Defendants made no effort to address how architectural clearance should be sought from the Lot Owners, to whom the review function devolved. The subdivision at issue is only comprised of 26 lots. Therefore, a committee of the whole could have been organized for purpose of this review issue, especially once Defendants were put on notice of the alleged problems via direct communication, the neighbors’ signed petition and the cease and desist letter. This Court believes the burden was on Defendants to engage in a dialogue with their neighbors around resolution of the issues. Defendants declined to do so. Instead, they proceeded to complete their home despite the

protests of their neighbors.<sup>1</sup>

¶14 The Court categorically rejects Defendants' claims that the CC&R provision dealing with home exteriors is ambiguous. It is difficult to fathom more clear and unambiguous language than that which states the exterior finish of homes in the subdivision must be all brick, brick and stucco or rock and stucco. *See* CC&R section 3.1(4).

¶15 It is also irrelevant that Handiplank® siding may be superior to stucco, as Defendants assert. The requirements of the CC&Rs are clear, unambiguous, and establish what materials are or are not permissible, although the Court notes that there appears to be some discretion granted to the ACC (or its successor, the committee of the whole of Lot Owners) to grant specific approval for other materials if a proper and timely request is made. CC&R 3.1(5). While the Court need not reach the question whether the CC&Rs would authorize a committee of the whole to grant an after-the-fact request by Defendants for retroactive approval of the non-conforming material, the analysis in *Swenson v. Erickson* is cautionary. In that case the Court held that such post-construction approval was outside of the authority of the review committee to grant. 2000 UT 16, ¶32 (p.815).

¶16 Based on the foregoing, Defendants' argument that their home "substantially complies" with the CC&Rs must fail. Plaintiffs have the right to have the CC&Rs enforced as written.

¶17 Defendants' affidavit identifies various other homes in the subdivision that allegedly

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<sup>1</sup>The Court notes that Defendants' own affidavit admits that early on in the dispute they were offered financial compensation in the amount of \$500 as an inducement to have them bring themselves into compliance with the CC&Rs instead of having those monies spent in legal fees. Defendants apparently declined the offer. Affidavit of Barbara Johnson at 3, ¶8.

violate the CC&Rs, and/or did not go through prior review by the ACC or the Lot Owners.<sup>2</sup>

Defendants' argument appears to be that, if the CC&Rs are still applicable, they have been violated by others. The obvious answer to the waiver argument is found in the CC&Rs where it states that "[f]ailure by any Owner to enforce any covenants or restrictions herein contained shall in no event be deemed a waiver of the right to do so thereafter. CC&R section 4.1.

¶18 The *Swenson* Court also dealt with the question whether there had been an abandonment of the restrictive covenants as evidenced by other violations of the CC&Rs. The Court acknowledged that "[c]onduct by property owners within a development . . . may terminate and render unenforceable a particular covenant where such conduct *so substantially changes the character of the neighborhood* as to neutralize the benefit of the covenant . . . or constitutes evidence of the abandonment of the covenant." 2000 UT 16 ¶21 (emphasis added; citations omitted). However, "before an abandonment of a covenant may be found there must be 'substantial and general noncompliance' with the covenant," and "[t]he violations must be so substantial as to destroy the usefulness of the covenant . . . . If the original purpose of the covenant can still be accomplished and substantial benefit will continue to inure to residents, the covenant will stand. *Id.* at ¶22 (citations omitted). *See also Papanikolas Bros. Enters. v. Sugarhouse Shopping Center Asscs.*, 535 P.2d 1256 (Utah 1975) ("Before a change will vitiate a covenant, it must be of such a magnitude as to neutralize the benefits of the restriction, to the

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<sup>2</sup>The Court notes that some of these allegations in the affidavit do not appear to be statements made of personal knowledge, and therefore would be inadmissible and insufficient to create a material issue of fact in dispute for purposes of resisting the summary judgment motion. *Western States Thrift & Loan Co. V. Blomquist*, 29 Utah 2d 58, 504 P.2d 1019 (1972) (Hearsay testimony that would not be admissible if testified to at trial may not properly be set forth in an affidavit on summary judgment). *See also Walker v. Rocky Mt. Recreation Corp.* 29 Utah 2d 274, 508 P.2d 538 (1973).

point of defeating the object and purpose of the restrictive covenant.”). Moreover, “[e]vidence of abandonment must be established by clear and convincing evidence.” *Id.* (citing *Metropolitan Inv. Co. v. Sine*, 14 Utah 2d 36,41, 376 P.2d 940, 943 (1962)).

¶19 Defendants cite three specific addresses in the subdivision where allegedly there are, or may be violations of the CC&Rs. Only one of the alleged violations is arguably related to the issue before the Court. Affidavit of Barbara Johnson at 5, ¶16 (“11721 So. History Drive . . . has Hardi-plank® on the window cutouts . . .”). The Court is unclear as to what, exactly, is meant by Defendants’ statement. In any event, this is hardly indicative that there has been such “substantial and general noncompliance with the covenant” requiring all subdivision homes to be built of all-brick, brick and stucco or rock and stucco as to establish as a matter of law, to a “clear and convincing” standard, that this covenant has been abandoned.

¶20 The Court concludes that Plaintiffs are entitled to summary judgment on all their claims, including the requested injunction and reasonable attorneys fees to the prevailing party, as authorized by the CC&Rs.

#### Rule 56(f) motion

¶21 “To qualify for relief under Rule 56(f) the [party opposing a motion for summary judgment] must show to the best of his . . . ability what facts are within the movant’s exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the Rules, and that [Plaintiff] is desirous of taking advantage of these discovery procedures. *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 841-42 (Utah Ct. App. 1987). Additionally, the trial court must examine whether the affidavit supporting the Rule 56(f) motion adequately “explains how the continuance will aid his opposition to summary judgment.”



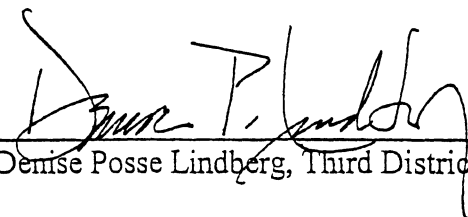
*Id.* at 841 (citing *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10<sup>th</sup> Cir. 1986)). The Court has reviewed counsel's Rule 56(f) affidavit and concludes that it fails to establish "what facts are within the . . . exclusive knowledge or control" of the party moving for summary judgment or what steps Defendants have attempted to move the discovery process forward. Nothing in counsel's affidavit explains how a continuance would aid Defendant's opposition to summary judgment. The Court believes discovery is unnecessary on what are, essentially, issues of law—the validity of the CC&Rs, waiver, and impossibility of performance. In short, based on the undisputed facts before the Court it appears that additional discovery would merely serve to delay the proceedings without increasing the likelihood that *material* issues of fact in dispute would be revealed.

#### ORDER

¶22 For the reasons stated, the Court DENIES Defendants' Rule 56(f) motion and GRANTS Plaintiffs' Motion for Summary Judgment on all claims. The Court further awards reasonable attorneys fees to Plaintiffs as the prevailing party. Plaintiffs' counsel to prepare and submit appropriate Order and Judgment pursuant to Utah R. Jud. Admin. 4-504, and an affidavit with supporting documentation establishing attorneys' fees reasonably incurred in this matter.

¶23 Clerk may strike the motion hearing and scheduling conference presently set for November 25, 2003.

So Ordered this 20<sup>th</sup> day of November, 2003. By the Court:

  
Denise Posse Lindberg, Third District Court Judge

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6528990

DECLARATION OF  
COVENANTS, CONDITIONS AND RESTRICTIONS  
OF  
SOUTH JORDAN ESTATES, PHASE 2 (Amended)  
11800 South 3600 West  
South Jordan, Utah

THIS DECLARATION is made this 4th day of December 1996, by S K Development, Inc., hereinafter referred to as "Declarant".

WITNESSETH:

WHEREAS, Declarant is the Owner of certain property (herein the "Lots") in South Jordan City, Salt Lake County, State of Utah, more particularly described as follows:

All of Lots, 201 through 226 South Jordan Estates, Phase 2 according to the official plat thereof filed with the Salt Lake County Recorder in Salt Lake County, Utah.

WHEREAS, Declarant intends that the Lots and each of them, together with the Common Easement as specified herein, shall hereafter be subject to the covenants, conditions, and restrictions, reservations, assessments charges and liens herein set forth.

NOW, THEREFORE, Declarant hereby declares, for the purpose of protecting the value and desirability of the Lots, that all of the Lots shall be held, sold and conveyed subject to the following easements, restrictions, and covenants and conditions, which shall run with the Lots, and be binding on all parties having any right, title or interest in the Lots or any part thereof, their heirs, successors and assigns, and shall insure to the benefit of each Owner thereof.

ARTICLE I

ARCHITECTURAL CONTROL

SECTION 1.1 The Architectural Control Committee shall be composed of Steven E. Sinner and Gaye H. Brower. A majority of the committee may designate a representative to act for it, in the event of death or resignation of any member of the committee, the remaining members of the committee, nor its designated representative shall be entitled to any compensation for services performed pursuant to this covenant.

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**SECTION 1.2** The Committee's approval or disapproval as required in these covenants shall be in writing. The Lot owner must submit two sets of formal plans and two site plans, (one set for each of the following: South Jordan City and Owner), which shall contain foundation plan, floor plans and all elevations showing materials to be used in construction, before the review process can commence. In the event the Committee or its designated representative fails to approve or disapprove within 30 days after plans and specifications have been submitted to it, approval will not be required and the related covenants shall be deemed to have been fully complied with.

**SECTION 1.3** All fences must meet South Jordan City codes. No walls and/or fences shall be constructed with a height of more than six (6) feet. No wall and/or fence of any height shall be constructed on any lot until after the height, type, design, materials, and approximate location thereof shall have been approved in writing by the Architectural Control Committee. The height or elevation of any wall shall be measured from the existing elevations of the property at or along the applicable points or lines. Any questions as to such height shall be completely determined by the Committee. Walls and/or fences shall be constructed as to the harmony of external design and location in relation to surrounding structures and topography by the Architectural Control Committee.

**SECTION 1.4** All buildings or sheds must have the approval of the Architectural Control Committee and meet all South Jordan City ordinances and codes.

**SECTION 1.5** **Termination of Committee.** Upon the first to occur of either (1) the completion of the construction of a Residence and the Landscaping upon each Lot, or (2) the date which shall be five (5) years from the date of this declaration, the Committee shall automatically cease to exist. Any and all rights, duties and/or responsibilities of the Committee shall at that time automatically become the rights, duties and/or responsibilities of the Lot Owners without the necessity of the filing of any amendment to this Declaration or any other action.

## ARTICLE II

### GENERAL RESTRICTIONS AND REQUIREMENTS

**Section 2.1** **Land Use and Building Types.** No building shall be erected, altered, placed or permitted to remain on any Lot other than: (1) one single Family dwelling with enclosed, attached garage for at least two cars. (2) One other detached building which is architecturally compatible with the residence. Any additional detached building must be approved by the Committee, and will only be approved after the Owner has demonstrated the reasonable need for any additional buildings and that the Committees approval of any additional building will not create a problem for any other Owner in the "SOUTH JORDAN ESTATES" Subdivision.

**Section 2.2 Subdivision of Lot.** No Lot may be divided, subdivided or separated into smaller parcels unless approved in writing by (1) the Architectural Control Committee and (2) by South Jordan City.

**Section 2.3** The houses to be located on Lots #201, 211, 212 and 226 shall "front" onto 11800 South Street. The curb cuts and driveways shall be from Monument Circle (3460 West Street) for the houses located on Lots #201 and 211 and from History Drive (3400 West Street) for the houses built on Lots # 212 and 226, respectively. **Per South Jordan City.**

### ARTICLE III

#### RESIDENTIAL AREA COVENANTS

**Section 3.1 Guidelines, Part A.**

1. No Lot shall be used except for residential purposes.
2. No building shall exceed two stories in height.
3. There shall be no more than two dwellings of the same style in a sequence throughout the subdivision.
4. Each dwelling must have a masonry exterior with all brick, or brick and stucco, or rock and stucco. All stucco work must include some popout detail work on all four sides.
5. All construction is to be comprised of new materials, except that used brick may be used with the prior written consent of the Architectural Control Committee. Any other materials must be approved by the Architectural Control Committee.

**Section 3.2 Guidelines, Part B.**

1. Each dwelling must have an attached garage for a minimum of 2 cars or a maximum of 3 cars. Each Lot may also have a detached garage with a maximum of 3 vehicles; provided that neither encroach upon any easement.
2. Colors of exterior material shall be approved by the Architectural Control Committee. Care should be given that each Residence complement those around it, and not detract in design, quality or appearance. All final decisions with respect to these enumerated standards and their application to a particular proposed structure in the Subdivision shall be made by the Architectural Control Committee.

**Section 3.3 Dwelling, Quality and Size.** The requirements below are exclusive of open porches, garages, and basements.

**Ramblers:** 1600 square feet main level.

**Multi-Level:** 1600 square feet minimum. Finished square feet constituting the combination of the main level and upper level, but not including family room, half bath and laundry room behind garage.

**Two Story:** First and second floor combined to equal not less than 2000 square feet.

**Section 3.4 City Ordinances.** All improvements on a Lot shall be made, constructed and maintained and all activities on a Lot shall be undertaken, in conformity with all laws and ordinances of the City of South Jordan, Salt Lake County, and the State of Utah which may apply, including without limiting the generality of the foregoing, all zoning and land use ordinances. Any Business operated out of the home, must be in strict compliance with the Zoning and Ordinances adopted by the City of South Jordan, and may require a conditional use permit to be applied for at the City of South Jordan.

**Section 3.5 Easements.** Easements for installation and maintenance of utilities and drainage facilities are reserved as shown on the recorded plat. Within these easements, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of utilities, drainage and irrigation, or which may change the direction of the flow of drainage channels in the easements, or which may obstruct or retard the flow of water through drainage of irrigation channels in the easements.

**Section 3.6 Nuisances.** No noxious or offensive activity shall be carried on upon any Lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood, including excessively loud music produced by any source. No large trucks, commercial vehicles, construction, or like equipment, of any kind or type, shall be stored or parked on the road or lot or in the front area of the home of any residential LOT in the subdivision except while engaged in transporting to or from a residence in the neighborhood. Also, no semi trucks or trailers will be allowed in the subdivision at any time, and no curb-side parking of any vehicle will be allowed in the street during winter months, overnight or for any period longer than four hours. No motor vehicles of any type shall be parked or permitted to remain on the streets or on the property unless they are in running condition, properly licensed and being regularly used. (Except antique vehicles stored in a garage.)

**Section 3.7 Location of Recreational Vehicles.** Boats, trailers, campers and motor homes may not be stored in the front yard of any LOT or in the street side yard of a corner LOT in excess of 24 hours, except that a vehicle owned by a guest of the resident may be stored in a required front yard or street side yard (on corner lots) for up to 7 consecutive days per calendar quarter. A motor home or travel trailer may be occupied by a guest or guests of the resident for up to 7 consecutive days per calendar quarter.

**Section 3.8 Temporary Structures.** No structures of a temporary character, ie, trailer, basement, tent, shack, barn, or other outbuilding shall be used on any LOT at any time as a residence, either temporarily or permanently.

**Section 3.9 Garbage and Refuse Disposal.** No owner shall allow his or her Lot to become so physically encumbered with rubbish, unsightly debris, garbage, equipment, weed growth, or other things or materials so as to constitute an eyesore as reasonably determined by the Architectural Control Committee. Within ten (10) days of receipt of written notification by the Architectural Control Committee of such failure, the Owner shall be responsible to make the appropriate corrections. No LOT shall be used or maintained as a dumping ground for rubbish

or trash. Garbage or other waste shall not be kept except in sanitary containers. All such containers must be kept clean and in good sanitary condition. All such containers shall not be stored in the front yard. Each LOT and its abutting street are to be kept free of trash, weeds, and other refuse by LOT owner (this includes the city strip). No unsightly material, debris or other objects are to be stored on any LOT in view of the general public.

**Section 3.10 Landscaping.** All front and side yards must be landscaped within eighteen (18) months after dwelling is occupied. Rear yards must be landscaped within two (2) years of occupation of dwelling. All park strips must be kept free of weeds and planted in grass, or grass and trees having a root system that is not conducive to sidewalk, curb or buried utilities damage. Trees planted in park strips shall be purchased, planted and cared for by homeowners and their placement shall be directed by the Architectural Control Committee. Any section of a Lot that is used for pasture must be well maintained and not over-grazed by livestock. All LOTS must be kept free of noxious weeds and must maintain a pleasant appearance. All fence lines must also be kept clean of noxious weeds. In regards to trees, no Cottonwood, Elm, Box Elder, Russian Olive, or Lombardy poplar trees will be permitted on any LOT.

**Section 3.11 Livestock and Poultry.** The only animals, livestock, or poultry raised, bred or kept on any LOT will be those permitted by South Jordan City's ordinances. However, swine, mink, poultry, pit bulls or other vicious dogs will not be allowed under any circumstances. Commercial raising of animals or pets will not be permitted, except with the specific permission of the Committee in writing. The number of animals allowed on each lot is to conform with South Jordan City's ordinances. LOT owners must control any flies created by their livestock, to the best of their ability. Any manure resulting from livestock must be spread or hauled away. Dogs must be kept on the LOT and are not allowed to run at large. Fences must be well maintained to insure containment of all animals. Owners shall be responsible for all damage or loss incurred by other Lot Owners or their invitee caused by animals they own. Owners will be responsible for maintaining control over animals they own at all times if such animals are taken out of the containment area. The enclosure constituting the containment area must be maintained such that the animal cannot escape therefrom. Any such containment areas must be cleaned on a regular basis to minimize odors and maintain a clean appearance. In no case may any household pet or other animal kept at or around the Residence be allowed to create a nuisance for neighboring Lot owners to noise, or otherwise.

**Section 3.12 Ownership.** This section serves to preserve the rights of ownership by making specific regulations that will protect the integrity of the LOTS. Property owners will be responsible for any and all water retention and run off from irrigation or other water sources, natural or man made, initiated at or pertaining to their property, that could affect or damage other property or properties. Owners will not be allowed to remove, restrict, or disassemble any drainage or secondary irrigation system put in place by declarant unless found to be defective and replaced by equal or greater system with approval of South Jordan City.

**Section 3.13 Commencement of Construction.** Purchaser of any LOT within this subdivision shall commence construction of a house on said LOT within three years from date

fee simple title is conveyed to original purchaser. Said house shall be completed with reasonable promptness thereafter. Maximum construction time shall be one year, unless the time limit is extended in writing by the Architectural Control Committee. The Architectural Control Committee may waive or postpone these requirements if it deems necessary, for due cause with prior written consent of the Architectural Control Committee. However, if the Architectural Control Committee waives for one, it shall not constitute a waiver for any more. Each particular case will stand on it own.

**Section 3.14 Signage.** No builder, homeowner, real estate company, developer or any other company or individual shall be allowed to display any sign within said subdivision that measures larger than 2,304 square inches without the approval of the Architectural Control Committee. Any individual or company shall be limited to only one sign per LOT or homesite without the approval of the Architectural Control Committee. S K Development, Inc and S K Properties, Inc. may erect signs upon its own property as S K Development, Inc. and S K Properties, Inc. deem necessary for the operation of the subdivision, and for the sale of LOTS and/or houses within said subdivision. The Architectural Control Committee may cause all unauthorized signs be removed.

**Section 3.15 Governmental Regulations.** When a subject is covered both by this Declaration and a governmental rule, restriction or ordinance, the more restrictive requirements shall be met.

**Section 3.16 Antennas.** All television and radio antennas shall be completely erected, constructed and placed within the enclosed area of the Residence or garage on the LOT. Satellite dishes or other electronic reception devices shall be located and screened so as to not be visible from the Street of an adjacent Lot. Exceptions must first be expressly approved in writing by the Committee.

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## ARTICLE IV

### GENERAL PROVISION

Section 4.1 **Enforcement.** Any Owner shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure by any Owner to enforce any covenants or restrictions herein contained shall in no event be deemed a waiver of the right to do so thereafter. Litigation costs arising from noncompliance of these restrictive covenants will be borne by the losing party.

Section 4.2 **Severability.** Invalidation of any one of these covenants or restrictions by judgement or court order shall in no way affect any other provision which shall remain in full force and effect.

Section 4.3 **Amendment.** The covenants and restrictions of this Declaration shall run with and bind the land, for a term of forty (40) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. This Declaration may be amended or terminated by a vote of at least seventy-five percent (75%) of the total votes of all owners, which vote shall be taken at a duly called meeting. Any amendment approval shall be reduced to writing, signed, and recorded against the LOTS.

IN WITNESS WHEREOF, the undersigned, being the Declarant herein, has hereunto set its hand this 4th day of December, 1996.

DECLARANT:

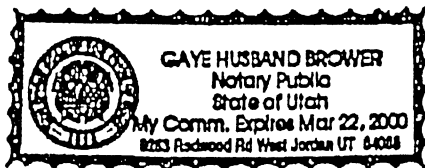
S K DEVELOPMENT, INC.

By: Steven E. Sinner  
Steven E. Sinner, President



STATE OF UTAH           )  
                              :  
COUNTY OF SALT LAKE )

On this 4th day of December, 1996, before me a Notary Public for the State of Utah, personally appeared Steven E. Sinner, President of S K Development, Inc. who executed the within instrument and acknowledged to me that he executed the same. IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notary Seal the day and year first above written.



Gaye Husband - Brower  
Notary for the State of Utah  
Residing at: West Jordan, UTAH  
My Commission Expires: March 22, 2000

12/16/96 12:40 PM 6528990 49.00  
NANCY WORKMAN  
RECORDER, SALT LAKE COUNTY, UTAH  
BRIGHTON TITLE  
REC BY: V ASHBY DEPUTY - WI

12/16/96 12:40 PM 6528990 49.00  
NANCY WORKMAN  
RECORDER, SALT LAKE COUNTY, UTAH  
BRIGHTON TITLE  
REC BY: V ASHBY DEPUTY - WI  
BK 7557 PG 2810

State of Utah  
County of Salt Lake

I, the undersigned, Recorder of Salt Lake County, Utah do hereby certify that by law I have the custody of a seal and all papers, documents, records and other writings required or permitted by law to be recorded and that the annexed and foregoing is a true and full copy of an original document on file as such Recorder.

Witness my hand and seal of said Recorder this  
24 day of March 2003  
GARY W. OTT, RECORDER

By

Amanda L. Gray

## DETERMINATIVE PROVISIONS

### 1. Former Utah R. Civ. P. 56

#### **56. Summary judgment.**

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

. . . .

(b) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . . .

(c) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(d) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Utah R. Civ. P. 65 (2004) (amended November 1, 2004)

2. UTAH R. CIV. P. 26(a)(2), (d), and (f)

**Rule 26. General provisions governing discovery.**

(a) *Required disclosures; Discovery methods.*

. . . .

(a)(2) *Exemptions.*

(a)(2)(A) The requirements of Subdivision (a)(1) and Subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on contract in which the amount demanded in the pleadings is \$20,000 or less . . . .

. . . .

(b) *Sequence and timing of discovery.* Except for cases exempt under Subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by Subdivision (f).

. . . .

(f) *Discovery and scheduling conference.* The following applies to all cases not exempt under Subdivision (a)(2), except as otherwise stipulated or directed by order.

(f)(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures

required by Subdivision (a)(1), and to develop a stipulated discovery plan. . . .

UTAH R. CIV. P. 26(a)(2), (d) & (f).

**3. Former Utah Rules of Judicial Administration 4-501(2)(B)**

**Rule 4-501. Motions.**

. . . .

*(2) Motions for Summary Judgment.*

. . . .

2(B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material fact which supports the party's contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Utah R. Jud. Admin 4-501 (2)(B) (2003) (repealed November 1, 2003).