

2004

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Jones v. Johnson*, No. 20040612 (Utah Court of Appeals, 2004).

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IN THE UTAH COURT OF APPEALS

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.

No. 20040612-CA

BRIEF OF APPELLANTS

Appeal From the Third Judicial District Court, Salt Lake County
Case No. 020915089 CN, Honorable Denise P. Lindberg

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS
JUL 22 2005

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2a-3.

ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION BELOW

The issues presented by this appeal are as follows:

1. **Issue:** Whether the district court properly granted summary judgment in favor of plaintiffs based on the restrictive covenants.

Standard of Review: A grant of summary judgment is reviewed for correctness with no deference afforded to the trial court's conclusions of law. When reviewing a grant of summary judgment, this Court reviews the record, including all inferences arising therefrom, in the light most favorable to the non-moving party. *Richards v. Security Pac. Nat'l Bank*, 849 P.2d 606, 608 (Utah Ct. App. 1993). On appeal, this Court gives a trial court's interpretation of restrictive covenants no particular weight and reviews such an interpretation for correctness. *Cecala v. Thorley*, 764 P.2d 643, 644 (Utah Ct. App. 1988).

Preservation of Issue in District Court: This issue was preserved in the district court in Defendants' 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 Attorneys' Planning Meeting Report and Discovery Plan filed on August 25, 2003. (R. 99-105.)

2. **Issue:** Whether the district court properly denied Appellants' motion pursuant to Utah Rule of Civil Procedure 56(f).

Standard of Review: A district court's decision under Rule 56(f) is reviewed for abuse of discretion. *Crossland Sav. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994).

Preservation of Issue in District Court: This issue was preserved in the district court in Defendants' 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 Attorneys' Planning Meeting Report and Discovery Plan filed on August 25, 2003. (R. 99-105.)

DETERMINATIVE PROVISIONS

The interpretation of the following rules are determinative of this appeal:

Utah Rule of Civil Procedure 56:

(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 for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *Motion and Proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. 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.

. . . .

(f) *When affidavits 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 the party's 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.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This is an appeal from a Decision and Order Granting Plaintiffs' Motion for Summary Judgment, Denying Defendants' Rule 56(f) Motion. (R. 159-68.)

The Complaint in this action was filed on or about December 26, 2002 seeking declaratory and injunctive relief based on defendants' alleged violation of restrictive covenants requiring that homes in a subdivision in Sandy, Utah be built from certain materials. (R. 1-21.) On March 7, 2003, defendants filed an Answer to Complaint denying the allegations in the Complaint. (R. 30-34.)

On July 23, 2003, plaintiffs filed a Motion for Summary Judgment and supporting memorandum and affidavits. (R. 35-95.) On August 3, 2005, before an attorneys' planning meeting report had been conducted and before any discovery had taken place, defendants filed a 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 Attorneys' Planning Meeting and Discovery Plan ("Opposition and Rule 56(f) Motion"). (R. 96-134.) In support of their Opposition and Rule 56(f) Motion, defendants' counsel filed a Rule 56(f) affidavit requesting that before the court rule on the motion for summary judgment, defendants be allowed time to conduct discovery regarding, among other things, non-compliance with the CC&R's by several residents of the Subdivision. (R. 124-27.) Mr. Stephens also requested a scheduling conference and the entry of a scheduling order in the case. (R. 124-27.)

On November 20, 2003, the district court granted the Motion for Summary Judgment and denied defendants' Rule 56(f) Motion. On February 9, 2004, a Judgment was entered against defendants ordering them to remove, within one hundred and eighty days (180) of the date of the judgment, the alleged non-conforming material used to finish the outside of their home. (R. 192-95.) Defendants subsequently moved the district court to alter or amend the judgment which was denied on May 3, 2004. (R. 221.) This appeal followed.

B. Statement of Facts Relevant to the Issues Presented for Review

1. Defendants constructed a home and reside at 11787 South History Drive in South Jordan Estates, South Jordan, Utah ("Subdivision") (R. 2.)
2. Plaintiffs are also residents of the Subdivision. (R. 2.)
3. In or around December 1996, the developer of the Subdivision executed and recorded with the Salt Lake County Recorder's Office a Declaration of Covenants, Conditions and Restrictions of South Jordan Estates, Phase 2 (Amended) ("CC&R's"). (R. 3, 10-17.) A true and correct copy of the CC&R's is submitted herewith as Exhibit 1 to the Addendum.
4. Article I of the CC&R's provides for the establishment of an Architectural Control Committee ("ACC") to approve new construction in the Subdivision. (R. 10.)
5. The CC&R's provide:

ARTICLE I
ARCHITECTURAL CONTROL

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 would not be required and the related covenants shall be deemed to have been complied with.

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 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. (R. 11.)

6. Article II of the CC&R's provides as follows:

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. . . .

(Emphasis added.)

7. Article III of the CC&R's states:

ARTICLE III

RESIDENTIAL AREA COVENANTS

Section 3.1 Guidelines, Part A.

....

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.

....

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. . . .

....

Section 3.6 Nuisances. 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. . . .

Section 3.7 Location of Recreational Vehicles. Boats, trailer, 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

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. . . .

8. Article IV of the CC&R's provides that:

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.

9. The original ACC established under the CC&R's terminated on December 4, 2001. (R. 11.)

10. On or about July 31, 2002, defendants submitted a building permit application to the Building Department of South Jordan City ("City") to construct their home using a material known as Hardi-plank for the exterior of the home. (R. 129.)

11. Hardi-plank is a masonry material made of cement, ground sand, cellulose fiber and select additives. Hardi-plank is not made from vinyl or aluminum and has a masonry-like finish. (R. 101.)

12. After defendants submitted their building permit application to the City, the City informed defendants that they were required to add a percentage of brick to the exterior of the home. (R. 129.) Defendants complied with the City's request and revised the original plans to use some brick on the exterior of their home. (R. 129.)

13. After some neighbors in the Subdivision complained to defendants about the material being used on the exterior of their home, defendants contacted the City and inquired as to whether defendants must remove the Hardi-plank material. (R. 130.)

14. The City informed defendants that they were not required to remove the Hardi-plank from the exterior of the home because it is a masonry product that meets the City's building material requirements. (R. 130.)

15. Defendants made several attempts to resolve the complaints of the residents in the Subdivision by contacting various individuals to address the issues regarding the materials used on the exterior of defendants' home. (R. 131.) Defendants also attempted to attend a neighborhood meeting where the issues regarding defendants' home were being discussed. (R. 131.) The residents who attended the neighborhood meeting refused, however, to allow defendant to participate in the meeting. (R. 131.)

16. During the neighborhood meeting, the formation of an architectural control committee was discussed. (R. 131.)

17. On or about November 24, 2002, plaintiffs and other members of the Subdivision signed a petition requesting that defendants comply with the CC&R's. The petition states that "[n]o other house in the South Jordan Estates has siding and they have all complied with this covenant" regarding building material requirements in the CC&R's. (R. 77-81.)

18. Several lots in the Subdivision include structures that do not comply with the CC&R's, including an unfinished shed and an unfinished garage. (R. 132.)

19. One home in the Subdivision is partially finished with the same Hardi-plank material used on defendants' home. This home also does not have a finished yard as required by the CC&R's. (R. 132.)

20. One home in the Subdivision had a trailer parked in front of the home for over one (1) year in violation of the CC&R's. That home also has an addition that was never submitted to or approved by the ACC or any residents in the subdivision. (R. 132.)

21. On or about December 26, 2002, plaintiffs filed the Complaint in this action seeking declaratory and injunctive relief. (R 1-21.)

22. On or about March 7, 2003, defendants filed an Answer to Complaint denying the allegations in the Complaint. (R. 30-34.)

23. On or about July 23, 2003, plaintiffs filed a Motion for Summary Judgment and supporting memorandum and affidavits. (R. 35-95.)

24. On August 25, 2003, defendants filed their Opposition Memorandum and Rule 56(f) Motion and supporting affidavits. (R. 96-134.)

25. The affidavit of R. Brent Stephens submitted in support of defendants' Rule 56(f) Motion states:

[D]iscovery, including necessary affidavits and depositions, have not been taken for the reasons stated herein, and . . . the 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 of the validity of the []CC&Rs, the issue of waiver, the issue of impossibility of performance, the issue of estoppel.

No attorneys' planning meeting or discovery has been obtained.

Defendants request thirty (30) days to file requests for production of documents and depose the plaintiffs.

....

Otherwise, these defendants are prejudiced if the relief sought under Rule 56(f), U.R.C.P., is not granted, and such prejudice is caused, in

part, by plaintiffs' failure to submit a discovery plan to defendants' counsel. (R. 125.)

26. On or about November 24, 2003, the district court entered a Decision and Order Granting Plaintiffs' Motion for Summary Judgment, Denying Defendants' Rule 56(f) Motion ("Order"). (R. 159-168). The Order states that upon termination of the original ACC under the CC&R's:

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[s] 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 order. 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. (R. 165) (emphasis added).

27. With respect to defendants' argument regarding ambiguity of the CC&R's, the Order states:

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. . . . (R. 165.)

28. Regarding defendants' assertions that other residents in the Subdivision had violated the CC&R's the court stated that non-compliance with CC&R's constituting abandonment of the CC&R's must be:

Substantial and general noncompliance with the covenant and the violations must be so substantial as to destroy the usefulness of the covenants. If the original purpose of the covenant can still be accomplished and substantial benefit will continue to inure to residents, the covenants will stand. (citations and quotations omitted) (R. 165-66.)

. . . .

Defendants cite three specific addresses in the subdivision where allegedly there are, or may be violations of the CC&R's. Only one of the alleged violations is arguably related to the issues before the Court. . . . 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. (R. 167) (emphasis added).

29. With respect to defendants' Rule 56(f) Motion, the district court ruled:

The Court has reviewed counsel's Rule 56(f) affidavit and concludes that it fails to establish "what facts are within the . . . exclusive knowledge 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&R's, waiver, and impossibility of performance. . .

(R. 168) (emphasis added).

30. On or about February 18, 2004, the district court entered a Judgment against defendants requiring that they remove the Hardi-plank material from their home within one hundred eighty (180) days of the entry of the Judgment and entered an award of \$6,180.02 in attorneys' fees. (R. 193.) On or about June 18, 2004, the court stayed enforcement of the judgment pending the outcome of this appeal. (R. 273-75.)

SUMMARY OF ARGUMENTS

Summary judgment is proper only where no material issues of fact exist and the moving party is entitled to judgment as a matter of law. In this case, issues of fact were raised by defendants in their opposition to the motion for summary judgment and additional issues of fact could have been adduced if defendants had been allowed to conduct additional discovery pursuant to Rule 56(f). Specifically, the CC&R's are ambiguous as to what type of materials are included in the meaning of the word "stucco." Specifically, the CC&R's do not specify whether a material that is made of the same compounds as stucco but looks somewhat different from traditional stucco is permitted under the CC&R's.

In addition, the CC&R's are ambiguous in that they do not specify the procedure for seeking or obtaining approval for construction in the Subdivision after the termination of the original architectural control committee. The trial court, however, failed to address these ambiguities and instead impermissibly imposed its own interpretation of the CC&R's rather than allowing additional discovery and considering all relevant parol and extrinsic evidence to determine the meaning of the restrictive covenants. The district court erred in ignoring the ambiguities in the CC&R's and denying defendants the opportunity to further address the meaning of the CC&R's through discovery. The district court's order should accordingly be reversed.

In their opposition to the motion for summary judgment, defendants raised several issues of fact regarding whether violations of the CC&R's throughout the Subdivision constituted abandonment of the restrictive covenants. Defendants also requested

additional time to explore through the discovery process the relevant evidence related to violations and abandonment of the CC&R's. However, rather than acknowledging the existence of such facts and allowing defendants to flesh out in discovery the relevant evidence regarding abandonment of the CC&R's, the district court summarily dismissed defendants' argument regarding violation and abandonment of the CC&R's. The grant of summary judgment was accordingly improper and should be vacated by this Court.

In granting summary judgment on plaintiffs' request for injunctive relief, the court failed to consider facts showing that the balance of harms in granting the injunctive relief weighs heavily in favor of defendants. Because defendants will suffer irreparable harm if the district court's ruling is allowed to stand and because they did not willfully violate the CC&R's, summary judgment was improper and should accordingly be reversed.

Finally, in denying defendants' Rule 56(f) motion, the district court deprived defendants the opportunity to adduce additional evidence that would uncover additional material issues of fact precluding summary judgment. If defendants had been allowed to conduct additional discovery under Rule 56(f), they could have discovered facts relevant to the ambiguous terms of the CC&R's, the type of building material allowed under the CC&R's, the intent of the parties regarding seeking and obtaining approval for construction in the Subdivision and the relative harms of granting injunctive relief. The district court erred in denying defendants' request for additional time to conduct discovery and the Order should be reversed and remanded to the trial court with instructions that defendants' Rule 56(f) motion be granted.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY GRANTED THE MOTION FOR SUMMARY JUDGMENT

a. Summary Judgment was Improper Because Material Issues of Fact Exist Regarding Ambiguity in the CC&R's

It is a well-settled rule that summary judgment is improper where an agreement, “judging solely from its contents, may be ambiguous.” *Colonial Leasing Co. v. Larsen Bros. Constr. Co.*, 731 P.2d 483, 487 (Utah 1986). If an agreement is ambiguous due to lack of clarity in its meaning, interpretation of the agreement is subject to parol evidence as to the parties’ intentions in executing the agreement. *Colonial Leasing Co. v. Larsen Bros. Constr. Co.*, 731 P.2d 483, 487 (Utah. 1986) (citations omitted). Even where specific terms of an agreement are not ambiguous, if the character of the agreement is ambiguous, summary judgment may not be granted. *Id.* If an agreement is ambiguous, a court may not rely on one construction of disputed terms to support a grant of summary judgment. *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 29 (Utah 2002). When ambiguity in a contract exists, “the intent of the parties is a question of fact to be determined by the jury.” *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990).

In interpreting restrictive covenants, courts generally enforce unambiguous restrictive covenants as written. *View Condo. Owners Ass’n v. MSICO, L.L.C.*, 2004 UT App 104 (Utah Ct. App. 2004). “However, where restrictive covenants are susceptible to two or more reasonable interpretations, the intention of the parties is controlling.” *Id.* (citations omitted). Further, where restrictive covenants contain “textual ambiguity,”

they are interpreted according to the same rules of construction as those used to interpret contracts. *Id.* In order to determine the intent of the parties, “the entire context of the covenant is to be considered. In construing the words of the covenant, the court is not limited to dictionary definitions, but the meaning of [the] words used is governed by the intention of the parties, to be determined upon the same rules of evidence as are other questions of intention.” *Id.* Regarding the interpretation of words in a contract, the Utah Supreme Court has held:

“When determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the extrinsic evidence of the judge’s own linguistic education and experience.

Ward v. Intermountain Farmers Association, 907 P.2d 264, 268 (Utah Ct. App. 1995).

In this case, the CC&R’s require that homes in the Subdivision be finished with masonry materials including brick, stucco, rock or some combination thereof. In addition, the General Restrictions and Conditions in the CC&R’s suggest that the purpose of the CC&R’s is to ensure architecturally compatible structures in the Subdivision.

Stucco is uniformly defined as “a material usually made of Portland cement, sand, and a small percentage of lime” 1988 Webster’s Ninth New Collegiate Dictionary 1170. The Hardi-plank material used on defendants’ home is made of cement, ground sand, cellulose fiber and select additives. (R. 101.) Hardi-plank is not made from vinyl or aluminum and has a masonry finish like stucco. Thus, 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. However, 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.

In addition, no evidence was presented in the district court as to the meaning or definition of the word stucco. The district court, however, imposed its own interpretation and definition of the word stucco and concluded in the Order that “[i]t 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. . . .” (R. 165.) As a result of the ambiguities in the CC&R's, it is necessary to consider parol evidence to determine the intent of the parties. This evidence, however, could only have been adduced by allowing the defendants additional time to conduct discovery pursuant to Rule 56(f) —a request that was denied by the district court and is discussed in further detail below in Section II. The ambiguities in the CC&R's regarding permissible building materials preclude summary judgment and the district court's ruling should accordingly be reversed.

In addition, the CC&R's provide for specific requirements to obtain approval from the original ACC established under the CC&R's. However, after termination of the ACC, the CC&R's do not specify the process that owners must follow to seek approval for construction in the Subdivision or from whom approval should be obtained. Although the CC&R's state that the rights, obligations and responsibilities of the ACC shall become those of all of the owners in the Subdivision, they do not specify if an owner must submit construction plans and receive approval from every owner in the subdivision

or if the owners must designate a committee to act as the ACC or if some other process should be used – such as comparable approval from the city.

Instead of acknowledging the ambiguity in the CC&R's regarding the process for obtaining approval after termination of the original ACC, the district court simply imposed its own interpretation of the contract. In the Order, the court stated:

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 order. 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. (emphasis added).

Although the CC&R's do not specify to whom a request for approval should be directed, the district court surmised what “could” have happened under the CC&R's and set forth what the court “believes” to be defendants’ responsibilities with respect to obtaining approval for construction of their home. While the court’s beliefs and speculation may constitute one possible interpretation of the CC&R's, it is unlikely that the parties intended that every owner in the Subdivision give approval for construction.

Obtaining approval from every resident in the Subdivision would not only be burdensome and impractical, it would allow one owner to veto any decision made by the other owners. It is more likely that the formation of a committee and some type of voting procedure was contemplated for obtaining approval for construction under the CC&R's.

In any event, the meaning of the CC&R's is a factual issue which cannot be disposed of on summary judgment. In order to determine the actual intent of the parties and the meaning of the CC&R's with respect to seeking and obtaining approval for construction in the Subdivision, additional discovery should have been allowed pursuant to defendants' Rule 56(f) motion.

Even assuming the district court's interpretation of the CC&R's was correct, its factual *finding* regarding defendants' attempt to resolve the issues with their neighbors is not supported by the facts. It is undisputed that Defendants did make several attempts to contact the residents in the neighborhood to discuss the problems and attempted, albeit unsuccessfully, to attend a neighborhood meeting during which the complaints about defendants' home were discussed. Again, compliance by defendants' with the CC&R's in seeking approval for construction of their home is yet another issue of fact that should be decided by a jury after a trial on the merits.

Material issues of fact exist here. The judgment should accordingly be set aside and this case remanded to the district court for further proceedings.

b. Summary Judgment was Improper Because Material Issues of Fact Exist Regarding Abandonment of the CC&R's

Restrictive covenants in a Subdivision, although generally enforceable, may terminate and be rendered unenforceable where there has been deviation from the covenants "as to neutralize the benefit of the covenant." *Swenson v. Erickson*, 2000 UT 16, ¶¶ 21-23 (Utah 2000). Restrictive covenants will be deemed abandoned where there is clear and convincing evidence of "substantial and general noncompliance." *Id.*

In determining whether a restrictive covenant has been abandoned, courts consider the “number, nature, and severity of the then existing violation[s], any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant.” *See Fink v. Miller*, 896 P.2d 649, 653 (Utah Ct. App. 1995) (citations omitted). If the number, nature and severity of the violations are readily ascertainable and constitute abandonment, the court need look no further. *Id.* However, “if abandonment is still in doubt, courts should then consider the other two factors – namely, prior enforcement efforts and possible realization of benefits – to resolve the abandonment question.” *Id.*; *see also Sandstrom v. Larsen*, 583 P.2d 971, 976 (Hawaii 1978) (the issue of abandonment is a question of fact).

In this case, defendants raised in the Opposition and Rule 56(f) motion issues regarding non-compliance with the CC&R’s by other residents in the Subdivision, including non-conforming structures in the Subdivision, a trailer that violates the CC&R’s, an unfinished yard and an addition for which approval was never received. Because no discovery in the case had been conducted, the information that defendants had regarding these violations, including whether any additional violations existed, the exact nature and severity of the violations and whether any prior action had been taken to enforce the CC&R’s, was minimal. Defendants accordingly requested that the court grant defendants, pursuant to Rule 56(f), additional time to conduct discovery regarding these violations.

If allowed to conduct discovery on violations of the CC&R's within the Subdivision, defendants could have learned, for example the amount of Hardi-plank material used on another home in the Subdivision and whether approval was sought or obtained for use of the material on that home. Defendants could discover whether any committee had been formed to review and approve construction after termination of the ACC. In addition, there are several provisions of the CC&R's that address the permissibility of trailers in the Subdivision and defendants could have learned through discovery which provision applied to the trailer parked in front of a home in the Subdivision for over one year.

The district court, rather than allow defendants to conduct discovery regarding other violations and related issues pertinent to the issue of abandonment of the CC&R's, denied the Rule 56(f) motion and entered judgment stating that additional discovery would be of no assistance to defendants. In its Order, however, the court acknowledged that it was "unclear" as to defendants' statements regarding other violations of the CC&R's and summarily concluded, without support, that the issues raised by defendants did not rise to the level of "clear and convincing" evidence necessary to show the CC&R's had been abandoned. This was reversible error. Defendants should at least have been afforded additional time to conduct written discovery and depositions to gather all evidence relevant to the issue of abandonment.

c. The District Court Improperly Granted Summary Judgment on Plaintiff's Claims for Injunctive Relief

In determining whether injunctive relief is appropriate to enforce a restrictive covenant, courts conduct a “balance of injury” test. *Crimmins v. Simonds*, 636 P.2d 478, 480 (Utah 1981) (applying balance of injury test in case where injunctive relief under restrictive covenants was at issue). Applying that test, courts may refuse to grant injunctive relief where the plaintiffs are “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.” *Id.* (citations omitted).

In this case, defendants’ alleged violation of the CC&R’s was not willful. Defendants received all necessary approvals and permits from the City. Upon receiving complaints from other homeowners in the Subdivision, defendants attempted to contact several homeowners to address the problem. In addition, defendants attempted to resolve the issue at a neighborhood meeting but plaintiffs refused to allow defendants to participate. Finally, defendants contacted the City regarding the use of Hardi-plank and were informed that because Hardi-plank is a masonry material, it complies with all applicable City building requirements.

The district court failed to consider the fact that the plaintiffs were not irreparably harmed by the defendants’ alleged violation. The defendants’ home was constructed of masonry material that is the same as stucco. The home is a high-quality, aesthetically pleasing residence. Plaintiffs made no allegation in the district court that defendants’

home in any way reduced the value of their homes. Other than plaintiffs' subjective opinion of the Hardi-plank material, plaintiffs did not allege any harm resulting from the material used to construct defendants' home.

Finally, the district court failed to balance the relative harms in granting summary judgment on plaintiffs' claim for injunctive relief. Rather, the court summarily ordered that defendants remove the Hardi-plank siding from their home within 180 days of the judgment. The district court did not consider the expense to defendants in removing and replacing the Hardi-plank material.

On balance, the harm to defendants in granting injunctive relief far outweighs the harm, if any, suffered by defendants. The district court accordingly erred in granting summary judgment on plaintiffs' claim for injunctive relief.

II. THE DISTRICT COURT IMPROPERLY DENIED DEFENDANTS' RULE 56(f) MOTION

Utah courts liberally consider rule 56(f) motions unless they are "dilatory or lacking merit." *Crossland Savs. v. Hatch*, 877 P.2d 1241, 1243 (Utah 1994); *Salt Lake County v. Western Dairymen Cooperative, Inc.*, 2002 UT 39 ¶ 24, 48 P.3d 910 (reversing denial of rule 56(f) motion where denial deprived party of discovery on relevant evidence that could defeat the motion for summary judgment). If a party submits a legitimate Rule 56(f) request which is denied by the district court:

The case must . . . go back for further proceedings as to this cause of action in order to afford [the moving party] an opportunity to produce evidence of the fact necessary to support the relief for which they ask. It is obvious that this evidence must come largely from the [opposing party]. This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within

his sole knowledge as set forth in affidavits prepared ex parte. Cross examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture. The [moving party] therefore, should be given a reasonable opportunity, under proper safeguards, to take the depositions and have discovery which they seek

Strand v. Associated Students of the University of Utah, 561 P.2d 191, 194 (Utah 1977).

In considering whether a Rule 56(f) motion is timely, courts consider whether the moving party is seeking purely speculative facts, whether the party has appropriately responded to discovery requests and whether sufficient time has passed since the inception of the lawsuit to conduct discovery. *See Reeves v. Geigy Pharmaceutical, Inc.*, 764 P.2d 636, 639 (Utah Ct. App 1998). A Rule 56(f) motion is neither meritless or dilatory where it “targets core issues that might defeat the pending summary judgment motion.” *Energy Management Services, L.L.C. v. Shaw*, 2005 UT App 90 ¶ 11, 110 P.3d 158, 162. Further, where a party has been denied an adequate opportunity to conduct discovery, a Rule 56(f) motion is not dilatory and should be granted. *Id.* ¶ 12. Utah courts have not adopted a bright line as to whether a party has had an adequate opportunity to conduct discovery. *See Crossland Savings v. Hatch*, 877 P.2d 1241, 1243-44 (Utah 1994). Instead, Utah courts consider the timeliness of a Rule 56(f) motion under the individual circumstances of each case. *See id.* An important objective of Rule 56(f) is to ensure that a diligent party has been provided adequate opportunity for discovery. *See Price Dev. Co.*, 2000 UT 26, ¶ 30, 995 P.2d 1237.

In this case, no discovery had been conducted at the time the Motion for Summary Judgment was granted. The lack of discovery, however, was due to plaintiffs’ failure to

fulfill their obligation to initiate an attorneys' planning meeting and prepare a scheduling order. Without an attorneys' planning meeting report and scheduling report, defendants could not, under Utah Rule of Civil Procedure 26, initiate any discovery. Because the burden was on plaintiffs to take the steps necessary for discovery to begin, any delay in conducting discovery cannot be attributable to defendants. Defendants diligently defended this action and responded appropriately to all motions filed by plaintiffs. Defendants requested additional time for discovery in their Rule 56(f) motion and also requested a scheduling conference. The district court denied these requests despite the fact that discovery, as explained above, would have allowed defendants to uncover additional issues of material fact responsive to the Motion for Summary Judgment. Because the trial court erred in denying defendants' Rule 56(f) motion, the Order should be set aside and remanded to the district court with instructions to allow defendants additional time to conduct discovery pursuant to Rule 56(f).

CONCLUSION

The district court improperly granted summary judgment in favor of plaintiffs because material issues of fact exist and/or could have been raised by defendants if given the opportunity to conduct additional discovery under Rule 56(f). The factual issues that preclude summary judgment, include, but are not limited to, the following:

1. Whether the meaning of the word "stucco" in the CC&R's includes materials that are made from the same compounds as stucco and have the same finish as stucco;
2. Whether the CC&R's contemplated a certain procedure for seeking and obtaining approval after termination of the original architectural control committee;

3. Whether defendants' actions in seeking approval for construction complied with the requirements of the CC&R's;

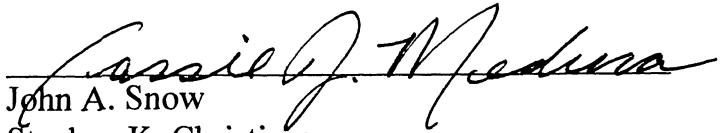
4. Whether the CC&R's were abandoned due to tolerated violations of the CC&R's by other residents in the Subdivision;

5. Whether the hardships faced by the defendants in removing the Hardi-plank from their home outweighed the harm, if any, to plaintiffs.

Based on the foregoing, the district court's Order should be reversed and this case remanded to the district court for further proceedings.

DATED this 21st day of July, 2005.

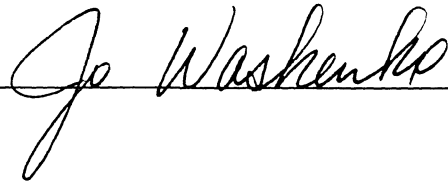
VAN COTT, BAGLEY, CORNWALL &
McCARTHY

By: 
John A. Snow
Stephen K. Christiansen
Cassie J. Medura
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **BRIEF OF APPELLANTS** to be mailed, postage prepaid, this 21st day of July, 2005, to the following counsel of record:

William A. Meaders, Jr.
Bryan H. Booth
KIRTON & MCCONKIE
60 East South Temple, #1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120
(801) 328-3600
Counsel for Appellees



Addendum

EXHIBIT 1

49

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 Committee's approval of any additional building will not create a problem for any other Owner in the "SOUTH JORDAN ESTATES" Subdivision.

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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.

Rambler: 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.

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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

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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

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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 its 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.** Invalidity 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.

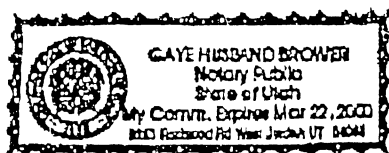
By: Steven E. Sinner
Steven E. Sinner, President

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-8-

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

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12/16/96 4:40 PM 49-00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
BRIGHTON TITLE
REC BY: V ASHBY DEPUTY - WI

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