2004

The View Condominium Owners Association, a Utah condominium association v. MSICO, L.L.C., a Utah limited liability company; the Town of Alta, a political subdivision of the State of Utah; and John Does 1 through 10 : Petitioner's Opening Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association,	:	
Plaintiff, Cross-Petitioner and Respondent,	:	Civil No. 20040369-SC
vs.	:	
MSICO, L.L.C., a Utah limited liability company; the TOWN OF ALTA, a political subdivision of the State of Utah; and JOHN DOES 1 through 10,	:	
Defendants, Petitioners and Cross-Respondents.	:	

PETITIONERS' OPENING BRIEF

Review on Writ of Certiorari
to the
Court of Appeals of the State of Utah

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to U.C.A. § 78-2 -2(5), having granted, in part, the parties' cross-petitions for writ of certiorari for review of the court of appeals decision.

STATEMENT OF ISSUES PRESENTED

1. Whether the court of appeals erred in ruling that Alta's termination of a snow storage designation constituted a taking without just compensation.

Standard of Review: Correction of error, with no deference to the court of appeals' conclusions of law. *See Grand County v. Rogers*, 2002 UT 25, ¶ 6, 44 P.3d 734.

Preservation of Issue: While plaintiff alleged a "taking" in its complaint (R. 4, ¶ 21), the parties did not argue this issue in their cross-motions for summary judgment (R. 293, 338A, 458). However, the district court's order of summary judgment rejects the taking claim as a matter of law. (R. 592, ¶ 8; Addendum, hereafter "Add.," at 19.) The court of appeals reversed and remanded the issue as presenting questions of material fact. *View Condominium Owners Ass'n. v. MSICO, L.L.C.*, 2004 UT App 104, ¶¶ 35-36, 90 P.3d 1042 (hereafter "Ct. App. Op.," Add. 2.)

2. Whether the court of appeals erred in holding that a restrictive parking covenant was terminated by plat amendment.

Standard of Review: Correctness. *See Grand County v. Rogers, supra.*

Preservation of Issue: This issue was argued by the parties in the cross-motions for summary judgment. (R. 295, 344.) The district court held that plaintiff has no such parking right (Add. 15-16, ¶¶ 1-4), and the court of appeals affirmed (Ct. App. Op., ¶ 29).

DETERMINATIVE LEGAL PROVISIONS

The snow-storage taking claim is governed by article I, section 22 of the Utah Constitution. The parking claim is governed by the Master Declaration of Covenants, Conditions and Restrictions of Sugarplum and the Amended Plat. These provisions are set forth verbatim in the Addendum. (Add. 26, 86, 148.)

STATEMENT OF THE CASE

This is an action by The View Condominium Owners Association ("The View" or "plaintiff") to prevent the construction of single-family homes on two lots of the Sugarplum Planned Unit Development in the Town of Alta ("Alta"). Plaintiff, which owns Lot 8, claims a right to store snow on the adjacent Lot 9 and a right to park on Lot 5, both of which lots are owned by defendant MSICO ("MSI"). (Complaint, R. 1.)

The district court denied plaintiff's motion for preliminary injunction, ruling that plaintiff has no right to store snow on Lot 9 or park on Lot 5, and that no irreparable harm would result from proceeding with construction. (Mem. Decision, R. 274, Add. 21.) The parties thereafter filed cross-motions for summary judgment. (R. 290, 332.) The district court held that any restrictive covenant for parking on the original Lot 5 was terminated by the recording of an Amended Plat that changed the layout and use of the lots prior to plaintiff's purchase of Lot 8. (Order, ¶¶ 1-4, Add. 16-17.) Regarding snow storage, the court held that plaintiff has no easement, contract, or estoppel right to store snow on MSI's Lot 9. Moreover, Alta's approval of an alternative snow storage plan for Lot 8 did not effect a "taking" of that lot. (*Id.*, ¶¶ 5-8.) Accordingly, the district court granted summary judgment for defendants on both issues. (*Id.*)

On appeal, the court of appeals affirmed that the developer had no intent to restrict the use of amended Lot 5 to parking. (Ct. App. Op., ¶¶ 15-29.) Regarding snow storage, the court of appeals also affirmed that plaintiff has no contract right to store snow on Lot 9. (*Id.*, ¶ 32.) However, the court of appeals reversed on the other theories, holding that plaintiff could have an unrecorded easement, and that material issues of fact preclude summary judgment on the estoppel and taking arguments. (*Id.*, ¶¶ 32-36.)

The parties filed cross-petitions for writ of certiorari. This Court granted both petitions, in part, agreeing to review only (1) whether Alta's revision of its snow storage plan for Lot 8 effected a taking of plaintiff's property, and (2) whether the parking covenant on Lot 5 was terminated by subsequent plat amendment. (Add. 1.)

STATEMENT OF FACTS

A. Sugarplum Declaration and Plats.

In August 1983, Sorenson Resources Company ("Sorenson") established the Sugarplum Planned Unit Development ("Sugarplum") on approximately 25 acres of land near the top of Little Cottonwood Canyon, in the Town of Alta ("Alta"), Salt Lake County. As set forth in the Master Declaration of Covenants, Conditions and Restrictions of Sugarplum ("Declaration"), the development was to consist of nine lots to be improved with condominiums, residential and commercial buildings, and appurtenant facilities. (R. 359, Recitals and sections 1.17, 3.1; Add. 26, 33, 42.) Recorded with the Declaration was a plat map ("Plat") showing the layout of the nine lots. (Full-size folded map, R. 419; Redacted map, Add. 84; Ct. App. Op., ¶ 2.)

Both the Declaration and the Plat expressly authorized amendment or modification of the layout and use of the lots. Section 13.1 of the Declaration authorizes amendment prior to sale of the lots, and section 13.2 provides that even after the first sale, the declarant "shall have the sole authority at any time to amend this Declaration, and the Map, if necessary, for the purpose of allocating density . . . or changing the configuration, size or location of Lots owned by Declarant." "Map" is defined to mean the Sugarplum "plat" "as the same may be amended from time to time." (Section 1.19.) Section 2.1.2 states that the "Declarant reserves the right . . . to change the location or size of any Lot prior to the time that such Lot is sold by Declarant to any third party. *All such changes to the number, size or location of any Lot shall be effected by a modification of the Map.*" (Emp. add.) The Plat itself, in listing the anticipated number of units on each lot, also provided that Sorenson or any successor "shall have the right to reallocate the density of development and location of each lot." (Add. 34, 36, 79; Ct. App. Op., ¶ 3.)

Regarding parking, section 3.1 of the Declaration originally provided that "Lot 5 shall be reserved for and improved with a parking facility for the owners of Lot 4 and Lots 6-9 and the Units constructed thereon." The original Plat reflected this reservation, aligning Lot 5 adjacent to Lots 8 and 9 and specifically providing, in the allocation of residential units for each lot, that Lot 5 would be allocated no units, but would instead be used for "Parking and Commercial Development of Air Space." (Add. 42, 84; Ct. App. Op., ¶ 4.)

In November 1984, prior to the sale of any lots, Sorenson recorded an amended plat map ("Amended Plat"), significantly altering the configuration, size, and location of

the nine lots, and reallocating the number of units for each lot and uses thereon. (Full-size folded map, R. 420; Redacted map, Add. 86.) The Affidavit of Brian Jones, an independent surveyor, attaches an over-lay exhibit that graphically illustrates these changes from the original Plat to the Amended Plat. (Transparent overlay map, R. 421-22; paper copy, Add. 88-91.) Importantly, the original Lot 5 is subsumed into the reconfigured Lots 6, 8, and 9, with approximately two-thirds of the original Lot 5 included in the Amended Lot 8. Amended Lot 5 is no longer contiguous to Lots 8 and 9, but is situated across the road from those lots on land that was previously part of Lot 4. Most significantly, however, the unit allocation listed on the Amended Plat *eliminates any reference to a reservation of Lot 5 for parking* and, instead, allocates 65 residential units to be constructed on amended Lots 4 and 5. (Add. 86-87; Ct. App. Op., ¶ 5.)

Walter Plumb, Sorenson's corporate secretary, testified that the purpose of the Amended Plat was to change the overall design of the project to a lower-rise format that would have less impact on the hillside and be more visually appealing to buyers. (Plumb Dep., R. 428-30, pp. 14-17, Add. 95-97.) The Amended Plat reallocated the building units among the nine lots to include the amended Lot 5 and eliminate the parking structure on that lot. The separate parking structure on Lot 5 was no longer needed because the buildings on Lots 6, 8, and 9 were architecturally-modified and shifted to one side of the lots to allow parking on the same lot with each building. (*Id.*, pp. 17-18, 32-33.) With the Amended Plat, Sorenson's intent was to amend and supersede the Declaration's provision for parking on Lot 5. Sorenson had no intent to create a parking

covenant on amended Lot 5 for the benefit of Lot 8; rather, the intent was that occupants of Lot 8 would park on their own lot. (*Id.*, pp. 21, 30-33.)

B. Sale of Lot 8 to The View Associates.

In January 1985, after recording of the Amended Plat, Sorenson sold and conveyed to plaintiff's predecessor, The View Associates, Lot 8 of Sugarplum. (R. 417, Add. 98.) The legal description of Parcel 1 on Exhibit A to the View's warranty deed expressly refers to "Lot 8, Sugarplum Amended, . . . as the same is identified in the Plat recorded November 26, 1984," the Amended Plat. (*Id.*, Add. 99.) Parcel 2 on that exhibit is described to include a non-exclusive easement for use of common areas and facilities of "Sugarplum Amended," as set forth in the Amended Plat, recorded in November 1984. (*Id.*) The View's warranty deed and attached legal description contain no reference to any parking right on Lot 5 or snow storage right on Lot 9.

Regarding parking for Lot 8, Russell Watts, who was president of The View Associates and was directly involved in the purchase of Lot 8, testified that "on-site parking was designed and constructed for The View building on Lot 8 in quantities sufficient to meet the local zoning requirements." (R. 579-80, ¶ 3, Add. 100-01.) Mr. Watts confirmed that The View Associates never bargained for, expected, acquired, or exercised any right to park on Lot 5. (*Id.*) That understanding is consistent with the testimony of Walt Plumb, the Sorenson representative in the sale of Lot 8, who testified that parking for Lot 8 has always been provided on Lot 8. The parties to the sale of Lot 8 never expected or anticipated that occupants of Lot 8 would park on Lot 5. (Plumb Dep., pp. 21, 33, Add. 96-97.)

Because of heavy snowfall in the canyon, the Town of Alta required a snow storage plan for Lot 8 prior to issuing a building permit. In a letter to Alta from Walt Plumb, Sorenson's corporate secretary, dated February 27, 1985, Mr. Plumb proposed storing snow on the adjacent and vacant Lot 9 during development of Lots 6 and 8:

> During development of Lots 6 and 8 . . . as part of our first one hundred units, snow shall be stored in appropriate areas. Should there be any excess snow, it may be stored on Lot 9 as recorded.
>
> We recognize that storage areas may change as to utilize the several alternatives (i.e. Snowbird property, Bipass [sic] road, etc.) that exist. Any changes shall be submitted at such time as we make applications for development in addition to our first one hundred units. [R. 431, Add. 105.]

Mr. Plumb testified that use of Lot 9 for snow storage was "an interim solution" to accommodate the developer of Lot 8 until a different solution became necessary. (R. 433-35, Add. 107-10.) In a letter dated March 5, 1985, Alta approved this provisional snow storage plan "[w]ith the understanding that adequate snow storage/removal has been addressed only for the first 100 units of the P.U.D. . . . , with substantial storage planned for Lot 9." (R. 514, Add. 111.) Russ Harmer, Alta's snow storage expert, formally approved this plan on April 27, 1985, designating Lot 9 as the site for "overflow snow storage" from Lot 8. (R. 517-18, Add. 114-15; Ct. App. Op., ¶ 7.) While Lot 9 was thereafter used for snow storage, The View Associates officer Russell Watts acknowledged his understanding that "the designation of the adjacent Lot 9 for a snow storage area was temporary and subject to change." (R. 580, Add. 101.)

C. **Sale of Lots 4, 5 and 9 to MSI.**

In December 1988, Sorenson conveyed Sugarplum Lots 4, 5 and 9 to defendant MSI. (R. 498, Add. 116.) Thereafter, various legal disputes arose between MSI and Alta regarding development of Lots 4, 5 and 9, resulting in a lawsuit in September 1996. One of the disputes related to Alta's refusal to allow development of Lot 9 while it was temporarily designated as a snow storage area for Lot 8. In a letter dated November 17, 1998, Alta's legal counsel informed The View of this lawsuit, speculating about potentially dire legal consequences for The View if it could no longer store snow on Lot 9. (R. 541, Add. 119; Ct. App. Op., ¶ 9.) However, those fears did not come to pass. Following further impact analysis, Alta passed a resolution, in August 1999, approving further limited development of MSI's property, contingent on an alternative snow storage plan:

> Some of the Sugarplum P.U.D. snow storage plans approved the storage of snow on what is now vacant land in the Sugarplum P.U.D. For example, as a condition of approval for the development of Lots 6, 7, and 8, *Lot 9 was committed for snow storage by the developer until such time as other adequate snow storage areas are provided on-site* and without crossing the By-Pass Road. Any further development at the Sugarplum P.U.D. would be contingent on adequate snow storage plans. [Res. #1999-PC-R-1, R. 506-07, Add. 121-23, emp. add.]

MSI subsequently developed an alternative snow storage plan for Lots 4, 5, 8, and 9 in connection with its proposal to build just ten single-family homes on Lots 4, 5, and 9. (Sugar Plum P.U.D., Lots 4, 5, & 9–Plan 2, Nov. 6, 2000; Full-size map, R. 198; Redacted map, R. 546, Add. 124.) Under this revised plan, snow will be removed from the four lots to five different adjacent sites, including a common dumping area north of

the Bypass Road, a common area north of Lot 4, open space on a portion of Lot 9, and contingent storage at the end of the access road. MSI also agreed to use heated driveways to reduce the amount of snow to be moved. (*Id.*) This revised storage plan includes the specific authorization of the Utah Department of Transportation to push snow across the Alta Bypass road as needed. (R. 583-84, Add. 125-26.)

The Town of Alta carefully reviewed and approved this revised snow storage plan and agreed to settle the MSI lawsuit. (Res. #2000-R-9, R. 37, Add. 127-28.) On November 9, 2000, MSI and Alta entered into a Definitive Settlement and Development Agreement, authorizing the construction of ten single-family homes on Lots 4, 5, and 9, and approving the revised snow storage plan for those lots and also Lot 8:

> 2.4 Snow Removal and Storage Requirements Approved. MSI has created and provided for a snow removal and storage plan for Lots 4, 5 and 9 . . . . By execution of this Definitive Agreement, Alta confirms, acknowledges and agrees that final review and approval by the Alta Technical Review Committee . . . of the subject snow removal and storage plans has been completed. Alta recognizes that MSI has included in the aforesaid snow removal and storage plan, removal and storage capacities and planning sufficient to accommodate, not only the requirements for Lots 4, 5 and 9, but also Lot 8 (the "View"). Accordingly, Alta agrees that because such approval of MSI's snow removal and storage plan has now been given and granted by Alta and its ATR Committee, any right to temporary or other use of Lot 9 for snow storage for the benefit of any other owners or occupants of property in the Sugarplum PUD . . . shall terminate and be immediately and automatically terminated and the provisions and expressions made in that certain February 27, 1985 letter signed by Walter Plumb . . . shall be of no further force or effect. Such termination and elimination of storage on Lot 9 is effective without any other consent, authorization or action by Alta. [R. 441, Add. 133; *see* Ct. App. Op., ¶ 11.]

Russ Harmer, Alta's snow storage expert, provided an expert witness report confirming the sufficiency of this revised snow storage plan:

> A workable snow storage and removal plan has been developed for Lots 4, 5, 8 and 9 in the Sugarplum P.U.D. in the Town of Alta. The snow storage plan would allow efficient removal and storage of the snow and deposit at locations that would allow access to, and occupancy of the buildings present or to be constructed on Lots 4, 5, 8 and 9 by vehicles and persons using or visiting Sugarplum within a reasonable amount of time with a reasonable degree of safety at costs that are comparable with other comparable locations in Little Cottonwood Canyon. The snow storage removal and storage plan, with deposit location, has been depicted on documents submitted to the Town of Alta and discussed in the "Definitive Agreement" section 2.4. The plan would allow development of Lots 4, 5 and 9, and still allow occupancy of Lot 8. [R. 549, Add. 143.]

D. <u>The View Lawsuit Against MSI and Alta</u>.

In December of 2000, The View commenced this lawsuit against MSI and Alta to prevent the approved construction of single-family homes on Lots 4, 5 and 9. (Complaint, R. 1; *see* R. 74: The View filed its action "in an effort to stop certain development.") The View claimed an unspecified easement across Lot 4, a right to park on Lot 5, and a "permanent right" to store snow on Lot 9. (Complaint, ¶¶ 20-25; Ct. App. Op., ¶ 12.)

In June 2001, The View filed a motion to enjoin construction on Lots 4, 5 and 9, alleging "irreparable harm." (R. 138-39.) The district court denied the motion, reasoning that The View's snow storage on Lot 9 was never intended to be permanent, and that Alta had approved an alternative snow storage plan that would meet plaintiff's needs. As for parking, The View demonstrated no right or need to park on Lot 5, as its occupants had never parked on Lot 5, and adequate parking had always been, and continued to be,

available on plaintiff's own Lot 8. Accordingly, The View failed to demonstrate irreparable harm or a likelihood of success on the merits. (Mem. Decision, R. 274, Add. 21-25.)

The parties thereafter filed cross-motions for summary judgment. (R. 290, 332.) The View argued that the Declaration created a restrictive covenant for parking on Lot 5. (R. 296.) The defendants demonstrated that the original parking designation for Lot 5 was terminated and superseded by the Amended Plat, which provided for residential units on Lot 5 and parking on each individual lot. (R. 344-52.) Additionally, defendants sought summary judgment on the snow storage issue, demonstrating that storage on vacant Lot 9 was intended only as a temporary solution until future development of that lot. Permission to use Lot 9 was not intended to, and did not, create a permanent, irrevocable right. Moreover, Alta formally approved a revised snow storage plan that would meet plaintiff's needs. (R. 352-55.)

The district court held that the material facts are undisputed and that defendants are entitled to judgment on both the parking and snow storage issues as a matter of law. (R. 588, Add. 15-19.) Specifically, the court held that the Amended Plat terminated the parking designation for Lot 5 by expressly substituting residential units for parking on that lot. Moreover, The View presented no evidence of developer intent to create a "parking right" on the amended Lot 5 for the benefit of Lot 8. (*Id.*, ¶¶ 3-4.) Regarding snow storage, the court held that (1) plaintiff has no easement for storage on Lot 9; (2) plaintiff has no contract for perpetual snow storage on Lot 9; (3) defendants are not estopped to alter the snow storage plan because defendants never represented that storage

on Lot 9 would be permanent; (4) Alta has undisputed legal authority to amend its own snow storage plans; and (5) the "taking" claim fails as a matter of law because plaintiff has no right to perpetual storage on Lot 9, and the revised snow storage plan does not deprive plaintiff of the use of its building on Lot 8. (*Id.*, ¶¶ 5-8.) The court thereafter entered a final judgment, dismissing unresolved claims, including the claimed easement on Lot 4. (R. 600, Add. 13.) Plaintiff appealed. (R. 609; Ct. App. Op., ¶ 13.)

The court of appeals affirmed that plaintiff has no right to park on Lot 5, but reversed, in part, the judgment regarding snow storage on Lot 9. (Ct. App. Op., Add. 2-12.) The court reasoned that the existence of a parking covenant depends on the developer's intent. Considering the Declaration to be ambiguous, the court examined the undisputed parol evidence and concluded that Sorenson had no intent for the Lot 5 parking designation to be permanent. (*Id.*, ¶¶ 15-26.) Alternatively, the court concluded that the Amended Plat validly terminated the designation of Lot 5 for parking. Accordingly, the district court correctly granted summary judgment for defendants. (*Id.*, ¶¶ 27-29.) Regarding snow storage, the court of appeals affirmed the absence of a contract because plaintiff provided no consideration. (*Id.*, ¶ 31.) However, the court reversed and remanded for trial on the other three theories. The court held that a valid easement could exist without being recorded (*id.*, ¶ 32), and material questions of fact precluded summary judgment on the elements of estoppel (*id.*, ¶¶ 33-34). Addressing the taking theory, the court held that Alta's removal of the Lot 9 snow storage designation could "damage" plaintiff's continued use of Lot 8; accordingly, the court remanded for

resolution of supposed factual issues related to the revised snow storage plan. (*Id.*, ¶¶ 35-36.)

This Court has now granted review to address the two issues identified above: (1) whether Alta's revised snow storage plan effected a "taking" of plaintiff's Lot 8, and (2) whether the restrictive parking covenant for Lot 5 was terminated by the Amended Plat. (Add. 1.)

SUMMARY OF ARGUMENT

The Town of Alta did not "take" plaintiff's property by merely directing plaintiff to dispose of excess snow on near-by sites other than Lot 9. In order to prove a taking under article I, section 22, plaintiff must show a protectable interest in property that is taken for public use. Plaintiff has no protectable property interest. With Sorenson's permission, Alta approved plaintiff's storage of snow on Lot 9 during development of Lots 6 and 8. Accordingly, plaintiff had only a revocable license to store snow on Lot 9. Plaintiff's "unilateral expectation" of continued snow storage on Lot 9 is not a protectable interest under the constitution.

Moreover, Alta's revised snow storage plan does not damage plaintiff's property interest. The snow storage plan is a valid exercise of Alta's regulatory police power to protect the health and safety of residents. Plaintiff is not damaged by the inconvenience of pushing its snow to a site other than Lot 9. The revised snow storage plan does not physically damage or prevent the use of plaintiff's Lot 8. The court of appeals' conclusion that Alta's revised snow storage plan could constitute a taking of plaintiff's Lot 8 is erroneous and should be reversed.

The covenant for central parking on original Lot 5 was terminated by the Amended Plat. Applying principles of contract construction, Sorenson clearly retained the authority to amend the covenants and the Plat to reallocate the use and density of lots. The Amended Plat eliminates original Lot 5 and removes the reference to parking on that lot. The parties' intent, unchallenged in the record, was to provide parking on each individual lot instead of Lot 5. Owners and occupants of Lot 8 never expected and have never exercised a right to park on Lot 5. The Amended Plat superseded the original Plat and amended the Declaration's parking covenant by incorporation into the Declaration. Accordingly, the court of appeals' conclusion that the Amended Plat terminated the parking covenant should be affirmed.

ARGUMENT

POINT I: THE COURT OF APPEALS ERRED IN RULING THAT ALTA'S REVISED SNOW STORAGE PLAN CONSTITUTED A TAKING OF PLAINTIFF'S PROPERTY.

The alleged taking of private property by a government entity is governed by Article I, Section 22 of the Utah Constitution, which states:

> Private property shall not be taken or damaged for public use without just compensation. [Add. 148.]

To recover under this provision, a claimant must show (1) some protectable interest in property that is (2) "taken or damaged" for a public use. *See, e.g., Colman v. Utah State Land Bd.*, 795 P.2d 622, 625-26 (Utah 1990). For example, in *Colman* this Court held these elements satisfied by allegations that the plaintiff's underwater brine canal in the

Great Salt Lake, operated under a state lease, was damaged when the state breached the causeway across the lake for flood-control purposes. *Id.* at 626-27. In the present case, plaintiff failed to prove these elements of a taking, and the court of appeals' analysis of the issue is flawed and incomplete.

A. Protectable Property Interest.

The scope of property interests subject to the taking provision is broad, extending to both real and personal property, both tangible and intangible, including leases, easements, and contracts. *See, e.g., id.* at 625-26; *Bagford v. Ephraim City*, 904 P.2d 1095, 1098-99 (Utah 1995). However, a mere unilateral expectation of a continued right or benefit is not a protectable property interest. For example, in *Bagford*, the plaintiffs had operated a private garbage collection and disposal business in the defendant city for five years. When the city adopted an ordinance establishing a municipal garbage collection service and requiring all residents to pay the city for that service, the plaintiffs sued the city for a taking of their business. This Court rejected the claim, holding that the plaintiffs had no vested, legally enforceable interest in a continuing garbage collection business. "[T]o create a protectable property interest, a contract must establish rights more substantial in nature than a mere unilateral expectation of continued rights or benefits." *Id.* at 1099. A property interest that is expired or terminable at will is not subject to the taking provision "because the mere expectation of benefits under such a contract" does not give either party a legally enforceable right against the other. *Id.* The plaintiffs "had no legal right to perform garbage collection services indefinitely. The

expectation that they could continue to collect their customers' garbage was not a contract right cognizable under article I, section 22." *Id.*

Similarly, in *Strawberry Electric Serv. Dist. v. Spanish Fork City*, 918 P.2d 870 (Utah 1996), the plaintiff electric service provider sued the city for providing municipal electric service to new consumers within the plaintiff's authorized service area. This Court held that because state law permits municipalities to provide electric service to newly annexed areas, the plaintiff had nothing more than a "unilateral expectation of continued privileges," which is not protectable under the taking provision. *Id.* at 878. The plaintiff's commercial privilege of providing exclusive electrical service to annexed areas, being "subject to termination" by the city, "is nothing more than a mere unilateral expectation of a continued right," not subject to the taking protection. *Id.* The plaintiff could have no protectable interest in a right that was terminable by the city.

B. Plaintiff Has No Protectable Interest.

In this case, the Town of Alta is vested with plenary authority to enact legal provisions for the health and safety of its inhabitants. Section 10-9-102 of The Municipal Land Use Development and Management Act states:

> [I]n order to provide for the health, safety, and welfare . . . of the municipality and its present and future inhabitants and businesses, . . . municipalities may enact all ordinances, resolutions, and rules that they consider necessary for the use and development of land within the municipality, including ordinances, resolutions, and rules governing uses, density, open spaces, structures, buildings, . . . light and air, . . . transportation . . . public facilities, vegetation, and trees and landscaping . . . .

No one disputes that this authority includes the power to require adequate snow removal and disposal plans, and to condition building permits on such plans. *See* U.C.A. § 10-9-1002(2); (Ct. App. Op., ¶ 7: "Due to the high volume of snow . . . Alta requires snow storage plans . . . before building permits are issued.")

Pursuant to this authority, Alta required a snow storage plan for The View's Lot 8 prior to construction of its condominiums. As an accommodation to the View, Sorenson proposed use of its own vacant Lot 9; however, the February 27, 1985 letter from Mr. Plumb made plain that such use would not be permanent. The second paragraph of the letter refers to the time period "[d]uring the development of Lots 6 and 8," and the third paragraph "recognize[s] that storage areas may change as to utilize the several alternatives . . . that exist." The letter concludes that such changes in snow storage "shall be submitted at such time as we make applications for development" of additional units. (Add. 105.) Mr. Plumb's subsequent testimony confirmed that Sorenson's intent was to provide only "an interim solution" for storage of snow from Lot 8. (Add. 107.) Alta's approval of this original snow storage plan for Lot 8 specifically stated that "adequate snow storage/removal has been addressed only for the first 100 units of the P.U.D.," making clear that further development may require revision of the plan. (Add. 111.) Even The View Associates' own agent, Russell Watts, testified that "the designation of . . . Lot 9 for a snow storage area was temporary and subject to change." (Add. 101, ¶ 5.)

Accordingly, plaintiff's right to store snow on Lot 9 can only be viewed as a temporary license or permit, subject to termination or revision by the Town of Alta, by whose authority the right was granted, with Sorenson's consent. *See, e.g., Webber v. Salt*

Lake City, 120 P. 503, 508-09 (Utah 1911) (property owner denied recovery for destruction of trees in city street because owner was "mere licensee"); *Riggins v. District Court*, 51 P.2d 645, 658 (Utah 1935) (license creates no vested or permanent right); 51 Am. Jur. 2d *Licenses and Permits* §§ 1-4 (2d ed. 2000) (license is a revocable privilege conferring no vested right). Because plaintiff acquired no vested right to store snow on Lot 9, either for a defined term or in perpetuity, plaintiff has no interest protectable by the taking provision. Like the garbage disposal business in *Bagford, supra*, which "had no legal right to perform garbage collection services indefinitely," 904 P.2d at 1099, plaintiff has no legal right to dump snow on Lot 9 in perpetuity. And like the electric service provider in *Strawberry Electric, supra*, whose privilege to provide service was "subject to termination" by the city, 918 P.2d at 878, plaintiff's privilege of storing snow on Lot 9 was subject to termination by Alta. As with the claimants in those cases, plaintiff has "a mere unilateral expectation" of continued benefits or privileges. *Id.* The privilege to store snow on Lot 9, having been granted to plaintiff by Alta, with Sorenson's consent, is subject to termination by Alta. Because plaintiff has only a "unilateral expectation" of continued snow storage on Lot 9, and not a permanent right to do so, plaintiff has no protectable property interest under article I, section 22. *Bagford, supra*, at 1100; *Strawberry Electric, supra*, at 878.

The court of appeals' analysis of plaintiff's property interest is contained in a single sentence, which concludes that plaintiff's *ownership* interest in *Lot 8* is sufficient. (Ct. App. Op., ¶ 36.) However, the court of appeals cites no authority for that conclusion, and this Court employed a more realistic analysis of property interest in *Bagford* and

Strawberry Electric, supra. In those cases, this Court did not focus on the existing physical assets of the garbage disposal and electric service businesses, but on their claimed right to continue or extend their service to customers taken over by the city. Specifically, in *Bagford, supra*, at 1099-1100, this Court did not find a protectable interest in the disposal company's garbage trucks simply because the city's garbage service would threaten the use or value of those trucks. *See also Strawberry Electric, supra*, at 877-78. Likewise, in this case, the correct focus is not on ownership of Lot 8, which remains unchanged, but on plaintiff's *claimed right to store snow on the neighbor's Lot 9.* What plaintiff seeks to enforce is not its ownership or use of Lot 8, but its claimed right to permanent snow storage on Lot 9. As shown above, plaintiff had no such permanent right, but only a provisional privilege terminable by Alta. As shown next, Alta's revision of the snow storage plan for Lots 8 and 9 did not take or damage plaintiff's property, even if plaintiff were deemed to have some protectable interest.

C. Plaintiff's Property Was Not Taken or Damaged.

This Court has defined a "taking," for purposes of article I, section 22, as "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed." *Colman v. Utah State Land Bd., supra*, 795 P.2d at 626 (citation omitted). Damage to land must include "some physical disturbance of a right . . . which the owner enjoys in connection with his property and which gives it additional value." *Id.* (citation omitted). "[T]o bring the case within the damage clause of the Constitution, there must be some physical interference with the property itself or with some easement

which constitutes an appurtenant thereto . . . . [S]uch 'damage' requires a 'definite physical injury cognizable to the senses with a perceptible effect on the present market value." *Id.* (citations omitted). Examples of such damage include "drying up wells and springs," "destroying lateral supports," flooding from adjacent land, or "depositing of cinders and other foreign materials on neighboring lands." *Id.* (citations omitted). *See also Strawberry Electric, supra*, 918 P.2d at 877.

Based on these definitions, a government entity does not "damage" private property by a lawful land-use regulation that does not substantially interfere with the property's use or substantially reduce the property's value. For example, in *Bagford v. Ephraim City, supra*, this Court held that the city did not damage the garbage collector's claimed property because the city had a right to offer competitive garbage service and "[did] not prohibit the private company from continuing to offer its services." 904 P.2d at 1100. Merely imposing an inconvenience or "competitive disadvantage" on the private owner is not a taking. *Id.* Similarly, in another case against Alta, *Haik v. Town of Alta*, 1999 U.S. App. LEXIS 6280 (10th Cir. 1999), the Tenth Circuit Court of Appeals held that Alta did not "take" private property, under article I, section 22 of the Utah Constitution, by denying building permits for lots that did not have access to required water and sewer service. (Add. 149.) *See also Smith Investment Co. v. Sandy City*, 958 P.2d 245, 256-59 (Utah App. 1998) (no taking by down-zoning private property from commercial to residential; mere diminution in value does not prove a "taking"); *Phillips v. King County*, 968 P.2d 871, 878-80 (Wash. 1998) (mere approval of developer's water drainage plan does not constitute a taking of property on which water accumulated);

Stroud v. City of Aspen, 532 P.2d 720, 721-23 (Colo. 1975) (requirement that developer furnish off-street parking does not effect a taking).

Alta's action in the present case merely regulates the disposal of snow; it does not take or damage plaintiff's property. Alta's only action was to *revise* the existing snow storage plan, requiring Lot 8 owners to store snow at three different near-by sites in addition to a portion of Lot 9. This is a lawful regulatory action by Alta pursuant to its general police power to provide for the health, safety, and welfare of its inhabitants. *See* U.C.A. § 10-9-102 (quoted above). By the same unquestioned authority to impose the original snow storage plan, Alta is empowered to revise that plan to meet changing needs. This regulation of snow storage is not a taking. This Court distinguished between a taking and mere regulation of property in *Colman, supra*:

> Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of property, yet they generally do not require compensation under article I, section 22.
>
> . . . The cases are numerous to the effect that . . . the state may without compensation regulate and restrain the use of private property when the health, safety, morals, or welfare of the public requires it; . . . *that the exercise of proper police regulations may to some extent prevent enjoyment of individual rights in property or cause inconvenience or loss to the owner, does not necessarily render the police law unconstitutional*, for the reason that such laws are not considered as appropriating private property for a public use, but simply as regulating its use and enjoyment . . . .
>
> . . . *[A] landowner cannot complain because he is inconvenienced in the use of his property, where such inconvenience arises out of the proper enforcement of the police power* to protect the public health, and where such enforcement does not amount to a taking or destruction of his property. [795 P.2d at 627-28, emp. add.]

Here, the revised snow storage plan did not take or damage plaintiff's property. The plan does not prevent or physically interfere with the use of plaintiff's Lot 8; nor does it result in physical damage to Lot 8. *See Colman, supra*, at 626. Neither does the plan *prohibit* snow removal from Lot 8. *See Bagford, supra*, at 1100 (only a prohibition of the activity could constitute a taking). Plaintiff has completely failed to allege or prove specifically how the revised snow storage plan has "taken" its property. Plaintiff has produced no evidence of lost property value, and mere diminution in value does not establish a taking in any event. *See Smith Investment Co., supra*, at 259. At most, plaintiff is inconvenienced by the possible need to push Lot 8 snow a little farther than next door; however, mere "inconvenience or loss to the owner does not necessarily render the police law unconstitutional." *Colman, supra*, at 628. Alta's revised snow storage plan is a valid exercise of police power for the safety and welfare of the area's inhabitants; as such, the plan does not take plaintiff's property. *See Smith Investment Co., supra*, at 257 ("government retains the ability, in furtherance of the interests of all citizens, to regulate an owner's potential uses of land"); *Stroud v. City of Aspen, supra*, at 722-23 (local government has broad discretion in regulating land use pursuant to police power); *Haik v. Town of Alta, supra*, at *22-23 (regulation of use to promote health and safety does not require compensation) (Add. 154).

The court of appeals concluded that the revised snow storage plan damaged plaintiff's use of Lot 8 based on Alta's letter of November 17, 1998 warning of possible legal action to enjoin occupancy of the View Condominiums if snow could not be stored on Lot 9. (Ct. App. Op., ¶ 36.) However, that letter was written *two years before* the

Definitive Settlement and Development Agreement between MSI and Alta expressly approving the revised snow storage plan and specifically eliminating the need for continued storage on Lot 9. (Add. 133.) Therefore, the revised plan, as approved by Alta, completely eliminated any possible interruption in the occupancy of the View due to lack of snow storage, as well as any risk of related legal action.

The court of appeals also referred to "conflicting evidence as to the validity and cost-impact of the revised snow storage plan" as grounds for "damage" to plaintiff's property. (Ct. App. Op., ¶ 36.) However, neither plaintiff nor the court of appeals cited any legal authority to challenge the *validity* of Alta's revised plan, or to establish that mere increased cost of snow removal constitutes a taking of Lot 8. Moreover, plaintiff produced *no evidence* to dispute the conclusion of Alta's snow storage expert that the cost of the revised plan is "comparable" with other locations in the area. (Add. 143.) In any event, increased cost of regulation is no different, in effect, from the "revenue losses" in *Bagford, supra*, at 1099, or the "diminution in value" in *Smith Investment Co., supra*, at 259, found by those courts not to constitute a taking. Plaintiff has no constitutional right to a permanently-fixed cost of snow removal. Neither is Alta constitutionally forbidden to impose a regulation that could result in increased cost to residents. Even if the revised plan did not work as intended, Alta could not be liable for a taking based upon its mere approval of the plan. *See Phillips v. King County, supra*, 968 P.2d at 879-80.

In summary, plaintiff has no protectable property interest under article I, section 22. Even if ownership of Lot 8 is considered a protectable interest, the revised snow

storage plan did not damage that property. Accordingly, the court of appeals erred in its conclusion that the revised plan could constitute a taking without compensation.

POINT II: THE COURT OF APPEALS CORRECTLY HELD THAT THE PARKING COVENANT FOR THE ORIGINAL LOT 5 WAS TERMINATED BY THE AMENDED PLAT.

A subdivision owner's declaration of covenants, conditions and restrictions constitutes a contract between the owner and subsequent purchasers of individual lots. Accordingly, "interpretation of the covenants is governed by the same rules of construction as those used to interpret contracts" generally. *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807. Such declarations should be enforced according to their plain terms to accomplish the intent of the parties. The parties' intent is determined from the language of the document as a whole, harmonizing all provisions to reach the "most reasonable interpretation" of the document. *Id.*, ¶¶ 11, 19. *See also Orlob v. Wasatch Management*, 2001 UT App 287, ¶¶ 12, 14, 33 P.3d 1078; *Cecala v. Thorley*, 764 P.2d 643, 644 (Utah App. 1988). Plats are also writings to be construed as part of the declaration. *Rowley v. Marrcrest Homeowners' Ass'n.*, 656 P.2d 414, 417 (Utah 1982). However, "restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property." *St. Benedict's Dev. v. St. Benedict's Hosp.*, 811 P.2d 194, 198 (Utah 1991). Generally, restrictive covenants are enforced only to the extent necessary to accomplish their protective purpose. *Id.*; *see also Dansie v. Hi-Country Estates Homeowners Ass'n.*, 1999 UT 62, ¶ 14, 987 P.2d 30.

A. Interpretation of the Declaration and Amended Plat.

In this case, the Declaration and the original Plat, recorded in August 1983, did provide for a common parking facility on *original* Lot 5. Section 3.1 of the Declaration, governing use of individual lots, states that "Lot 5 shall be reserved for and improved with a parking facility for the owners of Lot 4 and Lots 6-9." (Add. 42.) Consistent with this contemplated use of original Lot 5, the original Plat, under the "Anticipated Dwelling Density" for each lot, apportioned no dwelling units for original Lot 5, stating that it would be used for "Parking and Commercial Development of Air Space." (Add. 84.)

However, in November 1984, prior to the sale of any lots, Sorenson recorded the Amended Plat, which significantly altered the configuration, size, location, and use of the nine lots. One of the major purposes of the Amended Plat was to eliminate a central parking facility and instead provide for parking on each individual lot. (Plumb Dep., pp. 15-18, 21, 32-33, Add. 95-97.) Consistent with that intent, *original Lot 5 is eliminated and subsumed* into the reconfigured Lots 6, 8, and 9. Thus, in the Amended Plat, the "Lot 5" referred to in section 3.1 of the Declaration *no longer exists*. The new, Amended Lot 5 is no longer contiguous to Lots 8 and 9, but is separated from those lots by a road, on land that was originally Lot 4. (Overlay map, R. 422, Add. 90-91.) The Amended Plat plainly confirms that Lot 5 is no longer designated for parking. The listing of "Anticipated Dwelling Density" for each lot *eliminates the reference to parking on Lot 5* and replaces it with a designation of 65 dwelling units to be built on Lots 4 and 5. (Add. 86.)

The terms of the Declaration expressly authorize this amendment changing the use density of Lot 5 from parking to dwelling units. Section 1.19 of the Declaration defines "Map" to mean the recorded Plat, "as the same may be amended from time to time, and which is incorporated herein by this reference." (Add. 34.) Section 1.25 defines the "Project" to mean the lots shown on the recorded Plat, "as the same may be amended from time to time." (Add. 35.) In section 2.1.2, the "Declarant reserves the right . . . to change the location or size of any Lot prior to the time that such Lot is sold by Declarant to any third party. *All such changes to the number, size or location of any Lot shall be effected by a modification of the Map.*" (Add. 36, emp. add.) Section 2.1.5 authorizes unilateral amendment of use density by the Declarant prior to the sale of lots. (Add. 37.) Section 13.1 reserves to the Declarant the unilateral right to amend the Declaration prior to the sale of lots. (Add. 79.) And finally, section 13.2 authorizes unilateral amendment by the Declarant to allocate lot density even after sale of lots:

> Declarant shall have the *sole authority at any time to amend this Declaration, and the Map, if necessary, for the purpose of allocating density to Lots* owned by Declarant or changing the configuration, size or location of Lots owned by Declarant . . . . [Add. 79, emp. add.]

Consistent with the Declaration, the original Plat, under the heading "Anticipated Dwelling Density," also expressly authorized Sorenson to reallocate lot use density by plat amendment:

> Pursuant to section 2.1.5 of the Master Declaration . . . , [i]t is anticipated that the number of residential units to be constructed on said Lots 1 thru 9, as shown on this plat, shall be as follows (provided Sorenson Resources Company, or any successor, pursuant to the Declaration, *shall have the right to reallocate the density of development and location of each lot* . . . . [Add. 84, emp. add.]

Construing the Declaration and original Plat together, Sorenson plainly was authorized to change the use and density of the lots by recording an amended plat. The Amended Plat, then, superseded the original Plat, and became incorporated into the Declaration in place of the original Plat. By this amendment and incorporation into the Declaration, the terms of the Amended Plat became the terms of the Declaration. Thus, the change in use of Lot 5 from parking to dwelling units, as contained in the Amended Plat, being more recent in time, supersedes the Declaration's prior designation of Lot 5 for parking. This retained authority of the developer to amend restrictive covenants is uniformly upheld. *See, e.g., Rosi v. McCoy*, 356 S.E.2d 568 (N.C. 1987) (affirming developer's unilateral amendment of restrictive covenants); *Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300, 313-15 (Tex. App. 2001).

B. Supporting Case Law.

Case law confirms that a declaration of covenants should be interpreted in connection with the most recent amended plat. In *Richards v. Abbottsford Homeowners Ass'n.*, 809 S.W.2d 193 (Tenn. App. 1990), the declaration of covenants and original plat showed a housing development of 129 lots. The plaintiffs subsequently purchased two lots and recorded an amended plat that consolidated their two lots into a single lot. When the homeowners' association levied separate maintenance fees for each of the two original lots, as shown on the original plat, the plaintiffs sued for a declaration that they were liable only for the fee on their consolidated lot, as set forth in the amended plat. The court held that the declaration provision authorizing assessment of maintenance fees

on all lots "designated on the subdivision plat" should be construed to apply to the amended plat:

> [A] subdivision can have only one plat. It is evident from the language of the later plats in this case that they were intended to take the place of the portion of the original plat they amended.
>
> . . . [W]e find that the term "subdivision plat," as it is used in the declaration of covenants, refers to the plat . . . that incorporates all the otherwise valid amendatory plats filed since the recording of the original plat. [*Id.* at 196.]

Because the amended plat "superseded" the original plat, the declaration authorized a fee only on plaintiffs' single, consolidated lot. *Id.*

Moreover, restrictive covenants may be amended by the recording of an amended plat. In the leading case of *Matthews v. Kernewood, Inc.*, 40 A.2d 522 (Md. 1945), the original plat showed a subdivision of thirty-four lots on thirty-five acres of land. Restrictive covenants limited each lot to one dwelling and set cost and architectural standards. When the developer subsequently became unable to sell the last fourteen lots, he recorded an amended plat subdividing those lots into thirty-four smaller lots and modifying the cost and building standards. Existing owners sued to enforce the original restrictive covenants. Citing the express reservation of the developer's authority to amend the restrictive covenants at any time, the court upheld the resubdivision as set forth in the amended plat. The court reasoned that the restrictions must be interpreted together with the plat to which they refer. Moreover, the filing of an original plat does not restrict the filing of an amended plat. *Id.* at 523-25. Noting that restrictive covenants

are not favored and should be strictly construed, the court held that the developer could amend the restrictions by recording the amended plat:

> One who conveys a part of a tract of land by deed containing restrictive covenants may reserve to himself the power to modify or omit these restrictions altogether as was done in the case at bar. [*Id.* at 526.]

See also Brown v. McDavid, 676 P.2d 714, 718 (Colo. App. 1983) (citing *Matthews* to uphold termination of covenants upon resubdivision; all parties were on constructive notice that the covenants could be thus terminated).

Finally, interpretation of the Declaration and Amended Plat to change parking from a central facility on original Lot 5 to separate facilities on each lot is consistent with the intent of the parties, as required by *Swenson v. Erickson, supra*. Walt Plumb testified that Sorenson's intent was to eliminate central parking on Lot 5, providing instead for parking on the individual lots, thereby allowing dwelling units on Lot 5. (Add. 95-97.) Russell Watts, who originally purchased Lot 8 for The View Associates, testified that "on-site parking was designed and constructed for The View building on Lot 8 in quantities sufficient to meet the local zoning requirements." (Add. 101, ¶ 3.) Mr. Watts confirmed that owners of Lot 8 never bargained for or received any right to park on Lot 5, and that occupants of Lot 8 have always parked on Lot 8 and never on Lot 5. (*Id.*, ¶¶ 3-4.) The absence of any real need to park on Lot 5 provides further justification not to enforce the claimed covenant. *See St. Benedict's Dev., supra*, at 198. Moreover, because the View never claimed a right to park on Lot 5 until filing this lawsuit, to prevent MSI from developing its own lots, The View has abandoned any covenant for parking on Lot

5. *See Swenson v. Erickson, supra*, at ¶¶ 21-22 (abandonment through "substantial and general noncompliance" with the covenant).

In summary, the parking covenant in the Declaration was terminated by the recording of the Amended Plat. The court of appeals correctly concluded that the claimed parking covenant is unenforceable, albeit under different reasoning than set forth above. The court's analysis of whether the parking covenant "runs with the land" would appear unnecessary (Ct. App. Op., ¶¶ 17-19), as the more relevant preliminary inquiry is whether the parking covenant even exists after the Amended Plat. Because, as shown above, the covenant was extinguished by the Amended Plat prior to conveyance of Lot 8 to plaintiff, this Court need not address whether the covenant runs with the land. Ironically, even if the parking covenant did run with the land, plaintiff's Lot 8 is situated over much of the original Lot 5, thus allowing plaintiff to park for the past 19 years on the very land they claim here for parking. (*See id.*, ¶¶ 5, 27.) In addition, this Court need not resort to an ambiguity analysis, as did the court of appeals (*id.*, ¶¶ 20-25), because the intent of the developer to terminate the parking covenant is clear from the express provisions of the Declaration and Amended Plat.

CONCLUSION

Based on the foregoing, this Court should reverse the court of appeals' ruling that Alta's revised snow storage plan could constitute a taking of plaintiff's Lot 8. This Court should hold that there was no taking, as a matter of law. In addition, this Court should affirm the court of appeals' ruling that the covenant for parking on original Lot 5 was terminated by the Amended Plat, which eliminated parking on Lot 5.

DATED this 4th day of November, 2004.

KIRTON & McCONKIE

Merrill F. Nelson
Attorneys for Defendants, Petitioners and
Cross-Respondents

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of November, 2004, I caused two true and correct copies of the foregoing **Petitioners' Opening Brief** to be mailed through United States mail, postage prepaid, to the following:

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ADDENDUM INDEX

10492-0023 786428

IN THE SUPREME COURT OF STATE OF UTAH
---ooOoo---

The View Condominium Owners Association, a Utah condominium association,

Cross-Petitioners and Respondents.

v.

Case No. 20040369-SC
20020746-CA

MSICO, L.L.C., a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and John Does 1 through 10,

Petitioners and Cross-Respondents.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on May 10, 2004, by MSICO, L.L.C., and The Town of Alta and a Cross-Petition for Writ of Certiorari, filed on May 10, 2004, by The View Condominium Owners Association.

IT IS HEREBY ORDERED pursuant to Rule 45 of the Utah Rules of Appellate Procedure the Petition and Cross-Petition for Writs of Certiorari are granted only as to the following issues.

The petitioner's (MSICO LLC and Alta) third issue: Whether the court of appeals erred in ruling that Alta's termination of a snow storage designation constituted a taking without just compensation?

The cross-petitioner's (The View Condominium) first issue: Whether the court of appeals erred in holding that a restrictive parking covenant was terminated by plat amendment.

For The Court:

Dated August 13, 2004

Christine M. Durham
Chief Justice

2004 UT App 104

The VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association, Plaintiff and Appellant,

v.

MSICO, L.L.C., a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and John Does 1 through 10, Defendants and Appellees.

No. 20020746–CA.

Court of Appeals of Utah.

April 8, 2004.

Background: Condominium owners association brought action against town and owner of lots in planned unit development (PUD) to enforce alleged restrictive covenants allowing association to store snow on one lot and to use other lot for parking. The Third District Court, Salt Lake Department, Michael K. Burton, J., granted town's and lot owner's motion for summary judgment, and association appealed.

Holdings: The Court of Appeals, Norman H. Jackson, J., held that:

(1) developer did not intend that designation of lot as parking facility for other lots, in declaration of covenants for PUD, was a covenant that was to run with the land;

(2) association did not have a contractual right that other lot in PUD be reserved for snow storage;

(3) failure to record easement for snow storage was not fatal to association's easement claim;

(4) genuine issues of material fact precluded summary judgment on association's estoppel claim against town;

(5) association's estoppel claim against town was not barred based on town's status as a government entity; and

(6) genuine issue of material fact as to whether association's interest in the continued use of its property was taken or damaged by government action precluded summary judgment on association's taking action against town.

Affirmed in part, and reversed and remanded in part.

1. Covenants ⇐20

If recorded, the documents setting forth the plat designations for general plan developments can have the effect of creating restrictive covenants that are binding on all subsequent development. Restatement (Third) of Property (Servitudes) § 2.1.

2. Covenants ⇐20

Recording a declaration or plat setting out servitudes does not, by itself, create servitudes; so long as all the property covered by the declaration is in a single ownership, no servitude can arise, and only when the developer conveys a parcel subject to the declaration do the servitudes become effective. Restatement (Third) of Property (Servitudes) §§ 2.1, 2.14.

3. Covenants ⇐79(3)

Although subsequent purchasers may not have had an interest in property subject to restrictive covenants at the time that the general plan setting forth the restrictive covenants was enacted, those purchasers are entitled to enforce any covenants that may have been validly created. Restatement (Third) of Property (Servitudes) § 1.7.

4. Covenants ⇐53

A covenant that runs with the land must have the following characteristics: (1) the covenant must touch and concern the land; (2) the covenanting parties must intend the covenant to run with the land; and (3) there must be privity of estate.

5. Covenants ⇐53

Although the touch-and-concern and intent requirements for a covenant to run with the land are somewhat interrelated, the absence of any one of the requirements prevents a covenant from running with the land.

6. Covenants ⇐49

Restrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property.

7. Covenants ⇐69(1)

Developer did not intend that designation of lot as parking facility for other lots, in declaration of covenants for planned unit development (PUD), was a covenant that was to run with the land, where developer reserved right to amend declaration, parking agreement in declaration was ambiguous regarding its scope and duration and thus extrinsic evidence regarding intent was admissible, only direct evidence regarding developer's intent was testimony by developer's representative that parking designation was not intended to be permanent, and amended plat adopted before developer sold interest in lot changed location and dimensions of lot and contained no reference that lot was to serve as a parking facility.

8. Covenants ⇐53

Though an express statement in the document creating the covenant that the parties intend to create a covenant running with the land is usually dispositive of the intent issue, the parties' intent may also be implied by the nature of the covenant itself.

9. Covenants ⇐49

Generally, unambiguous restrictive covenants should be enforced as written; however, where restrictive covenants are susceptible to two or more reasonable interpretations, the intention of the parties is controlling.

10. Covenants ⇐49

In cases of textual ambiguity, interpretation of the covenants is governed by the same rules of construction as those used to interpret contracts.

11. Evidence ⇐461(1)

Provision of declaration of covenants for planned unit development (PUD), stating that lot was to be used as a parking facility for other lots, was ambiguous and thus trial court could rely on extrinsic evidence in determining whether developer intended such covenant to run with the land, where developer reserved right to amend declaration, and it was not clear whether amendment power was subordinate to parking provision.

12. Condominium ⇐8

Condominium owners association in planned unit development (PUD) did not have a contractual right that lot in PUD be reserved for snow storage, absent evidence that any consideration was exchanged between association, town or lot owner regarding snow storage.

13. Easements ⇐12(1)

A failure to record is not necessarily fatal to an easement claim.

14. Easements ⇐22

Non-recorded easements may be binding upon subsequent purchasers if the purchasers are under constructive notice that the easements exist.

15. Estoppel ⇐52.15

The elements essential to invoke equitable estoppel are: (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

16. Judgment ⇐181(15.1)

Genuine issues of material fact was to whether town represented that lot in planned unit development (PUD) was designated for and could be used by condominium owners association for snow storage, whether association relied on such representations to use lot to store excess snow, and whether association's costs for snow storage would increase if lot was no longer available for snow storage, precluded summary judgment on association's estoppel claim against town.

17. Estoppel ⇐62.1

As a general rule, estoppel may not be invoked against a governmental entity.

18. Estoppel ⇐62.1

There is a limited exception to general rule that estoppel may not be invoked against a government entity for unusual cir-

cumstances where it is plain that the interests of justice so require.

19. Estoppel ⇐62.4

Condominium owners association estoppel claim against town regarding use of lot in planned unit development (PUD) for snow storage was not barred based on town's status as a government entity, where town made numerous written representations to association that lot had been reserved for snow storage, and town actively asserted such position in prior litigation against owner of lot.

20. Eminent Domain ⇐2.1

A takings analysis has two principal steps: first, the claimant must demonstrate some protectable interest in property, and if such is demonstrated the claimant must then show that the interest has been taken or damaged by government action.

21. Eminent Domain ⇐2.1

A taking is any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed.

22. Judgment ⇐185.3(1)

Evidence that town threatened to take legal action against condominium owners association, if prior snow storage designation of lot in planned unit development (PUD) that association had been using for snow storage was threatened, and that such action might include an injunction precluding occupancy of portions of association's property during snow periods, raised genuine issue of material fact as to whether association's interest in the continued use of its property was taken or damaged by government action, in association's takings action against town, though association lacked a property interest in the lot designated for snow storage.

23. Appeal and Error ⇐169

As a general rule, appellate courts will not consider an issue raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.

24. Appeal and Error ⇐174, 1078(1)

Court of Appeals would not address argument by town and owner of lot in planned unit development (PUD) that condominium owners association lacked standing to bring action seeking declaration that association could continue to use lot for snow storage, where town and owner raised argument for the first time on appeal, and did not argue or provide authority suggesting that standing issue could be raised for the first time on appeal because trial court committed plain error or case involved exceptional circumstances.

Robert E. Mansfield and Stephen Christiansen, Van Cott Bagley Cornwall & McCarthy, Salt Lake City, for Appellant.

William H. Christensen and Lawrence B. Dingivan, Callister Nebeker & McCullough, Salt Lake City, for Appellees.

Before Judges BENCH, DAVIS, and JACKSON.

OPINION

JACKSON, Judge:

¶ 1 The View Condominium Owners Association (The View) challenges the district court's denial of its motion for summary judgment and the district court's grant of summary judgment to MSICO, L.L.C. (MSICO) and the Town of Alta (Alta). We affirm in part and reverse and remand in part.

BACKGROUND

¶ 2 The Sugarplum Planned Unit Development (Sugarplum PUD) comprises approximately 25 acres in Alta near the top of Little Cottonwood Canyon. On August 12, 1983, Sorenson Resources Company (Sorenson) recorded a plat of the Sugarplum PUD in the Salt Lake County Recorder's Office preliminary to developing the property. Sorenson simultaneously recorded a "Master Declaration of Covenants, Conditions, and Restrictions of Sugarplum, a Planned Unit Development" (the Declaration). In the "Recitals" section of the Declaration, Sorenson declared that "the Project shall be held, sold, con-

veyed ... and used subject to the following Declaration as to ... covenants, servitudes, restrictions, limitations, conditions and uses ... hereby specifying that such Declaration shall operate for the mutual benefit of all Owners of the Project and shall constitute *covenants to run with the land.*" (Emphasis added.)

¶ 3 Under the terms of section 1.25 of the Declaration, the Sugarplum PUD was divided into nine separate lots, "as shown on that certain map entitled 'SUGARPLUM, A PLANNED UNIT DEVELOPMENT' filed concurrently herewith in the office of the Salt Lake County Recorder, *as the same may be amended from time to time.*" (Emphasis added.) The amendment power referred to in section 1.25 was expounded upon in Article XIII of the Declaration. Section 13.1 accordingly states that, "[until] sale of the first Lot or Unit[,] Declarant shall have the right to amend this Declaration." Section 13.2 then states that, even after sale of the first lot, "Declarant shall have the sole authority at any time to amend this Declaration, and the Map, if necessary, for the purpose of allocating density to Lots owned by Declarant or *changing the configuration, size or location* of Lots owned by Declarant." (Emphasis added.)

¶ 4 Article III of the Declaration sets forth the "Use Restrictions" for the Sugarplum PUD. Under the terms of section 3.1, "[e]xcept as otherwise provided herein, each Lot may be used in any manner consistent with the requirements of applicable zoning.... Nevertheless, ... *Lot 5 shall be reserved for and improved with a parking facility* for the owners of Lot 4 and Lots 6–9 and the Units constructed thereon." (Emphasis added.)

¶ 5 On November 26, 1984, Sorenson recorded an Amended Sugarplum Plat (the Amended Plat). Under the terms of the Amended Plat, the configuration, size, and spatial relationships of the nine lots were significantly altered. Under the terms of the Amended Plat, the land previously designated as Lot 5 was now subsumed into the reconfigured Lots 6, 8, and 9. Significantly, approximately two-thirds of the land that had previously been recorded as Lot 5 was now included in the property allocated to the reconfigured Lot 8. As a result, Lot 5 was reconstituted across the street from Lots 6, 7, 8, and 9 using land that had previously been part of Lot 4. Finally, the Amended Plat omitted the prior references to Lot 5 as a site for "parking and commercial development."

¶ 6 The View's predecessor in interest purchased Lot 8 of the Sugarplum PUD on January 4, 1985. MSICO purchased Lots 4, 5, and 9 on December 31, 1988.

¶ 7 Due to the high volume of snow that falls in the area each year, the town of Alta requires snow storage plans from property owners before building permits are issued. Preliminary to receiving approval for the Sugarplum PUD (and prior to the sale of any of the lots), Sorenson representative Walter Plumb (Plumb) sent a letter to the town of Alta to clarify Sorenson's

> intent with regard to snow storage at the [Sugarplum] project. During development of Lots 6 and 8 ... snow shall be stored in appropriate areas. Should there be any excess snow, it may be stored on Lot 9 as recorded. We recognize that storage areas may change as to utilize several alternatives ... that exist. Any changes shall be submitted at such time as we make applications for development in addition to our first one hundred units.

Alta subsequently reviewed the proposed snow storage plan and requested changes. On March 5, 1985, Alta informed the developer of The View that it had approved Lot 8 for development. This approval was predicated on the "understanding that adequate snow storage/removal has been addressed only for the first 100 units of the P.U.D. ... with substantial storage planned for Lot 9." On April 27, 1985, Alta approved a snow removal plan for Lot 8. Under the terms of this plan, Lot 9 was expressly designated as overflow snow storage for The View. Since 1985, The View has continuously used Lot 9 for snow storage.

¶ 8 In 1988, Sorenson filed suit against Plumb alleging that Plumb had fraudulently failed to disclose to Sorenson that he had granted the use of Lot 9 for overflow snow storage. In a subsequent settlement of this

action, Plumb agreed to "cooperate fully with and assist Sorenson with the removal of the snow storage designation of Lot 9"

¶ 9 In September 1996, MSICO filed suit against Alta Among the causes of action listed in that suit were causes arising out of Alta's refusal to allow MSICO to develop Lot 9 On November 17, 1998, Alta sent a letter to the owners of The View to apprise them of the status of this litigation In that letter, Alta stated that

> "Lot 9" was designated by the developers of "The View" as the snow storage area for "Lot 8" *The Town granted construction approvals for The View based upon a snow storage plan designating "Lot 9" to receive snow from "Lot 8"*
>
> [MSICO] is taking the position in the litigation against the Town that "Lot 9" has *not* been validly designated as snow storage for snow removed from "Lot 8"
>
> If [MSICO] succeeds in its claim that The View's snow storage plan is invalid insofar as it designated "Lot 9" to receive snow from "Lot 8," such a result *would have major implications for The View home owners*
>
> Snow storage is a life-safety issue in Alta The Town has no choice but to require snow not be pushed into streets or impair emergency access or traffic If the View Condominium Owner's Association were to lose its ability to store snow on sites approved in its snow storage plan, *the Town would have little choice but to take legal action to protect the public safety and welfare That action might even include an injunction precluding occupancy of The View or portions thereof during snow periods*
>
> The Town vigorously disputes [MSICO]'s allegations that "Lot 9" is not validly dedicated as snow storage for "Lot 8," The View

(First, third, and fourth emphases added)

¶ 10 Pursuant to the litigation with MSICO, Alta filed a summary judgment motion, in which it argued that "[MSICO] cannot deny that its predecessor [Sorenson] sold Lot 9 to [MSICO] knowing that Lot 9 had been designated as snow storage" In a deposition in that case, Alta's Mayor testified that "Lot 9 was dedicated to snow storage by Walt Plumb in agreement with the planning commission" At a November 1999 town hearing arising out of the dispute, Alta's legal counsel testified that MSICO "knew there was a problem [arising out of the Lot 9 snow storage designation] as of 1988"

¶ 11 MSICO and Alta settled their dispute on November 9, 2000 As part of this settlement, Alta and MSICO purported to remove the designation of Lot 9 for The View's snow storage Anticipating that The View would seek judicial enforcement of its snow storage rights, MSICO and Alta agreed that MSICO would defend and indemnify Alta from "assertions or claims that may be brought by owners of units in Lots 6, 7, or 8 of the Sugarplum PUD concerning a prior snow storage designation of Lot 9" Further, as part of the settlement agreement, Alta purportedly approved a new snow storage plan for Lot 9 which would largely eliminate the use of Lot 9 as a snow depository site

¶ 12 On December 13, 2000, The View filed its complaint, alleging six causes of action against MSICO and Alta In its complaint, The View sought to enforce what it believed to be a restrictive covenant guaranteeing its occupants the right to use the reconstituted Lot 5 as a parking facility The View also sought to enforce its right to use Lot 9 as overflow snow storage It predicated this assertion on four different legal theories first, The View argued that it had a contract with MSICO and Alta allowing it to use Lot 9 as overflow snow storage, second, The View argued that principles of estoppel should be applied to prevent MSICO or Alta from contesting The View's right to store snow on Lot 9, third, The View argued that Alta's efforts to deprive it of its snow storage right on Lot 9 constitute a compensable taking, fourth, The View argued that MSICO had granted it an enforceable snow storage easement

¶ 13 Following preliminary motions and discovery, The View filed a motion for summary judgment on the Lot 5 parking claim MSICO/Alta responded with their own motion for summary judgment on all claims before the court Following briefing and oral argument, the district court denied The

View's summary judgment motion and granted MSICO/Alta's motion for summary judgment The View now appeals

ISSUES AND STANDARDS OF REVIEW

¶ 14 Summary judgment is appropriate only if there is no genuine issue of material fact and, given the facts, the moving party is entitled to judgment as a matter of law *See* Utah R Civ P 56(c) "We review the trial court's decision to grant summary judgment for correctness, viewing the facts in the light most favorable to the losing party We also review the trial court's determinations of law for correctness" *Fink v Miller*, 896 P 2d 649, 652 (Utah Ct App 1995) (quotations and citations omitted)

ANALYSIS

I The View's Right to Enforce the Lot 5 Parking Agreement

¶ 15 The View first argues that the district court was incorrect in ruling that there was no enforceable covenant guaranteeing The View parking rights on the reconfigured Lot 5 We disagree

[1–3] ¶ 16 It is well-established that, if recorded, the documents setting forth the plat designations for general plan developments can have the effect of creating restrictive covenants that are binding on all subsequent development *See* Restatement (Third) of Property Servitudes § 2 1 cmt c (2000) ("Real-estate developments involving multiple parcels or units almost always include easements and covenants Typically, the servitudes are set out in a separate document, often labeled a declaration") However, "[r]ecording a declaration or plat setting out servitudes does not, by itself, create servitudes So long as all the property covered by the declaration is in a single ownership, no servitude can arise Only when the developer conveys a parcel subject to the declaration do the servitudes become effective" *Id*, *see also id* at § 2 14 cmt a, 20 Am Jur 2d *Covenants* § 163 (1995) Further, although subsequent purchasers may not have had an interest in the property at the time that the general plan was enacted, the law holds that those purchasers are entitled to enforce any covenants that may have been validly created *See Fink v Miller*, 896 P 2d 649, 652 (Utah Ct App 1995) ("As a general proposition, property owners who have purchased land in a subdivision, subject to a recorded set of restrictive covenants and conditions, have the right to enforce such restrictions "), *see also* Restatement (Third) of Property Servitudes § 1 7 cmt a

[4–6] ¶ 17 Under Utah law, "[a] covenant that runs with the land must have the following characteristics (1) The covenant must 'touch and concern' the land, (2) the covenanting parties must intend the covenant to run with the land, and (3) there must be privity of estate" *Flying Diamond Oil Corp v Newton Sheep Co*, 776 P 2d 618, 622–23 (Utah 1989) (footnote omitted) "Although the touch-and-concern and intent requirements are somewhat interrelated, the absence of any one of the requirements prevents a covenant from running with the land" *Id* Further, " '[r]estrictive covenants are not favored in the law and are strictly construed in favor of the free and unrestricted use of property' " *Dansie v Hi–Country Estates Homeowners Assoc*, 1999 UT 62,-¶ 14, 987 P 2d 30 (quoting *St Benedict's Dev Co v St Benedict's Hosp*, 811 P 2d 194, 198 (Utah 1991))

[7] ¶ 18 There is no dispute in the present case as to whether the purported parking covenant touches and concerns the land, nor is there is a dispute as to whether privity of estate exists Instead, the sole dispute is whether Sorenson intended Lot 5's designation as a parking space for Lot 4 and Lots 6, 7, 8, and 9 to act as a covenant that would run with the land The district court ruled that there was no such intent We agree

[8–10] ¶ 19 Explaining the intent prong of the analysis, our supreme court has stated that "the original parties to the covenant must have intended that the covenant run with the land" in order for the covenant to be deemed binding on successive generations *Flying Diamond Oil Corp*, 776 P 2d at 627 Though "[a]n express statement in the document creating the covenant that the parties intend to create a covenant running with the land is *usually* dispositive of the intent is-

sue[,][t]he parties' intent may also be implied by the nature of the covenant itself." *Id.* (emphasis added). "Generally, unambiguous restrictive covenants should be enforced as written. However, where restrictive covenants are susceptible to two or more reasonable interpretations, the intention of the parties is controlling." *Swenson v. Erickson*, 2000 UT 16,¶ 11, 998 P.2d 807. In cases of textual ambiguity, "interpretation of the covenants is governed by the same rules of construction as those used to interpret contracts." *Id.* Thus,

> [i]n the determination of the intention 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.

20 Am.Jur.2d *Covenants* § 171.

[11] ¶ 20 The View first argues that the language of the Declaration was unambiguous and that the district court's reliance on extrinsic evidence in its examination of intent was therefore legal error. The relevant portions of the Declaration are: (1) section 3.1, which states that "Lot 5 shall be reserved for and improved with a parking facility for the owners of Lot 4 and Lots 6–9 and the Units constructed thereon"; (2) the Recitals section, which states that the terms of the Declaration "shall operate for the mutual benefit of all Owners of the Project and shall constitute *covenants to run with the land*" (emphasis added); and (3) section 13.2, which states that the "Declarant shall have the sole authority at any time to amend this Declaration, and the Map, if necessary, for the purpose of allocating density to Lots owned by Declarant or changing the configuration, size or location of Lots owned by Declarant."

¶ 21 Reading these three portions of the Declaration together, we see at least three different, equally plausible interpretations as to the scope and meaning of the Lot 5 parking agreement. First, one could plausibly read these provisions and conclude that, insofar as section 3.1 "reserves" Lot 5 as a parking lot for the occupants of Lot 4 and Lots 6, 7, 8, and 9, the amendment power reserved to Sorenson under section 13.2 was subject to the intra-contractual mandate that Lot 5 remain viable as a parking lot for the occupants of Lot 4 and Lots 6, 7, 8, and 9. Thus, section 13.2's general amendment power would be held subordinate to the parking agreement of section 3.1.

¶ 22 Second, one could plausibly read these provisions as MSICO does and conclude that Sorenson's reservation of the power to amend the "configuration, size[,] or location" of the Lot 5 designations clearly evidences an intent for the designation of Lot 5 as a parking lot to be a temporary designation, changeable by Sorenson at will. Under this reading, section 3.1's parking designation is thus subordinate to section 13.2's amendment power, thereby indicating that the parking agreement was an agreement that was at all times subject to extinguishment by the reserved amendment powers held by Sorenson.

¶ 23 Third, one could plausibly read these provisions as The View reads them and thus conclude that, because Sorenson retained the right to amend the "configuration, size[,] or location" of the respective lots, the covenant that Lot 5 be used as a "parking facility" for the other lots must mean that the right for the occupants of those other lots attaches to the most recent configuration of "Lot 5," regardless of whether its "configuration, size[,] or location" has been changed. In this manner, the various provisions of the contract would ostensibly be harmonized.

¶ 24 There are various strengths and weaknesses to each of these approaches. At the very least, however, the threshold plausibility of such disparate readings indicates that the parking agreement contained in the Declaration was ambiguous as to its scope and duration. As such, The View's argument that the district court erred by considering parol evidence in its determination of intent is simply incorrect.

¶ 25 Because of the intra-contractual ambiguity regarding the proper reconciliation of these various contractual provisions, the district court necessarily examined the evidence before it to determine whether, in the context of a summary judgment motion, it could

determine that the parties intended the permanent covenant language set forth in the Recitals section to apply to the parking agreement set forth in section 3.1 of the Declaration. The district court ruled that the evidence indisputably showed that the permanent covenant language was not meant to apply to the parking agreement and accordingly granted summary judgment on this issue. We agree.

¶ 26 To overcome a summary judgment motion, a party must present some direct evidence that would support its position. *See Thurston v. Workers Comp. Fund*, 2003 UT App 438,¶ 16, 83 P.3d 391. Here, the *only* direct evidence that was presented below regarding the application of the permanent covenant language to the parking agreement was the testimony of Walter Plumb. As discussed above, Plumb testified that Sorenson did not intend for the Lot 5 parking designation to be permanent. Given Plumb's direct, personal involvement in this project, this evidence was highly probative and directly on point to the question at hand. As noted by the district court, The View has failed to provide *any testimony* from *any witness* who was similarly involved in the events that would rebut Plumb's testimony regarding Sorenson's intent, nor has The View offered any direct testimony or evidence of its own that would support a contrary position. In the absence of any proof to the contrary, Plumb's unrebutted testimony regarding the proper application of the permanent covenant language to the parking agreement is by itself sufficient to support the district court's conclusion that there is no genuine question of material fact on this issue.

¶ 27 Even were we to look beyond the direct evidence, however, the result would still be the same. As noted by the district court, the evidence indicates that The View's predecessors in interest purchased Lot 8 *after* Sorenson had created and recorded the Amended Plat. The changes made in the Amended Plat altered the boundaries, dimensions, and spatial relationships of the various lots, and virtually all of the changes support the conclusion that Lot 5's prior designation as a parking lot was now obsolete. For example, the property that had been designated as "Lot 5" in the original Declaration was parceled out in the Amended Plat so as to be completely subsumed into various other lots. The reconfigured Lot 8 received almost two-thirds of the land that had once been designated as Lot 5, allowing the owners of the reconfigured Lot 8 to use that land for whatever purpose, parking or otherwise, that they deemed optimal. Given that the land comprising the old Lot 5 had been absorbed by the other lots, an entirely new Lot 5 was created in the Amended Plat. Importantly, the new Lot 5 was now located across the street from the reconfigured Lots 6, 7, 8, and 9, thus reducing its usefulness as a parking space for the occupants of Lots 6, 7, 8, and 9. Finally, in contrast to the original plans set forth in the Declaration, the Amended Plat contained no references to Lot 5 as a parking facility.

¶ 28 These changes, both individually and collectively, are consistent with the district court's conclusion that the new Lot 5 was not meant to serve as a subservient parking lot for Lot 4 and Lots 6, 7, 8, and 9, but that it was instead intended for its own future development. In contrast, The View has not offered anything in rebuttal which would support the conclusion that, in spite of these massive changes to the plat designations, the new Lot 5 was still intended to be reserved as a parking lot for the use of the various other lots.[1]

1. Perhaps because of the uncontroverted nature of this evidence, The View urges us to hold that the parking agreement should be held applicable to whatever space of land is currently designated as "Lot 5." However, we think that reading the Declaration in this manner could potentially create absurd results. For example, instead of creating a new, sizeable Lot 5 across the street from the reconstituted Lot 8, Sorenson clearly could have reconfigured the lots so as to put Lot 5 on the other side of the development from Lot 8. Such a move would have rendered Lot 5's use as a parking designation for the occupants of Lot 8 impractical. Indeed, under the amendment powers set forth in the Declaration, Sorenson could have gone even further. Sorenson could have chosen to create a "Lot 5" that was the size of a single family dwelling or even the size of a single parking stall. Such a downsizing of "Lot 5" would have rendered the Lot 5 parking agreement virtually meaningless. It is thus clear that, if the Lot 5 parking agreement were held to have

¶ 29 In sum, The View's entire argument on this issue is predicated on its own reconciliation of the various provisions contained in the Declaration The questionable, patently ambiguous internal interplay between the competing contractual provisions, however, mitigates any probative impact that the individual provisions might have otherwise had As a result, the district court correctly examined the extrinsic evidence, both direct and circumstantial, regarding Sorenson's actual intent with respect to the proper duration of the parking agreement Insofar as this evidence uniformly and irrebutably supports the conclusion that the parking agreement was meant to be temporary, we conclude that the district court correctly granted summary judgment on this issue

II The Lot 9 Snow Storage Agreement

¶ 30 The View next argues that the district court erred in granting summary judgment to MSICO and Alta on The View's claims that Lot 9 should have been reserved for snow storage In its complaint, The View argued that relief was proper under principles of contract, easement, estoppel, and takings law The district court dismissed each of these claims

[12] ¶ 31 The View's contract claim is easily disposed of There is no evidence in the record showing that any consideration was exchanged as part of the alleged contract between The View and Alta or MSICO regarding the Lot 9 snow storage This alone is fatal to The View's assertion of contractual rights, *see Aquagen Int'l, Inc v Calrae Trust*, 972 P 2d 411, 413–14 (Utah 1998), and the district court therefore did not err in dismissing this claim

applied to whatever form Lot 5 ultimately took Sorenson would have nevertheless retained the power to render the agreement completely useless by unchallengeable unilateral action Under The View s own interpretation then the parking agreement contained in section 3 1 of the Declaration would have been a manifestly illusory contractual provision thus rendering it void as a matter of law *See Peirce v Peirce* 2000 UT 7 ¶ 21 994 P 2d 193 (When there exists only the facade of a promise i e a statement made in such vague or conditional terms that the person making it commits himself to nothing the alleged promise is said to be illusory An illusory promise neither binds the person making it nor functions as consideration for a return promise) (Quotations and citations omitted) As such we refuse to read the Declaration in such a manner so as to produce what would manifestly be a legally indefensible result *See id* at ¶ 19 (holding that courts should endeavor to construe contracts so as not to grant one of the parties an absolute and arbitrary right to terminate a contract)

[13, 14] ¶ 32 However, The View's easement, takings, and estoppel claims warrant more serious examination The district court offered only one explanation for dismissing The View's easement claim, holding that "[i]t is undisputed that no recorded dedication or easement affects Lot 9 reserving it for snow storage for the benefit of Lot 8 " Assuming arguendo that this statement is true, it is nevertheless clear that a failure to record is not necessarily fatal to an easement claim Under well accepted principles of law, non-recorded easements may be binding upon subsequent purchasers if the purchasers are under constructive notice that the easements exist *See Johnson v Higley*, 1999 UT App 278,¶¶ 24–28, 989 P 2d 61 Thus, insofar as the district court's dismissal of The View's easement claim was based solely on an incorrect legal conclusion, that dismissal must be overturned

[15] ¶ 33 We also conclude that the district court erred in dismissing The View's estoppel claim

> The elements essential to invoke equitable estoppel are (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted, (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act, and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act

Eldredge v Utah State Ret Bd., 795 P 2d 671, 675 (Utah Ct App 1990)

[16–19] ¶ 34 Here, viewing the evidence in the light most favorable to the non-moving party, we conclude that there was sufficient evidence brought forward to raise a question of material fact as to each of the estoppel

elements. The first element—whether Alta made a statement that was "inconsistent . with a claim later asserted"—is amply supported by (i) the designation of Lot 9 as overflow storage by Alta in April 1985 and (ii) the numerous statements made by Alta to The View during its own litigation with MSICO, in which Alta repeatedly asserted that Lot 9 had been validly dedicated as snow storage. Further, evidence presented below also indicates that these official statements were relied upon by The View in its long-standing use of Lot 9 as a storage space for its excess snow during the winter months. Viewed in the light most favorable to The View, this evidence raises a question of material fact as to the second estoppel factor. Finally, the evidence presented below indicating that The View's costs for snow storage are likely to increase if Lot 9 is no longer available for that purpose raises a question of material fact as to whether The View would suffer an "injury" if Alta is allowed to contradict its prior statements as required by the third estoppel factor. Thus, viewing the facts presented below in the light most favorable to The View, we conclude that the estoppel claim should not have been dismissed.[2]

[20, 21] ¶ 35 Finally, we conclude that the district court erred in dismissing The View's takings claim. Under Utah law, "the takings analysis has two principal steps. First, the claimant must demonstrate some protectible interest in property. If the claimant possesses a protectible property interest, the claimant must then show that the interest has been taken or damaged by government action." *Strawberry Elec. Serv. Dist. v. Spanish Fork City,* 918 P.2d 870, 877 (Utah 1996) (quotations and citations omitted). Thus, a taking is "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed." *Id.* (quotations and citations omitted).

[22] ¶ 36 Here, there is no dispute as to The View's property interest in the continued use and development of Lot 8, thus satisfying the first prong of the takings analysis.[3] The question then becomes whether that interest has been "taken or damaged by government action." *Id.* Viewing the facts in the light most favorable to The View and drawing all reasonable inferences in its favor, we think that this prong has been satisfied. Alta has previously asserted that removal of the Lot 9

2. In response, Alta argues that the estoppel claim is improper because it was asserted against a governmental entity It is true that, "[a]s a general rule, estoppel may not be invoked against a governmental entity" *Anderson v Public Serv Comm'n,* 839 P 2d 822, 827 (Utah 1992) However, in Utah, "there is a limited exception to this general principle for unusual circumstances where it is plain that the interests of justice so require" *Id* (quotations and citations omitted) In *Anderson,* the Utah Supreme Court explained the contours of the "unusual circumstances" exception *Id* There, the court explained that the "unusual circumstances" exception is applicable where there have been "very specific written representations by authorized government entities" *Id* In *Celebrity Club, Inc. v. Utah Liquor Control Commission,* 602 P 2d 689 (Utah 1979), for example, the Utah Supreme Court held that a letter written by the Liquor Control Commission indicating that a private club was in compliance with applicable zoning regulations was sufficiently specific so as to allow an estoppel claim to proceed. *See id* at 691 Similarly, in *Eldredge v. Utah State Retirement Bd* , 795 P 2d 671 (Utah Ct App 1990), we held that various oral and written statements by employees of the Utah State Retirement Board regarding another employee's employment history were specific enough so as to warrant application of the unusual circumstances exception *See id* at 672–73 Here, Alta made numerous written representations to The View indicating that Lot 9 had been reserved for snow storage These representations were supported by Alta's active assertion of this position in prior litigation Due to the specificity of these representations, we conclude that the estoppel claim against Alta cannot be barred based on Alta's status as a governmental entity

3. Alta argues that The View's takings claim should be rejected due to The View's lack of a property interest in Lot 9 This argument, however, misses the point of The View's actual takings claim As discussed above, The View's takings claim is predicated on the damage that it would suffer as the result of possible legal or administrative action that would be taken against its properties on Lot 8 were the snow removal designation of Lot 9 changed Though the harm to The View's interest in Lot 8 would naturally stem from the change in status of Lot 9, it is nevertheless clear that the protectible property interest at the heart of the takings claim is the interest that The View asserts in Lot 8 itself. Thus, the fact that The View lacks a distinct property interest in Lot 9 is not fatal to its takings claim

snow storage designation would force it to initiate legal action against The View. In the November 17, 1998, letter that was sent to The View, Alta stated that, if the Lot 9 snow storage designation were removed, "the Town would have little choice but to take legal action to protect the public safety and welfare. That action might even include an injunction precluding occupancy of the View or portions thereof during snow periods." There is also conflicting evidence as to the validity and cost-impact of the revised snow storage plan approved as part of the November 2000 settlement between Alta and MSICO. Viewing this evidence in the light most favorable to The View, however, we are obligated to conclude that The View would be damaged by the removal of the Lot 9 snow storage designation. Accordingly, we conclude that The View did present sufficient evidence to raise questions of material fact, and the district court's dismissal of the takings claim must therefore be overturned.

III. The View's Standing

[23, 24] ¶ 37 Finally, in its responsive brief, MSICO and Alta assert that The View lacks standing to assert its claims. MSICO and Alta concede, however, that these claims were not raised below. "As a general rule, appellate courts will not consider an issue ... raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." *State v. Brown*, 856 P.2d 358, 359–60 (Utah Ct.App.1993). MSICO and Alta have not argued nor provided us with any authority suggesting that the standing issue qualifies under either exception. Accordingly, we decline to address the merits of this argument.

CONCLUSION

¶ 38 For the foregoing reasons, we affirm the district court's dismissal of The View's claim regarding the existence of a Lot 5 parking covenant. We also affirm the district court's dismissal of The View's contract claim regarding the Lot 9 snow storage right. However, we reverse the district court's dismissal of the easement, estoppel, and takings claims regarding the Lot 9 snow storage right, and remand this case to the district court for further proceedings consistent with this opinion.

¶ 39 WE CONCUR: RUSSELL W. BENCH, Associate Presiding Judge and JAMES Z. DAVIS, Judge.

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association., Plaintiff, vs. MSICO, LLC., a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and JOHN DOES 1 through 10, Defendants.	FINAL JUDGMENT UPON CROSS-MOTIONS FOR SUMMARY JUDGMENT Civil No. 000910067 Judge: Michael Burton

The Court, having entered summary judgment on or about June 12, 2002 and having reviewed the Stipulation and Joint Motion of the parties and good cause appearing, therefore,

IT IS HEREBY ORDERED ADJUDGED AND DECREED as follows:

1. Plaintiff's remaining claims concerning Lot 4 at the Sugarplum PUD should

be are hereby dismissed without prejudice.

2. MSICO's counterclaim concerning the use of Lot 9 by the owners of Lot 8 at the Sugarplum PUD is mooted by the summary judgment order and therefore MSICO's counterclaim is dismissed without prejudice.

3. Final judgment should be and is hereby entered consistent with the Court's Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment entered herein on or about June 12, 2002

DATED this 22 day of August, 2002

BY THE COURT:

Michael Burton
District Judge

Approved as to form and content:

DATED this 13 day of August, 2002

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Approved as to form:
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association., Plaintiff, vs. MSICO, LLC., a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and JOHN DOES 1 through 10, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Civil No. 000910067 Judge: Michael Burton

The Rule 56 cross-motions for partial summary judgment came before the Court for oral argument on April 25, 2002. Robert E. Mansfield appeared for the plaintiff and William H. Christensen appeared for the defendants.

Plaintiff is the owner of Lot 8 in the Sugarplum Planned Unit Development in Alta, Utah ("Sugarplum"). Plaintiff's motion sought summary judgment to the effect that a

"parking right" encumbers Lot 5 at Sugarplum, and that Lot 5 could not have any development that did not provide for a parking facility encompassing the entire acreage of that parcel for the benefit of the owners of Lot 8. Plaintiff's motion was largely premised on the Master Declaration of Covenants, Conditions and Restrictions of Sugarplum, a Planned Unit Development, Salt Lake County, Utah ("Master Declaration") recorded with the county recorder.

It is not contested that Defendant MSICO, LLC is the owner of Lots 4, 5 and 9 at Sugarplum. MSICO sought summary judgment dismissing plaintiff's claims of a "parking right" on Lot 5 and both defendants sought summary judgment on the claims arising from the alleged "parking right." Both defendants also sought summary judgment dismissing all claims asserting the existence of any permanent right by the plaintiff to use of Lot 9 as an undevelopable snow storage area in perpetuity arising from contract, estoppel, governmental taking or other theories.

The Court, having reviewed the memoranda and exhibits filed in connection with the motions and being fully apprized in the premises and pursuant to Rules 56 and 52(a), gives a brief statement of the grounds for its decision :

1. The undisputed facts show that the Master Declaration and original Sugarplum Plat were recorded on August 12, 1983. On November 11, 1984, about six weeks before plaintiff's predecessor in interest received its deed to Lot 8 (January 4, 1985), an Amended Sugarplum Plat was recorded (hereinafter "Amended Plat") . The Amended Plat changed the boundaries, dimensions and the spatial relationship of

some of the lots and roads in the PUD. The property conveyed to plaintiff is the "Lot 8" described in the Amended Plat, not the "Lot 8" in the Master Declaration, which referenced the original Sugarplum Plat. The deed from the developer to the plaintiff's predecessor in interest cited the Master Declaration, the original Sugarplum Plat and the Amended Sugarplum Plat. As a matter of law, the Amended Sugarplum Plat must be considered in interpreting the Master Declaration, and plaintiff cited to no writing, other than the Master Declaration, with respect to its claims of a "parking right" on Lot 5.

2. The undisputed facts show that the land originally platted in the Sugarplum Plat and referenced in the Master Declaration as "Lot 5" overlaps the land now known as "Lot 8" owned by the Plaintiff, and that the plaintiff has a parking lot located on part of the former "Lot 5" depicted on the original Sugarplum Plat.

3. The facts indicate that the Sugarplum development plans at the time of recording the Master Declaration subsequently changed. In contrast to both the original plat and Master Declaration, the Amended Plat omitted any mention of commercial development and a parking facility on the current Lot 5. The omission in the Amended Plat of any designation of Lot 5 as parking, and commercial space and substitution of residential densities instead, is evidence of the developer's and grantor's intent. The unrebutted deposition testimony of Mr. Plumb, the person responsible for recording the original Sugarplum Plat, the Master Declaration, the Amended Plat and the person who signed the deed to plaintiff's predecessor, was that at the time of amending the

Sugarplum Plat the owner intended to remove "parking/commercial" designation for the reconfigured "Lot 5," and that when Lot 8 was conveyed to plaintiff's predecessor, the developer did not intend to convey a "parking right" on Lot 5 for the benefit of the owner of Lot 8.

4. It is undisputed that the View has parking spaces on Lot 8 and that the View obtained permits for the use and occupancy of its building under Alta Town ordinances and regulations including on-site parking regulations.

5. It is undisputed that no recorded dedication or easement affects Lot 9 reserving it for snow storage for the benefit of Lot 8. The undisputed facts do not indicate the existence of, or breach of, any written contract(s) between the plaintiff and either MSICO, the Town of Alta, or others reserving Lot 9 for snow storage uses. It is undisputed that the owners of Lot 8 had deposited snow on Lot 9 for many years pursuant to Town approval and a letter signed by Mr. Plumb that mentioned, "during development of Lots 6 and 8" of the PUD, excess snow could be stored on Lot 9, but that "storage areas may change as to utilize several alternatives (i.e. Snowbird property, Bipass road, etc.)" subject to Town approval.

6. There is no evidence that plaintiff changed positions or reasonably relied upon statements allegedly made by either defendant concerning the alleged non-developability of Lot 9 for snow storage usage in connection with the purchase of units on Lot 8. It is also undisputed that both the original Plat and the Amended Plat described residential densities on Lot 9 and did not depict Lot 9 as

reserved for snow storage. As a matter of law, the undisputed facts do not support plaintiff's claims of estoppel against the Town or MSICO.

7. It is not disputed that the Town of Alta in connection with approval of 10 single family residential structures on Lots 4, 5 and 9 approved a snow storage and removal plan that addressed MSICO's lots, 4, 5, 9, and the plaintiff's lot as well. No evidence or authority was presented that the Town of Alta was prohibited from exercising its discretion to amend snow storage plans for the Sugarplum P.U.D.

8. In the absence of a cognizable "parking right" affecting Lot 5 and the absence of a reservation of Lot 9 as a snow storage depository area, and the lack of any evidence that plaintiff will be deprived of use of its building if Lots 4, 5 and 9 are developed as approved by the Town of Alta, plaintiff's "taking" claims fail as matter of law.

As set forth above, PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE, AND IS HEREBY, DENIED; AND DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE, AND HEREBY IS, GRANTED.

IT IS HEREBY ADJUDGED AND DECREED THAT: Plaintiff's Causes of Action Nos. 1 (Breach of Contract-Snow Storage Right); 3 (breach of the covenant of Good Faith and Fair Dealing); 4 (Estoppel); 5 (Taking Without Just Compensation Lots 5 and 9); and 6 (Violation of Easement–Snow Storage Right Lot 9) insofar as they pertain to Lots 5 or 9 at the Sugarplum Planned Unit Development ARE HEREBY DISMISSED ON THE MERITS WITH PREJUDICE.

This Partial Summary Judgment does not address or affect plaintiffs claims pertaining to Lot 4 at the Sugarplum PUD or MSICO's counterclaim.

DATED this 12 day of June, 2002

BY THE COURT:

Michael Burton
Third Judicial District Judge
for Salt Lake County, Utah

Approved as to Form:

DATED this 10 day of May, 2002

CALLISTER NEBEKER & MCCULLOUGH

WILLIAM H. CHRISTENSEN
Attorneys for Defendants

DATED this __ day of _____, 2002

PARRY, ANDERSON & MANSFIELD

ROBERT E. MANSFIELD
Attorneys for The View Condominium
Owners Association

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

THE VIEW CONDOMINIUM OWNERS ASSOC., Plaintiff, vs. MSICO, LLC, and THE TOWN OF ALTA, et.al. Defendants.	MEMORANDUM DECISION Case No. 000910067 Honorable BRUCE C. LUBECK Court Clerk: Marcy Thorne July 31, 2001

The above matter came on for hearing on Plaintiff's request for a preliminary injunction on July 31, 2001. Plaintiff was represented by Robert E. Mansfield and defendants were represented by William H. Christensen.

The court reviewed the pleadings and record and the proffers and arguments and exhibits of counsel. Being fully advised, the court enters this memorandum decision.

BACKGROUND

1. Plaintiff filed a complaint against defendants seeking money damages for breach of contract and other theories of recovery. Defendant Town of Alta filed a motion to dismiss which has not yet been heard. Defendant MSI filed an answer and counterclaim. Plaintiff then filed a motion for this preliminary injunction.

2. In short, this involves a case where a homeowners association of a condominium is claiming that defendants breached their obligations under a contract between previous owners to allow plaintiff to store snow on a lot adjacent to plaintiff's lot and breached an agreement providing for parking by plaintiffs on still another lot.

3. Plaintiff association are residents of The View in Alta, Utah, constructed on lot 8 of what is called the Sugarplum Planned Unit Development. The condominium was built as part of that development. At the time it was built on lot 8 the developer, Sorenson Resources, through its agent Walter Plumb III, sent a letter in 1985 to the Town of Alta stating that while

other lots, 6 and 8, were being developed, snow was to be stored in appropriate areas and any excess snow would be stored on lot 9. The letter then stated that the storage areas may change to use several alternatives which would be submitted at a later date. At the time Sorenson Resources developed and owned all of the Sugarplum lots. Since construction of The View, the snow from lot 8 has simply been plowed onto lot 9 at the expense of plaintiffs. If snow is not removed from lot 8 plaintiff has no access to the condominiums during the Winter due to the extreme snowfall.

4. A Master Declaration of Covenants, Conditions and Restrictions of Sugarplum was recorded in 1983 and it provided, in part, that lot 5 would be reserved for and improved with a parking facility for the owners of lots 4 and 6-9. Since construction, plaintiff has been parking on lot 8. The owners and guests of The View have never parked on lot 5 and have no intention of themselves constructing a parking facility on lot 5. At the time of the Master Declaration it was anticipated that Sugarplum would build only a few high rise structures providing for 99 living units as part of the development. Later the plat was changed to allow 65 units, but the Master Declaration was never changed.

5. Plaintiffs state they anticipated the additional parking as a result of that Master Declaration.

6. Defendants succeeded Sorenson Resources and now plan to develop lots 4, 5 and 9 and the Town of Alta plans to allow the building of a total of 10 single family luxury homes on those lots. That construction would prevent any parking facility from being built on lot 5 and prohibit almost all snow removal from lot 8 to lot 9. As part of that planned development litigation occurred between defendants in a separate action. In settlement of that litigation, the Town of Alta and MSI, defendants herein, entered into a Definitive Agreement wherein, among other agreements, it was agreed that MSI could develop lots 4, 5 and 9 as above, but were required to abide by a snow removal method that would not only satisfy the new buildings on lots 4, 5 and 9, but adequately allow for removal of snow from lot 8 occupied by plaintiffs.

7. The Town of Alta passed a resolution in August, 1999, Resolution #1999-PC-R-1, wherein it was provided that snow removal and storage was a major life-safety issue in Alta because of the extreme snowfall. Prior approval given by Alta to Sugarplum developers required snow storage plans that were approved as a condition of development of lots 6-8, and lot 9 was

"committed for snow storage by the developer until such time as other adequate snow storage areas are provided on-site and without crossing the By-Pass Road."

8. The snow removal plan agreed upon by defendants in settlement of their litigation calls for the crossing of the by-pass road to remove some of the snow. Approval from the Utah Department of Transportation has been obtained and there is no indication that permission will be withdrawn but equally no indication the permission will continue indefinitely to cross the by-pas road. Traffic safety and water quality are issues to be faced with that snow removal across the by-pass road. Some snow would still be removed to lot 9 and some to common areas of Sugarplum, on an area called Lot A, by traversing and crossing the by-pass road.

9. Currently the cost of plowing the snow from lot 8 to lot 9 is approximately $10,000 to $12,000 per year depending on snowfall amounts. Plaintiff's contractor estimates that if the snow has to be removed as set forth in the Definitive Agreement the cost will be 10 to 12 times as great. Defendant's expert believes the cost would be 4 to 5 times as great. The additional residents in lots 4, 5 and 9 would share that increased expense with the plaintiffs.

10. The planned construction in Alta requires several seasons as the heavy snowfall reduces the effective building season from approximately April to October. Defendants plan to begin building a retaining wall and installing utilities on lots 4 and 5 as soon as possible. If an injunction is issued, even if the case is resolved in total by the Spring of 2002, actual construction of the residences would probably not be completed until the Summer of 2003. The land comprising lots 4, 5 and 9 is valuable and worth approximately $4,000,000.00.

DISCUSSION

The standard for granting a preliminary injunction is well known. The applicant must show it will suffer irreparable harm unless the injunction is issued, the threatened injury to the applicant must outweigh whatever damage the proposed injunction may cause the party enjoined, public interest must not be adversely affected if the injunction is issued, and last, there must be shown a substantial likelihood that the applicant will prevail on the merits of the underlying claim or the case presents serious issues on the merits which should be the subject of further litigation. Hunsaker v. Kersh, 911 P.2d 67 (Utah 1999).

Applying the facts of this case to that standard the court is of the opinion that the motion for preliminary injunction must be denied.

The court finds there will not be irreparable harm to plaintiffs if defendants are not enjoined. As plaintiff points out, irreparable damage is not confined to situations where monetary relief cannot be calculated. Still the court finds no irreparable harm. The court finds that weighing the two first factors plaintiffs should not prevail. When considering the fourth factor, the result is strengthened.

Here there is an alternative to the snow being removed from lot 8 to lot 9. If the snow were not removed in any fashion from lot 8, and there was no prospect to do so, perhaps plaintiff would have a stronger claim to irreparable harm. Here, there is an alternative and there are other prospects. Defendants have entered into a Definitive Agreement which specifically provides that MSI is to be certain not only that snow removal is adequate from lots 4, 5 and 9, but from lot 8 as well.

Moreover, monetary damages can be calculated in this case. If plaintiffs are required to engage in snow removal at a certain cost that can be calculated and plaintiff can be fully compensated.

As to parking, the evidence is even more clear. The Master Declaration was entered into before The View was built. Even if plaintiffs did rely in some fashion on that agreement, parking has been occurring solely on lot 8 by plaintiffs for over 15 years and no harm has been shown by plaintiffs with respect to parking.

When considering the harm to the enjoined party, defendant MSI, the court finds that an injunction is not warranted to maintain the status quo. In fact the injury to defendants if enjoined is equal to and probably greater than the injury to plaintiffs if the injunction is not granted. Due to the length of the building season, the project would effectively be put off at least one year and more probably two years. Finished homes could not be sold until 2003. While public interests would not be damaged by the issuance of an injunction, defendants would be seriously damaged by having to await the finalization of this litigation if an injunction were issued. When weighing those factors the plaintiffs are not entitled to prevail on their motion.

When the court then analyzes the final factor, the

likelihood of success or the merits of remaining issues, the court finds the injunction should not enter. While not expressing an opinion on the ultimate issue, it is certainly not clear that the Plumb letter of 1985 created an easement or license in lot 9. Even considering fully the later Resolution, and the expressed opinions of the Alta mayor and town administrator, and the seemingly contradictory positions of Alta with respect to the use of lot 9, Plumb himself later testified in other proceedings, and the letter itself reflects his more current views, that lot 9 was an interim, stop-gap measure for snow storage until other means could be determined.

Thus, plaintiff has not shown the requisite likelihood of success nor that other remaining issues are such that an injunction is necessary to further litigate them.

Accordingly, it is hereby ordered that the motion for preliminary injunction should be and is hereby DENIED.

DATED this 31st day of July, 2001.

BY THE COURT

BRUCE C. LUBECK
DISTRICT COURT JUDGE

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Recording Requested By, and
When Recorded Mail To:

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MASTER DECLARATION OF

COVENANTS, CONDITIONS AND RESTRICTIONS OF

SUGARPLUM

A PLANNED UNIT DEVELOPMENT

SALT LAKE COUNTY, UTAH

BOOK 5482 PAGE 1173

ALTA 001047

259

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

MASTER DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS OF

SUGARPLUM

A PLANNED UNIT DEVELOPMENT

RECITALS

This Declaration, made on the date hereinafter set forth by SORENSON RESOURCES COMPANY, a Utah corporation ("Declarant"), is made with reference to the following facts:

A. Declarant is the owner of a certain tract of real property located in Salt Lake County, Utah and more particularly described in Exhibit "A" which is attached hereto and incorporated herein.

All of the property described in Exhibit "A" and all of the improvements thereon shall be referred to as the "Project".

B. The Project possesses great natural beauty which Declarant intends to preserve through the use of a coordinated plan of development and the terms of this Declaration. It is anticipated that the plan will provide for comprehensive land planning, harmonious and appealing landscaping, improvements, and the establishment of separate Maintenance Associations (as hereinafter defined) for portions of the Project. It is assumed that each purchaser of property in the Project will be motivated to preserve these qualities through community cooperation and by enforcing not only the letter but also the spirit of this Declaration. The Declaration is designed to complement local governmental regulations, and where conflicts occur, the more restrictive requirements shall prevail.

C. It is desirable for the efficient management and preservation of the value and appearance of the Project to create a non-profit corporation to which shall be assigned the powers and delegated the duties of managing certain aspects of the Project; maintaining and administering the Common Areas; administering, collecting and disbursing funds pursuant to the provisions regarding assessments and charges hereinafter created and referred to; and to perform such other acts as shall generally benefit the Project and the Owners. Sugarplum Master Homeowners Association ("Master Association"), a master property owners' association and a nonprofit corporation, will be incorporated under the laws of the State of Utah for the purpose of exercising the powers and functions aforesaid.

D. It is anticipated that certain lots created pursuant to this Declaration will be developed as condominium projects pursuant to the Condominium Ownership Act of the State of Utah. The relationship between lots which are developed into separate condominium regimes and lots which are not so developed will be described hereinafter.

E. Each Owner shall receive fee title to his Lot or Unit (as those terms shall be hereinafter defined), and a Membership in the Maintenance Association appurtenant to his Lot or Unit.

F. By this Declaration, Declarant intends to establish a common scheme and plan for the possession, use, enjoyment, repair, maintenance, restoration and improvement of the Project and the interests therein conveyed and to establish thereon a planned unit development, in compliance with that certain Agreement dated June 16, 1982 by and between the Town of Alta and Sorenson Resources Company.

NOW, THEREFORE, it is hereby declared that the Project shall be held, sold, conveyed, leased, rented, encumbered and used subject to the following Declaration as to division, easements, rights, assessments, liens, charges, covenants, servitudes, restrictions, limitations, conditions and uses to which the Project may be put, hereby specifying that such Declaration shall operate for the mutual benefit of all Owners of the Project and shall constitute covenants to run with the land and shall be binding on and for the benefit of Declarant, its successors and assigns, the Master Association, its successors and assigns and all subsequent Owners of all or any part of the Project, together with their grantees, successors, heirs, executors, administrators, devisees and assigns, for the benefit of the Project.

ARTICLE I

DEFINITIONS

Unless the context clearly indicates otherwise, the following terms used in this Declaration are defined as follows:

1.1 "Act" shall mean the Utah Condominium Ownership Act, Title 57, Chapter 8, Utah Code Annotated (1953), as amended, or any successor statute hereinafter enacted.

1.2 "Architectural Control Committee" or "Committee" shall mean the committee created pursuant to Article XI.

1.3 "Architectural Control Guidelines" or "Guidelines" shall mean the written review standards promulgated by the Architectural Control Committee as provided in Subarticle 11.3.

1.4 "Articles" shall mean the Articles of Incorporation of the Master Association as amended from time to time.

1.5 "Assessments" shall mean the Regular and Special Assessments levied against each Lot or Unit and its Owner by the Master Association as provided in Article VI.

1.6 "Board" shall mean the Board of Trustees of the Master Association.

1.7 "Bylaws" shall mean the Bylaws of the Master Association as amended from time to time.

1.8 "Condominium", "Condominium Unit", "Condominium Record of Survey Map" and "Condominium Project" shall mean as those terms are defined in the Act.

1.9 "Condominium Building" shall mean a structure containing two or more Condominium Units, constituting all or a portion of a residential or commercial Condominium Project.

1.10 "Common Area" shall mean (i) the property designated as Lot "A" on the Map, together with any real property within the Project, which is owned by the Master Association for the use and benefit of the Members, (ii) any leases, easements, or other rights over Project property which are owned by the Master Association for the use and benefit of the Members, and (iii) any portion of the Project which is owned by the Members as tenants-in-common but which is maintained by the Master Association for the use and benefit of the Members.

1.11 "Declarant" shall mean SORENSON RESOURCES COMPANY, a Utah Corporation, or any successor-in-interest by merger or by express assignment of the rights of Declarant hereunder by an

BK 5482 PG 1179

instrument executed by Declarant and (i) recorded in the Office of the Salt Lake County Recorder, and (ii) filed with the Secretary of the Master Association.

1.12 "Declaration" shall mean this instrument as amended from time to time.

1.13 "Developer" shall mean any person, other than Declarant, who owns one or more Lots or five or more Units in the Project for the purpose of selling or leasing them to members of the general public.

1.14 "Dwelling" shall mean a residential dwelling unit together with garages and/or other attached structures on the same Lot, and in the case of a Condominium all elements of a Condominium Unit as defined in the Act, the Declaration of Covenants, Conditions and Restrictions or Condominium Record of Survey Map for the Condominium Project in which such Unit is included.

1.15 "Improvement" shall mean Structures, as defined herein, plants such as trees, hedges, shrubs and bushes and landscaping of every kind. "Improvement" shall also mean any excavation, fill, ditch, diversion dam or other thing or device which affects or alters the natural flow of surface or subsurface water from, upon, under or across any portion of the Project. "Improvement" shall also mean any utility line, conduit, pipe or other related facility or equipment.

1.16 "Individual Charges" shall mean those charges levied against an Owner by the Master Association as provided in Section 6.5.

1.17 "Lot" shall mean one of the nine (9) parcels in the Project designated on the map as Lots 1-9, inclusive, each of which is designed to be improved with a Condominium Building, or another structure, as described herein. One or more Lots may be improved in such a manner as to constitute a "phase" in the development of the Project, in compliance with Section 22-9C-6 of the Uniform Zoning Ordinance of the Town of Alta.

1.18 "Maintenance Association" shall mean any incorporated or unincorporated association of Lot or Unit Owners (other than the Master Association) which is formed by operation of law or by the execution and filing of certain documents to facilitate the management, maintenance and/or operation of any portion of the Project (i) which portion of the Project is owned by a group of owners of Condominium Units or who are members of such association; or (ii) which portion of the Project is owned by such association for the benefit of a group of owners who are members of such association. Any association of unit owners (as defined in the Act) of a Condominium Project in the Project shall be referred to herein as a "Maintenance Association".

1.19 "Map" shall mean that subdivision map or P.U.D. plat entitled "SUGARPLUM, A PLANNED UNIT DEVELOPMENT", filed concurrently herewith in the Office of the Recorder of Salt Lake County, as the same may be amended from time to time, and which is incorporated herein by this reference.

1.20 "Master Association" shall mean the SUGARPLUM MASTER HOMEOWNERS ASSOCIATION, a Utah nonprofit corporation, the Members of which shall be Declarant and each of the Maintenance Associations organized within the Project.

1.21 "Member" shall mean a person or entity entitled to membership in the Master Association as provided herein.

1.22 "Mortgage" shall mean a mortgage or deed of trust encumbering a Lot or Unit or other portion of the Project. A "Mortgagee" shall include the beneficiary under a deed of trust. A "First Mortgage" or "First Mortgagee" is one having priority as to all other Mortgages or holders of Mortgages encumbering the same Lot or Unit or other portion of the Project. A "First Mortgagee" shall include any holder, insurer, or guarantor of a First Mortgage on a Lot or Unit or other portion of the Project. Any and all Mortgagee protections contained in the Project Documents shall also protect Declarant as the holder of a Mortgage or other security interest in any Lot or Unit in the Project.

1.23 "Owner" shall mean the person or entity holding a record fee simple ownership interest in a Lot or Unit, including Declarant, as well as vendees under installment purchase contracts. "Owner" shall not include persons or entities who hold an interest in a Lot or Unit merely as security for the performance of an obligation. In the case of Lots, "Owner" shall include the record owner or contract vendee of each Lot until the filing of a declaration of condominium and record of survey map with respect to the improvements constructed on such Lot. Thereafter, "Owner" shall refer to the individual owners and contract vendees of Units in the Condominium Project constructed on such Lot.

1.24 "Permit" shall mean the permit, if any, issued by the California Department of Real Estate or any successor state agency pursuant to the California Out-of-State Land Promotions Law (Business and Professions Code Section 10249 et seq.) as it may be amended from time to time. The Declarant may, but shall not be obligation to, sell Lots or Units in the Project to purchasers in California. References in the Project Documents to a Permit shall not be construed as a representation by Declarant that such a Permit has been applied for, will be applied for, has been issued or will be issued for the Project but are included for the sole purpose of assisting the Declarant in qualifying the Project for a Permit when and if it chooses to do so. Where any right contained in the Project Documents is limited by an event

which is defined in relation to the issuance of a Permit, and no such Permit has been issued, such limiting event shall be deemed to have not yet occurred and such right shall continue to exist unlimited by such event.

1.25 "Project" shall mean the real property located in Salt Lake County, Utah and more particularly described as:

> Lots 1 through 9, inclusive, as shown on that certain map entitled "SUGARPLUM, A PLANNED UNIT DEVELOPMENT" filed concurrently herewith in the office of the Salt Lake County Recorder, as the same may be amended from time to time, and all improvements erected thereon.

Prior to the filing of the Map with the Salt Lake County Recorder, the Project shall be described as set forth in attached Exhibit "A".

1.26 "Project Documents" shall mean the Articles, Bylaws, Declaration, Rules and Regulations of the Master Association, and Architectural Control Guidelines.

1.27 "Rules and Regulations" shall mean the rules and regulations promulgated by the Master Association to further govern the possession, use and enjoyment of the Project, as amended from time to time.

1.28 "Structure" shall mean any tangible thing or device to be fixed permanently or temporarily to real property including but not limited to any Dwelling, as defined herein, building, garage, driveway, walkway, concrete pad, asphalt pad gravel pad, porch, patio, shed, greenhouse, bathhouse, tennis court, pool, barn, stable, fence, wall, pole, sign, antenna, or tent.

1.29 "Unit" shall mean each Condominium Unit in the Project.

ARTICLE II

DESCRIPTION OF PROJECT; RIGHTS OF OWNERS, DECLARANT

2.1 Description of Project.

2.1.1 Project.

The Project shall consist of all of the real property described in attached Exhibit "A", and all of the improvements thereon.

2.1.2 Lots.

The Project shall consist of nine Lots, each of which are to be improved with one or more Condominium Buildings, commercial buildings and facilities, parking facilities or appurtenant structures or facilities. The Lots do not include the Common Area. Declarant reserves the right to increase or decrease the number of Lots in the Project, subject to the density restrictions described in Section 2.1.4, as well as the right to change the location or size of any Lot prior to the time that such Lot is sold by Declarant to any third party. All such changes to the number, size or location of any Lot shall be effected by a modification of the Map.

2.1.3 Reservation of Air Space.

Declarant hereby reserves unto itself, its successors and assigns, the exclusive right to develop, build upon, lease, sell and otherwise use the air space above Lot 5 (the "Air Space"). Declarant also reserves an easement with respect to Lot 5 for the placement of any pillars, posts, walls, footings or other devices used to support any structures which may be constructed in the Air Space reserved hereby. Declarant and/or any transferee of the Air Space shall have the right to construct any improvements therein for commercial, retail, residential, recreational or any other use permitted by applicable state and local law. No owner of Lot 5 or any part thereof shall impair or restrict development of the Air Space, but shall cooperate fully with such development and execute any such further documents or agreements deemed necessary by Declarant for the development of such space. Declarant further reserves an easement for egress and ingress over Lot 5, and the roads within the Project providing access to Lot 5, for the purpose of constructing and improving the Air Space, and for access to and from the improvements constructed in the Air Space. Such easement shall also be used for ingress and egress by any other owners, lessees, guests, employees, contractors, invitees or customers of Declarant or any subsequent owner(s) of the Air Space or any improvements constructed thereon. Any instrument conveying an interest in Lot 5 shall disclose the reservation of air space rights as described herein, and shall describe the dimensions of the Air Space, in particularity, and the rights reserved therewith and appurtenant thereto.

2.1.4 Maintenance Associations.

There shall be several Maintenance Associations organized in the Project. Each Lot and each Unit in the Project shall be included in a Maintenance Association (commonly referred to as a homeowners' or unit owners' association) created for the purpose of operating, maintaining and governing the use of the Improvements and the common areas and facilities constructed or naturally existing on the Lot(s)

Bk 5182 Pg 1183

included in each Maintenance Association. Each Maintenance Association shall assess and collect fees from its members, in accordance with the provisions of its governing instruments, to cover the cost of its activities and responsibilities. It is anticipated that each Condominium Project shall establish its own Maintenance Association, although there may be one or more Condominium Buildings in any Condominium Project. A Maintenance Association may be limited to a single Lot and the Improvements thereto, or may be comprised of two or more Lots and the Improvements thereto, at the discretion of the Owner(s) of such Lots, and pursuant to the provisions of Utah State Law.

2.1.5 Density.

The Project is zoned for the construction of a maximum of 200 Units. Declarant shall have the right to allocate the specific number of Units to be constructed on each Lot at the time such Lot is conveyed by Declarant to any third party (or such earlier date as Declarant may desire). Attached Exhibit "B" shall set forth the allocation of Units to be constructed on each Lot in the Project. On or before the sale of any Lot in the Project by Declarant, Exhibit "B" shall be amended, if necessary, to specify the maximum number of Units to be constructed on such Lot. After any Lot has been sold by Declarant to a third party, Exhibit "B" can only be amended with respect to such Lot with the approval of the owner thereof and Declarant. Lot and Unit owners shall execute such documents as are necessary to carry out the provisions of this Subsection 2.1.4, including, but not limited to, amendments hereto, affidavits, consents, etc.

2.1.6 Common Area.

The Common Area shall consist of (i) the property designated as Lot "A" on the Map, (ii) all real property and improvements thereto within the Project, which are owned and maintained by the Master Association for the use and benefit of the Members, including any roads which are not situated entirely on any single Lot , (iii) any leases, easements, or other rights over Project property which are owned by the Master Association for the use and benefit of the Members, and (iv) any portion of the Project which is owned by the Members as tenants-in-common but which is maintained by the Master Association for the use and benefit of the Members. Except as otherwise approved by the Town of Alta, no residential or commercial structures shall be constructed on the Common Area.

2.1.7 Incidents of Lot Ownership, Inseparability

Every Lot and Unit shall have appurtenant to it the following interests:

(b) a non-exclusive easement for use, enjoyment, ingress and egress over the Common Area subject to such restrictions and limitations as are contained in the Project Documents and subject to other reasonable regulation by the Master Association.

Such interests shall be appurtenant to and inseparable from ownership of the Lot or Unit. Any attempted sale, conveyance, hypothecation, encumbrance or other transfer of these interests without the Lot or appurtenant Unit shall be null and void. Any sale, conveyance, hypothecation, encumbrance or other transfer of a Lot or Unit shall automatically transfer these interests to the same extent.

2.1.8 Owner's Obligation to Maintain Lot

Except where such duties have been delegated to a Maintenance Association, each Owner shall maintain his Lot or Unit, and all Improvements thereon, in a safe, sanitary and attractive condition. In the event that an Owner fails to maintain his Lot or Unit as provided herein in a manner which the Board reasonably deems necessary to preserve the appearance and/or value of the Project, the Board may notify the Owner of the work required and demand that it be done within a reasonable and specified period. In the event that the Owner fails to carry out such maintenance within said period, the Board shall, subject to the notice and hearing requirements of Section 7.2.1.2, have the right to enter upon the Lot or Unit to cause such work to be done and individually charge the cost thereof to such Owner. Notwithstanding the foregoing, in the event of an emergency arising out of the failure of an Owner to maintain his Lot or Unit, the Board shall have the right to immediately enter upon the Lot or Unit to abate the emergency and Individually Charge the cost thereof to such Owner.

2.1.9 Maintenance Association's Obligation to Maintain

Maintenance Associations shall be responsible for the maintenance of a certain Lot or Lots in the Project pursuant to a recorded declaration of covenants, conditions and restrictions with respect to such Lot or Lots.

The Master Association will be responsible for maintaining (including snow removal), repairing and replacing of all of the private roads in the Project, but shall assess each Maintenance Association for its share of the cost of such maintenance, repair and replacement as follows:

(a) Each of the Maintenance Associations having responsibility for Lots 1-3 shall individually bear the expense of maintaining the road(s) located on the Lot(s) included in each such Maintenance Association.

BOOK 5182 PAGE 1185

(b) The Maintenance Association(s) having responsibility for Lots 4-9 shall bear the expense of maintaining the road(s) providing access to such Lots from Little Cottonwood Road, as shown on the Map.

The cost of maintaining, repairing and replacing all other private roads in the Project shall be a common expense of the Project. In the event that the maintenance expenses for a particular road are to be paid by more than one Maintenance Association as set forth above, such expenses shall be allocated between the Maintenance Associations to be charged based on the number of Units in each of such Maintenance Associations.

Each Maintenance Association shall maintain, repair and replace its area of responsibility and all Improvements thereon, in a safe, sanitary and attractive condition. Such maintenance responsibility shall include, but shall not be limited to, the control of rubbish, trash, garbage and landscaping visible from other portions of the Project. In the event that a Maintenance Association fails to maintain its area of responsibility as provided herein in a manner which the Board reasonably deems necessary to preserve the appearance and/or value of the Project, the Board shall notify the Maintenance Association of the work required and demand that it be done within a reasonable and specified period. In the event that the Maintenance Association fails to carry out such maintenance within said period, the Board shall, subject to the notice and hearing requirements of Section 7.2.1.2, have the right to enter upon said area of responsibility to cause such work to be done and individually charge the cost thereof to such Maintenance Association. Notwithstanding the foregoing, in the event of an emergency arising out of the failure of a Maintenance Association to maintain its area of responsibility, the Board shall have the right to immediately enter upon said area of responsibility to abate the emergency and individually charge the cost thereof to such Maintenance Association.

2.1.8 Encroachment Easements

Each Owner is hereby declared to have an easement appurtenant to his Lot, over all adjoining Lots and the Common Area for the purpose of accommodating the encroachment due to minor and professionally acceptable errors in engineering, original construction, settlement or shifting of a building, or any other cause. The Master Association is hereby declared to have an easement appurtenant to the Common Area over all adjoining Lots for the purpose of accommodating any Common Area encroachment due to minor and professionally acceptable errors in engineering, original construction, settlement, or shifting of a building or any other cause. There shall be valid easements for the maintenance of said encroachments as long as they shall exist, and the rights and obligations of Owners shall not be altered in any way by said encroachments, settlement or shifting;

provided, however, that in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if said encroachment occurred due to the willful misconduct of said Owner or Owners. In the event a structure is partially or totally destroyed, and then repaired or rebuilt, the Owners of each Lot agree that minor encroachments over adjoining Lots or Common Area or by Common Area over Lots shall be permitted and that there shall be a valid easement for the maintenance of such encroachments so long as they shall exist.

2.1.9 Delegation of Use: Contract Purchasers, Lessees, Tenants

Any Owner may temporarily delegate his rights of use and enjoyment in the Project to the members of his family, his guests, and invitees, and to such other persons as may be permitted by the Project Documents, subject however, to the Project Documents. However, if an Owner of a Lot or Unit has sold his Lot or Unit to a contract purchaser, leased or rented it, the Owner, members of his family, his guests and invitees shall not be entitled to use and enjoy the Project while such contract of sale or lease is in force. Instead, the contract purchaser, lessee or tenant, while such contract or lease remains in force, shall be entitled to use and enjoy the Project and may delegate the rights of use and enjoyment in the same manner as if such contract purchaser, lessee or tenant were an Owner during the period of his occupancy. Each Owner shall notify the secretary of the Master Association of the names of any contract purchasers, lessees or tenants of such Owner's Lot or Unit. Each Owner, contract purchaser, lessee or tenant also shall notify the secretary of the Master Association of the names of all persons to whom such Owner, contract purchaser, lessee or tenant has delegated any rights of use and enjoyment in the Project and the relationship that each such person bears to the Owner, contract purchaser, lessee or tenant. Any delegated rights of use and enjoyment are subject to suspension to the same extent as are the rights of Owners.

2.1.10 Responsibility for Common Area Damage

The cost of repair or replacement of any portion of the Common Area resulting from the willful or negligent act of an Owner, his contract purchasers, lessees, tenants, family, guests or invitees shall be, in addition to the party at fault, the joint responsibility of such Owner to the extent that it is not covered by insurance maintained by the Master Association. The Master Association shall cause such repairs and replacements to be made and the cost thereof may be levied as an Individual Charge against such Owner.

773

2.2 Rights of Declarant

2.2.1 Reservation of Easements to Complete, Sell

Declarant hereby reserves in itself, its successors, assigns and any other Developers the following easements over the Project to the extent reasonably necessary to complete and sell, lease, rent or otherwise dispose of the Lots or Units constructed thereon:

(a) easements for ingress and egress, drainage, encroachment, utilities, maintenance of temporary structures, operation and storage of construction equipment and vehicles, for doing all acts reasonably necessary to complete or repair the Project, or to discharge any other duty of Declarant and any other Developers under the Project Documents or sales contracts or otherwise imposed by Law.

(b) easements for activity reasonably necessary to sell, lease, rent or otherwise dispose of the Lots or Units.

These easements shall exist until the date on which the last Lot or Unit is sold by Declarant or any Developer.

2.3 Utilities

2.3.1 Rights and Duties

Whenever sanitary sewer, water, electric, gas, television receiving, telephone lines or other utility connections are located or installed within the Project, the Owner of each Unit served by said connections shall be entitled to the non-exclusive use and enjoyment of such portions of said connections as service his Unit. Every Owner shall pay all utility charges which are separately metered or billed to his Unit. The Maintenance Association established by any Condominium Building(s) in the Project shall pay all utility charges which are metered or billed to the structures served by such Maintenance Association. Every Owner shall maintain all utility installations located in or upon his Unit except for those installations maintained by the Master Association, a Maintenance Association, or utility companies, public or private. The Master Association, Maintenance Associations and utility companies shall have the right, at reasonable times after reasonable notice to enter upon the Units, Common Area, or other portions of the Project to discharge any duty to maintain Project utilities.

Whenever sanitary sewer, water, electric, gas, television receiving, telephone lines or other utility connections, are located within the Project, the Owner of a Unit served by said connections shall have the right, and is hereby granted an easement to the full extent necessary therefore, to at

reasonable times after reasonable notice enter upon Units, Lots, Common Area or other portions of the Project or to have his agents or the utility companies enter upon the Lots, Units, Common Area, or other portions of the Project to maintain said connections.

In the event of a dispute between Owners with respect to the maintenance, repair or rebuilding of said connections, or with respect to the sharing of the cost thereof, then the matter shall be submitted to the Board, which shall have final authority to resolve each such dispute.

2.3.2 Easements for Utilities and Maintenance

Easements over and under the Project for the installation, repair and maintenance of sanitary sewer, water, electric, gas, and telephone lines, cable or master television antenna lines, and drainage facilities, which are of record in the office of the Salt Lake County Recorder, or as may be hereafter required to serve the Project, are hereby reserved for Declarant and the Master Association, together with the right to grant and transfer the same.

ARTICLE III

USE RESTRICTIONS

In addition to all of the covenants contained herein, the use of the Project and each Lot and Unit therein is subject to the following:

3.1 Use of Individual Lots

Except as otherwise provided herein, each Lot may be used in any manner consistent with the requirements of applicable zoning and other land use ordinances and regulations. Nevertheless, without limiting the nature of the Improvements that may be constructed on any Lot or the nature of the form of legal ownership of such improvements (e.g. condominiums, planned unit developments, subdivision of Lots, etc.), it is anticipated that Lots 1-4, inclusive, and 6-9, inclusive, shall be improved with Condominium Buildings, commercial buildings, and appurtenant facilities;

Lot 5 shall be reserved for and improved with a parking facility for the owners of Lot 4 and Lots 6-9 and the Units constructed thereon, subject to Declarant's reservation of the air space rights to Lot 5 as described in Section 2.1.3 above. In addition, Declarant, its successors or assigns, and other Developers may use any Units in the Project owned by Declarant or

Bk 5482 Pg 1189

such other Developers for model home units, sales offices, project management offices and other general administrative facilities.

Lot A shall be part of the Common Area, as described in Section 2.1.5 above, and shall not be developed or improved with any residential or commercial buildings.

3.2 Nuisances

No noxious, illegal, or offensive activities shall be carried on in any Unit, Lot or other part of the Project, nor shall anything be done thereon which may be or may become an annoyance or a nuisance to or which may in any way interfere with each owner's quiet enjoyment of his respective Lot or Unit, or which shall in any way increase the rate of insurance for the Project or for any other Lot or Unit, or cause any insurance policy to be cancelled or cause a refusal to renew the same.

3.3 Parking

Unless otherwise permitted by the Board, no motor vehicles shall be parked or left on any portion of the Project other than within a driveway, garage, carport or other parking structure.

No truck larger than three/quarter (3/4) ton, nor trailer, nor camper shell (other than attached to a pickup truck regularly used by an Owner), nor vehicles designed and operated as off the road equipment for racing or other sporting events, shall be permitted on the Project for longer than twenty-four hours without the consent of the Board. The Master Association may reserve certain portions of any parking facility constructed in the Project for the parking of such vehicles.

3.4 Signs

No sign of any kind shall be displayed to the public view from any Lot, Unit or from the Common Area or from any other portion of the Project without the approval of the Board except (i) one sign of customary and reasonable dimensions advertising a Lot or Unit for sale, lease or rent displayed from such Lot or Unit, and (ii) such signs as may be used by Declarant or its assignees for the purpose of selling Lots or Units as permitted by Section 2.2.1. However, the provisions of this Subsection 3.4 shall not apply to any improvements constructed in the Air Space above Lot 5.

BOOK 5482 PAGE 1190

3.5 Animals

Unless expressly authorized by the Board, no animals of any kind shall be raised, bred, or kept on any portion of the Project.

3.6 *Garbage and Refuse Disposal*

All rubbish, trash and garbage and other waste shall be regularly removed from the Project, and shall not be allowed to accumulate thereon. Rubbish, trash, garbage and other waste shall be kept in sanitary containers. All equipment, garbage cans, or storage piles shall be kept screened and concealed from the view of other portions of the Project, except for the scheduled day for trash pick-up.

3.7 Radio and Television Antennas

No Owner may construct, use, or operate his own external radio, television or other electronic antenna or satellite receiver without the consent of the Board. No Citizens Band or other transmission shall be permitted from the Project without the consent of the Board.

3.8 Right to Lease, Rent

Nothing in this Declaration shall prevent an Owner from leasing or renting his Lot or Unit. However, any lease or rental agreement shall be in writing and be expressly subject to the Project Documents and any lease or rental agreement must specify that failure to abide by such provisions shall be a default under the lease or rental agreement.

3.9 Power Equipment and Car Maintenance

No power equipment, work shops, or car maintenance or any nature, other than emergency repair, shall be permitted on the Project without the consent of the Board. In deciding whether to grant approval, the Board shall consider the effects of noise, air pollution, dirt or grease, unsightliness, fire hazard, interference with radio or television reception, and similar objections.

3.10 Drainage

No Owner shall do any act or construct any improvement which would interfere with the natural or established drainage systems or patterns within the Project without the approval of the Board. Provided, however, drainage from the back portion of each Lot on which Improvements are constructed shall comply with the requirements of the Salt Lake County Flood Control District.

Bk:5482 Pg:1131

3.11 Mineral Exploration

Subject to the right of the owners of mineral rights with respect to the Project (provided this Subsection shall not be deemed to increase the scope of such rights or grant any additional rights to such owners), no portion of the Project shall be used in any manner to explore for or to remove any oil or other hydrocarbons, minerals of any kind, gravel, or earth substance. No drilling, exploration, refining, quarrying, or mining operations of any kind shall be conducted or permitted to be conducted thereon; nor shall wells, tanks, tunnels, mineral excavations, shafts, derricks, or pumps used to mine or drill for any substances be located on the Project. No drilling for water or geothermal resources or the installation of such wells shall be allowed unless specifically approved by the Board.

3.12 Water Use

No Owner of a Lot or Unit contiguous to a stream or body of water shall have any rights over or above those of other Owners with respect to use of the water, the land thereunder, or the water therein. No person shall acquire or be divested of title to any land adjacent to or beneath such water within the Project due to accretion, erosion, or change in water levels. No Lot shall be contoured or sloped, nor may drains be placed upon any Lot, so as to encourage drainage of water from such Lot into any body of water without the approval of the Architectural Control Committee. All streams and other natural bodies of water within the Project are protected as watershed, and access thereto by persons and animals is strictly prohibited.

3.13 Maintenance Association Use Restrictions

Nothing herein shall prevent Declarant, a Developer or a Maintenance Association from adopting use restrictions for a Lot or portion of the Project which are more restrictive than those set forth herein, provided that such restrictions shall in no way modify the provisions hereof.

3.14 Fair Housing

No Owner shall either directly or indirectly forbid or restrict the conveyance, encumbrance, lease, mortgaging or occupancy of his Lot or Unit to any person on the basis of race, color, religion, ancestry or national origin.

3.15 Compliance with Project Documents

Each Owner, contract purchaser, lessee, tenant, guest, invitee, or other occupant of a Lot or Unit or user of the Common Area shall comply with the provisions of the Project Documents.

3.16 Use of Common Area by Public

The general public shall have a right of entry through and over the Common Area for the purpose of access to any portion of the Project used for commercial purposes in accordance with the terms and provisions hereof.

3.17 Timeshare

Except as otherwise approved by the Town of Alta, no Units of the Project shall be developed as timeshare projects, nor shall any "timeshare interests" (as that term is defined in the Utah Uniform Land and Timeshare Sales Practices Act, U.C.A. §57-11-2(11) [1953, as amended in 1983]) be created or sold in the Project.

3.18 Lock-Out

In the event of avalanche or the threat thereof, authorized agents of the Town of Alta may prohibit all ingress and egress to and from the Project, as well as all access to or exit from any Building in the Project by any Owners, lessees, guests, employees or any other persons. In the event of any such prohibition on access and travel, neither the Town of Alta nor its authorized agents shall be liable to Declarant, the Owners, their lessees, guests, employees or any other persons for loss or damage occassioned by or resulting from such prohibition.

ARTICLE IV

THE ASSOCIATION MEMBERSHIP AND VOTING

4.1 Master Association

Sugarplum Master Homeowners Association, a Utah nonprofit corporation, shall be the Master Association.

4.2 Management of Project

The management of the Project shall be vested in the Master Association in accordance with the Project Documents and all applicable laws, regulations and ordinances of any governmental or quasi governmental body or agency having jurisdiction over the Project.

4.3 Membership

Declarant and each Maintenance Association shall be a Member of the Master Association, subject to the Project Documents.

BK5482 PG1193

4.4 Transferred Membership

Membership in the Master Association shall not be transferred, pledged, or alienated in any way by, or on behalf *of, any Maintenance Association.*

4.5 Voting

There shall be two hundred (200) votes in the Master Association, allocated between the Maintenance Associations, based on one (1) vote for each Unit included in each Maintenance Association. Declarant shall be entitled to exercise any remaining votes. However, in the event that the Town of Alta or any other governmental entity having jurisdiction over the Project shall restrict the total number of Units which can be constructed on the Project to more or less than 200 Units, then the total number of votes in the Master Association shall be increased or decreased by the same amount.

The President of each Maintenance Association or his Agent shall cast all of the votes to which such Association is entitled.

4.6 Record Date

The Association shall fix, in advance, a date as a record date for the determination of the number of votes exercisable by each Maintenance Association. The record date shall be not less than ten (10) days nor more than ninety (90) days prior to any meeting or taking action.

4.7 Commencement of Voting Rights

The voting rights of each Maintenance Association with respect to the Units included therein shall not vest until Assessments have been levied against those Units by the Master Association, as set forth in Subsection 6.8 hereof; provided, however, Declarant's voting rights shall vest upon execution of this Declaration.

4.8 Special Majorities

There are various sections of the Project Documents which require the vote or written assent of a majority of the voting power of the Association residing in Members other than Declarant prior to the undertaking of certain actions by the Master Association or the Board. In no event shall such provisions be deemed to preclude Declarant from casting the votes to which it is entitled pursuant to Subsection 4.5 hereof. Therefore, with the exception of the voting requirements of Article X hereof, any provision in the Project Documents which requires the vote or written assent of a majority of the voting power of the Association residing in Members other than Declarant

shall also require the vote or written assent of a majority of the total voting power of the Association.

4.9 Membership Meetings

Regular and special meetings of the Master Association shall be held with the frequency, at the time and place and in accordance with the provisions of the Bylaws.

4.10 Board of Trustees

The affairs of the Master Association shall be managed by the Board of Trustees, which shall be established, and which shall conduct regular and special meetings according to the provisions of the Articles and Bylaws.

ARTICLE V

MASTER ASSOCIATION POWERS, RIGHTS, DUTIES, LIMITATIONS

5.1 Generally

The Master Association shall have the power to perform any action reasonably necessary to exercise any right or discharge any duty enumerated in this Article V or elsewhere in the Project Documents or reasonably necessary to operate the Project. In addition, the Master Association shall have all the powers and rights of a nonprofit corporation under the laws of the State of Utah.

The Master Association shall act through its Board of Trustees and the Board shall have the power, right and duty to act for the Master Association except that actions which require the approval of the Members of the Master Association shall first receive such approval.

The powers, rights, duties and limitations of the Master Association set forth in this Article V and elsewhere in the Project Documents shall rest in and be imposed on the Master Association concurrently with the close for the first sale of a Lot in the Project.

5.2 Enumerated Rights

In addition to those Master Association rights which are provided elsewhere in the Project Documents the Master Association shall have the following rights:

BK5482 PG1195

5.2.1 Delegation

To elect, employ, appoint, to assign and to delegate the rights and duties of the Master Association to officers, employees, agents and independent contractors.

5.2.2 Enter Contracts

To enter contracts with third parties to furnish goods or services to the Project subject to the limitations of Section 5.4.

5.2.3 Borrow Money

To borrow money and with the approval by vote or written assent of a majority of the voting power of the Master Association, mortgage, pledge, deed in trust, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred.

5.2.4 Dedicate and Grant Easements

To dedicate or transfer all or any part of the Common Area to any public agency, authority or utility or any other entity for such purposes and subject to such conditions as may be agreed to by the Master Association; provided, however, that no such dedication or transfer shall be effective unless (i) such dedication or transfer is approved by two thirds (2/3) of the voting power of the Master Association, and (ii) an instrument in writing is signed by the Secretary of the Master Association certifying that such dedication or transfer has been approved by the required vote or written assent.

5.2.5 Establish Rules and Regulations

To adopt reasonable rules not inconsistent with this Declaration, the Articles or the Bylaws, relating to the use of the Common Area and all facilities thereon, and the conduct of Owners, Developers and their contract purchasers, lessees, tenants and guests with respect to the Project and other Owners. Pursuant to those Rules and Regulations, the Master Association shall have the right to limit the number of guests of an Owner or Developer utilizing the Common Area, the manner in which the Common Area may be used, and the right to charge reasonable admission and other fees for the use of any recreational facility situated on the Common Area. A copy of the Rules shall be mailed or otherwise delivered to each Owner and Developer and a copy shall be posted in a conspicuous place within the Common Area.

5.2.6 Entry

To enter upon any portion of the Project, including any Lot or Unit after giving reasonable notice to the Owner thereof, for any purpose reasonably related to the performance by the Master Association of its duties under this Declaration. In the event of an emergency such right of entry upon any Lot or Unit shall be immediate.

5.3 Enumerated Duties

In addition to those Master Association duties which are imposed elsewhere in the Project Documents the Master Association shall have the following duties:

5.3.1 Manage, Maintain Common Area

The Master Association shall manage, operate, maintain, repair and replace any property acquired by or subject to the control of the Master Association, including personal property, in a safe, sanitary and attractive condition.

5.3.2 Enforce Project Documents

To enforce the provisions of the Project Documents by appropriate means as provided at Article 7.

5.3.3 Maintain Flood Control System.

To maintain, repair and replace the flood control facilities and equipment located on and serving the Project.

5.3.4 Levy and Collection of Assessments and Individual Charges

To fix, levy and collect Assessments and Individual Charges in the manner provided in Articles VI and VII.

5.3.5 Taxes and Assessments

To pay all real and personal property taxes and assessments and all other taxes levied against the Common Area, personal property owned by the Master Association or against the Master Association. Such taxes and assessments may be contested or compromised by the Master Association; provided, that they are paid or that a bond or other security insuring payment is posted before the sale or the disposition of any property to satisfy the payment of such taxes.

To prepare and file annual tax returns with the Federal government and the State of Utah and to make such elections as may be necessary to reduce or eliminate the tax liability of the Master Association.

BK5482 PG1197

5.3.6 Water and Other Utilities

To acquire, provide and pay for utility services as necessary for the Common Area.

5.3.7 Legal and Accounting

To obtain and pay the cost of legal and accounting services necessary or proper to the maintenance and operation of the Project and the enforcement of the Project Documents.

5.3.8 Insurance

To obtain and pay the cost of insurance for the Project as provided in Section 8.1.

5.3.9 Bank Accounts

To deposit all funds collected from Owners pursuant to Articles VI and VII hereof and all other amounts collected by the Master Association as follows:

(a) All funds shall be deposited in a separate bank account ("General Account") with a federally insured bank located in the State of Utah. The Funds deposited in such account may be used by the Master Association only for the purposes for which such funds have been collected.

(b) Funds which the Master Association shall collect for reserves for capital expenditures relating to the repair and maintenance of the Common Area, and for such other contingencies as are required by good business practice shall, within ten (10) days after deposit in the General Account, be deposited into an interest bearing account with a federally insured bank or savings and loan association located in the State of Utah and selected by the Master Association, or invested in Treasury Bills or Certificates of Deposit or otherwise prudently invested which shall all herein be collectively referred to as the "Reserve Account". Funds deposited into the Reserve Account shall be held in trust and may be used by the Master Association only for the purposes for which such amounts have been collected.

5.3.10 Annual Report of Domestic Nonprofit Corporation

To make timely filings of the annual report required by Section 16-6-97 and 16-6-98 of the Utah Nonprofit Corporation and Cooperative Association Act. Such annual report shall be made on forms prescribed and furnished by the Secretary of State of Utah and shall be delivered to the Secretary of State between the first day of January and the first day of April of

each year, except that the first annual report shall be filed between the first day of January and the first day of April of the year next succeeding the calendar year in which the certificate of incorporation was issued by the Secretary of State.

5.3.11 Preparation and Distribution of Financial Information

To regularly prepare budgets and financial statements and to distribute copies to each Member and each Owner as follows:

(a) A pro-forma operating statement (budget) for each fiscal year shall be distributed not less than sixty (60) days before the beginning of the fiscal year;

(b) A balance sheet as of an accounting date which is the last day of the month closest in time to six months from the date of closing of the first sale of a Lot or Unit, and an operating statement, for the period from the date of the first closing to the said accounting date, shall be distributed within 60 days after the accounting date. This operating statement shall include a schedule of assessments received and receivable identified by the number of the subdivision Lot or Unit and the name of the entity assessed.

(c) An annual report consisting of the following shall be distributed within one hundred twenty (120) days after the close of the fiscal year as defined below;

(i) A balance sheet as of the last day of the fiscal year;

(ii) An operating (income) statement for said fiscal year;

(iii) A statement of changes in financial position for said fiscal year.

For any fiscal year in which the gross income to the Master Association exceeds Seventy-Five Thousand Dollars ($75,000.00) the annual report referred to above shall be prepared by an independent accountant. If the annual report is not prepared by an independent accountant, it shall be accompanied by the certificate of an authorized Officer of the Master Association that the statements were prepared without an audit from the books and records of the Master Association.

B5482 P1139

5.3.12 Maintenance and Inspection of books and Records

To cause to be kept adequate and correct books of account, a register of Members, minutes of Member and Board meetings, a record of all corporate acts, and other records as are reasonably necessary for the prudent management of the Project and to present a statement thereof to the Members at the annual meeting of Members.

The Membership register (including names, addresses and voting rights), books of account and minutes of meetings of the Members, of the Board, and of committees shall be made available for inspection and copying by any Member of the Master Association, or by its duly appointed representative, and any Owner, at any reasonable time and for a purpose reasonably related to his interest as a Member, at the principal office of the Master Association or at such other place within the Project as the Board of Trustees shall prescribe. The Board shall establish reasonable rules with respect to:

(a) Notice to be given to the custodian of the records by the Member or Owner desiring to make the inspection;

(b) Hours and days of the week when such an inspection may be made;

(c) Payment of the cost of reproducing copies of the documents requested by a Member or Owner.

Every Trustee shall have the absolute right at any reasonable time to inspect all books, records and documents of the Master Association and the physical properties owned or controlled by the Master Association. The right of inspection by a Trustee includes the right to make extracts and copies of documents.

5.3.13 Statements of Status

To provide, upon the request of any Owner or Mortgagee, a written statement setting forth the amount, as of a given date, of any unpaid Assessments or Individual Charges against any Member. Such statement, for which a reasonable fee may be charged, shall be binding upon the Master Association in favor of any person who may rely thereon in good faith. Such written statement shall be provided within ten (10) days of the request.

BOOK 5482 PAGE 1220

5.3.14 Architectural Control

To maintain architectural control over the Project and appoint the members of the Architectural Control Committee in connection therewith, pursuant to Article XI.

5.4 Enumerated Limitations

Except with the vote or written assent of a majority of the total voting power of the Master Association residing in Members other than Declarant, the Board shall be prohibited from taking any of the following actions:

(a) Entering into a contract with a third person wherein the third person will furnish goods or services for the Common Area or to the Master Association for a term longer than one (1) year with the following exceptions:

(i) A contract with a public utility company if the rates charged for the materials or services are regulated by a public utilities entity; provided, however, that the term of the contract shall not exceed the shortest term for which the supplier will contract at the regulated rate.

(ii) Prepaid casualty and/or liability insurance policies of not to exceed three (3) years duration provided that the policy permits short rate cancellation by the insured.

(iii) Lease agreements for laundry room fixtures and equipment of not to exceed five (5) years duration provided that the lessor under the agreement is not an entity in which the Declarant has a direct or indirect ownership interest of ten percent (10%) or more.

(b) Incurring aggregate expenditures for capital improvements to the Common Area in any fiscal year in excess of five percent (5%) of the budgeted gross expenses of the Master Association for that fiscal year;

(c) Selling during any fiscal year property of the Master Association having an aggregate fair market value greater than five percent (5%) of the budgeted gross expenses of the Master Association for that fiscal year;

(d) Paying compensation to Trustees or to Officers of the Master Association for services performed in the conduct of the Association's business; provided, however, that the Board may reimburse a Trustee or Officer for expenses incurred in carrying on the business of the Master Association;

(e) Filling a vacancy on the Board created by the removal of a Director.

ARTICLE VI

ASSESSMENTS

6.1 Agreement to Pay Assessments and Individual Charges; Vacant Lot Exemption

Declarant for each Lot or Unit owned by it, hereby covenants and agrees, and each Owner, by acceptance of a deed for a Lot or Unit, is deemed to covenant and agree for each Lot or Unit owned, to pay all Regular Assessments and all Special Assessments (collectively "Assessments"), and all Individual Charges, to be established and collected as provided in this Declaration and in the other Project Documents. All Assessments shall be levied against each of the Maintenance Associations for the Lots and Units included in each such Maintenance Association. Each Maintenance Association shall be responsible for collecting from its members, each member's pro-rata share of such Assessments, in accordance with the governing instruments of the Maintenance Association.

6.2 Purpose of Assessments

The purpose of Assessments is to raise funds necessary to operate the Project. Assessments shall be used exclusively to promote the recreation, health, safety and welfare of all the Owners and for the improvement, maintenance and administration of the Project and other expenditures incurred in the performance of the duties of the Master Association as set forth in the Project Documents.

6.3 Regular Assessments

The purpose of Regular Assessments is to raise funds necessary to pay the anticipated costs of operating the Project during the fiscal year and to accumulate reserves to pay costs anticipated in future years. Not less than sixty (60) days before the beginning of each fiscal year, the Board shall prepare or cause to be prepared, and distributed to each Member, a proposed pro forma operating statement or budget for the forthcoming fiscal year. Copies of the proposed budget shall be made available to all Owners upon request. Any Member and any Owner may make written comments to the Board with respect to said pro forma operating statement. The pro forma operating statement shall be prepared consistently with the prior fiscal year's operating statement and shall include adequate reserves for contingencies and for maintenance, repairs and replacement of the

Common Area improvements or Master Association personal property likely to need maintenance, repair or replacement in the future.

Not more than sixty (60) days nor less than thirty (30) days before the beginning of each fiscal year, the Board shall meet for the purpose of establishing the Regular Assessment for the forthcoming fiscal year. At such meeting the Board shall review the proposed pro forma operating statement or budget, and written comments received and any other information available to it and, after making any adjustments that the Board deems appropriate, shall establish the Regular Assessment for the forthcoming fiscal year; provided, however, that the Board may not establish a Regular Assessment for any fiscal year which is more than twenty percent (20%) greater than the Regular Assessment for the immediately proceeding fiscal year without the approval of a majority of the voting power of the Master Association residing in Members other than Declarant. Not less than thirty (30) days before the beginning of each fiscal year the Board shall distribute to each Member and each Owner a final copy of the pro forma operating statement or budget for the forthcoming fiscal year. Regular Assessments shall be payable in equal monthly installments due on the first day of each month, unless the Board adopts some other basis for collection.

6.4 Special Assessments

6.4.1 General

If the Board determines that the estimated total amount of funds necessary to defray the common expenses of the Master Association for a given fiscal year is or will become inadequate to meet expenses for any reason, including, but not limited to, unanticipated delinquencies, costs of construction, unexpected repairs or replacements of capital improvements on the Common Area, the Board shall determine the approximate amount necessary to defray such expenses, and if the amount is approved by the Board it shall become a Special Assessment. The Board may, in its discretion, provide for the payment in installments of such Special Assessment over the remaining months of the fiscal year or levy the Assessment immediately against each Unit. Special Assessments shall be due on the first day of the month following notice of their levy.

6.4.2 Limitation on Special Assessments

Any Special Assessment which singly or in the aggregate with previous Special Assessments for the fiscal year would amount to more than five percent (5%) of the budgeted gross expense of the Association for the fiscal year, shall require approval of a majority of the voting power of the Association residing in Members other than Declarant.

6.5 Individual Charges

Individual Charges may be levied against an Owner (i) as a monetary penalty imposed by the Master Association as a disciplinary measure for the failure of the Owner, his guests, invitees, or lessees, to comply with the Project Documents, or (ii) as a means of reimbursing the Master Association for costs incurred by the Master Association for repair of damage to Common Areas and facilities for which the Owner was responsible, or to otherwise bring the Owner and his Unit into compliance with the Project Documents. Individual Charges against an Owner shall not be enforceable through the lien provisions of the Project Documents. Notwithstanding the foregoing, charges imposed against a Unit and its Owner consisting of reasonable late payment penalties and/or charges to reimburse the Master Association for loss of interest, and/or for costs reasonably incurred (including attorney's fees) in the efforts to collect delinquent Assessments shall be fully enforceable through the lien provisions of the Project Documents.

6.6 Personal Obligation for Individual Charges

All Individual Charges, together with late charges, interest, costs, and reasonable attorney's fees incurred in collecting Individual Charges, shall be the personal obligation of the Owner of such Unit at the time when the Individual Charges fell due. If more than one person or entity was the Owner of a Unit at the time the Individual Charges fell due, the personal obligation to pay each Individual Charge shall be joint and several. No Owner may exempt himself from liability for his Individual Charges by waiver of the use or enjoyment of any of the Project.

6.7 Allocation of Regular and Special Assessments

Except as otherwise provided herein, Regular and Special Assessments shall be levied against each Maintenance Association based on the number of Units included in each Maintenance Association. The Regular and Special Assessments to be levied against any particular Association shall be calculated by multiplying the total amount of such Assessments by a fraction, the numerator of which is the number of Units included in such Maintenance Association, and the denominator of which is the total number of Units for which assessments are to be levied, as determined in accordance with the provisions of Section 6.8.

6.8 Commencement of Assessments and Individual Charges

The right to levy Assessments and Individual Charges against a Maintenance Association shall commence as to all Units in a Condominium Building included in the Maintenance Association on the first day of the month following the closing of the first sale of a Unit in that Building. Thereafter, Regular Assessments

shall be levied on the first day of each month of the fiscal year.

ARTICLE VII

ENFORCEMENT OF RESTRICTIONS

7.1 General

The Master Association, any Maintenance Association or any Owner shall have the right to enforce compliance with the Project Documents in any manner provided by law or in equity, including without limitation, the right to enforce the Project Documents by bringing an action for damages, an action to enjoin the violation or specifically enforce the provisions of the Project Documents, to enforce the liens provided for herein (except that no Owner or Maintenance Association shall have the right to enforce independently of the Master Association any Assessment, Individual Charge, or Assessment lien created herein) and any statutory lien provided by law, including the foreclosure of any such lien and the appointment of a receiver for an Owner and the right to take possession of the Lot or Unit in the manner provided by law. In the event the Master Association, a Maintenance Association, or any Owner shall employ an attorney to enforce the provisions of the Project Documents against any Owner or Maintenance Association, the prevailing party shall be entitled to reasonable attorneys' fees and costs in addition to any other amounts due as provided for herein. All sums payable hereunder by an Owner or Maintenance Association shall bear interest at eighteen percent (18%) per annum from the due date, or if advanced or incurred by the Master Association, or any other Owner or Maintenance Association pursuant to authorization contained in the Project Documents, commencing fifteen (15) days after repayment is demanded. All enforcement powers of the Master Association shall be cumulative. Failure by the Master Association or any Owner or Maintenance Association, to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

7.2 Specific Enforcement Rights

In amplification of, and not in limitation of, the general rights specified in Section 7.1 above, the Master Association shall have the following rights:

7.2.1 Enforcement by Sanctions

7.2.1.1 Limitation

The Master Association shall have no power to cause a forfeiture or abridgment of an Owner's right to the full use and enjoyment of his Lot or Unit on account of a failure by the Owner to comply with provisions of the Project Documents except where the loss or forfeiture is the result of the judgment of a court or a decision arising out of arbitration or on account of a foreclosure or sale under a power of sale for failure to pay Assessments levied by the Master Association.

7.2.1.2 Disciplinary Action

The Master Association may impose reasonable monetary penalties or other appropriate discipline for failure to comply with the Project Documents. Notwithstanding the foregoing, the Master Association shall have no right to interfere with an Owner's right of ingress or egress to his Unit.

Before disciplinary action authorized under this subarticle can be imposed by the Master Association the Owner against whom such action is proposed to be taken shall be given notice and the opportunity to be heard as follows:

(a) The Board shall give written notice to the Owner at least fifteen (15) days prior to the meeting at which the Board will consider imposing disciplinary action. Such notice shall set forth those facts which the Board believes justify disciplinary action, and the time and place of the meeting;

(b) At such meeting the Owner shall be given the opportunity to be heard, including the right to present evidence, either orally or in writing, and to question witnesses;

(c) The Board shall notify the Owner in writing of its decision within three (3) days of the decision. The effective date of any disciplinary action imposed by the Board shall not be less than eight (8) days after the date of said decision.

7.2.1.3 No Lien for Monetary Penalties

A monetary penalty imposed by the Master Association as a disciplinary measure for failure of an Owner to comply with the Project Documents or as a means of reimbursing the Master Association for costs incurred by the Master Association in the repair of damage to Common Area for which the Owner was allegedly responsible or in bringing the

BK5482 PG1226

Owner and his Lot or Unit into compliance with the Project Documents shall not be considered an assessment which may become a lien against the Owner's Lot or Unit. Provided, however, the provisions of this subsection do not apply to charges imposed against an Owner or Maintenance Association consisting of reasonable late payment penalties for delinquent assessments and/or charges to reimburse the Master Association for the loss of interest and for costs reasonably incurred (including attorneys' fees) in its efforts to collect delinquent assessments.

7.2.2 Suit to Collect Delinquent Assessments or Individual Charges

A suit to recover a money judgment for unpaid Assessments or unpaid Individual Charges, together with late charges, interest, costs, and reasonable attorneys' fees shall be maintainable by the Master Association. In the case of unpaid Assessments such suit shall be maintainable without foreclosing or waiving the lien securing such unpaid Assessments.

7.2.3 Enforcement of Lien

If there is a delinquency in the payment of any Assessment or installment levied against a Maintenance Association, any amounts that are delinquent together with the late charges, interest at eighteen percent (18%) per annum, costs of collection and reasonable attorneys' fees, shall be a lien against all of the Units included in such Maintenance Association upon the recordation in the office of the County Recorder of a Notice of Delinquent Assessment. The Notice of Delinquent Assessment shall be signed by an authorized representative of the Master Association and shall state the amount of the delinquent Assessment, a description of the affected Units, and the name of the record Owner(s). Such lien shall be prior to all other liens and encumbrances, recorded or unrecorded, except only:

(a) Tax and special assessment liens on the Unit in favor of any assessing agency or special district; and

(b) First Mortgages on the Unit recorded prior to the date that the Notice of Delinquent Assessment was recorded.

The Notice of Delinquent Assessment shall not be recorded unless and until the Board or its authorized representative has mailed to the delinquent Maintenance Association and each Owner who is a member of such Maintenance Association , not less than fifteen (15) days before the recordation of the Notice of Delinquent Assessment, a written demand for payment, and unless the delinquency has not been cured within said fifteen (15) day period. Any Owner may pay directly to the Master Association his pro-rata share of the delinquent Assessment levied against the Maintenance Association of which he

is a member (calculated by dividing the total amount of the delinquent Assessment by the number of Units in such Maintenance Association). In the event of payment by an Owner of his pro-rata share of any delinquent Assessment, the Master Association shall prepare and record a document releasing such Owner's Unit from the lien of the delinquent Assessment which is so cured. The governing instruments for each Maintenance Association shall provide that any payment made by an Owner to the Master Association for his pro-rata share of the Master Association Assessments may be applied by such Owner as a credit against the Assessments levied by his Maintenance Association next be coming due.

After the recording of the Notice of Delinquent Assessment, the Board or its authorized representative may cause the Units with respect to which a Notice of Delinquent Assessment has been recorded to be sold in the same manner as a sale is conducted under Utah law for the exercise of powers of sale, or through judicial foreclosure. In connection with any sale under Utah law for the exercise of a power of sale, the Board is authorized to appoint its attorney or any title insurance company authorized to do business in Utah as trustee for purpose of giving notice and conducting the sale, and such trustee is hereby given a power of sale. If a delinquency including Assessments and other proper charges is cured after recordation of the Notice of Delinquent Assessment but before sale, or before completing a judicial foreclosure, either by the appropriate Maintenance Association or by any Owner with respect to the Unit(s) owned by him, the Board or its authorized representative shall cause to be recorded in the office of the County Recorder a certificate setting forth the satisfaction of such claim and release of such lien, as to those Units for which such lien obligation has been cured. The Master Association, acting on behalf of the Owners, shall have the power to bid upon the Unit at foreclosure sale and to acquire, hold, lease, mortgage and convey the Unit.

7.2.4 Transfer by Sale or Foreclosure

The sale or transfer of any Unit shall not affect the Assessments lien or lien right. However, the sale or transfer of any Unit pursuant to the exercise of a power of sale or judicial foreclosure involving a default under a First Mortgage shall extinguish the lien for Assessments which became due prior to such sale or transfer. No transfer of the Unit as the result of a foreclosure or exercise of a power of sale shall relieve the new Owner, whether it be the former beneficiary of the First Mortgagee or another person, from the lien for any Assessments or Individual Charges thereafter becoming due.

ARTICLE VIII

INSURANCE, DESTRUCTION, CONDEMNATION

8.1 Insurance

In addition to other insurance required to be maintained by the Project Documents, the Master Association shall maintain in effect at all times the following insurance:

8.1.1 Liability Insurance

The Master Association shall obtain and maintain comprehensive public liability insurance insuring the Master Association, the Board, the Declarant, Owners, occupants of Units, their respective family members, guests, invitees, and the agents and employees of each, against any liability incident to the ownership, use or maintenance of the Common Area and including, if obtainable, a cross- liability or severability of interest endorsement insuring each insured against liability to each other insured. The limits of such insurance shall not be less than One Million Dollars ($1,000,000) covering all claims for death, personal injury and property damage arising out of a single occurrence. Such insurance shall include coverage against any liability customarily covered with respect to projects similar in construction, location, and use.

8.1.2 Casualty Insurance

The Master Association also shall obtain and maintain a policy of casualty insurance for the full replacement value (without deduction for depreciation) of all of the improvements within the Common Area. Such insurance shall include coverage against any risk customarily covered with respect to projects similar in construction, location, and use. The policy shall name as insured the Master Association for the benefit of the Owners and Declarant, as long as Declarant is the Owner of any Lot or Unit, and all Mortgagees as their respective interests may appear, and may contain a loss payable endorsement in favor of any trustee described in Section 8.1.3.

8.1.3 Trustee

All casualty insurance proceeds payable under Sections 8.1.2 for losses to real property and improvements may be paid to a trustee, to be held and expended for the benefit of the Owners, Mortgagees, and others, as their respective interests shall appear. Said trustee shall be a commercial bank or trust company in the County in which the Project is located that agrees in writing to accept such trust.

8.1.4 Other Insurance

The Board shall purchase and maintain worker's compensation insurance, to the extent that it is required by law, for all employees or uninsured contractors of the Master Association. The Board also may purchase and maintain fidelity coverage against dishonest acts on the part of Trustees, Officers, managers, trustees, employees or volunteers who handle or who are responsible to handle the funds of the Master Association, and such fidelity bonds shall name the Master Association obligee, and shall be written in an amount equal to one hundred fifty percent (150%) of the estimated annual operating expenses of the Master Association, including reserves. In connection with such fidelity coverage, an appropriate endorsement to cover any persons who serve without compensation shall be added if the policy would not otherwise cover volunteers. The Board shall also purchase and maintain insurance on personal property owned by the Master Association, and any other insurance that it deems necessary or is customarily obtained for projects similar in construction, location and use.

8.1.5 Owner's Liability Insurance

An Owner, individually or through the Maintenance Association of which his Lot or Unit is a part, may carry whatever personal and property damage liability insurance with respect to his Lot or Unit that he desires.

8.1.6 Owner's Fire and Extended Coverage Insurance

Each Owner shall obtain and maintain fire, casualty and extended coverage insurance for the full replacement value of all of the improvements on his Lot or Unit. Notwithstanding the foregoing this subarticle shall be deemed satisfied where a Maintenance Association has obtained fire, casualty and extended coverage insurance for an Owner's Lot or Unit (including condominiums). An Owner may insure his personal property.

8.1.7 Officer and Director Insurance

The Master Association may purchase and maintain insurance on behalf of any Trustee, Officer, or member of a committee of the Master Association (collectively the "agent") against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not the Master Association would have the power to indemnify the agent against such liability under applicable law.

8.1.8 Waiver of Subrogation

All property and liability insurance carried by the Master Association, or the Owners shall contain provisions whereby the insurer waives rights of subrogation as to the Master Association, Trustees, Officers, Committee members, Declarant, Owners, their family, guests, agents and employees.

8.1.9 Notice of Cancellation

Insurance carried by the Master Association may require the insurer to notify any First Mortgagee requesting such notice at least fifteen (15) days in advance of the effective date of any reduction or cancellation of the policy.

8.1.10 Annual Review of Policies

All insurance policies shall be reviewed at least annually by the Board in order to ascertain whether the coverage contained in the policies is adequate in light of increased construction costs, inflation or any other factor which tends to indicate that either additional insurance policies or increased coverage under existing policies are necessary or desirable to protect the interest of the Master Association.

8.1.11 Payment of Premiums

Premiums on insurance maintained by the Master Association shall be a common expense funded by Assessments levied by the Master Association.

8.2 Destruction

8.2.1 Minor Destruction Affection the Common Area

Notwithstanding Section 8.2.2 the Board shall have the duty to repair and reconstruct the Common Area without the consent of Members and irrespective of the amount of available insurance proceeds, in all instances of destruction where the estimated cost of repair and reconstruction does not exceed five percent (5%) of the budgeted gross expenses of the Master Association for that fiscal year.

8.2.2 Major Destruction Affecting the Common Area

8.2.2.1 Destruction; Proceeds Exceed 85% of Reconstruction Costs

If there is a total or partial destruction of the Common Area, and if the available proceeds of the insurance carried pursuant to Section 8.1 are sufficient to

Book 5482 Page 1211

cover not less than eight-five percent (85%) of the costs of repair and reconstruction, the Common Area shall be promptly rebuilt unless, within forty-five (45) days from the date of destruction, Members then holding at least seventy-five percent (75%) of the voting power of the Master Association determine that repair and reconstruction shall not take place.

8.2.2.2 Destruction; Proceeds Less than 85% of Reconstruction Costs

If the proceeds of insurance carried pursuant to Section 8.1 are less than eighty-five percent (85%) of the costs of repair and reconstruction, repair and reconstruction of the Common Area shall not take place unless, within forty-five (45) days from the date of destruction, Members then holding at least a majority of the voting power of the Members other than Declarant determine that repair and reconstruction shall take place.

8.2.2.3 Special Assessment to Rebuild

If the determination is made to rebuild, the Master Association shall levy a Special Assessment against all Members to cover the cost of rebuilding not covered by insurance proceeds.

8.2.2.4 Rebuilding Contract

If the determination is made to rebuild, the Board shall obtain bids from at least two (2) reputable contractors, and shall award the repair and reconstruction work to the most reasonable bidder in the opinion of a majority of the Board. The Board shall have the authority to enter into a written contract with the contractor for the repair and reconstruction, and the insurance proceeds be disbursed to said contractor according to the terms of the contract. It shall be the obligation of the Board to take all steps necessary to assure the commencement and completion of authorized repair and reconstruction within a reasonable time.

8.2.2.5 Rebuilding Not Authorized

If the determination is made not to rebuild, then any insurance proceeds and any other funds held for rebuilding of the Common Area shall be distributed among the Members on the same basis as their Regular Assessment obligation, and between the Members and Mortgagee(s) as their interests shall appear.

BOOK 1812 PAGE 1212

8.2.3 Destruction Affecting Lots.

If there is a total or partial destruction of a Condominium Building, the Owners of Units therein, through their Maintenance Association shall have the following options:

(a) the Owners shall rebuild or repair the Condominium Building in substantial conformity with its appearance, design and structural integrity immediately prior to the damage or destruction. However, the Maintenance Association of an affected Condominium Lot or Building may apply to the Architectural Control Committee for reconstruction of its Building in a manner which will provide for an exterior appearance and/or design which is different from that which existed prior to the date of the destruction. Application for such approval shall be made in compliance with the provisions of Article XI; or

(b) the Maintenance Association shall clear all structures from the Condominium Lot and shall landscape it in a manner which is approved by the Architectural Control Committee.

Rebuilding or landscaping shall be commenced within a reasonable time after the date of the damage or destruction and shall be diligently pursued to completion.

8.3 Condemnation

8.3.1 Condemnation Affecting Common Area

8.3.1.1 Sale in Lieu

If an action for condemnation of all or a portion of the Common Area is proposed or threatened by any entity having the right of eminent domain, then on the written consent of seventy-five percent (75%) of the Owners and subject to the rights of all Mortgagees, the Common Area, or a portion of it may be sold by the Board. The proceeds of the sale shall be distributed among the Maintenance Associations on the same basis as their Regular Assessment obligations and between the Unit Owners in accordance with the provisions of the governing instruments of their respective Maintenance Associations.

8.3.1.2 Award

If the Common Area, or a portion of it, is not sold but is instead taken, the judgment of condemnation shall by its terms apportion the award among the Maintenance Associations or Owners and their respective Mortgagees. If the judgment of condemnation does not apportion the award then the award shall be distributed as provided in subarticle 8.3.1.1.

BK05182 PG1213

8.3.2 Condemnation Affecting Lots

If an action for condemnation of all or a portion of, or otherwise affecting a Lot is proposed or threatened, the Owner and the Mortgagees of the affected Lot, as their respective interests shall appear, shall be entitled to the proceeds of any sale or award relating to the affected Lot.

If any Lot is rendered irreparably uninhabitable as a result of such a taking, that portion of the Lot so taken shall be deemed deleted from the Project and the Owners and Mortgagees of the affected Lot, upon receiving the award and any portion of the reserve funds of the Master Association reserved for the Lot, shall be released from the applicability of the Project Documents and deemed divested of any interest in the Common Area. Any portion of such Lot remaining after the taking shall be included as part of the Common Area of the Project. Provided, however, the governing documents of each Condominium Lot shall govern the effect of condemnation upon the owners of Units constructed on such Lot and the Common Areas and facilities of such condominium regime.

ARTICLE IX

MORTGAGEE PROTECTIONS

9.1 Mortgages Permitted

Any Owner may encumber his Lot or Unit with Mortgages.

9.2 Subordination

Any lien created or claimed under the provisions of this Declaration is expressly made subject and subordinate to the rights of any First Mortgage that encumbers any Lot or Unit or other portion of the Project, made in good faith for value, and no such lien shall in any way defeat, invalidate, or impair the obligation or priority of such First Mortgage unless the First Mortgagee expressly subordinates his interest, in writing, to such lien.

9.3 Effect of Breach

No breach of any provision of this Declaration shall invalidate the lien of any Mortgage in good faith and for value, but all of the covenants, conditions and restrictions shall be binding on any Owner whose title is derived through foreclosure sale, trustee's sale, or otherwise.

9.4 Non-Curable Breach

No Mortgagee who acquires title to a Lot or Unit by foreclosure or by deed in lieu of foreclosure or assignment-in-lieu of foreclosure shall be obligated to cure any breach of this Declaration that is non-curable or of a type that is not practical or feasible to cure.

9.5 Right to Appear at Meetings

Any Mortgagee may appear at meetings of the Master Association or the Board, in accordance with the provisions of the Bylaws.

9.6 Right to Furnish Information

Any Mortgagee may furnish information to the Board concerning the status of any Mortgage.

9.7 Right to Examine Books and Records, Etc.

The Master Association shall make available to Owners, prospective purchasers and First Mortgagees, current copies of the Project Documents and the books, records and financial statements of the Master Association. "Available" means available for inspection, upon request, during normal business hours or under other reasonable circumstances.

Any First Mortgagee shall be entitled, upon written request, to a financial statement of the Master Association for the immediately preceding fiscal year, free of charge. Such financial statement shall be furnished by the Master Association within a reasonable time following such request.

9.8 Owners Right to Ingress and Egress

There shall be no restriction upon any Owners' right of ingress and egress to his Lot or Unit, which right shall be perpetual and appurtenant to his Lot ownership.

9.9 Notice of Intended Action

Upon written request to the Master Association, any First Mortgagee shall be entitled to timely written notice of:

(a) Any proposed termination of the legal status of the Project as a Planned Unit Development.

(b) Any condemnation loss or casualty loss which affects a material portion of the Project or any Lot or Unit on which there is a First Mortgage held, insured, or guaranteed by such requesting party.

(c) Any delinquency in the payment of Assessments or Individual Charges owed by an Owner or Maintenance Association of a Lot or Unit subject to a First Mortgage held, insured or guaranteed by such requesting party which remains uncured for a period of sixty (60) days.

9.10 First Mortgagee Assessment Liability for Individual Charges

Any First Mortgagee who obtains a title to a Lot or Unit pursuant to the remedies provided in the Mortgage or foreclosure of the Mortgage shall not be liable for such Unit's Individual Charges which are assessed prior to the acquisition of title to such Lot or Unit by the Mortgagee, but shall be liable for Individual Charges assessed thereafter.

9.11 Distribution; Insurance and Condemnation Proceeds

No provision of the Project Documents shall give a Lot or Unit Owner, or any other party, priority over any rights of the First Mortgagee of the Lot or Unit pursuant to its Mortgage in the case of a distribution to such Lot or Unit Owner of insurance proceeds or condemnation awards for losses to or a taking of the Lot, Unit and/or Common Area.

9.12 Taxes

First Mortgagees of Lots or Units may, jointly or singly, pay taxes or other charges which are in default and which may or have become a charge against the Common Area and may pay overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for such Common Area, and First Mortgagees making such payments shall be owed reimbursement therefore from the Master Association. Entitlement to such reimbursement shall be reflected in an agreement in favor of all First Mortgagees of Lots duly executed by the Master Association, and an original or certified copy of such agreement shall be possessed by Declarant.

9.13 Maintenance Reserves

Master Association Assessments or charges shall include an adequate reserve fund for maintenance, repairs, and replacement of those elements of the Project that must be replaced on a periodic basis and shall be payable in regular installments rather than by special assessments.

9.14 Notice of Default

A First Mortgagee, upon request, shall be entitled to written notification from the Master Association of any default in the performance by the affected Lot or Unit Owner of any

obligation under the Project Documents which is not cured within sixty (60) days.

9.15 Conflicts

In the event of a conflict of any of the provisions of this Article IX and any other provisions of this Declaration, the provisions of this Article IX shall control.

ARTICLE X

ENFORCEMENT OF DECLARANT'S DUTY TO COMPLETE THE PROJECT

Where any Common Area improvements in the Project have not been completed prior to the issuance of a Permit, and where the Master Association is obligee under a bond or other arrangement ("Bond") to secure performance of the commitment of Declarant to complete such improvements, the Board shall consider and vote on the question of action by the Master Association to enforce the obligations under the Bond with respect to any improvement for which a Notice of Completion has not been filed within sixty (60) days after the completion dated specified for that improvement in the Planned Construction Statement appended to the Bond. If the Master Association has given an extension in writing for the completion of any Common Area improvement, the Board shall consider and vote on the aforesaid question if a Notice of Completion has not been filed within thirty (30) days after the expiration of the extension. A special meeting of Members of the Master Association for the purpose of voting to override a decision by the Board not to initiate action to enforce the obligations under the Bond or on the failure of the Board to consider and vote on the question, shall be held not less than thirty-five (35) days nor more than forty-five (45) days after receipt by the Board of a petition for such meeting signed by Members representing five percent (5%) or more of the total voting power of the Master Association. At such special meeting a vote of a majority of the voting power of the Master Association residing in Members present other than Declarant to take action to enforce the obligations under the Bond shall be deemed to be the decision of the Master Association and the Board shall thereafter implement this decision by initiating and pursuing appropriate action in the name of the Master Association.

ARTICLE XI

ARCHITECTURAL CONTROL

11.1 Approval of Alteration and Improvements

11.1.1 General Limitation

Subject to the exceptions described at Section 11.1.2 no Improvement may be constructed, painted, altered or in any other way changed on any portion of the Project without the prior written approval of the Architectural Control Committee ("Committee").

11.1.2 Exemption

Notwithstanding Section 11.1.1, no Committee approval shall be required for (i) initial Improvements constructed by, or with the express written approval of Declarant; (ii) normal maintenance of exempt or previously approved Improvements; (iii) rebuilding an exempt or previously approved Improvement; (iv) changes to the interior of an exempt or previously approved Structure; (v) work reasonably required to be performed in an emergency for the purpose of protecting any person or property from damage.

11.2 Architectural Control Committee

11.2.1 Number, Appointment, Terms

The Committee shall be composed of five (5) members. Declarant shall appoint all of the initial members, and reserves the right to appoint a majority of the members of the Committee until ninety (90%) of all Units to be constructed in the Project have been sold or until the fifth anniversary of the original issuance of the final Permit for the Project, whichever first occurs.

After one (1) year from the date of issuance of the first Permit with respect to any Units of the Project, the Board shall have the right to appoint one (1) member of the Committee until ninety percent (90%) of all Units to be constructed in the Project have been sold or until the fifth anniversary of the original issuance of the final Permit for the Project, whichever first occurs. Thereafter the Board shall have the right to appoint all members of the Committee.

Members appointed to the Committee by the Board shall be from the Membership of any Maintenance Association. Members appointed to the Committee by Declarant need not be members of the Master Association or any Maintenance Association.

The terms of the initial members of the Committee shall be until the first anniversary of the issuance of the first Permit for the Project, or five (5) years following the filing of this Declaration, whichever occurs first. Thereafter, the terms of the Committee members shall be four (4) years. Any new member appointed to replace a member who has resigned or been removed shall serve such member's unexpired term. Vacancies on the Committee caused by resignation or removal of a member shall be filled by the party empowered to originally appoint such member. No member of the Committee may be removed without the vote or written consent of the Board; provided, however, that Declarant may change its designated members of the Committee without such vote or consent.

11.2.2 Operation

The Committee shall meet from time to time as necessary to properly perform its duties hereunder. The requirements for valid Committee meetings and actions shall be the same as that which is required for valid Board meetings and action as provided in the Bylaws. The Committee shall keep and maintain a record of all action from time to time taken by the Committee at meetings or otherwise, and shall maintain files of all documents submitted to it, along with records of its activities. Unless authorized by the Master Association, the members of the Committee shall not receive any compensation for services rendered. All members shall be entitled to reimbursement by the Master Association for reasonable expenses incurred by them in connection with the performance of their duties.

11.2.3 Duties

The Committee shall adopt Architectural Control Guidelines ("Guidelines") as provided in Section 11.3 and shall perform other duties imposed upon it by the Project Documents or delegated to it by the Board.

The address of the Committee shall be the principal office of the Master Association as designated by the Board pursuant to the Bylaws. Such address shall be the place for the submittal of plans and specifications and the place where current copies of the Guidelines shall be kept.

11.3 Architectural Standards, Guidelines

11.3.1 Committee Guidelines

The Board shall approve the initial Guidelines adopted by the Committee. The Committee may, from time to time, amend said Guidelines prospectively, if approved by four (4) members of the Committee; otherwise Board approval shall be required for any amendment. Said Guidelines shall interpret and

implement the provisions of this Article XI by setting forth more specific standards and procedures for Committee review. All Guidelines shall be in compliance with all applicable laws and regulations of any governmental entity having jurisdiction over Improvements on the Project, shall incorporate high standards of architectural design and construction engineering, shall be in compliance with the minimum standards of Section 11.3.2 and otherwise shall be in conformity with the purposes and provisions of the Project Documents.

A copy of the current Guidelines shall be available for inspection and copying by any Lot or Unit Owner at any reasonable time during business hours of the Master Association.

11.3.2 Standards

The following minimum standards shall apply to any Improvements constructed on the Project:

(a) All Improvements shall be constructed in compliance with the applicable zoning laws, building codes, subdivision restrictions and all other laws, ordinances and regulations applicable to Project Improvements.

(b) In reviewing proposed Improvements for approval, the Committee shall consider at least the following:

(i) Does the proposed Improvement conform to the purposes and provisions of the Project Documents?

(ii) Is the proposed Improvement of a quality of workmanship and materials comparable to other Improvements that are proposed or existing on the Project?

(iii) Is the proposed Improvement of a design and character which is harmonious with proposed or existing Improvements and with the natural topography in the immediate vicinity?

11.4 Committee Approval Process

11.4.1 Approval Application

Any Owner proposing to construct, paint, alter or change any Improvement on the Project which requires the prior approval of the Committee shall apply to the Committee in writing for approval of the work to be performed and a proposed time schedule for performing the work. The Committee may charge an Owner a reasonable fee for application review.

BOOK 5482 PAGE 1220

In the event additional plans and specifications for the work are required by the Committee, the applicant shall be notified of the requirement within thirty (30) days of receipt by the Committee of his initial application or the application shall be deemed sufficiently submitted. If timely notified the applicant shall submit plans and specifications for the proposed work in the form and context reasonably required by the Committee and the date of his application shall not be deemed submitted until that date. Such plans and specifications may include, but are not limited to, showing the nature, kind, shape, color, size, materials and location of the proposed work, or the size, species and location of any plants, trees, shrubs and other proposed landscaping.

11.4.2 Review and Approval

Upon receipt of all documents reasonably required by the Committee to consider the application, the Committee shall proceed expeditiously to review all of such documents to determine whether the proposed work is in compliance with the provisions and purposes of the Project Documents and all Guidelines of the Committee in effect at the time the documents are submitted. In the event the Committee fails to approve an application, it shall notify the applicant in writing of the specific matters to which it objects. In the event the Committee fails to notify the applicant within forty-five (45) days after receipt of all documents reasonably required to consider an application or a correction or resubmittal thereof of the action taken by the Committee, the application shall be deemed approved. One set of plans as finally approved shall be retained by the Committee as a permanent record. The determination of the Committee shall be final and conclusive and, except for an application to the Committee for reconsideration, there shall be no appeal therefrom.

11.4.3 Commencement, and Completion of Approved Work

Upon receipt of the approval of the Committee, the applicant shall proceed to have the work commenced and diligently and continuously pursued to completion in substantial compliance with the approval of the Committee including all conditions imposed therewith. The approval of the Committee shall be effective for a period of one (1) year after the date of the approval subject to the right of the Committee to provide for a longer period at the time of its approval, or subsequently to extend the period upon a showing of good cause, and in the event the approved work is not commenced within the effective period of the approval, then the applicant, before commencing any work, shall be required to resubmit its application for the approval of the Committee.

All work approved shall be completed within one (1) year after the date of commencement, or such other reasonable period specified by the Committee at the time of approval, with the period of time subject to extension, at the option of the Committee, by the number of days that work is delayed by causes not under the control of the applicant or his contractor or as otherwise extended by the Board. Upon completion of approved work, the applicant shall give written notice thereof to the Committee.

If for any reason the Committee fails to notify the applicant of any noncompliance within sixty (60) days after receipt of said notice of completion from the application, the improvement shall be deemed to be completed in accordance with said approved plans.

11.4.4 Inspection, Non-Compliance

The Committee, or any authorized representative shall have the right at any reasonable time, after reasonable notice, to enter upon any portion of the Project for the purpose of determining whether or not any work is being performed or was performed in compliance with the Project Documents.

If at any time the Committee determines that work is not being performed or was not performed in compliance with the Project Documents or the Guidelines, whether based on a failure to apply for or obtain approval, a failure to comply with approval, a failure to timely commence or complete approved work or otherwise, the Committee shall notify the Owner in writing of such non-compliance specifying the particulars of non-compliance within a reasonable and specified time period.

In the event that the offending owner fails to remedy such non-compliance within the specified period the Committee shall notify the Board in writing of such failure. The Board shall, subject to the notice and hearing requirements of Section 7.2.1.2, have the right to remedy the non-compliance in any appropriate manner permitted by the Project Documents or otherwise permitted by law, or in equity, including but not limited to removing the non- complying Improvement, or recording a notice of non- compliance on the property, as appropriate. The owner shall have the obligation to reimburse the Master Association for any costs incurred in enforcing these provisions and if the Master Association is not reimbursed upon demand the Board shall have the right to Individually Charge the cost thereof to such owner.

11.5 Waiver

The approval by the Committee of any plans, drawings, specifications of any Improvements constructed or proposed, or in

connection with any matter requiring the approval of the Committee under the Project Documents shall not be deemed to constitute a waiver of any right to withhold approval of any similar plan, drawing, specification or matter submitted for approval. Where unusual circumstances warrant it, the Committee may grant reasonable variances from the architectural control provisions hereof or from the Guidelines. Such variances shall be made on a case-by-case basis and shall not serve as precedent for the granting of any other variance.

11.6 Estoppel Certificate

Within thirty (30) days after written demand is delivered therefor to the Committee by any Maintenance Association, Owner or Mortgagee, and upon payment to the Master Association of a reasonable fee (as fixed from time to time by the Board), the Committee shall execute and deliver in recordable form, if requested, an estoppel certificate executed by any three (3) of its members, certifying, with respect to any portion of the Project, that as of the date thereof either (a) all Improvements made and other work done upon or within said portion of the Project comply with the Project Documents, or (b) such Improvements or work do not so comply in which event the certificate shall also identify the noncomplying Improvements or work and set forth with particularly the basis of such noncompliance. Such statement shall be binding upon the Master Association and Committee in favor of any person who may rely thereon in good faith.

11.7 Liability

Neither the Declarant, the Committee, the Board nor any member thereof shall be liable to the Master Association or to any Owner or to any third party for any damages, loss, prejudice suffered or claimed on account of (a) the approval or disapproval of such plans, drawings and specifications, whether or not defective, (b) the construction or performance of any work, whether or not pursuant to approved plans, drawings and specifications, (c) the development of any portion of the Project, or (d) the execution and filing of an estoppel certificate pursuant to Section 11.6 or the execution and filing of a notice of noncompliance or noncompletion pursuant to Section 11.4.4, whether or not the facts therein are correct, if the Declarant, the Board, the Committee or such member has acted in good faith on the basis of such information as may be possessed by them. Specifically, but not by way of limitation, it is understood that plans and specifications neither the Committee, the members thereof, the Master Association, the Members, the Board nor Declarant assumes liability or responsibility therefor, or for any defect in any structure constructed from such plans and specifications.

ARTICLE XII

GENERAL PROVISIONS

12.1 Notices

Notices provided for in the Project Documents shall be in writing and shall be deemed sufficiently given when delivered personally or 48 hours after deposit in the United States mail, postage prepaid, addressed to an Owner at the last address such Owner designates to the Master Association for delivery of notices, or in the event of no such designation, at such Owner's last known address, or if there be none, at the address of the Owner's Lot or Unit. Notices to the Master Association shall be addressed to the address designated by the Master Association by written notice to all owners.

12.2 Notice of Transfer

No later than five (5) days after the sale or transfer of any Lot or Unit under circumstances whereby the transferee becomes the Owner thereof, the transferee shall notify the Master Association in writing of such sale or transfer. Such notice shall set forth: (i) the Lot or Unit involved; (ii) the name and address of the transferee and transferor; and (iii) the date of sale. Unless and until such notice is given, the Master Association shall not be required to recognize the transferee for any purpose, and any action taken by the transferor as an Owner may be recognized by the Master Association. Prior to receipt of any such notification by the Master Association, any and all communications required or permitted to be given by the Master Association shall be deemed duly given and made to the transferee if duly and timely made and given to such transferee's transferor.

12.3 Construction, Headings

The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development of a planned community and for the maintenance of the Project. The Article headings have been inserted for convenience only, and shall not be considered or referred to in resolving questions of interpretation or construction.

12.4 Severability

The provisions of this Declaration shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or provisions contained herein shall not invalidate any other provisions hereof.

12.5 Exhibits

All exhibits referred to are incorporated herein by such reference.

12.6 Easements Reserved and Granted

Any easements or air space rights referred to in this Declaration shall be deemed reserved or granted as applicable, or both reserved and granted, by reference to this Declaration in a deed to any Lot.

12.7 Binding Effect

This Declaration shall inure to the benefit of and be binding on the successors and assigns of the Declarant, and the heirs, personal representatives, grantees, tenants, successors and assigns of any Owner.

12.8 Violations and Nuisance

Every act or omission whereby a covenant, condition or restriction of this Declaration is violated in whole or in part is hereby declared to be a nuisance and may be enjoined or abated, whether or not the relief sought is for negative or affirmative action, by Declarant, the Master Association or any Owner or Owners.

12.9 Violation of Law

Any violation of any state, municipal or local law, ordinance or regulation pertaining to the ownership, occupation or use of any of the Project is hereby declared to be a violation of this Declaration and subject to any or all of the enforcement procedures herein set forth.

12.10 Singular Includes Plural

Whenever the context of this Declaration requires same, the singular shall include the plural and the masculine shall include the feminine.

12.11 Conflict of Project Documents

If there is any conflict among or between the Project Documents, the provisions of this Declaration shall prevail; thereafter, priority shall be given to Project Documents in the following order: Articles, Bylaws, Rules and Regulations of the Master Association and Architectural Control Guidelines.

12.12 Termination of Declaration

This Declaration shall run with the land, and shall continue in full force and effect for a period of fifty (50) years from the date on which this Declaration is executed. After that time, this Declaration and all its covenants and other provisions shall be automatically extended for successive ten (10) year periods unless this Declaration is revoked by an instrument executed by Owners of not less than three-fourths (3/4) of the Lots and Units in the Project, and recorded in the Office of the Salt Lake County Recorder within one year prior to the end of said 50-year period or any succeeding 10-year period.

ARTICLE XIII

AMENDMENT

13.1 Amendment Prior to First Sale

Until sale of the first Lot or Unit Declarant shall have the right to amend this Declaration.

13.2 Amendment After the First Sale

After the first sale of a Lot or Unit this Declaration shall be amended upon the vote or written assent of a majority of the total voting power of the Master Association, and a majority of the total voting power of the Master Association other than Declarant; provided, however Declarant shall have the sole authority at any time to amend this Declaration, and the Map, if necessary, for the purpose of allocating density to Lots owned by Declarant or changing the configuration, size or location of Lots owned by Declarant, in accordance with Subsections 2.1.2 and 2.1.4 hereof. All Owners shall execute any documents necessary to carry out the provisions of this Subsection 13.2.

13.2.1 Specific Provisions

The percentage of the votirg power necessary to amend a specific clause or provision herein shall not be less than the percentage of affirmative votes prescribed for action to be taken under said clause or provision.

13.3 Amendment to Satisfy Other State Laws

Declarant or others may sell Lots or Units in the Project to purchasers in several states, including California. In the event that the Project Documents do not comply with the requirements of any state in which Declarant intends to sell Lots or Units, Declarant shall have the unilateral right, without the

5482 1226

approval of the Board or of the Members, to amend the Project Documents as necessary to conform to the requirements of the applicable state, including California. In the event of conflict between this Section 13.3 and any other provision of Article XIII, this Section 13.3 shall control.

13.4 Amendment Instrument

An amendment shall become effective when it has received the required approvals and the Board has executed, acknowledged and recorded in the Office of the Salt Lake County Recorder, an instrument expressing the amendment and certifying that the required approvals were received.

The undersigned, being the Declarant herein, has executed this Declaration on July 27, 1983

SORENSON RESOURCES COMPANY

By: _____

Title: _____

By: _____

Title: Secretary

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

On the 27th day of July, 1983, personally appeared before me James L. Sorenson, who being by me duly sworn did say that he the said James L. Sorenson is the President of SORENSON RESOURCES COMPANY, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said _____ duly acknowledged to me that said corporation executed the same.

_____
NOTARY PUBLIC
Residing at: SLC, UT

My Commission Expires:
3/12/84

BB011/002 51 063083

ALTA 001101

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

On the 27th day of July, 1983, personally appeared before me Walter J. Plumb, II, who being by me duly sworn did say that he the said Walter J. Plumb, III is the Secretary of SORENSON RESOURCES COMPANY, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said _____ duly acknowledged to me that said corporation executed the same.

Marilyn L Greer
NOTARY PUBLIC
Residing at: SLC, UT

My Commission Expires:
3/12/84

LEGAL DESCRIPTION OF THE PROJECT

Edmund W. Allen, registerd land surveyor, state of Utah, certify that I have surveyed the surface rights only to the following described property:

BEGINNING at a 2" steel pipe placed in the rock kern of corner #2 of the Blackjack Mining Lode Claim, Survey #5288, said claim corner being located S 32°13'19" W 3,377.23 feet, more or less, from the Northeast corner of Section 6, Township 3 South, Range 3 East, Salt Lake Base and Meridian, and running thence S 18°16' E 263.39 feet along the West line of said Blackjack Claim; thence N 71°45' E 187.88 feet; thence S 17°07' W 221.95 feet to the beginning point of a 442.256 foot radius curve to the left; thence Southerly 132.00 feet along the arc of said curve to a point on said West line of the Blackjack Claim; thence S 18°16' E 37.99 feet to Corner #3 of said Blackjack Claim; thence N 71°42'58" E 57.42 feet along the South line of said Blackjack Claim to a point on the arc of a 376.256 foot radius curve to the left; thence Southerly 183.785 feet along the arc of said curve; thence S 30°46' E 51.10 feet to a point on the Southeasterly line of the Snowbird claim, Survey #5152, thence N 22°44'53" E 307.27 feet along said Southeasterly line to a point on said South line of the Blackjack Claim; thence N 71°42'58" E 490.31 feet to a point on the North line of the Martha Claim, Survey #5897; thence N 49°42' E 403.65 feet along said North line; thence N 16°32'40" W 323.28 feet; thence S 22°40' W 212.12 feet; thence N 67°20' W 152.0 feet; thence N 22°41'34" E 134.98 feet; thence S 73°29'05" W 116.41 feet to a point on the Southeasterly line of the Hellgate No. 2 Mineral Mining Lode Claim, Survey #5282; thence S 22°40' E 153.85 feet to corner #1 of said Hellgate No. 2 Claim; thence S 6°37' W 35.28 feet along the North line of said Hellgate No. 2 Claim to a point on the South line of the Hellgate Mineral Mining Lode Claim, Survey 282; thence N 65°32'42" E 550.52 feet to corner #2 of said Hellgate Claim thence N 15°50'49" W 239.0 feet along the East line of said Hellgate Claim, thence N 42°35'38" W 73.70 feet; thence N 22°42' W 65.0 feet; thence S 53°53' W 68.0 feet; thence S 76°19' W 54.0 feet; thence Southwesterly 1595 feet more or less along the Centerline of Little Cottonwood Creek to a point on the South line of said Hellgate No. 2 Claim; thence S 67°14'21" E 186.96 feet more or less along South line to a point on the North line of said Blackjack Claim thence S 71°42'58" W 113.55 feet to the point of beginning.

TOGETHER with an access easement, being a forty foot wide non-exclusive right of way for ingress, and egress, twenty feet to either side of a center line described as follows:

BEGINNING at a point 13 feet South of Engineering Station 56 + 30.35 of Utah State Bypass Highway in Little Cottonwood Canyon, Salt Lake County, Utah said point being N 79°58'58" W 116.39 feet from Utah Department of Highway Monument No. SL-A-13, which said monument is S 13°39'21" W 2531 feet from the Northeast corner of Section 6, Township 3 South, Range 3 East, Salt Lake Base and Meridian; and running thence Southwesterly to the corner No. 1 of the surveyed Hellgate No. 2 Mineral Mining Lode Claim, Survey No. 5282; thence S 22°40' W along the Southeast Boundary line of said Hellgate No. 2 Mineral Mining Lode Claim 200.0 feet, more or less, to the Southwest corner of Lot of Blackjack Village Subdivision, according to the official plat thereof recorded in Salt Lake County, State of Utah; thence N 73°32'30" E 116.41 feet to the boundary of the subject property described above,

CONTAINS: 25.78 acres

EXHIBIT B

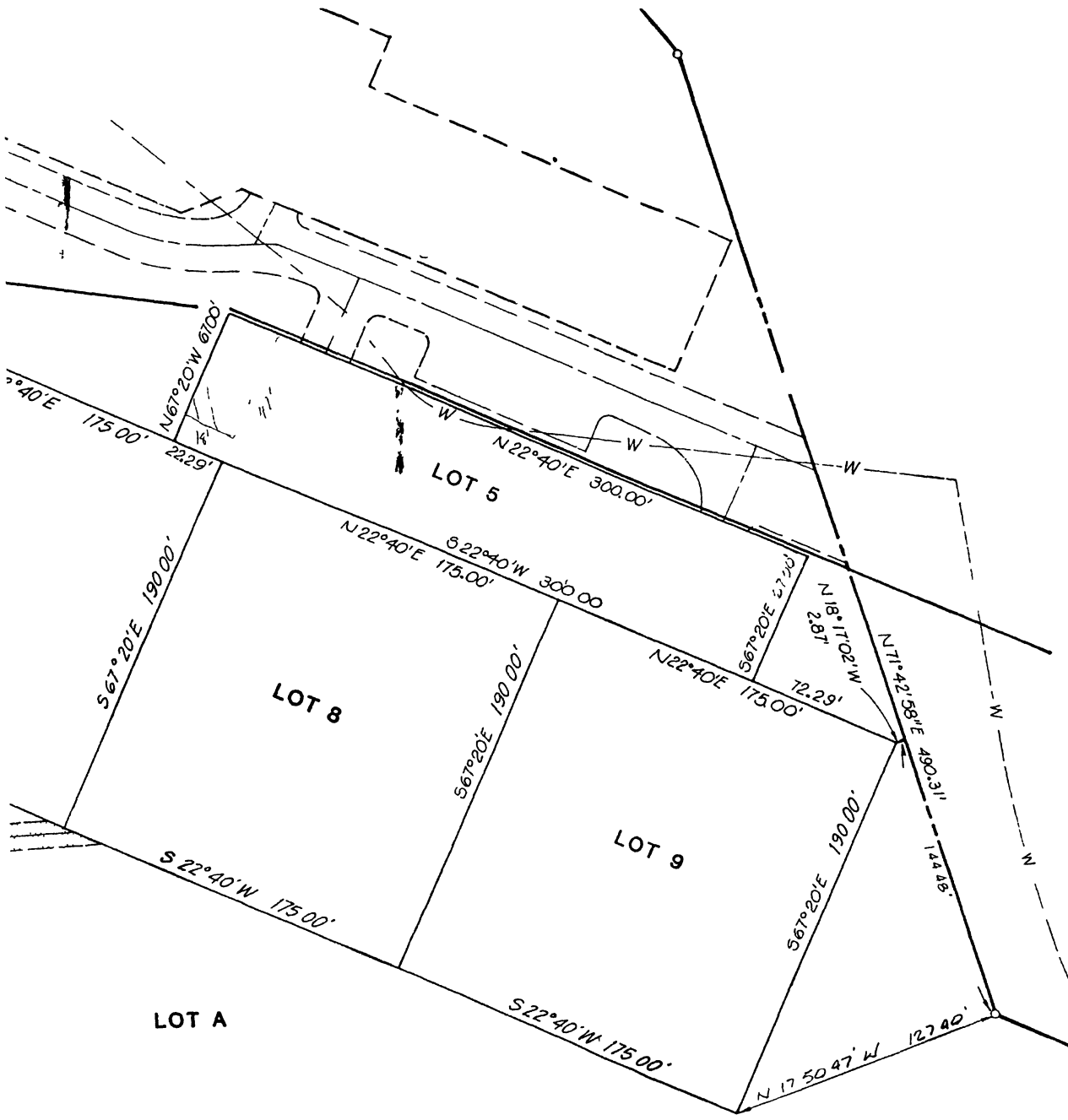
DENSITY

Lot	Units to be Constructed
1	20
2	6
3	9
4	85
5	parking and commercial development of the Air Space
6	20
7	20
8	20
9	20

NOTE: Pursuant to Section 2.1.5 of this Declaration and the provisions of that certain Agreement dated June 16, 1982, by and between the Town of Alta and Sorenson Resources Company, no more than 200 residential units shall be constructed on the Project; provided that Sorenson Resources Company shall, pursuant to this Declaration, have the right to reallocate the number of Units to be constructed on each Lot.

sugarplum

A PLANNED UNIT DEVELOPMENT LOCATED IN
SECTION 6, T3S, R3E, SLB&M



PHASED DEVELOPMENT

THE DEVELOPMENT OF THE SUGARPLUM PLANNED UNIT DEVELOPMENT SHALL OCCUR IN PHASES. EACH PHASE WILL CONSIST OF BUILDINGS AND OTHER IMPROVEMENTS CONSTRUCTED ON ONE OR MORE LOTS. PHASE I SHALL CONSIST OF A SINGLE BUILDING CONSTRUCTED ON LOT 2, CONTAINING SIX CONDOMINIUM UNITS. SUBJECT TO MODIFICATION BY SORENSON RESOURCES COMPANY, ITS SUCCESSORS OIR ASSIGNS, IT IS ANTICIPATED THAT THE VARIOUS PHASES IN THE DEVELOPMENT SHALL BE AS FOLLOWS·

PHASE	*LOTS*
I	*2*
II	*3*
III	*1*
IV	*5,8,9*
V	*6,7*
VI	*4*

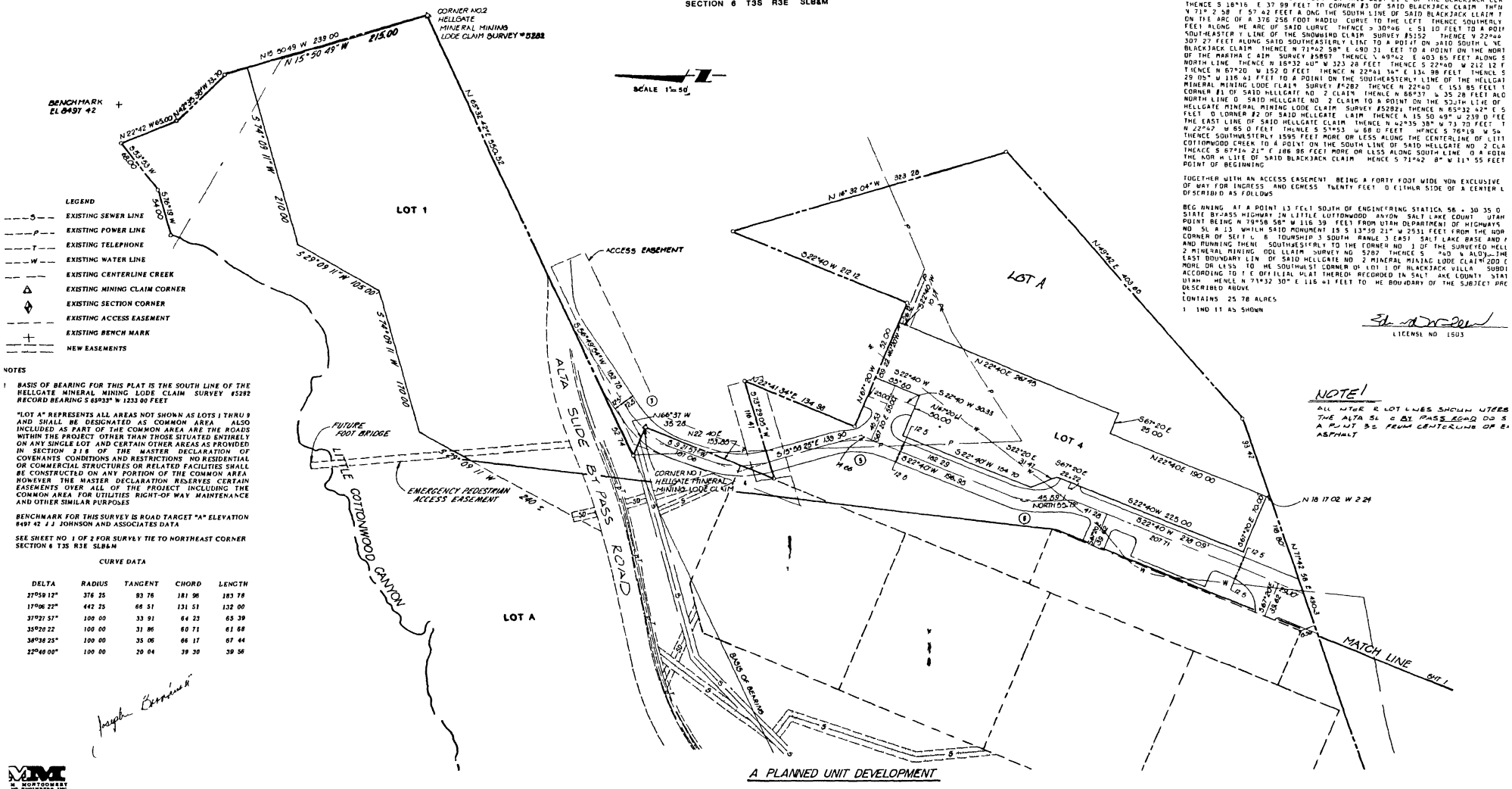
ANTICIPATED DWELLING DENSITY

PURSUANT TO SECTION 2.1.5 OF THE MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF SUGARPLUM, A PLANNED UNIT DEVELOPMENT, AND THE AGREEMENT DATED JUNE 16, 1982, BETWEEN SORENSON RESOURCES COMPANY AND THE TOWN OF ALTA, NO MORE THAN 200 RESIDENTIAL UNITS SHALL BE CONSTRUCTED ON LOTS 1 THRU 9 AS SHOWN ON THIS PLAT. IT IS ANTICIPATED THAT THE NUMBER OF RESIDENTIAL UNITS TO BE CONSTRUCTED ON SAID LOTS 1 THRU 9, AS SHOWN ON THIS PLAT, SHALL BE AS FOLLOWS (PROVIDED SORENSON RESOURCES COMPANY, OR ANY SUCCESSOR, PURSUANT TO THE DECLARATION, SHALL HAVE THE RIGHT TO REALLOCATE THE DENSITY OF DEVELOPMENT AND LOCATION OF EACH LOT, SO LONG AS NO MORE THAN 200 RESIDENTIAL UNITS ARE CONSTRUCTED ON LOTS 1 THRU 9 AS SHOWN ON THIS PLAT OR AS AMENDED.

LOT	*UNITS*
1	*20*
2	*6*
3	*9*
4	*85*
5	*PARKING AND COMMERCIAL DEVELOPMENT OF AIR SPACE*
6	*20*
7	*20*
8	*20*
9	*20*
A	*COMMON AREA*

sugarplum

A PLANNED UNIT DEVELOPMENT LOCATED IN
SECTION 6 T3S R3E SLB&M



LEGEND

- ---S--- EXISTING SEWER LINE
- ---P--- EXISTING POWER LINE
- ---T--- EXISTING TELEPHONE
- ---W--- EXISTING WATER LINE
- EXISTING CENTERLINE CREEK
- △ EXISTING MINING CLAIM CORNER
- ◆ EXISTING SECTION CORNER
- EXISTING ACCESS EASEMENT
- EXISTING BENCH MARK
- NEW EASEMENTS

NOTES

1. BASIS OF BEARING FOR THIS PLAT IS THE SOUTH LINE OF THE HELLGATE MINERAL MINING LODE CLAIM SURVEY #5292 RECORD BEARING S 65°33" W 1233 00 FEET

"LOT A" REPRESENTS ALL AREAS NOT SHOWN AS LOTS 1 THRU 9 AND SHALL BE DESIGNATED AS COMMON AREA ALSO INCLUDED AS PART OF THE COMMON AREA ARE THE ROADS WITHIN THE PROJECT OTHER THAN THOSE SITUATED ENTIRELY ON ANY SINGLE LOT AND CERTAIN OTHER AREAS AS PROVIDED IN SECTION 2 1 8 OF THE MASTER DECLARATION OF COVENANTS CONDITIONS AND RESTRICTIONS NO RESIDENTIAL OR COMMERCIAL STRUCTURES OR RELATED FACILITIES SHALL BE CONSTRUCTED ON ANY PORTION OF THE COMMON AREA HOWEVER THE MASTER DECLARATION RESERVES CERTAIN EASEMENTS OVER ALL OF THE PROJECT INCLUDING THE COMMON AREA FOR UTILITIES RIGHT-OF WAY MAINTENANCE AND OTHER SIMILAR PURPOSES

BENCHMARK FOR THIS SURVEY IS ROAD TARGET "A" ELEVATION 8497 42 J J JOHNSON AND ASSOCIATES DATA

SEE SHEET NO 1 OF 2 FOR SURVEY TIE TO NORTHEAST CORNER SECTION 6 T3S R3E SLB&M

CURVE DATA

DELTA	RADIUS	TANGENT	CHORD	LENGTH
27°59 12"	376 25	93 76	181 96	183 78
17°06 22"	442 25	66 51	131 51	132 00
37°27 57"	100 00	33 91	64 23	65 39
35°20 22	100 00	31 86	60 71	61 68
38°38 25"	100 00	35 06	66 17	67 44
22°40 00"	100 00	20 04	39 30	39 56

SURVEYOR'S CERTIFICATE

I EDMUND W ALLEN REGISTERED LAND SURVEYOR STATE OF UTAH CERTIFY THA SURVEYED THE SURFACE RIGHTS ONLY TO THE FOLLOWING DESCRIBED PROPERTY

B GINNING AT A 2" STEEL PIPE PLACED IN THE ROCK KERN OF CORNER #2 OF TH JACK MINING LODE CLAIM SURVEY #5288 SAID CLAIM CORNER BEING LOCATED S 19" W 3 377 23 FEET MORE OR LESS FROM THE NORTHEAST CORNER OF SECTION TOWNSHIP 3 SOUTH RANGE 3 EAST SALT LAKE BASE AND MERIDIAN AND RUNNIN S 18°16 E 263 39 FEET ALONG THE WEST LINE OF SAID B ACKJACK CLAIN THE N 1°45 E 187 88 FEET THENCE S 17 07 E 221 95 FEET TO THE BEGINNING OF A 442 256 FOOT RADIUS CURVE TO THE LEFT THENCE SOUTHERLY 132 00 FEE THE ARC OF SAID CURVE TO A POINT ON SAID WEST LI E OF THE BLACKJACK CLA THENCE S 18°16 E 37 99 FEET TO CORNER #3 OF SAID BLACKJACK CLAIM THEN N 71° 2 58 E 57 42 FEET A ONG THE SOUTH LINE OF SAID BLACKJACK CLAIM T ON THE ARC OF A 376 256 FOOT RADIU CURVE TO THE LEFT THENCE SOUTHERLY FEET ALONG HE ARC OF SAID CURVE THENCE S 30°46 E 51 10 FEET TO A POIN SOUTHEASTER Y LINE OF THE SNOWBIRD CLAIM SURVEY #5152 THENCE N 22°46 307 27 FEET ALONG SAID SOUTHEASTERLY LINE TO A POINT ON SAID SOUTH L NE BLACKJACK CLAIM THENCE N 71°52 58" E 490 31 EET TO A POINT ON THE NORT OF THE MARTHA C AIM SURVEY #5867 THENCE \ 49°42 E 403 85 FEET ALONG S NORTH LINE THENCE N 18°32 40" W 323 28 FEET THENCE S 22°40 W 212 12 F THENCE N 67°20 W 152 0 FEET THENCE N 22°41 34" E 134 38 FELT THENCE S 29 05" W 116 41 FEET TO A POINI ON THE SOUTHEASTERLY LINE OF THE HELLGAT MINERAL MINING LODE CLAIM SURVEY #5282 THENCE N 22°40 E 153 85 FEET T CORNER #1 OF SAID HELLGATE NO 2 CLAIM THENCE N 66°37 W 35 28 FEET ALO NORTH LINE O SAID HELLGATE NO 2 CLAIM TO A POINT ON THE SOUTH LINE OF HELLGATE MINERAL MINING LODE CLAIM SURVEY #5282 THENCE N 65°32 42" E 5 FEET O LORNER #2 OF SAID HELLGATE CLAIM THENCE N 15 50 49" W 239 0 FEE THE EAST LINE OF SAID HELLGATE CLAIM THENCE N 42°35 38" W 13 20 FEET T N 22°42 W 65 0 FEET THENCE S 51°53 W 68 0 FEET HENCE S 76°19 W 54 THENCE SOUTHWESTERLY 1595 FEET MORE OR LESS ALONG THE CENTERLINE OF LITT COTTONWOOD CREEK TO A POINT ON THE SOUTH LINE OF SAID HELLGATE NO 2 CLA THEACE S 67°14 21" E 186 96 FEET MORE OR LESS ALONG SOUTH LINE O A POIN THE NOR H LITE OF SAID BLACKJACK CLAIM HENCE S 71°42 8" W 11 55 FEET POINT OF BEGINNING

TOGETHER WITH AN ACCESS EASEMENT BEING A FORTY FOOT WIDE NON EXCLUSIVE OF WAY FOR INGRESS AND EGRESS TWENTY FEET O EITHER SIDE OF A CENTER L DESCRIBED AS FOLLOWS

BEG NNING AT A POINT 13 FEET SOUTH OF ENGINEERING STATION 58 + 30 35 O STATE BYPASS HIGHWAY IN LITTLE COTTONWOOD ANYON SALT LAKE COUNT UTAH POINT BEING N 79°58 58" W 116 39 FEET FROM UTAH DEPARTMENT OF HIGHWAYS NO 5L A 13 WHICH SAID MONUMENT IS S 13°19 21" W 2531 FEET FROM THE NOR CORNER OF SEC I O 6 TOWNSHIP 3 SOUTH RANGE 3 EAST SALT LAKE BASE AND M AND RUNNING THENC SOUTHWESTERLY TO THE CORNER NO 1 OF THE SURVEYED HELL 2 MINERAL MINING ODI CLAIM SURVEY NO 5287 THENCE S °40 W ALONG THE EAST BOUNDARY LIN OF SAID HELLGATE NO 2 MINERAL MINING CLAIM 200 MORE OR LESS TO HE SOUTHWEST CORNER OF LOT 1 OF BLACKJACK VILLA SUBDI ACCORDING TO T E OFFICIAL PLAT THEREOF RECORDED IN SALT AKE COUNTY STAT UTAH HENCE N 71°32 30" E 116 41 FEET TO HE BOUNDARY OF THE SUBJECT PRE DESCRIBED ABOVE

CONTAINS 25 78 ACRES

1 IND 11 AS SHOWN

LICENSE NO 1503

NOTE!
ALL NTER E LOT LINES SHOWN UTERS THE ALTA SL E BY PASS ROAD DO S A PUNT 3± FROM CENTERLINE OF E ASPHALT

A PLANNED UNIT DEVELOPMENT

M MONTGOMERY
MONTGOMERY ENGINEERING, INC

PLANNING COMMISSION

APPROVED TH S 24 DAY OF July A D 1981 BY THE ALTA TOWN PLANNING COMMISSION

CHAIRMAN ALTA TOWN PLANNING COMM

ENGINEER S CERTIFICATE

I HEREBY CERTIFY THAT TH S OFFICE HAS EXAMINED THIS PLAT AND IT IS CORRECT IN ACCORDANCE WITH INFORMATION ON FILE IN THIS OFFICE

July 28, 1983 DATE

ALTA TOWN ENGINEER

ALTA TOWN COUNCIL

PRESENTED TO THE BOARD OF ALTA TOWN COUNCIL THIS 11th DAY OF August A D 1983 AT WHICH TIME THIS PLANNED UNIT DEVELOPMENT WAS APPROVED AND ACCEPTED

ATTEST ALTA TOWN CLERK

ALTA TOWN MAYOR

RECORDED # 3830327

STATE OF UTAH COUNTY OF SALT LAKE RECORDED AND FILED QUEST OF STEVEN D PETERSON

DATE 8 12 83 TIME 10 28AM BOOK 536 PA

$3600 FEE $

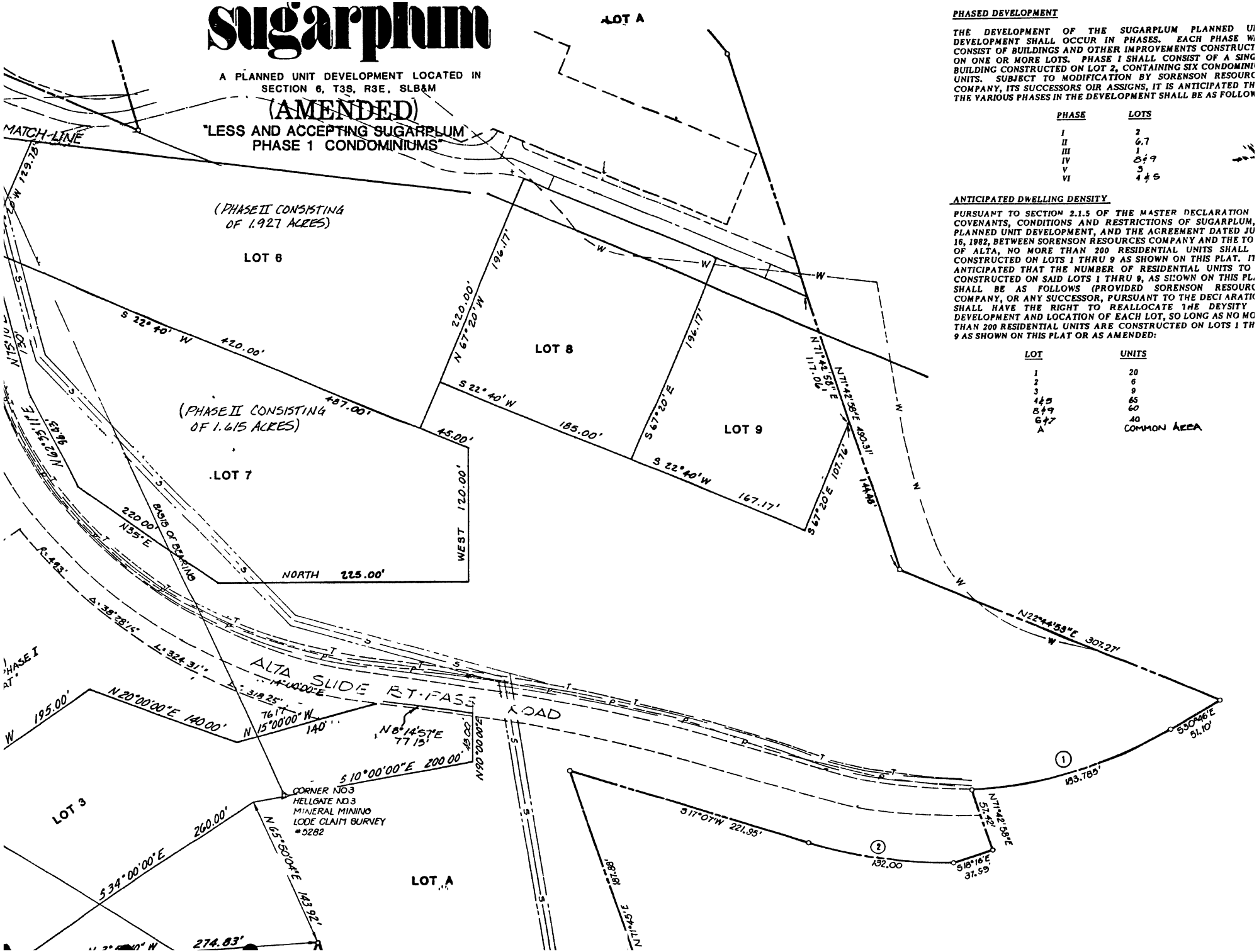
SALT LAKE COUNTY

sugarplum

A PLANNED UNIT DEVELOPMENT LOCATED IN
SECTION 6, T3S, R3E, SLB&M

(AMENDED)

"LESS AND ACCEPTING SUGARPLUM PHASE 1 CONDOMINIUMS"



PHASED DEVELOPMENT

THE DEVELOPMENT OF THE SUGARPLUM PLANNED UI DEVELOPMENT SHALL OCCUR IN PHASES. EACH PHASE W CONSIST OF BUILDINGS AND OTHER IMPROVEMENTS CONSTRUCT ON ONE OR MORE LOTS. PHASE I SHALL CONSIST OF A SING BUILDING CONSTRUCTED ON LOT 2, CONTAINING SIX CONDOMINI UNITS. SUBJECT TO MODIFICATION BY SORENSON RESOURC COMPANY, ITS SUCCESSORS OIR ASSIGNS, IT IS ANTICIPATED TH THE VARIOUS PHASES IN THE DEVELOPMENT SHALL BE AS FOLLOW

PHASE	LOTS
I	2
II	6,7
III	1
IV	8 & 9
V	3
VI	4 & 5

ANTICIPATED DWELLING DENSITY

PURSUANT TO SECTION 2.1.5 OF THE MASTER DECLARATION COVENANTS, CONDITIONS AND RESTRICTIONS OF SUGARPLUM, PLANNED UNIT DEVELOPMENT, AND THE AGREEMENT DATED JU 16, 1982, BETWEEN SORENSON RESOURCES COMPANY AND THE TO OF ALTA, NO MORE THAN 200 RESIDENTIAL UNITS SHALL CONSTRUCTED ON LOTS 1 THRU 9 AS SHOWN ON THIS PLAT. IT ANTICIPATED THAT THE NUMBER OF RESIDENTIAL UNITS TO CONSTRUCTED ON SAID LOTS 1 THRU 9, AS SHOWN ON THIS PL SHALL BE AS FOLLOWS (PROVIDED SORENSON RESOURC COMPANY, OR ANY SUCCESSOR, PURSUANT TO THE DECLARATI SHALL HAVE THE RIGHT TO REALLOCATE THE DEYSITY DEVELOPMENT AND LOCATION OF EACH LOT, SO LONG AS NO MO THAN 200 RESIDENTIAL UNITS ARE CONSTRUCTED ON LOTS 1 TH 9 AS SHOWN ON THIS PLAT OR AS AMENDED:

LOT	UNITS
1	20
2	6
3	9
4 & 5	65
8 & 9	60
6 & 7	40
A	COMMON AREA

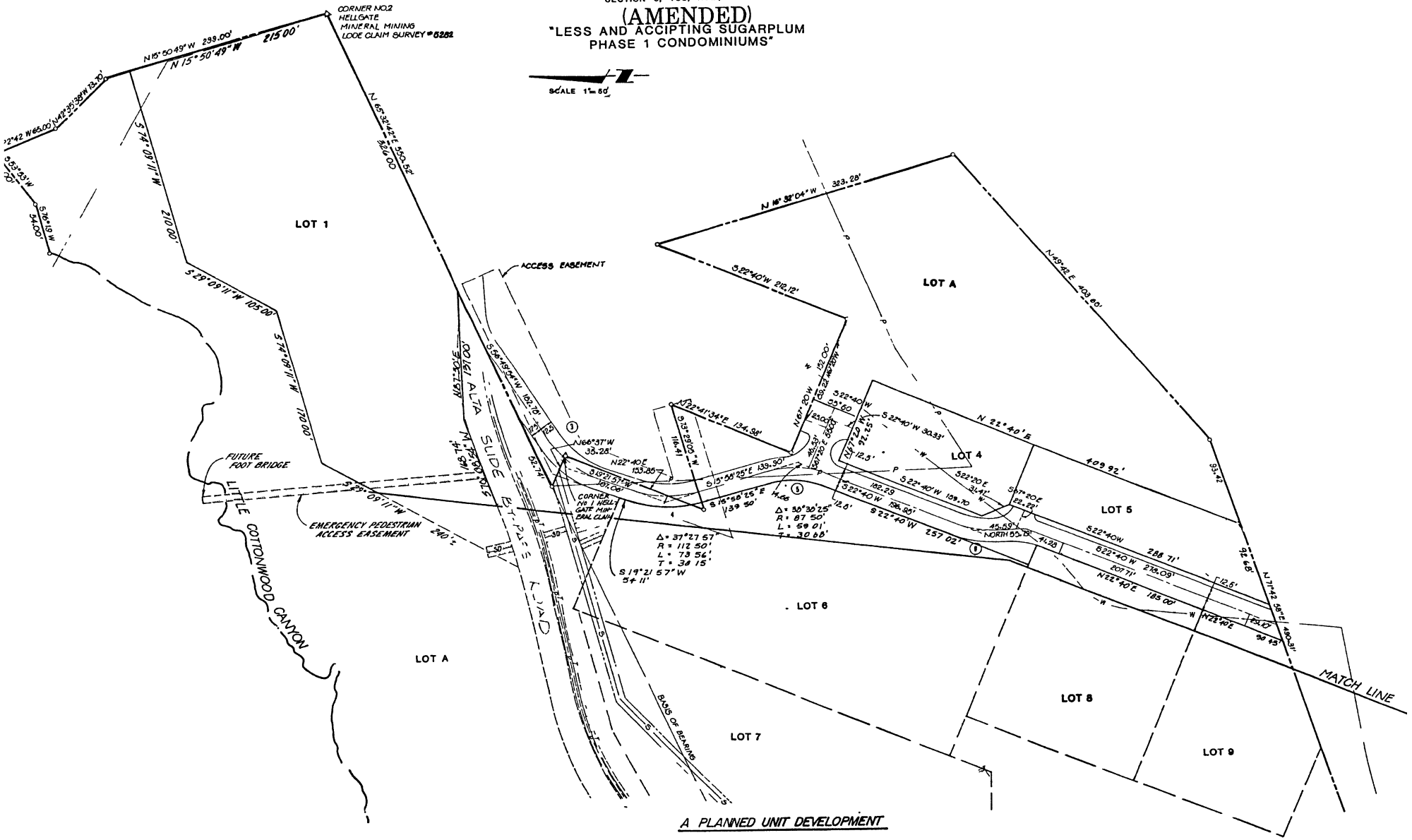
sugarplum

A PLANNED UNIT DEVELOPMENT LOCATED IN
SECTION 6, T3S, R3E, SLB&M

(AMENDED)

"LESS AND ACCIPTING SUGARPLUM
PHASE 1 CONDOMINIUMS"

SCALE 1" = 50'



A PLANNED UNIT DEVELOPMENT

CALLISTER NEBEKER & MCCULLOUGH
WILLIAM H. CHRISTENSEN (4810)
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, UT 84133
Telephone: (801) 530-7300
Facsimile: (801) 364-9127

Attorneys for Defendants MSICO, LLC.
and The Town of Alta.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association., Plaintiff, vs MSICO, LLC., a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and JOHN DOES 1 through 10, Defendants.	AFFIDAVIT OF BRIAN D. JONES, P.L.S. Civil No. 00910067 Judge: Bruce Lubeck

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

I, Brian D. Jones, being first duly sworn upon oath depose and state.

1. I am an adult over the age of 18.

2. I have been the Vice President for Thompson-Hysell Engineers during all times relevant to this case.

3. I have personal knowledge of matters set forth in the Affidavit.

4. I am a licensed land surveyor in the state of Utah and have been since 1996

5. Thompson-Hysell Engineers prepared the overlay (attached hereto) based upon the Original Sugarplum Plat and Original Amended Sugarplum Plat on file with the Salt Lake County Recorder, Entry numbers 83-10-137 and 84-11-181. It is drawn to scale and is a true and accurate depiction of the lots and juxtaposition of the various lots

5. The overlay correctly depicts and compares the changes made in the boundaries of Lots 4, 5, 6, 7, 8 and 9.

6. Further affiant sayeth not.

DATED this 4th day of FEBRUARY 2002.

THOMPSON-HYSELL ENGINEERS

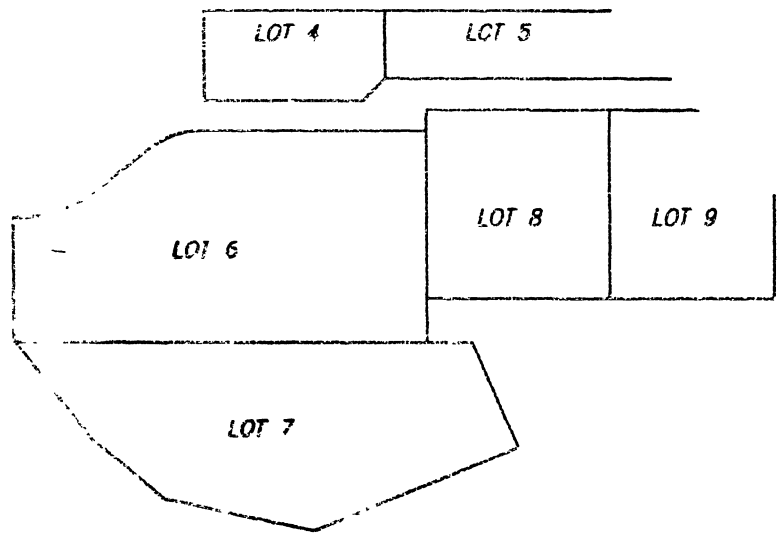
BRIAN D. JONES, P.L.S.
Vice President

Subscribed, sworn to and acknowledged before me by Brian D. Jones, whose identity is known to me or proven to me on the basis of satisfactory evidence, this 4th day of February 2002.

Notary Public
MELISSA DEMETROPOULOS
479 East Valleyview Drive
Tooele, Utah 84074
My Commission Expires
March 16, 2005
State of Utah

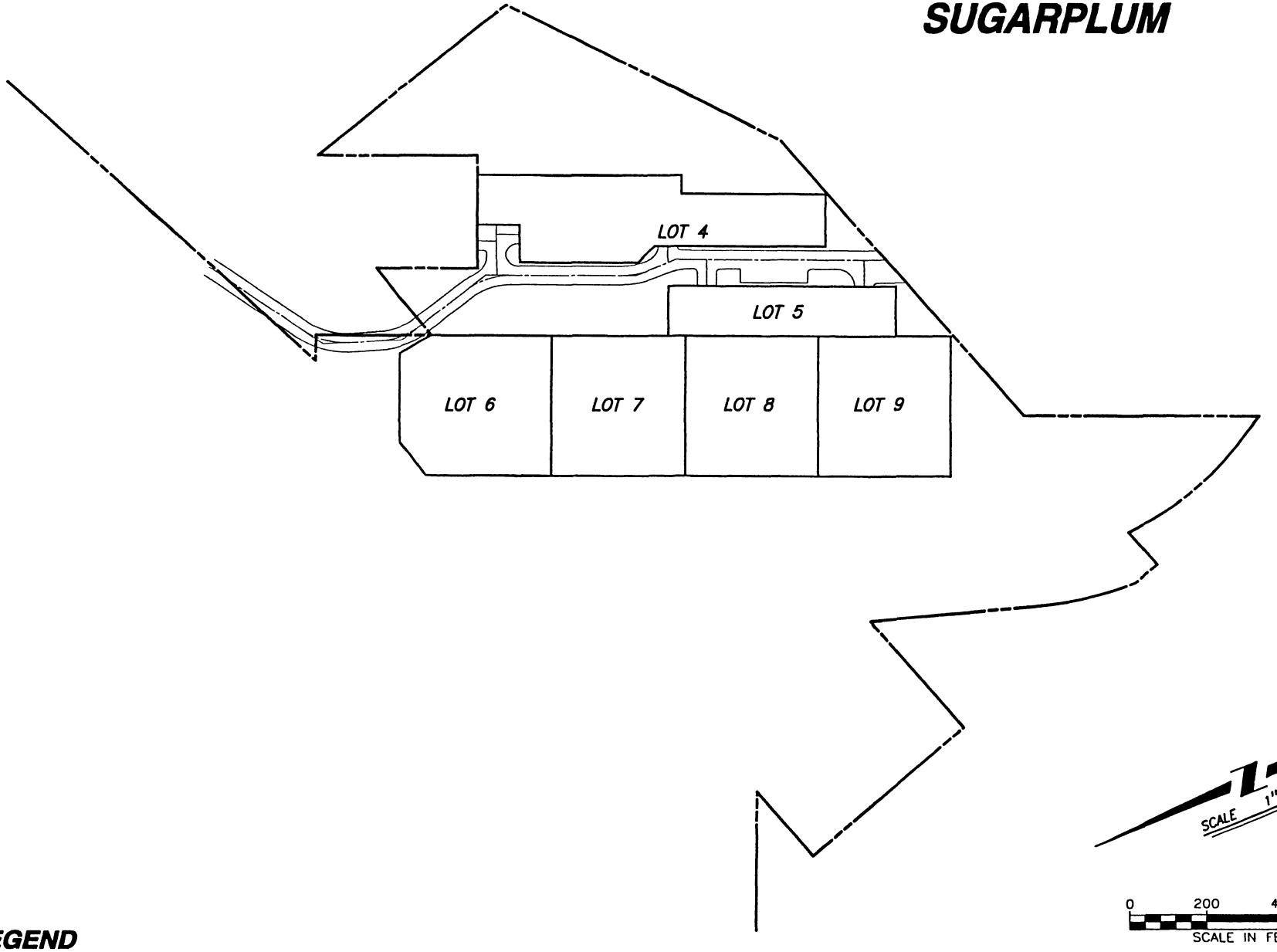
Melissa Demetropoulos
NOTARY PUBLIC

AMENDED



AMENDED LOT LINES

SUGARPLUM



SCALE 1" = 200'

0 200 400 600

SCALE IN FEET

LEGEND

LOT LINES

BOUNDARY

The View v. MSICO; The Town of Alta,
Civil No. 000910067 (Third District Court, Utah)

THOMPSON-HYSELL ENGINEERS
A DIVISION OF THE KEITH COMPANIES
960 WEST LEVOY, SUITE 100, TAYLORSVILLE, UTAH 84123 (801) 743-0696

The View Condominium Owners v. MSICO, LLC and The Town of Alta
Civil No. 00910067 (Third District Court, Utah)

COMBINED MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN
SUPPORT OF DEFENDANTS' CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT 7
DEPOSITION OF WALTER PLUMB
TAKEN ON JANUARY 29, 2002

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

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association,

Plaintiff,

-vs-

Civil No. 00910067

MSICO, LLC, a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and JOHN DOES 1 through 10,

Defendants.

Examination Before Trial held at 658 Winton Road, Rochester, New York on January 29, 2002, commencing at 10:20 a.m.

DEPOSITION OF: Walter J. Plumb

REPORTED BY: PATRICIA A. FAGAN

APPEARANCES.

PARRY, ANDERSON & MANSFIELD
Appearing on behalf of the Plaintiff
60 East South Temple, Suite 1270
Salt Lake City, Utah 84111
BY: ROBERT E MANSFIELD, ESQ
(Via Telephone)

CALLISTER, NEBEKER & McCULLOUGH
Appearing on behalf of the Defendants
10 East South Temple
Salt Lake City, Utah 84133
BY: WILLIAM H. CHRISTENSEN, ESQ.

VIDEOGRAPHER: LEGAL VIDEO ASSOCIATES
2604 Elmwood Avenue
Rochester, New York 14618
BY: MICHAEL CAPEHART

INDEX OF WITNESSES

MR. CHRISTENSEN: Let the record reflect this is the time and place for the videotaped deposition of Walter J. Plumb, III. We're at 658 Winton Road, Rochester, New York, which is the case called The View Condominium Association, plaintiff, versus, MSICO, LLC; the Town of Alta, political subdivision of the State of Utah.

I am William Christensen, on behalf of the defendants. By telephone we have Robert E. Mansfield of Parry, Anderson & Mansfield, Salt Lake City, Utah on behalf of the plaintiff condominium association.

Rob, before we go on the video record, pursuant to the Utah rules of civil procedure, objections as to the form of the question should be made now giving parties the opportunity to correct questions if necessary, other than that, objections as to relevance and otherwise would be reserved consistent with Rule 32.

MR. MANSFIELD: That's correct. And Bill, could you speak up a little bit, you're a little weak there.

MR. CHRISTENSEN: Okay, I'll try to --

MR. MANSFIELD: That's good there.

MR. CHRISTENSEN: Okay, I'll speak towards the phone. Now if the witness is ready and the court reporter is ready and Mike the videographer is almost ready; when he's ready, we'll go on the record.

THE VIDEOGRAPHER: Okay. We're now on the record. Today's date is January the 29th, 2002, the time is 10:22 east coast time. The video company is Legal Video Associates located at 2604 Elmwood Avenue, PMB331 Rochester, New York, 14618. The videotape operator is Mike Capehart. We are located at 658 Winton Road, Rochester, New York, 14618. Our deponent is Walter J. Plumb.

This deposition is taken on behalf of the defendant. The case caption reads as follows: In the Third Judicial District Court of Salt Lake County, State of Utah. The View Condominium Owners Association, a Utah condominium association, plaintiff, MSICO, LLC, a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and John Does 1 through 10, defendants. Civil Number 00910067.

Would the parties present please identify themselves for the record. The court reporter may

the market at any one time.
Q. Okay. And with respect to the legend in the upper right-hand corner, it speaks to allocation of units; why did Sorenson Resources include that language on this plat?
A. On the original master plan that was prepared by Fowler, Ferguson, an architectural firm in Salt Lake City, these were assigned densities to each parcel in accordance with the original master plan that was submitted to the town.
Q. All right. And does the legend in the upper right-hand corner give the developer any flexibility with respect to unit allocations?
A. Yes, the developer could reallocate units among the various parcels as long as they didn't exceed 200 units.
Q. All right. And Mr. Plumb, did there come a time when the Sugarplum plat was changed?
A. Yes.
Q. And can you explain why the plat you're looking at right now was eventually changed?
A. There were several reasons why the plat was changed, but the first being we did not like the architecture that was originally prepared by Fowler, Ferguson, which was a design much like the existing Snowbird architecture at the resort, which is primarily concrete and glass. Secondly, we wanted to go to a lower rise format that would have

less impact on the hillside, and not only be more visually appealing, more appealing to buyers. We fired Fowler, Ferguson, the architectural firm, having been dissatisfied with their design.
Q. All right. Now, before we leave the Sugarplum plat that you're looking at, it provides different densities for different lots in the upper right-hand corner; do you see that?
A. Yes.
Q. Now, it also with respect to Lot 5 provides for what in terms of units?
A. Well, Lot 5 had parking and commercial development of the air space above the parking.
Q. All right. And before we're through with that exhibit, Mr. Plumb, I wonder if we could show it just quickly to the video operator so the jury can see.
A. (Witness complies.)
Q. Thank you. Let me hand you another document that looks similar that is different.

MR. CHRISTENSEN: Now, Mr. Mansfield, I'm handing the witness a two-page blueprint type document entitled Sugarplum amended.

Q. And I'll hand it to you, Mr. Plumb, and ask you if you've seen this or a copy like this before.

A. Yes.
Q. And can you tell me just generally what's the difference between the Sugarplum plat you were looking at before and this amended plat?
A. The amended plat has Lot 6 and 7 as larger parcels to accommodate a low rise condominium development. It has the elimination of Lot 5 as a parking structure, and instead, it became a parcel that was located on the southern part of a new road which would be constructed on the southern portion of Lot 8 and 9 and Lot 6.
Q. All right. And directing your attention to the lower right-hand corner of the Sugarplum amended plat, can you tell whether or not this document was recorded with the Salt Lake County recorder?
A. Yes, it was recorded by myself.

MR. CHRISTENSEN: I would move the admission of the Sugarplum amended plat as an exhibit and would ask the court reporter at trial to mark it next in order.

Q. Now, with respect to the legend in the upper right-hand corner of the page you're looking at there, Mr. Plumb, what changes occurred between the original Sugarplum plat and the amended plat?
A. I believe the phasing order was changed, density was

reallocated on the anticipated dwelling density, which -- and the parking structure was eliminated.
Q. All right. And can you tell us the date the amended plat was recorded?
A. Yes. It was 11/26/84.
Q. So November 26th of 1984. So a little more than a year after the original plat was recorded, the amended plat was -- was recorded?
A. Yes.
Q. Now, calling your attention to Lots 4 and 5, and 8 and 9, why -- why was it that the -- that the change between the original plat and the amended plat was desired by the developer of Sorenson Resources Company?
A. It was desired because on the upper part, Lot 4 and 5, they became a lower rise building, and Lot 6 and 7 became lower -- became stand-alone condominiums. And Lot 1 also became a building that was -- that could -- could in fact be a lower rise building.
Q. All right. And can you explain why on the restrictive legend in the upper right-hand corner of the amended plat, why was the prior mention of commercial use and that parking structure omitted in the amended plat?
A. There was a -- Along with the submittal of the plats, in order to obtain the town's approval, there was also a

modified master plan that was sent into the town with various architecture on it. And with the change in building structures, there no longer was the -- the upper buildings were all located on the south side of Lot 6, 8, and 9. With that change, there was no longer a necessity for a parking structure.

Q. Before we leave our discussion of the Sugarplum amended plat, perhaps we can hold it up so that the jury can see it on video.

A. (Witness complies.)

Q. And Mr. Plumb, there's some pencilled writing on this copy, I apologize for that; that's not your handwriting, is it?

A. No.

Q. Do you recognize whose it is?

A. No.

Q. Okay. Now, did there come a time when Lot 8 at the Sugarplum P.U.D. was sold?

A. Yes.

Q. And do you recall to whom Lot 8 was sold? And let me hand you --

MR. CHRISTENSEN: Mr. Mansfield, I'm now handing the witness a document entitled special warranty deed.

Q. And Mr. Plumb, I'll ask you if you recognize that document.

MR. MANSFIELD: Bill, was that in the group of things you gave me?

MR. CHRISTENSEN: I believe it was.

A. Yes, I recognize this document.

MR. CHRISTENSEN: Let's wait a minute and make sure Mr. Mansfield can find it first.

MR. MANSFIELD: I don't have that, Bill.

MR. CHRISTENSEN: Let's go off the record. Rob, can we go off the record?

MR. MANSFIELD: Yeah.

THE VIDEOGRAPHER: We're now going off the record. Today's date is January 29th. The time is 10:47. We are going off the record.

(Whereupon an off-the-record discussion was held.)

THE VIDEOGRAPHER: We're now going on the record. Today's date is January 29th, 2002. The time is 10:50. We are now back on the record.

Q. All right. Mr. Plumb, did there come a time when Sorenson Resources Company negotiated with a fellow named Kevin Watts concerning Lot 8 at Sugarplum?

A. Yes.

Q. Who is Kevin Watts?

A. Kevin Watts is with -- a architect, and with his family, a developer.

Q. Okay. Let me hand you a document known as special warranty deed and ask you if you've seen this document or a copy like it before.

A. Yes.

Q. And tell us what this is.

A. It's a deed from Sorenson Resources, Inc. to The View Associates Limited, a Utah limited partnership.

Q. And what's the date of this deed?

A. The date is the 4th day of January, 1985.

Q. All right. And to your knowledge, was The View Associates Limited a legal entity controlled by members of the Watts family?

A. Yes.

Q. And up at the top of the page, I'll direct your attention to the line that says recorded at the request of Russell Watts; who is Russell Watts?

A. A son of Kevin Watts.

Q. All right. And were you involved in negotiating the sale of Lot 8 to the Watts people?

A. Yes.

Q. And in connection with the sale of the -- of Lot 8 to the Watts Group, did you assist at any time in obtaining

development approvals from the Town of Alta with respect to Lot 8?

A. Yes.

Q. Okay.

MR. CHRISTENSEN: I would move the admission of the special warranty deed as an exhibit next in order.

Q. Now, with respect to the conveyance to the Watts Group, and you can keep looking at that --

A. Uh-huh.

Q. -- if you would, Mr. Plumb, was there any intention by Sorenson Resources to grant an easement for the use of Lot 5 for a parking structure for the benefit of Lot 8 which was being purchased by The View Associates, LTD?

A. No.

Q. And same -- same question; at the time Sorenson Resources sold Lot 8 to The View Associates Limited, was there an intention to create a covenant for the benefit of Lot 8 for the creation or construction of a parking structure on Lot 5?

A. No.

Q. Now, Mr. Plumb, this -- this deed, which is in early January 1985, from Sorenson Resources was only -- was less than two months after an amendment to the plat; is that

Q. And do you know whether or not the master association ever held a meeting?
A. I'm not sure of that.
Q. Okay. Now, Mr. Plumb, as a -- as a lawyer, the master declaration was based on lots as depicted on the original Sugarplum plat back in 1983, and I'll ask you if the master declaration has not been amended to coincide with the reconfigured lots, isn't it true that the master declaration and any references to the lots would be to some extent inaccurate?
A. Yes.
Q. Okay. When Sorenson Resources Company amended the Sugarplum plat back in 1984 and removed the references to a parking and commercial structure on Lot 8, did Sorenson Resources intend that the amended plat would also affect the master declaration?
A. Yes.
Q. Was there ever an intention by Sorenson Resources Company to use Lot 5 for a parking lot without residential units on it at any time from the beginning?
A. Could you restate that?
Q. Yeah. Was there ever a time when Sorenson Resources intended that Lot 5 would not have the potential for some residential construction on it?

A. Well, I think that the -- on the first plat it was going to have commercial on it above the parking.
Q. Okay. When Sorenson Resources amended the Sugarplum plat just before the sale of Lot 8 to the -- to The View Associates Limited, the Watts people, in 1985, what was the intention with respect to the -- to the master declaration?
A. That the new plat would supersede the master declaration if there was a conflict.
Q. All right. And let me direct your attention to Lot 4; you're familiar with that, it's near Lot 5. I'd be happy to show it to you.

MR. CHRISTENSEN: And Mr. Mansfield, I'm now handing the witness a demonstrative exhibit prepared by Thompson-Hysell Engineers, the front page is a transparency, and the back page is paper. The back page says Sugarplum, and the transparency says amended.

Q. I just want to hand you that, Mr. Plumb, and you probably have not seen that before. But just to direct your attention to the location of Lot 4 at Sugarplum and remind you of that. Do you recall where Lot 4 is generally located in relation to Lot 8 and Lots 5 and 9?
A. On the amended plat or on the original plat?

Q. On the amended plat.
A. Yes.
Q. And do you know -- have you ever heard that there is an easement running across Lot 4 for the benefit of Lot 8, an access easement or other right-of-way?
A. There was no such thing.
Q. Okay. Now, to your knowledge, Mr. Plumb, has the building known as The View been lived in since approximately the late 1980s?
A. Yes.
Q. And to your knowledge, does The View have parking spaces for its units?
A. Yes.
Q. And do you know whether or not any units of The View have been deemed unusable or illegal to occupy due to insufficient parking by the Town of Alta or the fire department or anybody else?
A. Not that I'm aware of.
Q. To your knowledge, has there ever been a parking structure built on Lots 4, 5, or 9 in the Town of Alta?
A. No, there has not been.
Q. And finally, Mr. Plumb, was there ever a decision made to your knowledge on how if a parking structure had actually been built on Lot 5, how it would have been paid for

vis-a-vis Lot 8 or any other lots that would have had the benefit of the use of such a parking structure?
A. We didn't really contemplate that, because when the plat was amended -- and keep in mind the -- the architecture for the new amended plat was actually provided by Kevin Watts, he actually did the master plan for the new amended plat, and there was never anything after the amendment, there was nothing contemplated for a parking structure at all on Lot 5 nor any parking on Lot 8 nor any additional parking for Lot 8 on any other lot.

MR. CHRISTENSEN: Thank you, Mr. Plumb. Your witness, Mr. Mansfield.

MR. MANSFIELD: Thank you, Mr. Christensen.

EXAMINATION BY MR. MANSFIELD:

Q. Mr. Plumb, let me have you look back at the letter dated February 27th, 1985. Do you have that in front of you?
A. Yes.
Q. And then us also -- And also if you could have in front of you the special warranty deed.
A. Yes.
Q. Do you have both of those?
A. Yes.
Q. How come the February 27th letter was given after the property was transferred to the Watts -- or to The View

Recorded at Request of Russell K. Watts, 5200 South Highland Drive, #101, SLC 84117

at _____, M. Fee Paid $_____

by_____ Dep. Book_____ Page_____ Ref:_____

Mail tax notice to Grantee Address 5200 South Highland Drive #101 Salt Lake City, Utah 84117

4044197 SPECIAL WARRANTY DEED

T-100295

[CORPORATE FORM]

SORENSEN RESOURCES, INC., also known as SORENSEN RESOURCES COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, of County of Salt Lake, State of Utah, grantor, hereby CONVEYS AND WARRANTS against all claiming by, through or under it to

THE VIEW ASSOCIATES, LTD., a Utah Limited Partnership

grantee of Salt Lake City, County of Salt Lake, State of Utah for the sum of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION DOLLARS the following described tract of land in Salt Lake County, State of Utah: SEE EXHIBIT "A" ATTACHED HERETO AND BY REFERENCE MADE A PART HEREOF

Lot 8, SUGARPLUM, a Planned Unit Development, as the same is identified in the Plat recorded August 12, 1983, as Entry No. 3830327, in Book 83-8 of Plats, at page 99 of Official Records, and in the Master Declaration of Covenants, Conditions, and Restrictionsof SUGARPLUM, a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328, in Book 5482, at pages 1173 through 1230, of Official Records.

TOGETHER WITH a right and easement of use and enjoyment in and to the Common Ares and Facilities, as described in and provided for in the said Master Declaration of Covenants, Conditions, and Restrictions of SUGARPLUM, a Planned Unit Development.

EXCEPTING all minerals in or under said land, including, but not limited to, metals, oil, gas, coal, stone and mineral rights, mining rights, and easement rights or other matters relating thereto, whether express or implied.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 4th day of January, A. D. 19 85

Attest:

_____
Secretary.

[CORPORATE SEAL]

SORENSEN RESOURCES, INC.

By _____

WALTER J. PLUM III, Secretary

BOOK 5825 PAGE 2242

STATE OF UTAH,

County of Salt Lake

On the 4th day of January, A. D. 1985 personally appeared before me and WALTER J. PLUMB, III who being by me duly sworn did say, each for himself, that he, the said is the president, and he, the said WALTER J. PLUMB, III is the secretary of SORENSEN RESOURCES, INC., a/k/a SORENSEN RESOURCES COMPANY, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said and WALTER J. PLUMB, III each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

_____
Notary Public.

My commission expires October 22, 1987 My residence is Salt Lake City, Utah

417

EXHIBIT "A" T. 100295

PARCEL 1:

Lot 8, SUGARPLUM AMENDED, a Planned Unit Development, as the same is identified in the Plat recorded November 26,1984, as Entry No. 4019736 in Book 84-11 of Plats at page 181 of Official Records, and in the Master Declaration of Covenants, Conditions, and Restrictions of SUGARPLUM, a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328, in Book 5482 at pages 1173 through 1230 of Official Records.

TOGETHER WITH a right and easement of use and enjoyment in and to the Common Areas and Facilities, as described in and provided for in the said Master Declaration of Covenants, Conditions and Restrictions of SUGARPLUM, a Planned Unit Development.

EXCEPTING all minerals in or under said land, including but not limited to metals, oil, gas, coal, stone and mineral rights, mining rights and easement rights or other matters relating thereto whether express or implied.

PARCEL 2:

A non-exclusive easement for the benefit of Parcel 1 for use and enjoyment in and to the Common Areas and Facilities of SUGARPLUM AMENDED, a Planned Unit Development, as created by and subject to the terms, provisions, covenants, and conditions contained in the Master Declaration of Covenants, Conditions and Restrictions of SUGARPLUM, a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328 in Book 5482 at pages 1173 through 1230 of Official Records, over and upon the Common Areas and Facilities as the same are defined and provided for in the said Master Declaration of Covenants, Conditions and Restrictions of SUGARPLUM, a Planned Unit Development, and as further defined and described on the Official Plat of SUGARPLUM AMENDED, a Planned Unit Development, recorded November 26, 1984, as Entry No. 4019736 in Book 84-11 of Plats at page 181 of Official Records

Excepting all minerals in or under said land including but not limited to metals, oil, gas, coal, stone and mineral rights, mining rights and easement rights or other matters relating thereto whether express or implied.

BOOK 5625 PAGE 2213
KATIE L. DIXON
RECORDER
SALT LAKE COUNTY, UTAH
JAN 29 12 24 PM '85
UTAH TITLE & ABST.
DEP

415

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association., Plaintiff, vs. MSICO, LLC., a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and JOHN DOES 1 through 10, Defendants.	AFFIDAVIT OF RUSSELL K. WATTS Civil No. 00910067 Judge: Michael K. Burton

STATE OF UTAH }

ss.

COUNTY OF SALT LAKE }

Russell K. Watts, being first duly sworn upon oath, deposes and states:

1. I am an adult over the age of 18 and have personal knowledge of the facts set forth in this Affidavit and declare that the facts set forth herein are true upon penalty of perjury.

2. On behalf to the View Associates Ltd., I was directly involved in the negotiations

with Walter J. Plumb, III of Sorenson Resources Company, for the purchase of Lot 8 at the Sugarplum Planned Unit Development in Alta, Utah. A copy of the Special Warranty Deed dated January 3, 1985 that was conveyed to the View Associates Ltd. is attached as an exhibit. It was recorded at my request by the Salt Lake County Recorder.

3. In connection with development of the project on Lot 8, known as "The View", on-site parking was designed and constructed for The View building on Lot 8 in quantities sufficient to meet the local zoning requirements. In connection with purchase of Lot 8 from Sorenson Resources Company in 1985, I never bargained for or believed that the View Associates Ltd. intended to acquire, or actually acquired, any right, easement or interests with respect to a parking facility or parking spaces on any other property at Sugarplum whether on Lot 5 or any other lot.

4. I have no recollection of ever informing any potential purchasers of units at the View, or any buyers of units, or any realtors involved in marketing units at the View that any additional parking spaces or facilities would be available to View unit owners off-site at any nearby lots or properties in Sugarplum or elsewhere.

5. With respect to snow storage and removal plans submitted in connection with the development approvals of Lot 8 in 1985, my understanding was that the designation of the adjacent Lot 9 for a snow storage area was temporary and subject to change. I never understood that Lot 9 would be permanently vacant or non-developable.

6. Further affiant sayeth not.

DATED this 20 day of March, 2002

RUSSELL K. WATTS

Appeared before me this day Russell K. Watts a person known to me or whose identity was proved upon satisfactory evidence who after being sworn upon oath did sign the foregoing Affidavit before me this 20 day of March 2002.

NOTARY PUBLIC

NOTARY PUBLIC
Tamara L. Peterson
6200 S. Highland Dr. Ste. 101
Salt Lake City, Utah 84121
Commission Expires
May 16, 2002
STATE OF UTAH

339669.1

KKI

ATTACHED
EXHIBIT

Recorded at Request of Russell K. Varga, 5200 South Highland Drive, #101, SLC 84117

at _____, M. Fee Paid $_____

By _____ Dep. Book _____ Page _____ Ref. _____

Mail tax notice to Grantee Address 5200 South Highland Drive #101 Salt Lake City, Utah 84117

4044197 # SPECIAL WARRANTY DEED T-100293

[CORPORATE FORM]

SORENSEN RESOURCES, INC., also known as SORENSEN RESOURCES COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, County of Salt Lake, State of Utah, grantor, hereby CONVEYS AND WARRANTS against all claiming by, through or under it to

THE VIEW ASSOCIATES, LTD., a Utah Limited Partnership

grantee of Salt Lake City, County of Salt Lake, State of Utah for the sum of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION DOLLARS the following described tract of land in Salt Lake County, State of Utah:

SEE EXHIBIT "A" ATTACHED HERETO AND BY REFERENCE MADE A PART HEREOF

Lot 8, SUGARFLUM, a Planned Unit Development, as the same is identified in the Plat recorded August 12, 1983, as Entry No. 3830327, in Book 83-8 of Plats, at page 99 of Official Records, and in the Master Declaration of Covenants, Conditions, and Restrictions of SUGARFLUM, a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328, in Book 5482, at pages 1175 through 1230, of Official Records.

TOGETHER WITH a right and easement of use and enjoyment in and to the Common Area and Facilities, as described in and provided for in the said Master Declaration of Covenants, Conditions, and Restrictions of SUGARFLUM, a Planned Unit Development.

EXCEPTING all minerals in or under said land, including, but not limited to, metals, oil, gas, coal, stone and mineral rights, mining rights, and easement rights or other matters relating thereto, whether express or implied.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 4th day of January, A. D. 19 85

Attest:

_____ Secretary

SORENSEN RESOURCES, INC.

By _____ President

WALTER J. FLINK, III Secretary

[CORPORATE SEAL]

STATE OF UTAH,

County of Salt Lake

On the 4th day of January, A.D. 1985 personally appeared before me WALTER J. FLINK, III and _____, who being by me duly sworn did say, each for himself, that he, the said WALTER J. FLINK, III is the president, and he, the said _____ is the secretary of SORENSEN RESOURCES, INC., a/k/a SORENSEN RESOURCES COMPANY, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said WALTER J. FLINK, III and _____ acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

_____ Notary Public.

My commission expires October 22, 1987 My residence is Salt Lake City, Utah

BOOK 5605 PAGE 2242

Sorenson Resources
340 Whitney Avenue
Salt Lake City, Utah 84115
Telephone (801) 467-1531

February 27, 1985

Alta Planning Commission
Alta, Utah 84092

Re: Snow Storage
Sugar Plum P.U.D.

Gentlemen:

The purpose of this letter is to clarify our intent with regard to snow storage at the above stated project.

During development of Lots 6 and 8 on Black Jack Road as part of our first one hundred units, snow shall be stored in in appropriate areas. Should there be any excess snow, it may be stored on Lot 9 as recorded.

We recognize that storage areas may change as to utilize the several alternatives (i.e. Snowbird property, Bipass road, etc.) that exist. Any changes shall be submitted at such time as we make applications for development in addition to our first one hundred units.

Sincerely,

Walter J. Plumb, III

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

MSI, INC., a Utah corporation, Plaintiff, vs. TOWN OF ALTA, a political subdivision of the State of Utah, Defendant.	Civil No. 960906424 Deposition of: WALTER J. PLUMB, III Volume I

* * *

Volume I of the deposition of WALTER J. PLUMB, III, was taken at the instance and request of the Defendant at the offices of Campbell Maack & Sessions, 201 South Main Street, Suite 1300, Salt Lake City, Utah, on the 23rd day of April 1998 at the hour of 9:30 a.m., before Susette M. Snider, a Certified Shorthand Reporter, Registered Professional Reporter and Notary Public in and for the State of Utah.

CERTIFIED COPY

V 2

A. Yes.

Q. And why was Lot 9 designated as a snow storage site?

A. Because the road that originates on the bypass road and goes in a curved fashion over to the Watts development, that particular road requires snow removal, and it was the easiest place to -- or the most convenient place to dump the snow over on Lot 9.

Q. And you wouldn't dispute that snow storage is a valid issue for a town like the Town of Alta up in a mountain community?

A. No. I think it's important.

Q. And Park City has similar requirements, doesn't it?

A. Yes.

Q. With respect to the snow storage designation of Lot 9, at what point did Mr. Sorenson become apprised that Lot 9 had been designated for snow storage?

A. Well, see, let me say this: I don't believe Lot 9 has been designated for snow storage. That was a temporary agreement until we either reached an agreement with Snowbird to push it over on their land or on forest service land. That was purely intended to be an interim solution.

Obviously, as the price of land escalates, in theory you could scoop the ground (sic) off the road in front of Kevin Watts's project, drive it down to the bypass road and dump it over to the side or put it on some of our common area or -- and the operator wouldn't like that because it would be a long distance to haul it between -- or if the ground was extremely valuable, I mean you could -- to be facetious, you could build a fire --

Q. And melt it?

A. -- and melt it right there rather than let Lot 9 go.

And at that time I had no intention of taking what should have been -- Lot 8 was $800,000 -- taking an $800,000 lot and keeping it for snow storage just to keep Kevin Watts happy. It was okay on an interim basis until we reached a different snow storage solution.

MR. CHRISTENSEN: Let me show counsel what is Exhibit 12.

Q. And now I'll hand it to you.

MR. DALTON: This is the snow storage letter?

Q. (By Mr. Christensen) Do you recognize that letter, Mr. Plumb?

A. Yes.

Q. And that's a copy of a letter that you sent to the Town of Alta and signed?

A. Yes.

Q. And does it designate Lot 9 as snow storage in the Sugarplum PUD?

A. As -- as -- it doesn't designate it as permanent.

Q. How would you characterize it, Mr. Plumb?

A. An interim thing sort of like -- I would call this a buddy agreement. Watts doesn't want the snow -- in order to get his approval, sure, we don't want to haul it all the way down until we figure this out, but in the interim -- because my letter clearly states, We recognize the storage areas may change to utilize alternatives, Snowbird property, bypass road, et cetera, that exists, and any changes in the future will be made. So it was just purely an interim kind of thing until we found a better solution for it.

Q. Have you found a better solution for snow storage from The View, Lot 8?

A. I'm not sure. I haven't really been involved in that part of it lately. I don't -- I don't know what they've been doing.

Q. But there's no question in your mind, is

there, that Jim Sorenson knew in 1988 that there was a snow storage problem with Lot 9 when he and you entered your settlement agreement?

A. No. It's actually in the agreement. But when you say did Jim Sorenson actually know things personally? You know, he's surrounded by a -- a lot of experts, attorneys, accountants, and I'm not so sure how much he really knows about any given project at any time.

Q. Well, does Mr. Sorenson's signature appear on Deposition Exhibit No. 79, which is the settlement agreement?

A. Yeah, um-hum.

Q. So it's fair to say that Mr. Sorenson --

A. Read the agreement?

Q. Yes.

A. Um-hum. (Affirmative.) But I'm not so sure that Lot 9, a storage thing, would set any bells off, you know. And when you have an empire like he has, I'm not so sure Lot 9 would be, Honey, we've got a problem with lot 9 tonight, you know. What's going to be next?

Q. Thank you for that clarification.

But there's no question, is there, that regardless of how important or unimportant it may

TOWN OF ALTA
ALTA, UTAH
84092

363-5105 / 742-3522

March 5, 1985

Kevin Watts Architects/Planners
5200 Highland Drive Suite 100
Salt Lake City, Utah 84117

Re: Alta Planning Commission Action on Phase 3, Lot 8, Sugar Plum Planned Unit Development

Dear Mr. Watts:

This letter is to officially inform you that on February 27, 1985, the Alta Planning Commission approved the preliminary submittal for The View project, Phase 3, Lot 8 of the Sugar Plum Planned Unit Development (P.U.D.), subject to completion and approval of the following conditions. The Commission's approval authorizes you to procede with the technical documentation necessary to satisfy all of the following conditions based on the Overall Masterplan and site plan for lot 8 dated January 28, and February 21, 1985, respectively. After all of the conditions have been satisfied and signed off by the appropriate people, all of the plans/sign offs will become attachments and requirements of your Conditional Use Permit, which is necessary before application for an actual building permit. The conditions outlined below, are based on the original recommendations of the Technical Review Committee.

1) Firefighting plan. A complete plan, including all necessary map data and corresponding explanatory narrative, must be approved and signed off by Alta Fire Marshal Toby Levitt. Said plan will then be attached as a condition to the Conditional Use Permit (C.U.P.).

2) Snow Storage/Removal. With the understanding that adequate snow storage/removal has been addressed only for the first 100 units of the P.U.D. Re: the original Supreme Court Settlement Agreement, with substantial storage planned for Lot 9, the revised snow storage/removal plan with details on locations, equipment and time constraints, must be approved and signed off by Russ Harmer. Said plan will then be attached as a condition to the C.U.P.

3) Sewer and Water. Complete plans , including scheduling, bond requirements etc., must be approved and signed off by Doug Evans, Manager of the Salt Lake County Service Area #3-Snowbird. Said plans will then be attached as conditions to the C.U.P.

TOWN OF ALTA
ALTA, UTAH
84092
363-5105 / 742-3522

4) Skier Access. A skier access plan, including any required map designations, must be approved and signed off by Doug Christenson. Said plan will then be attached as a condition to the C.U.P.

5) Vegetation Plan. A detailed vegetation plan, clearly showing trees to be removed for construction and identifying all trees not to be disturbed, must be approved and signed off by John Guldner. Said plan will then be attached as a condition to the C.U.P.

6) Interlodge Hazards. A plan covering all aspects of interlodge procedures, including notification, signing, emergency food storage etc., must be approved and signed off by Marshal Eric Eliason, Fire Marshal Toby Levitt and Doug Christenson. Said plan will then be attached as a condition to the C.U.P.

7) Outside Agency Checklist. Written approvals must be submitted to the Town Office, along with any required plans, from all agencies not previously addressed on the attached checklist. All such plans will then be attached as conditions to the C.U.P.

8) Construction Site Ordinances as attached hereto.

9) All other applicable Town, County and State ordinances and conditions.

10) Payment of all required fees.

When all of the above conditions have been satisfied, please submit four (4) complete copies, in the above order, to the Town Office. All of the conditions, along with this letter, will then be enacted as the completed Conditional Use Permit for Phase 3. After completion and approval of all Conditional Use Permit requirements, application may be made with actual, detailed construction plans for the building permit.

The Commission's decision was based on the Overall Masterplan dated January 28, 1985 and the site plan for phase 3 dated February 21, 1985. The approval was also based on all of the units being integral single family units only, with no "lockout" provisions.

TOWN OF ALTA
ALTA, UTAH
84092

363-5105 / 742-3522

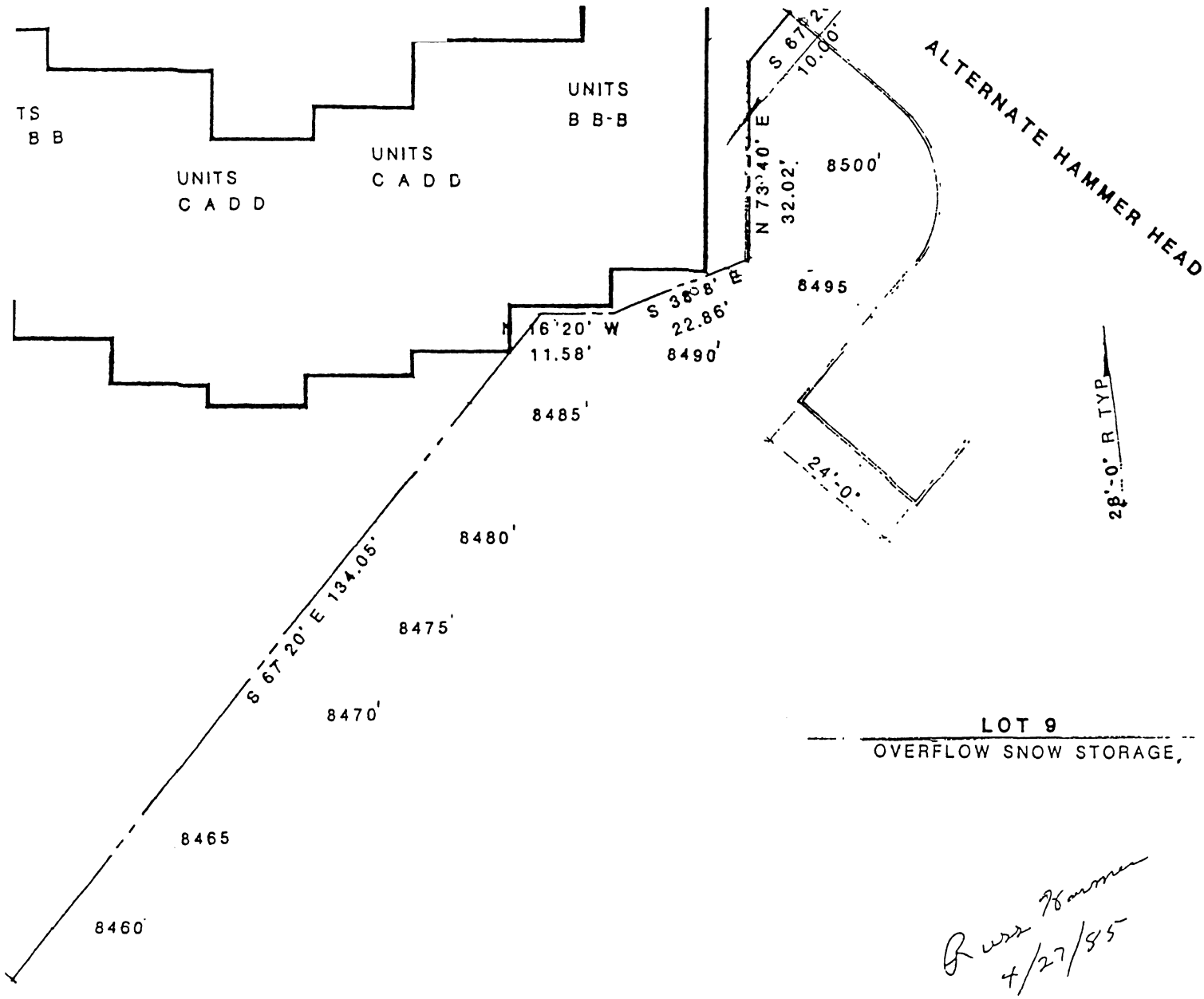
Please be aware of two items not included in the Planning Commission's C.U.P. approval, specifically related to the building and occupancy permits. 1) A full time on site inspector will be required. The inspector will be paid by the Town but the Town will be reimbursed by the developer. 2) The Town's standard avalanche hold harmless forms (copy enclosed) will be required for the project as a whole, as well as each individual unit, before the issuance of any occupancy permits.

We will all be looking forward to a successful construction season for 1985. Please don't hesitate to contact me at the Town Office if you should have any further questions.

Sincerely:

John H. Guldner
Town of Alta

cc Walter J. Plumb
Mike Swenson
Alta Planning Commission
Alta Town Council
R.W. Cummock
E.Barney Gesas
Doug Evans
Alta Technical Review Committee



Russ Hammer
4/27/95

Horn Right Corner of
11" x 24" Sheet Labelled The View at Sugarplum
[illegible] Site Plan

Top left corner of 36" x 24" Sheet (reduced to 65%)

Added per review at Sugarplum Snow storage site plan

MONSEN ENG. 88791

Note:

1. Snow removal equipment shall be a front end loader wide track doser, & pick-up with front blade (if pick-up is not available, the front end loader could be fitted with a front blade and/or bucket).

2. Overflow snow storage shall be transported to Lot #9.

3. No cover over parking area.

4. Storage calculation:

Parking area:

Usable parking area = 6152 sq. ft.
12' x (50% compaction) = 6'
6' x 6152' sq ft. = **36,912 cu. ft.**

Access road fronting Lot #8

185' x 25' = 4625 sq. ft.
12' (50% of compaction) = 6'
6' x 4625 sq ft = 27,750 cu. ft.

TOTAL 64,662 cu. ft.

Snow storage overflow for Lot #9 = 64,662 cu. ft.

Lot #9 Storage Capability

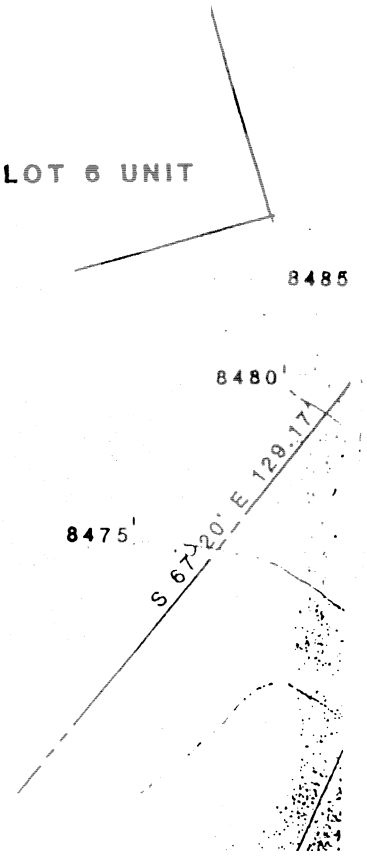
16,100 sq. ft. usable for snow storage.
16,100 x 10' average storage depth = 161,000 cu. ft.

Other Criteria

1. Elevated walkway to be ramp or flat to accommodate snow blower.

2. Expect up to 12' of snow build-up on north end of roof.

3. Snow removal equipment requires storage with electrical outlet to warm engine.



WHEN RECORDED, MAIL T

MSI, INC.

2511 South West Temple

Salt Lake City, UT 84115

4721 2
04 JANUARY 89 11:53 AM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
SORENSON DEVELOPMENT
REC BY: REBECCA GRAY , DEPUTY

Space Above for Recorder's Use

SPECIAL WARRANTY DEED

[CORPORATE FORM]

SORENSON DEVELOPMENT, INC. , a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City , of County of Salt Lake , State of Utah grantor, hereby CONVEYS AND WARRANTS against the Acts of the Grantor only to

MSI, INC., a Utah corporation

grantee of Salt Lake City, County of Salt Lake, State of Utah for the sum of TEN AND NO/100---------- DOLLARS and other good and valuable consideration the following described tract of land in Salt Lake County, State of Utah:

See Exhibit "A" attached hereto and by this reference made a part hereof.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 31st day of December , A. D. 19 88

Attest:

Secretary.

Sorenson Development, Inc.

By

President.

[CORPORATE SEAL]

STATE OF UTAH,

County of SALT LAKE } ss.

On the 31st day of December , A. D. 1988 personally appeared before me James L. Sorenson and who being by me duly sworn did say, each for himself, that he, the said James L. Sorenson is the president, and he, the said is the secretary of Sorenson Development, Inc. , and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said James L. Sorenson and each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

Notary Public.

My commission expires 04-02-91 My residence is Provo, UT

FORM 104C—WARRANTY DEED SPECIAL CORP FORM— © BEN PTG CO — 3115 SO 2000 EAST — SALT LAKE CITY

BOOK 6091 PAGE 1427

498

EXHIBIT "A"

Parcel No. 1:

Unit No. 1, SUGARPLUM PHASE I CONDOMINIUM, as the same is identified and shown on the Record of Survey Map of said project, recorded October 27, 1983, as Entry No. 3862378, in Book 83-10 of Plats, at page 137, of Official Records, as further defined and described in the Declaration of Condominiums of the SUGARPLUM PHASE I CONDOMINIUM, recorded October 27, 1983, as Entry No. 3862379, in Book 5502, at pages 1875 through 1905, of Official Records, and in the amended and restated Declaration of Condominium of the SUGARPLUM PHASE I CONDOMINIUM, recorded January 23, 1984, as Entry No. 3895871, in Book 5525, at page 781, of Official Records. TOGETHER WITH the appurtenant undivided percentage ownership interest in and to the common areas and facilities, (and the limited common areas and facilities), as the same are further defined and described in the said Declaration of Condominium of the SUGARPLUM PHASE I CONDOMINIUMS, and in the said amended and restated Declaration of Condominium of the SUGARPLUM PHASE I CONDOMINIUMS.

Parcel No. 2:

Unit 12H, as shown in the Record of Survey map for Northpoint Estates Condominiums (as Amended) appearing in the Records of the County Recorder of Salt Lake County, State of Utah, in Book No. and Page No. 81-2-49, of Plats, and as defined and described in the Declaration for Northpoint Estates Condominiums (as Amended) recorded the 24th day of February, 1981, as Entry No. 3537205, Book No. 5216, Page No. 1330.

Together with the appurtenant undivided interest in the common area.

Parcel 3:

Parcel A:

Lots 4 and 5, SUGARPLUM AMENDED a Planned Unit Development, as the same is identified in the Plat recorded November 26, 1984, as Entry No. 4019736, in Book 84-11 of Plats, at Page 181 of Official Records, and in the Master Declaration of Covenants, Conditions, and Restrictions of SUGARPLUM a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328, in Book 5482, at pages 1173 through 1230 of Official Records.

EXCEPTING all minerals in or under said land including, but not limited to, metals, oil, gas, coal, stone and mineral rights, mining rights, and easement rights or other matters relating thereto whether express or implied.

Parcel B:

A non-exclusive easement for the use and enjoyment in and to the Common Areas and Facilities of SUGARPLUM AMENDED, a Planned Unit Development, as created by and subject to the terms, provisions, covenants, and conditions contained in the Master Declaration of Covenants, Conditions and Restrictions of SUGARPLUM, a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328, in Book 5482, at Pages 1173 through 1230 of Official Records, over and upon the Common Areas and Facilities as the same are defined and provided for in the said Master Declaration of Covenants, Conditions and Restrictions of SUGARPLUM, a Planned Unit Development, and as further defined and

described on the Official Plat of SUGARPLUM AMENDED, a Planned Unit Development, recorded November 26, 1984, as Entry No. 4019736, in Book 84-11 of Plats, at Page 181 of Official Records.

EXCEPTING all minerals in or under said land including, but not limited to, metals, oil, gas, coal, stone and mineral rights, mining rights and easement rights or other matters relating thereto whether express or implied.

Parcel C:

Lot 9, SUGARPLUM AMENDED a Planned Unit Development, as the same is identified in the Plat recorded November 26, 1984, as Entry No. 4019736, in Book 84-11 of Plats, at Page 181 of Official Records, and in the Master Declaration of Covenants, Conditions, and Restrictions of SUGARPLUM a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328, in Book 5482, at pages 1173 through 1230 of Official Records.

EXCEPTING from said Lot 9 the following described property:

BEGINNING at a point which is South 316.99 feet and East 713.77 feet from a 2" steel pipe placed in the rock kern of Corner #2 of the Black Jack Mining Lode Claim, Survey #5288, said claim corner being located South 32 degrees 13 minutes 19 seconds West 3377.23 feet, more or less, from the Northeast corner of Section 6, Township 3 South, Range 3 East, Salt Lake Base and Meridian, and running thence North 67 degrees 20 minutes West 52.127 feet; thence South 16 degrees 20 minutes East 11.58 feet; thence South 38 degrees 08 minutes East 22.86 feet; thence North 73 degrees 40 minutes East 32.02 feet to the point of BEGINNING.

EXCEPTING all minerals in or under said land including, but not limited to, metals, oil, gas, coal, stone and mineral rights, mining rights, and easement rights or other matters relating thereto whether express or implied.

Parcel D:

A non-exclusive easement for the use and enjoyment in and to the Common Areas and Facilities of SUGARPLUM AMENDED, a Planned Unit Development, as created by and subject to the terms, provisions, covenants, and conditions contained in the Master Declaration of Covenants, Conditions and Restrictions of SUGARPLUM, a Planned Unit Development, recorded August 12, 1983, as Entry No. 3830328, in Book 5482, at Pages 1173 through 1230 of Official Records, over and upon the Common Areas and Facilities as the same are defined and provided for in the said Master Declaration of Covenants, Conditions and Restrictions of SUGARPLUM, a Planned Unit Development, and as further defined and described on the Official Plat of SUGARPLUM AMENDED, a Planned Unit Development, recorded November 26, 1984, as Entry No. 4019736, in Book 84-11 of Plats, at Page 181 of Official Records.

EXCEPTING all minerals in or under said land including, but not limited to, metals, oil, gas, coal, stone and mineral rights, mining rights and easement rights or other matters relating thereto whether express or implied.

Subject to easements, restrictions and rights of way appearing of record or enforceable in law and equity.

CALLISTER NEBEKER
& McCULLOUGH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
GATEWAY TOWER EAST SUITE 900
10 EAST SOUTH TEMPLE
SALT LAKE CITY UTAH 84133
TELEPHONE 801 530 7300
FAX 801 364 9127

November 17, 1998

The View Condominium Owner's Association
c/o P. O. Box 920025
Alta, Utah 84092

Re: *MSI, Inc. v. Town of Alta*, Utah District Court for Salt Lake County, Civil No. 96 09006424; Snow Storage Issues

Dear Ladies and Gentlemen:

The Town of Alta has been sued by MSI, Inc. in the above-styled case, concerning zoning of land near "Lot 8" of the Sugarplum P.U.D., known as the "View." Plaintiff, MSI, Inc. claims ownership of "Lot 9" of the Sugarplum P.U.D.

Be advised that "Lot 9" was designated by the developers of "The View" as a snow storage area for "Lot 8." The Town granted construction approvals for The View based upon a snow storage plan designating "Lot 9" to receive snow from "Lot 8."

MSI is taking the position in the litigation against the Town that "Lot 9" has not been validly designated as snow storage for snow removed from "Lot 8", The View. If MSI succeeds in its claim that The View's snow storage plan is invalid insofar as it designates "Lot 9" to receive snow from "Lot 8," such a result would have major implications for The View home owners.

Snow storage is a life-safety issue in Alta. The Town has no choice but to require snow not be pushed into streets or impair emergency access or traffic. If The View Condominium Owner's Association were to lose its ability to store snow on sites approved in its snow storage plan, the Town would have little choice but to take legal action to protect the public safety and welfare. That action might even include an injunction precluding occupancy of The View or portions thereof during snow periods. Of course, the Town of Alta wants to avoid such a drastic result.

The Town vigorously disputes MSI's allegation that "Lot 9" is not validly dedicated as snow storage for "Lot 8," The View.

We advise the View Home Owner's Association of the situation in the spirit of full disclosure since your rights could be affected if MSI succeeds in what the Town considers a specious claim.

Very truly yours,

William H. Christensen
Attorneys for the Town of Alta

WHC/bll

cc: Mayor William H. Levitt

Town of Alta
RESOLUTION #1999-PC-R-1

A Resolution of the Alta Planning Commission Concerning The Sugarplum Planned Unit Development

Be It Resolved by the Town of Alta Planning Commission as Follows:

1. The Town entered an Agreement in June 1982 with Sorenson Resources Company concerning some real property located up-canyon from the Snowbird Resort. The 1982 Agreement provided for various performances by both parties with respect to development of the property. The land is generally known as "Sugarplum."

2. The property was, and is, zoned FM-20. The Agreement included conceptual approval of a planned unit development of four buildings, each with 50 single family condominium units, subject to further refinements by the Developer and subject to the Town's regular land use ordinances and processes. The P.U.D. was to be completed in phases, and the Agreement provided for the construction of 100 units prior to an impact analysis after which up to a possible 100 additional units could be constructed. It is important to note that the Agreement only guaranteed 100 units. Under the Agreement, any additional units would be dependant upon the results of the impact analysis with the possibility of construction up to a maximum of 200 units.

3. The Agreement, ¶ 4, provided that "future development . . . , after completion of Phases I and II described hereinbelow will be subject to analysis by the Town and its planning commission of the impact of said Phases I and II as developed in accordance with review procedures established by Salt Lake County and adopted by the Town, may be impacted and restricted by any one of the following factors: * * *

f) Other relevant items of public safety, health and welfare."

4. The Planning Commission, pursuant to the language of the 1982 Agreement, in fulfilment of its obligation to examine the impacts of the Sugarplum Planned Unit Development, has commissioned a study by independent consultants to advise the Commission. Bonneville Research, Evolution Planning & Development and Dames & Moore have submitted an analysis report dated May 17, 1999 ("Analysis")[1]. The Commission has referred to, reviewed and considered the Analysis in making this

---

[1] A copy of the May 17, 1999 Sugarplum P.U.D. Analysis Prepared for Town of Alta is available for inspection at the Town's offices during normal office hours.

Resolution, but does not solely rely upon the Analysis. The Commission has taken comment and received input and recommendations from the consultants, the developer, the public and the Town Staff, and held public hearings, (including May 25,1999) pursuant to published notice, on the Sugarplum P.U.D. impact analysis

5. With respect to further development of the Sugarplum P.U.D., the Commission notes that "other relevant items of public safety, health", ¶ 2(f) in the 1982 Agreement, is essential to consideration of further development proposals. Prominent among other items relevant to the subject P.U.D. include: The Commission notes that the existing development of the P.U.D. does not resemble in any way the depiction attached to the 1982 Agreement. After the Agreement was signed in 1982, at the request of the developer, the concept shown in the 1982 Agreement was abandoned and changed from four buildings, containing 50 single family units each, to a dispersed "village style" planned unit development consisting of numerous buildings, in which each unit would be, in the words of the developer, bigger, lower and more spread out than the individual units in the four building plan. This changed concept utilized the majority of the developable land while radically changing the previously agreed-upon concept, but the developers chose not submit and obtain approval for a comprehensive site plan for all phases of the entire P.U.D. and instead proposed conceptual plans on a phase-by-phase basis to this Commission. The Commission accommodated the developer's request to abandon the original conceptual scheme and it accommodated numerous requests to vary from the original phasing depicted and described in the 1982 Agreement. In evaluating future development proposals, the Commission must consider the dispersed development design that has actually been built on the subject P.U.D. In evaluating any further development proposals, the Commission would consider the compatibility of further development with existing development patterns in and near the P.U.D. along with other relevant factors.

6. The Analysis indicates that a significant amount of the vacant Sugarplum P.U.D. acreage appears to be on slopes of 30% or greater. The Town's zoning ordinances have identified slopes of 30% or greater as unsuitable for development. The Analysis, pages 20-23, also concludes that development on slopes of 30% or greater would be unwise. This Commission, has not knowingly ignored, or waived, the 30% slope restriction in other building approvals in the Town. During the long history of the development of this P.U.D., this Commission has repeatedly advised the developers of the Town's 30% slope ordinance. Proposals for further development at the Sugarplum P.U.D. must consider the topography of proposed building sites and the applicable slope ordinance.

7. Snow storage is a major life-safety and road traffic issue everywhere in Alta because of the extreme snowfall. The Commission notes that prior approvals given to the Sugarplum P.U.D. developers were conditioned upon adequate snow removal and storage plans. Some of the Sugarplum P.U.D. snow storage plans

approved the storage of snow on what is now vacant land in the Sugarplum P.U D For example, as a condition of approval for the development of Lots 6, 7 and 8, Lot 9 was committed for snow storage by the developer until such time as other adequate snow storage areas are provided on-site and without crossing the By-Pass Road Any further development at the Sugarplum P.U.D. would be contingent on adequate snow storage plans. Any proposals for further development at Sugarplum must also adequately consider other elements affecting the public health, safety and welfare, including but not limited to, conservation of soil and water, vehicle access, landscaping, views, re-vegetation, etc.

8. The Commission concludes that there appears to be potential for development of a maximum of approximately 10 additional units within the boundaries of the Sugarplum P.U.D. Such density is consistent with the overall density at the P.U.D. to date. Any further development would be subject to compliance with Town ordinances, planning criteria and procedures, including those mentioned above. The Commission will entertain development proposal(s) for the Sugarplum P.U.D. up to the maximum additional units and expeditiously evaluate the same in accordance with the controlling Town ordinances and laws and will consult and consider the Impact Analysis in its review of any further development proposals in connection with the Sugarplum P.U.D.

9. Given the history of this P.U.D. and the substantial amount of the Commission's limited time devoted to analyzing proposals concerning this project since 1982, the Commission expresses its desire that the P.U.D. achieve final completion with a minimum of further time from this Commission. The Commission will consider a proposal for development in accordance with the foregoing and the applicable laws and ordinances.

10. In accordance with Town ordinance section 22-10-2(6), this decision may appealed to the Alta Town Council within 10 days from date of the signature of the Chairman hereof.

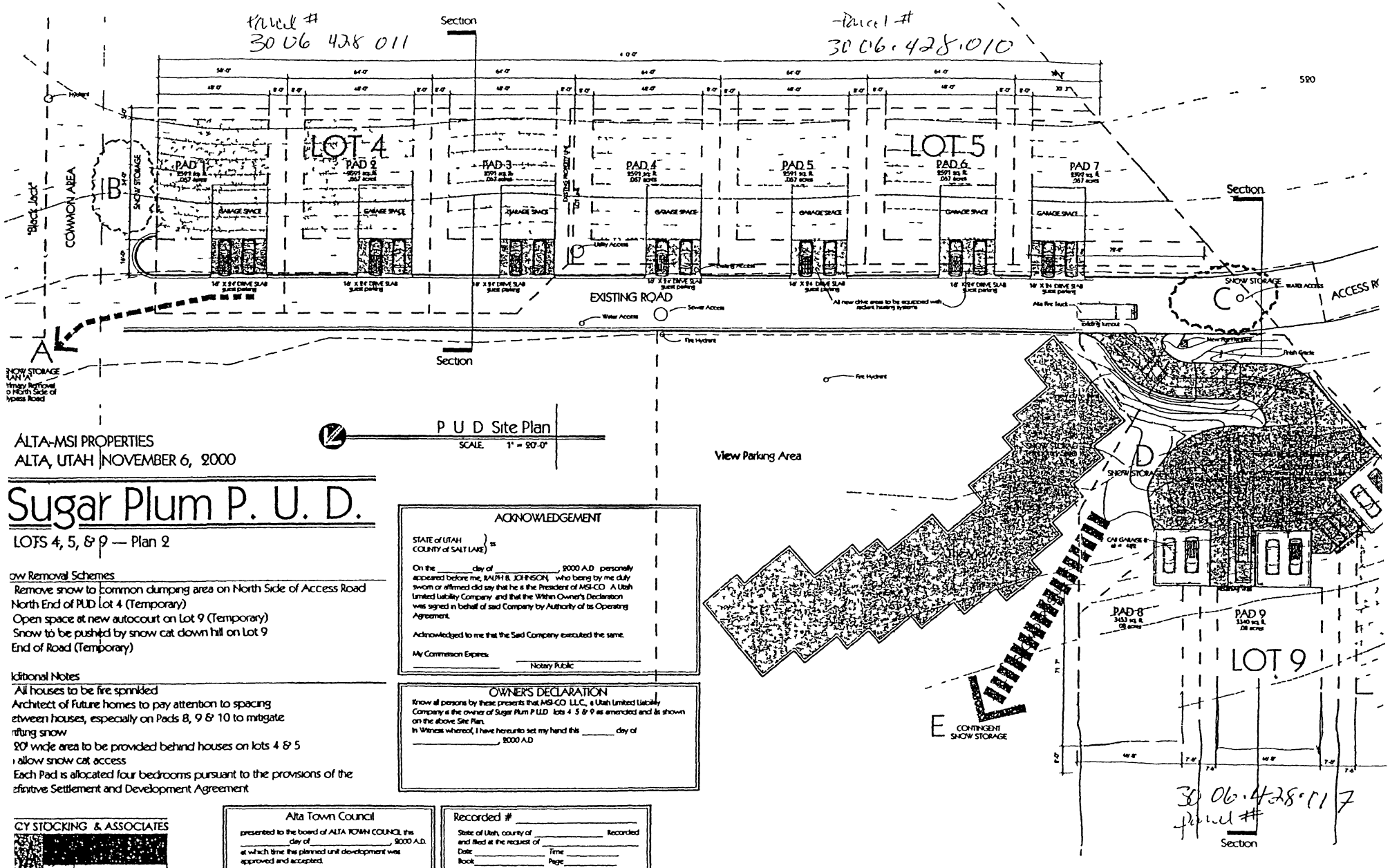
ADOPTED BY THE ALTA PLANNING COMMISSION ON THIS 27 day of Aug., 1999

By:

For the Alta Planning Commission

:\ODMA\MHODMA\IMANAGE;252858,4August 23, 1999 (10:10AM)

917



P U D Site Plan
SCALE 1" = 20'-0"

ALTA-MSI PROPERTIES
ALTA, UTAH NOVEMBER 6, 2000

Sugar Plum P. U. D.

LOTS 4, 5, & 9 — Plan 2

ow Removal Schemes

Remove snow to common dumping area on North Side of Access Road
North End of PUD Lot 4 (Temporary)
Open space at new autocourt on Lot 9 (Temporary)
Snow to be pushed by snow cat down hill on Lot 9
End of Road (Temporary)

ldítional Notes

All houses to be fire sprinkled
Architect of Future homes to pay attention to spacing
etween houses, especially on Pads 8, 9 & 10 to mitigate
rifting snow
20' wide area to be provided behind houses on lots 4 & 5
allow snow cat access
Each Pad is allocated four bedrooms pursuant to the provisions of the
efinitive Settlement and Development Agreement

ACKNOWLEDGEMENT

STATE of UTAH)
COUNTY of SALT LAKE) ss

On the _____ day of _____, 2000 A.D. personally appeared before me, RALPH B. JOHNSON, who being by me duly sworn or affirmed did say that he is the President of MSI-CO A Utah Limited Liability Company and that the Within Owner's Declaration was signed in behalf of said Company by Authority of its Operating Agreement.

Acknowledged to me that the Said Company executed the same.

My Commission Expires: _____ Notary Public

OWNER'S DECLARATION

Know all persons by these presents that MSI-CO LLC, a Utah Limited Liability Company is the owner of Sugar Plum P UD lots 4 5 & 9 as amended and as shown on the above Site Plan.
In Witness whereof, I have hereunto set my hand this _____ day of _____, 2000 A.D

GY STOCKING & ASSOCIATES
ARCHITECTS

Alta Town Council

presented to the board of ALTA TOWN COUNCIL this _____ day of _____, 2000 A.D. at which time the planned unit development was approved and accepted.

Attested—Alta Town Clerk Alta Town Mayor

Recorded # _____

State of Utah, county of _____ Recorded and filed at the request of _____
Date _____ Time _____
Book _____ Page _____

Salt Lake County Recorder

Michael O. Leavitt
Governor
Thomas R. Warne
Executive Director
John R. Njord
Deputy Director

State of Utah
DEPARTMENT OF TRANSPORTATION

James C. McMinimee, Director
Region Two
2010 South 2760 West
Salt Lake City, Utah 84104-4592
(801) 975-4900
FAX: (801) 975-4913
INTERNET: www.sr.ex.state.ut.us

May 24, 2000

Mr. Justin Barney
MSI
165 South Temple, STE 300
Salt Lake City, UT 84101

Dear Mr. Barney:

I have review your letter dated May 3, 2000 asking Mr. George Priskos for permission to push snow across the Alta Bypass road. I see no problems with you proposal given the following conditions:

1) You are responsible for any and all traffic control needed during your operation.
2) Traffic is not inhibited.
3) You are responsible to obtain permission from any property owner that your snow may encroach.

You will need to follow the permitting process that we have established for people who want to work within the UDOT right-of-way; and a permit will be required each year. Please contact Francine Rieck for an appointment at (801) 975-4810 to obtain a permit.

Thank you for your cooperation and good luck with your project.

Sincerely,

Randall R Park

Randall R. Park, P.E.
Region Operations Engineer

RRP/ser

cc: Fran Rieck
George Priskos

MSI

May 3, 2000

Utah Department of Transportation
Attention: George Priskos
6601 South 3000 East
Salt Lake City, Utah 84121

RE: Sugarplum Development

Dear Mr. Priskos:

In following up to our telephone conversation today I am writing you regarding our snow storage plan for the development of Lots 4, 5, and 9, Sugarplum P.U.D., as amended. The Sugarplum development is on the western boundary of Alta in Little Cottonwood Canyon. Our plan designates snow storage areas within the confines of these lots. In the event of conditions requiring additional snow storage we will utilize an area across the Alta Bypass Road. I met with Virgil of your office at the site an discussed our plan with him. Virgil commented that the current practice at Sugarplum is to occasionally store snow at this location and indicated that his only concern was that the snow be stored beyond the white painted lines on the road so that the snow piles do not narrow the traffic lanes. He said that there is more than adequate space for the snow at this location.

You may contact me if you have any questions regarding this matter.

Please acknowledge your approval of our plan by signing a copy of this letter and returning it to me in the enclosed, self-addressed, stamped envelope.

Thank you.

Sincerely,

Justin Barney

Justin Barney
Property Administrator

Approved by UDOT:

By: See attached Letter
Print Name:

Town of Alta
RESOLUTION #2000-R-9

A Resolution of the Alta Town Council Concerning Settlement of the legal action *MSI, Inc. v. Town of Alta* Civil No. 96-0906424 and the Sugarplum Planned Unit Development

WHEREAS, The Town of Alta annexed certain lands located up-canyon from the Snowbird Resort and in connection therewith executed an Agreement in June, 1982 with Sorenson Resources Company concerning the annexed land limiting the number of potential housing units to a maximum of 200 single family, non-time-share units. The approximately 25 acres of land is generally known as "Sugarplum." The 1982 Agreement provided that an interim impact analysis would be conducted after construction of approximately 100 units to consider the capacity and suitability for additional development, if any.

WHEREAS, MSI, Inc., as a successor in interest to Sorenson Resources, Co., sued the Town of Alta in Utah District Court claiming that it is entitled to develop 99 units on the subject property and demanding that the impact analysis be conducted.

WHEREAS, The Planning Commission issued Resolution #1999-PC-R-1[1] *concerning the Sugarplum P.U.D. interim impact analysis and finding that approximately 10 more units could be built on the property subject to planning laws and regulations.*

WHEREAS, MSI, Inc. appealed the Alta Planning Commission's Resolution #1999-PC-R-1 which was affirmed by the Town Council after public hearing MSI's appeal on November 10th, 1999. Settlement discussions occurred between the parties and proposals submitted.

WHEREAS, The Alta Planning Commission held two public hearings: October 3rd and 24th, 2000 concerning a proposed settlement of the case involving some limited development on the subject lands. The hearings including discussion of proposed settlement terms, a proposed Memorandum of Understanding, depictions of proposed building plans, the interim impact study, vegetation studies, snow storage and removal plans, slope analysis. The Planning Commission took public comment, deliberated and gave input and suggestions to the developers concerning the proposed development plans.

WHEREAS, The Town of Alta's Technical Review Committee evaluated the proposed development plans including snow storage and removal plans submitted by

[1] A copy of Planning Commission Resolution #1999-PC-R-1 is attached hereto.

the developer.

WHEREAS, A closed meeting to discuss the MSI v. Town of Alta litigation was conducted by the Town Council with legal counsel in accordance with state law pursuant to notice on November 9th, 2000. Public hearing was held on Thursday, November 9th, 2000 pursuant to posted and published public notice concerning a proposed Definitive Settlement Agreement. Copies of the proposed Definitive Settlement Agreement were available to persons attending the hearing. The Town Council considered the pros and cons of resolving the lawsuit. Staff comments and recommendations were received. Citizen input was taken and statements were made concerning the terms of and consequences of the proposed settlement and resulting development potential. After due deliberation:

Be It Resolved by the Town of Alta Town Council as Follows:

1. Because the Council concludes that settlement of the MSI v. Alta lawsuit is in the best interests of the citizens of the Town of Alta, and because the limited development allowed for in the Definitive Agreement would protect the health, welfare and safety of the residents of the Town of Alta, the Mayor is authorized to execute the submitted proposed Definitive Settlement and Development Agreement after changes have been made to the text of the Agreement as articulated by the Council during the hearing concerning paragraphs 1.1 (maximum of 4 bedrooms per pad); 1.3 (35 foot height limitation); 4.1 (expansion of MSI's defense obligations in the event of lawsuits resulting from the subject development).

ADOPTED BY THE ALTA TOWN COUNCIL ON THIS 9 day of November, 2000

By:

William H. Levitt
Mayor William H. Levitt

ATTEST:

Kate Black
Town Clerk

[SEAL]

Definitive Settlement and Development Agreement

THIS DEFINITIVE SETTLEMENT AND DEVELOPMENT AGREEMENT (hereinafter, the "Definitive Agreement") is entered into this 9 day of November, 2000, by and between **MSI Co., LLC**, a Utah limited liability company (formerly known as "MSI, Inc." and hereainfter referred to as "MSI") and **The Town of Alta**, a political subdivision of the State of Utah ("Alta").

Recitals

WHEREAS, approximately 25 acres of land known as the Sugarplum property was originally located within the boundaries of Salt Lake County and an annexation dispute with accompanying litigation arose concerning the proposed annexation of the Sugarplum property into Alta,

WHEREAS, Alta and Sorenson Resources Company, as the owner of the Sugarplum property at the time, were parties to a June 16, 1982 Agreement (the "Agreement") that resolved the annexation dispute and permitted annexation and development of what has become known as the Sugarplum Planned Unit Development ("Sugarplum PUD") under certain general conditions set forth in the Agreement;

WHEREAS, five phases of development have occurred to date within the Sugarplum PUD, with such development consisting of 100 or more approved units, all of which were developed and constructed pursuant to the terms of the Agreement and under the provisions of applicable law and ordinances;

WHEREAS, a Sugarplum PUD Amended Plat (the "Amended Plat") was duly recorded with the Salt Lake County Recorder on November 26, 1984 and shows anticipated dwelling densities for each "lot" or phase within the Sugarplum PUD;

WHEREAS, MSI is the current owner of Lots 4, 5 and 9 within the Sugarplum PUD, having succeeded to the title by mesne conveyances and also being, in other respects, successor in interest to the rights of Sorenson Resources Company with respect to the Agreement and the Sugarplum PUD with respect to the development therein of Lots 4, 5 and 9;

WHEREAS, MSI commenced suit against Alta on or about September 11, 1996 in an action styled MSI, Inc. v The Town of Alta, Civil No. 960906424 (the "Action"), which is currently pending in the Third Judicial District Court in and for Salt Lake County, State of Utah (the "Court");

WHEREAS, Alta has denied the allegations in the Action and maintains, notwithstanding the allegations to the contrary, that it has acted in accordance with the terms of the Agreement and all applicable land use ordinances, laws and regulations;

WHEREAS, Alta has now conducted and completed all aspects of the impact analysis that the Agreement contemplated to occur upon completion of the first 100 units of the Sugarplum PUD and Alta has concluded and is willing to commit and agree with MSI that there are no conclusions found in the said impact analysis that would, in any way, give rise to any basis for an impediment or objection to the development of ten (10) single-family luxury homes that is proposed by MSI with respect to Lots 4, 5 and 9, as more fully detailed hereinafter;

WHEREAS, Alta and MSI have previously executed a Memorandum of Understanding contemplating and setting forth the principal term and provisions of a compromise and settlement arrangement (the "Memo of Understanding"); and

WHEREAS, the parties now desire to fully implement the Memo of Understanding and complete a definitive agreement, merging the Memo of Understanding into such definitive agreement and finally compromise their differences, settle the Action and eliminate any confusion or disagreement concerning either their respective rights under the Agreement or the development of "Lots" 4, 5 and 9, it being expressly understood that the subject settlement is a compromise of disputed claims and that the consideration provided for herein may not be construed to be an admission by either party of any liability claimed in the Action;

WHEREAS, the parties are exchanging mutual consideration described herein that will benefit the public interest by development and other approvals that lower the density of land uses on the subject property and within the Sugarplum PUD, thereby fostering uses that are more compatible with the development patterns already existing within the Sugarplum PUD than might otherwise occur if the potential densities described in the Agreement and otherwise provided in the Amended Plat were to be developed to the maximum potential provided in either the Agreement or the Amended Plat;

AGREEMENT

NOW THEREFORE, in consideration of the foregoing recitals and of the mutual covenants, promises and agreements hereinafter set forth, the parties contract and agree as follows:

Section 1. Development Scope and Detail. Alta covenants and agrees that, subject to the provisions and conditions set forth in this Definitive Agreement, MSI is entitled to develop ten (10) building pads (an aggregate total) on Lots 4, 5 and 9 in the Sugarplum PUD. For purposes hereof, a building pad shall mean the real property (including both the building footprint and the surrounding yard and other open areas appurtenant to the same) for the construction of single-family luxury homes with attached or detached garages and other associated improvements ("Building Pad" or, where more than one is referenced, the "Building Pads"). In the aggregate, the total number of bedrooms and "guest rooms" (as that term is defined in the Alta Zoning Ordinance in effect on the date hereof)(for all purposes arising hereafter in this Definitive Agreement, the use of the term "bedroom" shall mean and include guest rooms) for all ten (10) Building Pads and the homes to be constructed thereon, shall not exceed forty (40). MSI shall retain the discretion to allocate the aforesaid aggregate bedroom building allowance amongst the ten (10) Building Pads and homes, as it sees fit in its absolute and sole discretion.

1.1 Bedroom Count Criteria and Agreements. The determination of what constitutes a "bedroom" for these purposes shall be in accordance with the procedures hereinafter set forth and such determination shall be binding upon MSI and upon Alta. In this regard, MSI and Alta agree that the "Final Site Plan" (as hereinafter defined) states the number of the four (4) bedrooms being allocated by MSI to each Building Pad and such allocation shall, except as hereinafter provided, be a final allocation of bedrooms. Nothing herein obligates MSI to be the party who constructs each of the contemplated single-family luxury homes on the subject Building Pads and for ease of reference herein, the term "Pad Owner" shall be a reference to the person or party (including MSI and any successor or assign of MSI) who ultimately submits building plans for a single-family home on a given Building Pad. When a Pad Owner submits building plans to Alta's building official, Alta shall have no obligation to approve the same if the number of bedrooms designated thereon do not conform to the number of bedrooms allocated to that Building Pad pursuant to this Definitive Agreement. Any disagreement as to whether a room constitutes a bedroom or functional bedroom will be resolved in connection with the approval of the building plans. The Alta building official's approval of the building plans will constitute a final and binding determination that the Pad Owner has complied with the allocation of bedrooms for that Building Pad. Nothing in this paragraph shall be construed to preclude Alta from initiating legal action (including but not limited to citations, fines, injunctive relief, etc.) against the Pad Owner or other occupant in the event that Alta discovers conversion of any room into an additional bedroom or functional equivalent contrary to the final approved building plans. Alta specifically agrees that it will not seek to require any reallocation of bedrooms among the Building Pads. Alta also agrees that it will not preclude Pad Owners (including MSI while MSI is the owner of the relevant Building Pads) from a reallocation of the number of bedrooms for specific Building Pads so long as there is a written agreement between the Pad Owners of the Building Pads that are the subject of the reallocation and so long as such reallocation is accomplished in compliance with the covenants, conditions and restrictions applicable to Lots 4, 5 and 9 and so long as Alta's written acknowledgement is obtained in advance. Alta agrees to act promptly to acknowledge any such reallocation notification, subject to the requirement that the involved Pad Owners have submitted all papers, agreements and instruments that are necessary to evidence satisfaction of the allocation conditions set forth hereinabove. In connection with the determination of what shall constitute a "bedroom," both parties are obligated to act reasonably and in good faith, each covenanting hereby to so act. For this purpose, the existence of usable space, undesignated space or plan labeling of space shall not, in and of itself be sufficient to accommodate a conclusion that the space is or is not a "bedroom." Further, the fact that a space designated on the building plans might be converted to a bedroom shall not be the basis for a conclusion that the room is a bedroom.

1.2 MSI Discretion. Nothing herein is a requirement upon MSI to develop the maximum number of bedrooms or the maximum number of Building Pads permitted hereunder and Alta agrees that the discretion to seek development on Lots 4, 5 and 9 less than the permitted maximums shall belong absolutely and solely to MSI.

1.3 MSI Establishment of Building and Architectural Guidelines and Standards. MSI hereby agrees to, in connection with its development efforts and before the sale or transfer of any of the Building Pads, establish a set of rational architectural, building and development

guidelines that will be followed and placed in effect for all of the Building Pads (the "MSI Guidelines"). The MSI Guidelines shall, at a minimum include the following height restrictions applicable to all buildings constructed on the Building Pads. Buildings shall be limited to a height of 35 feet from the midpoint of a gable to the level of ground directly below. For purposes hereof the "level of ground" shall mean an average slope line from the front to the rear of the Building Pad at the existing grade before any excavation or grading is done on the Building Pad.

Section 2. Agreed Development Requirements and Restrictions. MSI and Alta agree that the development contemplated by and described in Section 1 above shall be subject to the following agreed contractual provisions, conditions, restrictions and terms:

2.1 Handling of Slope Issues. Alta hereby expressly confirms, acknowledges, covenants and agrees that MSI may propose construction upon and actually construct upon areas of Lots 4, 5 and 9 that would otherwise be subject to prohibitions set forth in the current FM-20 zoning ordinances and regulations of Alta with respect to areas having a slope in excess of 30%. Both parties acknowledge and agree that the right recognized in the first sentence of this Subsection 2.1 is the direct result of the decision and agreement by Alta to (a) clarify and ratify that its approval of the Amended Plat with the unit density allocations thereon for Lots, 4, 5 and 9 were intended to be a departure from any such slope restrictions, such departure being specifically allowed in a planned unit development approval and (b) acknowledge and confirm that the terms of the Agreement could be and are hereby construed to be the commitment and agreement of Alta to allow construction on the property comprising Lots 4, 5 and 9 under the pre-annexation approvals or expectations of approval that had been obtained for such property when it was yet under the jurisdiction of Salt Lake County. MSI agrees that the right to build on the aforesaid slopes shall be subject to the requirement that MSI place the Building Pads and locate the ultimate building footprints on Lots 4, 5 and 9 in accordance with the recommendations of qualified and licensed geo-technical engineers who have undertaken site-specific engineering studies and planning to designate the Building Pads. MSI agrees to utilize only qualified, licensed geo-technical engineers who have professional liabililty coverage that is adequate for the purposes hereof, in the reasonable judgment of MSI. MSI acknowledges and agrees that adjustments to the location and siting of specific Building Pads on the "Final Site Plan" (as that term is hereinafter defined) may be required by such site-specific engineering studies and recommendations ("Site-specific Requirement"). Both MSI and Alta agree to cooperate in making such modifications or amendments to the Final Site Plan as are mandated by any Site-specific Requirement, specifically agreeing to cooperate and exercise good faith efforts to preserve the reasonable location and siting expectations of the owner of the specific Building Pad and of the surrounding Building Pads. Specifically, any such modification for a specific Building Pad that requires re-location of other Building Pads may not be effectuated without the consent of the other owners of the affected Building Pads. MSI agrees that it will include in the declaration that is the subject of Subsection 5.2, a covenant that each Building Pad owner will not unreasonably withhold consent to any Building Pad relocation required by a Site-specific Requirement.

2.2 Site Plan – Approval. MSI and Alta have reviewed a preliminary site plan, a copy of which was attached to the Memo of Understanding and preliminarily approved, in concept, by

Alta. Attached hereto as **Exhibit A**, is the final site plan (the "Final Site Plan") depicting ten (10) Building Pads on Lots 4, 5 and 9, seven of which are located on Lots 4 and 5. Alta has had full opportunity to review and analyze the Final Site Plan and by execution of this Definitive Agreement grants full and final approval of the same. Alta specifically acknowledges and agrees that by this approval, Alta is expressing its full acknowledgment that the open space siting and design as set forth on the Final Site Plan is in fulfillment of all requirements for such open space specified in the Memo of Understanding.

2.3 Off-Road Parking Requirements. MSI agrees that each of the ten single-family homes contemplated hereby shall have a minimum of two (2) off-road parking places for motor vehicles. The said parking places may be either covered (including spaces in garages) or uncovered and shall otherwise be in compliance with the requirements of Alta ordinances §§ 22-11-1 et seq.

2.4 Snow Removal and Storage Requirements Approved. MSI has created and provided for a snow removal and storage plan for Lots 4, 5 and 9 (taking into account the development plans contemplated hereby and has incorporated the same into the Final Site Plan and certain narrative and other descriptions of the said plan, all attached hereto as an appendix to the Final Site Plan). By execution of this Definitive Agreement, Alta confirms, acknowledges and agrees that final review and approval by the Alta Technical Review Committee (the "ATR Committee") of the subject snow removal and storage plans has been completed. Alta recognizes that MSI has included in the aforesaid snow removal and storage plan, removal and storage capacities and planning sufficient to accommodate, not only the requirements for Lots 4, 5 and 9, but also Lot 8 (the "View"). Accordingly, Alta agrees that because such approval of MSI's snow removal and storage plan has now been given and granted by Alta and its ATR Committee, any right to temporary or other use of Lot 9 for snow storage for the benefit of any other owners or occupants of property in the Sugarplum PUD (including any owners association) or for any other purpose shall terminate and be immediately and automatically terminated and the provisions and expressions made in that certain February 27, 1985 letter signed by Walter Plumb on behalf of Sorenson Resources Company to the Alta Planning Commission shall be of no further force or effect. Such termination and elimination of storage on Lot 9 is effective without any other consent, authorization or action by Alta. Nothing herein is intended to prohibit or impair MSI's efforts to, in connection with the implementation of the approved plan, take all actions necessary to allocate the removal and storage costs and expenses among the properties served by the approved plan, including with respect to the owners of Lot 8.

2.5 Interlodge Procedure Compliance. MSI agrees that it will comply with the "interlodge procedures" imposed by the Town of Alta by putting into effect and implementing one of the following two (2) alternatives: (a) provision of a "manager's unit," provided that such manager's unit shall also have designated one (1) parking space (which may be one of the spaces required for the residence in which the manager's unit is being located) or (b) make suitable arrangements with an existing manager in a different phase or portion of the Sugarplum PUD, subject to the review and approval of the Alta Technical Review Committee, which review shall be processed expeditiously and which approval shall not be unreasonably withheld. With respect to the provision of a "manager's unit," Alta hereby consents and agrees that MSI may satisfy this requirement by renting a portion of one of the single-family residences contemplated

by this Definitive Agreement and such rental shall not constitute a violation of the spirit or substance of this Definitive Agreement or the applicable ordinances and regulations in effect in Alta even if such rented portion includes a living area that includes a kitchen facility, bath and bedroom (being one of the approved bedrooms in an approved building plan), so long as such unit is used solely for (a) the purpose of providing living quarters for a manager responsible for meeting the interlodge procedures imposed by Alta or (b) if the unit is not being used for a manager, then only for the guests, invitees and household members of the Pad Owner with no rental arrangement (short or long-term).

2 6 Compliance with Vegetation Ordinance. MSI acknowledges that preservation and renewal of forest resources is an important concern in enhancing the natural beauty and property values in the Town of Alta. MSI agrees that in consideration of the foregoing approval of the Final Site Plan (such approval including the proposed removal of existing vegetation to accommodate the Building Pad and ultimate building sites that are implicated and intended thereby), MSI will meet the following re-planting and re-vegetation plan that has been fully discussed, considered and agreed to by Alta as the fulfillment of the terms of the Alta vegetation ordinance (Ordinance No. 1992-0-1, hereinafter the "Vegetation Ordinance"). In this regard, Alta has agreed to apportion the following described vegetation replacement requirements equally over the ten (10) Building Pads in consideration of MSI's agreement to a replacement formula that, in the material aspect hereinafter described (the "Extra Accommodation"), exceeds the requirements of the Vegetation Ordinance replacement formula. The parties agree that the vegetation replacement formula that shall apply to the Building Pads is as follows:

(a) As the "Extra Accommodation," for ten (10) of the mature trees (as defined in the Vegetation Ordinance) that are proposed for removal to allow development and building on the Building Pads, MSI agrees to plant five (5) vigorous seedlings at least six inches in height, three (3) vigorous saplings at least five feet in height and two (2) 10-15 foot trees..

(b) for any mature tree proposed for removal other than the ten (10) specified above, to allow development and building upon the Building Pads, as provided in the Vegetation Ordinance, five (5) vigorous seedlings at least six inches in height and five (5) vigorous saplings at least five feet in height shall be planted.

Based upon the Final Site Plan, the parties agree that the total number of trees that are proposed for removal to accommodate the proposed development and construction on the Building Pads is the number specified on Schedule 2.6 (attached hereto and incorporated herein by this reference and comprised of that certain "Tree Location Map" prepared by Michael Aldrich). Schedule 2.6 shall control for all purposes hereunder. The placement of replacement trees shall be made by MSI in the exercise of its reasonable judgment and discretion, provided that MSI agrees to give due consideration to placement suggestions made by the Mayor of Alta or other public official designated by the Mayor to make such suggestions. The aggregate replacement obligation arising from the application of the foregoing formula shall be equally apportioned among the ten (10) Building Pads. In that regard, Alta accordingly agrees that the requirements of the Vegetation Ordinance that apply to each Building Pad (including any bond required thereunder) shall be limited to the satisfaction of the aforesaid apportioned planting and revegetation

requirement. Alta imposes these requirements after full and due consideration of the requirements of its vegetation ordinance and after reaching the considered conclusion that the foregoing plan is due compliance with the objectives and intent of the same.

2.7 Agreed Remaining Compliance – Conditional Use Permit. The adoption of this Definitive Agreement by Alta and the execution hereof by Alta shall constitute the issuance by Alta of the conditional use permit for the proposed development of Lots 4, 5 and 9. Accordingly, Alta covenants and agrees that this Definitive Agreement shall constitute such official action and that the requirements, conditions and provisions hereof are the definitive requirements, conditions and provisions applicable to the development of and construction upon the Building Pads contemplated by the Final Site Plan approved hereby. To that end, Alta, hereby specifies and agrees, that except for compliance with the express requirements and conditions set forth elsewhere in this Definitive Agreement, development and ultimate construction of contemplated improvements upon the Building Pads, the only other remaining compliance requirements are as follows:

(a) Compliance of any proposed building plans and specifications with Alta's skier access plan, as attached hereto and incorporated herein as Schedule 2.7 (a).

(b) Demonstrating compliance with the requirements of "outside agencies" as specified in the outside agency checklist attached hereto and incorporated herein by this reference as Schedule 2.7(b).

(c) Payment of standard and required fees of Alta applicable to the development and construction review and approval process.

(d) Compliance with the requirements of Alta's ordinances dealing with construction sites and their management.

(e) Compliance with the provisions of Alta's Ordinance 1996-0-3 and the execution, by the Pad Owner of the relevant Building Pad, of an avalanche indemnity agreement in the form attached hereto as Schedule 2.7(e).

(f) Compliance with the terms of the Uniform Building Code, in effect in the Town of Alta at the time of the application for a building permit for the relevant Building Pad.

Alta agrees that neither the foregoing ordinances or requirements listed in this Subsection 2.7 nor any amendments or modifications to the same shall apply to Lots 4, 5 and 9, the Building Pads or the Pad Owners if the same shall result in the imposition of any material additional condition to or restriction upon the development and construction contemplated by this Definitive Agreement or would otherwise result in a material frustration of the purpose, intent or objectives of this Definitive Agreement. Alta has, in the consideration of the content and substance of this Definitive Agreement, concluded that development and construction in compliance with the terms and provisions set forth herein and in accordance with referenced ordinances and

regulations, as in effect on this date, are and shall be fully consistent with the health, safety and welfare objectives of Alta for the general public and for the owners and occupants of the said Lots 4, 5 and 9 and the Building Pads approved hereunder.

Section 3. Stipulations Regarding Density. MSI, as part of the consideration for the agreements and promises of Alta hereunder, stipulates and agrees that the interpretation and construction of the term "unit" as set forth in the zoning ordinances of Alta, for purposes of measuring "density" usage, shall mean, regardless of the number of segregated and partitioned building units or "front doors," every two (2) bedrooms. Accordingly, MSI acknowledges and agrees that the 40 bedrooms allowed by Alta hereunder shall be the equivalent of 20 units of density, regardless of how the said bedrooms are allocated between the ten (10) Building Pads and the ultimately constructed residences. MSI further agrees not to hereafter contest or dispute the application of the aforesaid definitional approach to the determination of the number of units of density in the Sugarplum PUD and agrees and stipulates that if all 40 bedrooms are actually constructed, 147.5 units of the density available in the Sugarplum PUD shall have been used. Further, MSI hereby relinquishes, abandons, and agrees not to assert or claim any units of density allocated to Lots 4, 5 and 9 over and above the approved 20 units and will not hereafter attempt to sell, transfer, assign or otherwise grant rights to any other person or party in such density units or rights. Nothing herein shall be a waiver or relinquishment of any voting rights of MSI attributable to the ownership of Lots 4, 5 and 9 under the Master Declaration of Covenants, Conditions and Restrictions of Sugarplum, Recorded as Entry No. 3830328 in the records of the Salt Lake County Recorder (the "Master Declaration"). Alta agrees that the relinquishment of development rights effectuated hereby is not intended to, in any way, diminish, abrogate or otherwise negatively affect such voting rights under the Master Declaration and hereby agrees that MSI may assert the existence of such density rights for the sole purpose of preserving and exercising voting rights provided under the Master Declaration.

Section 4. Indemnification Provisions. The following indemnification provisions are applicable under this Definitive Agreement:

4.1 MSI Indemnification of Alta. MSI agrees to indemnify, defend and hold Alta harmless from any and all loss, liability, expense, charge, claim or action brought by other owners or holders of property located in the Sugarplum PUD that arise out of (a) Alta's approval of development and construction on Lots 4, 5 and 9 as provided and contemplated by this Definitive Agreement; (b) Alta's prior approvals of the Agreement, the original Sugarplum PUD plat, the Amended Plat or conditional use permits in the Sugarplum PUD and (c) breach by MSI of the terms of this Definitive Agreement. This indemnification shall include, but is not limited to, assertions or claims that may be brought by owners of units in Lots 6, 7 or 8 of the Sugarplum PUD ("the View" and the "Village") concerning a prior snow storage designation of Lot 9, concerning any road easements and an identification of Lot 5 for parking, as part of the subject matter or requirements or conditions included in or the subject of prior approvals. Further, in all events, to the extent that the same is applicable, Alta shall assert any and all rights of governmental immunity or other similar immunities afforded by law with respect to any indemnified claims. In the event MSI and Alta are sued jointly based on any allegation covered by this Subsection 4.1, MSI shall assume the defense of both parties. Alta reserves the right at all times to employ legal counsel of its choice at its sole expense. In the event that Alta chooses

to retain independent counsel, MSI shall instruct its legal counsel to consult in good faith with Alta's counsel with respect to the defense of the subject claim or claims. However, Alta shall be solely responsible for any claims asserted (and shall defend itself if sued alone) based upon representations or statements made by Alta, its elected officials, representatives, employees or agents concerning development rights within the Sugarplum PUD. Further, the foregoing indemnification shall not extend to or cover any acts, omissions, statements or representations made by Alta, its officers, agents, bureaus, commissions, departments or other political subdivisions that were clear and intentional violations of known and applicable law or intentionally tortious conduct.

4.2 Alta Indemnification of MSI. Alta hereby agrees to and shall indemnify and hold MSI harmless from and against any and all loss, liability, expense, charge, claim or action brought by any person or party and arising out of (a) any of the matters for which Alta is solely responsible under the provisions of the third sentence of Subsection 4.1 above; (b) any matter exempted from the indemnification of MSI under the penultimate sentence of Section 4.1 above and (c) any breach by Alta of this Definitive Agreement.

4.3 Indemnification Terms. In the event that any other person or party brings or asserts any claim against either of the parties to this Agreement that is the subject of an indemnification obligation, both Alta and MSI hereby covenant and agree to cooperate with one another so that the indemnitor is provided all of the reasonably necessary assistance, information, data and knowledge necessary to effectively defend or otherwise act to avoid the asserted claim, loss, liability, expense or action. This cooperation shall include, but not be limited to, delivery of or providing other reasonable access to relevant documents and the giving of testimony. MSI's defense obligation, when applicable, shall include the payment of all attorneys' fees, costs of court and other expenses incurred in connection with acting to defend or otherwise avoid the claims being asserted. In such situations, MSI shall have the sole and absolute right, to select legal counsel to defend any joint lawsuit asserted against the parties. Further MSI shall have the sole and absolute discretion to settle, compromise or otherwise deal with the indemnified claim or claims.

Section 5. Other Relevant Terms and Provisions - Settlement. With respect to the subject matter of this Definitive Agreement, the Agreement the Sugarplum PUD and the dispute that is subject hereof, the parties also agree to be bound by the following:

5.1 Impact Analysis Fees. With respect to the impact analysis that was conducted by Alta, as set forth in the recitals above, MSI agrees to pay the actual costs and fees incurred by Alta to conduct such analysis up to but not exceeding the sum of $13,000. Alta will compile all applicable invoices and charges for such analysis and submit the same for payment under cover of a certification that the charges are all reasonably and actually attributable to the conduct of the said analysis. Upon presentation, MSI shall pay the same within ten (10) business days (excluding Saturdays, Sundays and any other holiday observed or recognized by the courts of the United States, the courts of the State of Utah or by any major commercial bank doing business in the State of Utah.).

5.2 Binding Declaration MSI agrees that it shall, prior to the sale or transfer of any of the Building Pads or the entering into of a contract to so sell or transfer, draft a declaration of covenants, conditions and restrictions for Lots 4, 5 and 9 that, at a minimum, sets forth the applicable covenants of MSI herein as restrictions, covenants, conditions and equitable servitudes upon all of said Lots 4, 5 and 9 and shall, execute the same and record the same in the real estate records of Salt Lake County, State of Utah. The said declaration shall include a provision that the provisions of the said declaration that implement the restrictions imposed by this Definitive Agreement may not be modified or amended without the prior written consent of Alta and Alta agrees that it will not unreasonably withhold such consent. MSI is at liberty to incorporate other conditions, covenants, restrictions and equitable servitudes not contrary to applicable law and it is the intent of MSI that the MSI Guidelines shall become part of such declaration. Alta hereby acknowledges that the Sugarplum PUD is a planned unit development and that Lots 4, 5 and 9 may be, consistent with such planned unit development, be developed hereunder as a "sub" planned unit development or, as elsewhere in the Sugarplum PUD, condominium regimes (townhouse or otherwise) and hereby consents to such development without the imposition of further subdivision requirements, except as necessary under the applicable PUD or condominium laws, to identify severable or salable units.

5.3 Final Compromise, Release and Settlement. Upon execution of this Definitive Agreement, except as expressly hereinafter provided, the disputes, disagreements and claims set forth in the Action shall be deemed to be and are, fully and finally compromised, settled, released and discharged and MSI shall execute and file a dismissal on the merits of the Amended Complaint, with prejudice and each side shall bear their own attorneys' fees, costs and expenses. Notwithstanding the foregoing, both sides agree that the Court, both before and after such dismissal of the Amended Complaint shall continue to exercise and have jurisdiction over the implementation of this Definitive Agreement and the parties stipulate and agree that the Court may appoint a special master, as mutually agreed by both sides, to resolve disputes in the enforcement and implementation of the terms of this Definitive Agreement. In order to facilitate and legally base such retained jurisdiction, the parties agree that the dismissal of the Amended Complaint shall provide for a partial dismissal of the Amended Complaint, provided that such partial dismissal shall be fully and finally effective for all purposes except the limited oversight and dispute resolution provisions hereinabove set forth. Both Alta and MSI agree that disputes over the implementation of this Definitive Agreement and with respect to the review and approval process associated with the development of and construction on Lots 4, 5 and 9 shall be fully and finally decided by the Court under the procedures set forth hereinabove.

Section 6. Warranties and Representations. The parties make the following representations and warranties in connection with this Definitive Agreement and the subject matter hereof.

6.1 Alta Warranties and Representations. Alta hereby warrants and represents that it has all power, authority and right to enter into this Agreement and to perform in accordance with the provisions and terms hereof. No consent, permit, authorization, approval or other action is required as a condition to such power, authority and right except the ratification of this Definitive Agreement and the Final Site Plan by the Town Council of Alta, as contemplated by the Memo of Understanding. Further, Alta has not assigned, transferred, conveyed or otherwise alienated or granted other rights or interests in the subject matter of this Definitive Agreement. The officer

signing this Definitive Agreement is fully authorized and empowered by applicable law to execute this Definitive Agreement on behalf of Alta and to bind Alta thereby.

6.2 MSI Warranties and Representations. MSI hereby warrants and represents that it has all power, authority and right to enter into this Agreement and to perform in accordance with the provisions and terms hereof. No consent, permit, authorization, approval or other action is required as a condition to such power, authority and right. Further, MSI has not assigned, transferred, conveyed or otherwise alienated or granted other rights or interests in the subject matter of this Definitive Agreement, including any of the claims, rights or interests that are being asserted in the Action. The officer signing this Definitive Agreement is fully authorized and empowered by applicable law to execute this Definitive Agreement on behalf of MSI and to bind MSI thereby.

Section 7. Miscellaneous Provisions. This Definitive Agreement is executed under and shall be governed by the laws of the State of Utah. This Definitive Agreement shall be binding upon all successors and assigns of the parties hereto (any reference to the said parties herein being also a reference to such successors and assigns) and it is the intent of the parties that the terms shall bind and restrict and otherwise condition the use of the real property comprising Lots 4, 5 and 9 and this Definitive Agreement shall be recorded in the real estate records of Salt Lake County and MSI hereby agrees that the same shall be a "declaration" of binding covenants, conditions and restrictions applicable to the referenced real property, constituting an equitable servitude thereon and is intended to be and shall run with the land. This Defintive Agreement is divisible and severable so that, so long as the principal objectives and intent hereof are not materially frustrated thereby, the unenforceability of any provision or provisions hereof shall not result in the unenforceability of any remaining provisions. No amendment or modification of this Definitive Agreement may be made unless the same is in writing signed by both of the parties hereto. No waiver of any term or provisions, covenant or agreement, right, remedy or interest arising hereunder or provided hereby shall be binding upon any party hereto unless the same is expressed clearly in a writing signed by the party to be charged with the same. This Definitive Agreement is the result of a joint drafting effort by both parties hereto and any ambiguity contained herein shall not be, by reason of the allocation of drafting responsibility, construed against either party. The breach by a party of the terms of this Definitive Agreement shall give rise to the obligation, in addition to all others available at law or in equity, to pay and reimburse to the other party, all reasonable attorneys' fees and expenses (including costs of court) incurred in any way by reason of such breach or the pursuit of rights, remedies, damages, or interests hereunder. Such obligation includes any and all such expenses, including but not limited to those incurred in connection with demands, notices, negotiations, actions, suits, alternate dispute resolution, trial, appeal and bankruptcy or other insolvency proceedings. In the event of any conflict between the terms of this Definitive Agreement and the Agreement, the terms hereof shall govern. This Definitive Agreement and the subject resolution of the Action are the reasonable and due exercise by Alta of its police power and the discretion delegated to Alta by virtue of Utah Code Ann. Sections 10-1-2 and 10-9-102 et. seq. and by virtue of the Planned Unit Development ordinance of Alta and as the administrative implementation of prior legislative decisions of Alta (including, the subject matter of the Agreement and the associated annexation of the subject real property). This Definitive Agreement does not constitute the unlawful delegation of the police powers or other governmental powers or discretion of Alta and Alta is at

liberty to continue to exercise the same, including the enactment of ordinances and regulations for the health, safety and welfare of the community (including the Sugarplum PUD community), provided, that such additional ordinances, rules and regulations do not conflict with the terms hereof or frustrate the intent, purposes or objectives hereof or rights vested hereunder

IN WITNESS WHEREOF, this Definitive Agreement is executed as of the day and date first set forth hereinabove.

MSI Co, LLC, a Utah limited liability company

By Ralph B. Johnson
Name: Ralph B. Johnson
Title: President

Town of Alta

By William H. Levitt
William H. Levitt, Mayor

State of Utah

County of SALT LAKE

The foregoing instrument was acknowledged before me this 9 day of November, 2000 by William H. Levitt Mayor of the Town of Alta.

Katherine S. W. Black
Notary Public

My Commission expires: 3/15/04

NOTARY PUBLIC
Katherine S. W. Black
P.O. Box 8016, Highway 210
Alta, Utah 84092
My Commission Expires
March 15, 2004
STATE OF UTAH

448

CALLISTER NEBEKER & MCCULLOUGH
WILLIAM H. CHRISTENSEN (4810)
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, UT 84133
Telephone: (801) 530-7300
Facsimile: (801) 364-9127

Attorneys for Defendants MSICO, LLC.
and The Town of Alta.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association., Plaintiff, vs. MSICO, LLC., a Utah limited liability company; The Town of Alta, a political subdivision of the State of Utah; and JOHN DOES 1 through 10, Defendants.	**EXPERT WITNESS REPORT** (Russ Harmer) Civil No. 000910067 Judge: David S. Young

Pursuant to Rule 26(a)(2)(b) U.R.C.P., Defendants submit the following report of Russ Harmer.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Report was served by fax and United States mail, first class postage prepaid, on the 1 day of February 2002, on the following:

Robert E. Mansfield, Esq.
Randall C. Allen, Esq.
Parry Anderson & Mansfield
60 East South Temple, Suite 1270
Salt Lake City, Utah 84111

William H. Christensen

308990 1

Report of Russ Harmer

Summary of Experience:

Please see the resume attached as an exhibit.

Subject Matter of Opinions

A workable snow storage and removal plan has been developed for Lots 4,5, 8 and 9 in the Sugarplum P.U.D. in the Town of Alta. The snow storage plan would allow efficient removal and storage of the snow and deposit at locations that would allow access to, and occupancy of the buildings present or to be constructed on Lots 4, 5, 8 and 9 by vehicles and persons using or visiting Sugarplum within a reasonable amount of time with a reasonable degree of safety at costs that are comparable with other comparable locations in Little Cottonwood Canyon. The snow storage removal and storage plan, with deposit location, has been depicted on documents submitted to the Town of Alta and discussed in the "Definitive Agreement" section 2.4. The plan would allow development of Lots 4, 5 and 9, and still allow occupancy of Lot 8.

Currently about $8000-$12,000 for View's snow removal–this number will increase, but presumably would be shared by more people in the final phase of Sugarplum.

Discussion will be made concerning presentations made before the Town of Alta Technical Review Committee about approval of the snow storage plan for Lots 4, 5, 8 and 9.

BASIS FOR OPINIONS

- The Town of Alta vicinity receives an average of 500 inches of snow per winter season.

◆ Prior studies of Sugarplum PUD as a former member of Alta's Technical Review Committee and engineering plans prepared by the architect (Tracy Stocking Associates) have been consulted.

◆ The subject land has been observed numerous times in snow conditions, including The View.

◆ Observations have been made on numerous occasions of snow conditions on the access road leading to Lot 9 and Lot 8, including observations about snow load, plow access, distances to snow deposit sites, equipment that could be used for snow removal and the configuration of the existing roads and buildings and its affect on snow removal.

◆ Utah Department of Transportation has issued a letter allowing vehicles to cross the Governor's By-Pass Road for snow removal/deposit purposes.

◆ Development of Lots 4, 5, and 9 at Sugarplum will not increase the snow load.

◆ Town required heated driveways on the Lots 4 and 5 and the large driveway on Lot 9 heated. This will reduce the amount of snow to be plowed or transported.

◆ Estimate for costs of new snow storage plan are based on experience with similar distances, type of equipment and observations of the configuration of the roads and buildings.

COMPENSATION FOR EXPERT WORK

General charges for consulting work is $40 per hour plus expenses.

PRIOR DEPOSITIONS AND PUBLICATIONS

No publications. One deposition as a fact witness in an employment case involving the Alta Ski Lifts Company.

Dated this 31 day of January, 2002

Russell L Warner

3569 E. Kings Hill Circle
Salt Lake City, Utah 84121
E-mail: rharmer@utah-inter.net
Office/Res.: (801) 942-0076
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Russ Harmer

Resume

Profile

- Resort planning
- Agency approvals
- Growth studies for businesses and municipalities
- Building project development
- Contract negotiations
- Project construction coordinator

Experience and Accomplishments

May 1999 – Present

- Founded RH Planning Consultants
- **M.S.I. Co., L.L.C. Properties:** Snow removal and storage plan at Sugar Plum P.U.D. for the development of lots 4, 5, and 9, in the Town of Alta. Construction and utility planning for the 10 building sites. Arranged for an avalanche study for the entire project.
- **Alf Engen Ski Museum Foundation:** Owner's construction consultant for the building of the Joe Quinney Winter Sports Center at the Utah Olympic Park. During the 2002 Olympics this center will be the media headquarters for events at the Olympic Park. After the Olympics this building will house the Alf Engen and 2002 Olympics Museums.
- **Liberty WireStar Incorporated:** Developed site plan; worked with Salt Lake City Public Utilities, Salt Lake County Development Services, and Emigration Canyon Community Council, to acquire approval for the use of the Little Mountain cellular location. Helped with project design, and planning for the construction of the site.
- **Sandy Suburban Improvement District:** Prepared an updated growth study for the expansion forecast of their facilities. Met with: Sandy City Office of Economic Development, Sandy City Future Planner, South Jordan Planner, and Midvale City Planner.
- **Rustler Lodge Ski Lift:** Developed a site plan; worked with the lift manufacturer on the design; worked with the U.S. Army Corps of Engineers, the U.S. Forest Service, Salt Lake City Public Utilities, and the Town of Alta to acquire the necessary approvals for the project. Met with the board of a local environmental group so they would understand the project and not oppose it; and worked as the project manager to supervise the construction and completion of the lift.

March 1990 – May 1999 Alta Ski Area, Alta, UT
Assistant General Manager

Special Projects: Coordinated subcontractors in design and construction; including architectural, mechanical, electrical, and civil engineering firms.

- Organized and supervised all phases of design, implementation, and construction of $2.7 million, 430-seat, mid-mountain restaurant. This building (constructed at 9,000 feet) would typically take one year to build, opened on schedule in seven months.

552

- Organized and supervised summer budgets ($7-9 million yearly).
- Future planning and updating the company master plan including Environmental Impact Statements and planning for the implementation of ADA.
- Supported and advised eight department heads in projects and operations, and helped manage 400 employees.
- Assumed responsibilities for the general manager in his absence.
- Company liaison for 15 government agencies: U.S. Forest Service, U.S. Army Corps of Engineers, Environmental Protection Agency, State of Utah Bureau of Air Quality, State of Utah Water Quality, State of Utah Property Tax Division, Utah Transit Authority, State of Utah Health Department, Utah Department of Transportation, Salt Lake County Health Department, Salt Lake County Water Quality Department, Salt Lake County Development Services Division, Salt Lake City Public Utilities, Town of Alta, and Town of Alta Planning Commission. Worked with Salt Lake County commissioners and Salt Lake area city mayors.

Management activities:

- Coordinated agreements and leases, contracts, radio systems, updating records, liability and property insurance (lowered premiums by over $100,000.00 per year and increased coverage).
- Executive Producer for promotional video about Alta Ski Area.
- Worked with Universal Studios filming a movie at Alta.
- Coordinated shoots with numerous companies filming various commercials, and with ABC Wide World of Sports on a ski jumping event.

December 1966-March 1990 Alta Ski Area, Alta, UT

Supervisor of Vehicle Operations and Maintenance

- Designed and implemented $2.5 million ski-area expansion, which included increasing the area by one third in size; added two ski lifts and additional trails.
- Developed the ski slope grooming plan, and managed the 24-hour operation of slope grooming, vehicle maintenance, and parking lot snow removal.
- Formulated the snowmaking master plan.

Conferences

National Ski Areas Association, 1967-1998

- Resort management
- Future planning
- Government regulation updates

Resort Forum Conference, Vail, Colorado, 1998

Affiliations

Turning Point Ski Foundation board advisor, Intermountain Ski Area Association board member, Town of Alta Planning Commission advisor, Utah Transit Authority Park and Ride committee

Interests

Skiing, gardening, camping, fly-fishing, computers, domestic and international travel, birding, architectural history, botany, forestry, dendrology, hiking, swimming, and photography

NOTES TO DECISIONS

ANALYSIS

In general.

No man can have a vested interest in the work or labor of another, nor has he a right to insist that another work for him, since that would violate this section. McGrew v. Industrial Comm'n, 96 Utah 203, 85 P.2d 608 (1938).

Appointment of administrator of estate.

This section prohibits the appointment of a person to serve as administrator of a decedent's estate if that person refuses to consent to such appointment. In re Estate of Cluff, 587 P.2d 128 (Utah 1978).

Withholding tax.

Provision requiring that a city withhold state income taxes due from employees does not subject the city to involuntary servitude. Salt Lake City v. State Tax Comm'n, 11 Utah 2d 359, 359 P.2d 397 (1961).

COLLATERAL REFERENCES

Am. Jur. 2d. — 45 Am. Jur. 2d Involuntary Servitude and Peonage § 1 et seq.

C.J.S. — 70 C.J.S. Peonage § 3; 80 C.J.S. Slaves § 10.

Key Numbers. — Slaves ⇐ 24.

Sec. 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Advance payment of compensation.

This section provides merely that the property shall not be taken or damaged for public use without just compensation, and does not require compensation to be paid in advance. Anderson Inv. Corp. v. State, 28 Utah 2d 379, 503 P.2d 144 (1972).

Airplane overflights.

For discussion of taking issues in an action by landowners alleging that their land has been "taken" by overflights, see Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986).

Closing street.

Where city, without notice, petition, or hearing, closes a portion of a street and alley abutting on school board-owned property on both sides and used for vehicular travel, and thus creates a cul-de-sac as to privately owned property, there has been a taking requiring just compensation. Boskovich v. Midvale City Corp., 121 Utah 445, 243 P.2d 435 (1952).

Closing of city street and alleged impairment of access to commercial properties was not a "damaging" or "taking" within the meaning of this section; the alleged damages resulted from a temporary, one-time occurrence and not a permanent, continuous, or inevitably

1 of 212 DOCUMENTS

RAYMOND A. HAIK; MARK C. HAIK, Plaintiffs-Appellants, v. TOWN OF ALTA, a political subdivision of the State of Utah; SALT LAKE CITY CORPORATION, a political subdivision of the State of Utah, Defendants-Appellees.

No. 97-4202

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1999 U.S. App. LEXIS 6280; 1999 Colo. J. C.A.R. 1903

April 5, 1999, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY:

Reported in Table Case Format at: *1999 U.S. App. LEXIS 16419.*

Certiorari Denied October 4, 1999, Reported at: *1999 U.S. LEXIS 5762.*

PRIOR HISTORY: (Dist. of Utah). (D.C. No. 96-CV-732-J).

DISPOSITION: AFFIRMED.

LexisNexis(R) **Headnotes**

COUNSEL: For RAYMOND A. HAIK, MARK C. HAIK, Plaintiffs - Appellants: Stephen G. Crockett, Giauque, Crockett, Bendinger & Peterson, Salt Lake City, UT. Nanci Snow Bockelie, Moxley & Campbell, Salt Lake City, UT.

For TOWN OF ALTA, Defendant - Appellee: Paul D. Veasy, Parsons, Behle & Latimer, Salt Lake City, UT. David C. Richards, Christensen & Jensen, Salt Lake City, UT. Lee Kapaloski, Salt Lake City, UT.

For SALT LAKE CITY CORPORATION, Defendant - Appellee: Christopher E. Bramhall, Lynn H. Pace, Salt Lake City Attorney's Office, Salt Lake City, UT.

JUDGES: Before BRISCOE, BARRETT, and MURPHY Circuit Judges.

OPINIONBY: JAMES E. BARRETT

OPINION: ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[*2]

Raymond A. Haik and Mark C. Haik (the Haiks) appeal the district court's grant of summary judgment in favor of defendants, the Town of Alta (Alta) and Salt Lake City Corporation (Salt Lake City) on their equal protection and taking claims.

Background

In October, 1994, the Haiks purchased lots 25, 26, 29, and 30, of the Albion Basin Subdivision # 1 (Albion Basin) located above the Alta and Snowbird ski resorts at the top of Little Cottonwood Canyon, east of Salt Lake City, Utah. The Haiks then contacted Alta regarding water and sewer services for their lots. Alta responded in November, 1994, that it does not provide water and sewer services to Albion Basin and referred the Haiks to Salt Lake City's Department of Public Utilities, Water Division. In April, 1995, the Haiks requested

applications for building permits and sewer and water services from Alta. Alta responded that it would be premature to begin the building permit process until the Haiks had procured adequate water and approval for a full containment sewage holding tank. The Haiks then sought information from Salt Lake City regarding water service to Albion Basin. In 1996, Salt Lake City notified the Haiks that it declined [*3] to consent to the extension of Alta water pipes and water supply to Albion Basin, relying on paragraph 8 of the 1976 Water Supply Agreement and the 1991 Watershed Ordinance, § 17.04.020 of Salt Lake City's Ordinances.

Alta receives its water supply from Salt Lake City by virtue of the August 12, 1976, INTERGOVERNMENTAL AGREEMENT-WATER SUPPLY AGREEMENT SALT LAKE CITY TO ALTA CITY (the 1976 Water Supply Agreement). (Appellants' App. Vol. I, Tab 9.) The 1976 Water Supply Agreement "makes available to Alta for its use, . . ., the normal flow of raw, untreated water, not to exceed 265,000 gallons per day, ..." *Id.* at 97 P1. Paragraph 8, relied on by Salt Lake City, contains the following restriction:

> 8. It is expressly understood and agreed that said pipelines shall not be extended to or supply water to any **properties** or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City.

Id. at 99 P8. It is undisputed that Albion Basin lays beyond the 1976 Alta city limits. It is also undisputed that the Board of Health required lots to be supplied with 400 gallons of water per day as a precondition for issuance of a building [*4] permit and that the lots were each entitled to only 50 gallons of water per day from a water agreement with Little Cottonwood Water Company.

In October, 1997, the Haiks initiated this action, claiming that because Alta has surplus water and the lots are located within the current town limits, Alta had a legal duty to supply water to their lots based on Alta's historical conduct and applicable state and federal laws. n1 *Id.* Vol. I at 6 P20. The Haiks contended that: (1) Alta had **taken and damaged their property** for public use by refusing to extend its municipal services to Albion Basin and by its refusal to grant them a building permit, in violation of Article I, Section 22 of the Utah Constitution, *id. at 11 P 39;* (2) Alta's actions in furtherance of its policy of non-development have been arbitrary and capricious, depriving them of their right to substantive due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution and *42 U.S.C. § 1983, id.* at *13 P 47;* (3) Alta's actions deprived them of their rights to substantive due process and equal protection of the law under Article [*5] I, Sections 7 and 24 of the Utah Constitution and violated the Annexation Ordinance and *Utah Code section 10-2-401(4)*, which required Alta to make the same level of municipal services available to their **property** as it does to others, *id.* at 14 P50; (4) they were entitled to a declaration that the 1976 Water Supply Agreement does not preclude the extension of Alta's water lines to their lots; *id.* at 15 P54; and (5) they were entitled to an injunction preventing Salt Lake City from raising the 1976 Water Supply Agreement as a defense to the extension of Alta's water lines and requiring Alta to make municipal services available to their lots in order to receive a building permit, *id.* at 16 P59.

> n1 The Haiks initiated this action in the Third Judicial District Court in and for Salt Lake County, State of Utah. (Appellants' App. Vol. I at 1.) Salt Lake City removed the action to federal district court. *Id.* at 34.

On October 31, 1997, the district court granted summary judgment in favor of Alta and Salt [*6] Lake City. *Id.* Vol. III at 853-81. On the Haiks' equal protection claim against Alta, the district court concluded that the claim "presupposed the existence of a legal a duty on the part of Alta to supply water to **property** owners such as the Haiks, as well as the legal and physical capacity to do so." *Id.* at 860. The court then noted that while Alta may have the physical capacity to supply water to the Haiks' lots, Alta does not have the legal capacity to do so under the terms of the 1976 Water Supply Agreement, without Salt Lake City's consent. *Id.* at 865-66. On the Haiks' equal protection claim against Salt Lake City, the court found that: (a) the Haiks "failed to establish that Salt Lake City had breached any duty [to] reasonably . . . give or refuse consent, whether under the implied covenant of good faith dealing, or otherwise," *id.* at 872, and (b) equal protection is not available to challenge Salt Lake City's exercise of its contractual power to consent pursuant to paragraph 8 of the 1976 Water Supply Agreement because it had no legal duty to furnish water to users outside its own city limits, be they "similarly situated" or not, *id.* at 873-74. On the [*7] Haiks' annexation claim, the district court concluded that they failed to establish an express legislative or contractual duty on the part of Alta to supply water to their **property** and Alta cannot be fairly burdened with an implied legal duty to supply water that Alta has no legal right to use. *Id.* at 869. The court then rejected the Haiks' **taking** claim against Alta on the ground that "neither the Haiks nor the Town of Alta had available the water necessary to make an 'economically viable use' of the Albion Basin **property** through

construction of residential dwelling," *id.* at 877, and the Haiks retain the "'full 'bundle' of property rights' they purchased," *id.* at 875. The court reasoned that if the loss of economic viability is caused by something other than the government regulation, it does not constitute a taking. *Id.* at 877.

On appeal, the Haiks contend that the district court erred: (1) in concluding that they could not bring an equal protection claim against Salt Lake City because it was acting in a proprietary capacity in supplying water outside its corporate limits; (2) in concluding that Alta did not violate their right to equal protection by refusing to extend [*8] its water lines to their lots, in view of the district court's finding that Alta was physically able to supply water and they were willing and able to pay the costs of connection; (3) in failing to recognize that Salt Lake City's refusal to consent to Alta's extension of water to their lots could not be reasonable where it was not based on any finding that their proposed use would be detrimental to the watershed, but on a collusive desire to prevent any development in the upper Albion Basin; and (4) in determining no taking occurred even though they are completely unable to build on their lots.

We review the district court's order granting summary judgment *de novo*, applying the same standard as the district court. *Thomas v. International Bus. Machs., 48 F.3d 478, 484 (10th Cir. 1995).* Summary judgment is appropriate only "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. [*9] " *Fed. R. Civ. P. 56(c).* "We examine the factual record and reasonable inferences therefrom in the light most favorable to [the non-movants], who opposed summary judgment." *Thomas, 48 F.3d at 484.*

Discussion

I. Equal Protection

The Haiks argue that they have asserted a viable equal protection claim against Salt Lake City. The Haiks maintain that: (1) Salt Lake City's refusal to consent to the extension of Alta's water lines to their property is a governmental act subject to equal protection challenges, and (2) even if Salt Lake City acted in a proprietary rather than a governmental capacity, equal protection challenges may be raised against governmental entities acting in their propriety capacities. The Haiks declare that Salt Lake City's refusal to consent to Alta's extension of its water lines to their lots could not be reasonable in that it was not based on any finding that their proposed use would be detrimental to the watershed, but on a collusive desire to prevent any development in the upper Albion Basin. n2 In addition, the Haiks reason that the district court erred in concluding that Alta did not violate their right to equal protection by refusing to [*10] extend its water lines to their lots, in view of the district court's finding that Alta was physically able to supply water and they were willing and able to pay the costs of connection. n3

n2 We assume for the purposes of this discussion only that the Haiks may maintain an equal protection claim against Salt Lake City.

n3 The Haiks initially brought their equal protection claim under both the United States Constitution and the Utah Constitution. It is unclear whether the district court considered their equal protection claim under both state and federal law or solely under state law. It is also unclear under which their appeal lies. However, in the interests of finality, we will consider their claim under both federal and state law.

A. Federal Equal Protection

> According to the Equal Protection Clause of the Fourteenth Amendment, "No State shall . . . deny to any person within its jurisdiction the equal protection [*11] of the laws." U.S. Const. amend. XIV, § 1. This Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill, 521 U.S. 793, 799, 117 S. Ct. 2293, 2297, 138 L. Ed. 2d 834 (1997).* Unless a legislative classification or distinction burdens a fundamental right or targets a suspect class, courts will uphold it if it is rationally related to a legitimate end. *Id.*
>
> *Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 532 (10th Cir. 1998).*

"The interest in water for real estate development is not a fundamental right." *Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990). See also O'Neal v. City of Seattle, 66 F.3d 1064, 1067 (9th Cir. 1995)* (equal protection claim based on denial of water service reviewed under rational basis standard because it affects only economic interests, not fundamental rights); *Magnuson v. City of Hickory Hills, 933 F.2d 562, 567 (7th Cir. 1991)* ("We do not consider the right to continued municipal water service [*12] such a fundamental right; . . .."); *Ransom v. Marrazzo, 848 F.2d 398, 413 (3d Cir. 1988)* (strict scrutiny not required because water service is not a fundamental right);

Chatham v Jackson 613 F 2d 73, 80 (5th Cir 1980) (water service not a fundamental right) Thus, to meet a constitutional challenge the state action in question needs only some rational relation to a legitimate state interest *City of New Orleans v Dukes, 427 U S 297 303, 49 L Ed 2d 511, 96 S Ct 2513 (1976), Tonkovich 159 F 3d at 532* Moreover, because state action subject to rational basis review is presumptively constitutional, the burden is on the plaintiffs to establish that the state action is irrational or arbitrary and that it cannot conceivably further a legitimate governmental interest *Riddle v Mondragon, 83 F 3d 1197, 1207 (10th Cir 1996)* "Under the rational basis test, if there is a 'plausible reason[] for [the state] action, our inquiry is at an end '" *United States v Castillo, 140 F 3d 874, 883 (10th Cir 1998)* **[*13]** (quoting *United States R R Retirement Bd v Fritz, 449 U S 166 179, 66 L Ed 2d 368, 101 S Ct 453 (1980))* "We need not find that the legislature ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise " *Id* (citations omitted)

There are plausible reasons for Alta's refusal to extend its water lines to the Haiks' **property.** Alta has a legitimate state interest in not breaching its 1976 Water Supply Agreement Alta does not have an independent right to water, it merely purchases water from Salt Lake City Thus, while Alta may have the physical capacity to supply water to the Haiks' lots, it does not have the legal right to do so, and to compel Alta to breach its contract would be unreasonable Nor, we add, does Alta have a legal obligation under Utah law to provide the Haiks with water A series of Utah Supreme Court cases have specifically expressed that "a municipal corporation does not have a legal duty to provide water service to all members of the public " *Thompson v Salt Lake City Corp , 724 P 2d 958 959 (Utah 1986)* **[*14]** *See Rose v Plymouth, 110 Utah 358, 173 P 2d 285, 286 (Utah 1946)* The Utah Supreme Court recently reinforced that a municipality need only act "reasonably" with respect to the provision of municipal services to its residents *See Platt v Town of Torrey, 949 P 2d 325, 329 (1997)* We find Alta treated the Haiks reasonably here

Furthermore, Salt Lake City has a legitimate interest in preserving its watershed The Haiks failed to establish that Salt Lake City's refusal to consent to the extension of Alta's water lines to their **property** was irrational or arbitrary or that it could not conceivably further a legitimate governmental interest in view of the extensive evidence presented by Salt Lake City regarding preservation of its watershed, Little Cottonwood Canyon The Haiks challenge Salt Lake City's stated interest in protecting the watershed by noting Salt Lake City has consented to other extensions and uses not contemplated by the 1976 Water Supply Agreement The additional uses referred to are Alta's 1995 extension, without Salt Lake City's consent, of its lines to the Alpenglow Lodge, Salt Lake City's consent in 1988 and again in 1993 to allow **[*15]** Alta Ski Lifts Company to use additional water for **snowmaking,** and Salt Lake City's consent in 1992 to provide water to the U S Forest Service for recreational purposes at the Albion Basin campground Because Alpenglow sits within Alta's 1976 boundaries, extension of the lines without Salt Lake City's consent was appropriate and is irrelevant to plaintiffs' claim of unequal and irrational treatment This same explanation applies to Salt Lake City's 1988 consent for **snowmaking** purposes, which was similarly limited Finally, the City's 1992 consent to allow the Forest Service to use water for recreational purposes and 1993 consent to allow additional **snowmaking** were authorized by 1991 Salt Lake City ordinance § 17 04 020 B, which authorized the City to consent only to use for **snowmaking** or fire protection, use by certain governmental entities on land owned or leased by those entities, and use by residential **property** owners with a spring on their **property.** *See* Appellant's App at 327-28 Significantly, § 17 04 prohibits the City from consenting to any use - including extension of Alta's water lines to the Haiks' **property** - other than these three articulated uses, or amending any **[*16]** current permit to enlarge the service boundary or increase the water supply *See id at 327* The Salt Lake City Council has made a rational legislative determination that the particular uses above, even if outside existing service areas, will not result in significant harm to the watershed, whereas increased residential and commercial use outside existing service areas (in this case Alta's 1976 town boundaries) will result in such damage This classification is rational and is related to the City's stated objective of protecting the watershed

In short, Alta and Salt Lake City proffer they had to draw the line somewhere, and chose to do so in the 1976 Agreement at Alta's 1976 town boundaries They do not claim to be seeking to stop all development in the canyon, or even all development in Alta for that matter Rather, their purported objective is to curtail further environmentally harmful development outside Alta's 1976 town boundaries Line-drawing "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the lines [That] the line might have been drawn differently at some points is" not **[*17]** a matter for judicial consideration *Federal Communications Comm'n v Beach Communications, Inc , 508 U S 307, 315-16, 124 L Ed 2d 211, 113 S Ct 2096* (quoting *United States R R Retirement Bd v Fritz 449 U S 166, 179, 66 L Ed 2d 368, 101 S Ct 453 (1980))*

B Utah Equal Protection

Article I, § 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation." Utah Const. Art. I, § 24. Although this language is dissimilar to its federal counterpart, "these provisions embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984).* "First, a law must apply equally to all persons within a class." *Id. at 670.* "Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." *Id.* If **[*18]** the relationship of the classification to the objectives is unreasonable or fanciful, the disparate treatment is unreasonable. *Id.* We presume that the state acted on a reasonable basis. *Id. at 671 n.14.* However, that presumption does not require us to accept any conceivable reason for the state action. *Id.* "Rather, we judge such enactments on the basis of reasonable or actual . . . purpose." *Id.* Additionally, a municipal corporation "does not have a legal duty to provide water service to all members of the public, ..." *Thompson v. Salt Lake City Corp., 724 P.2d 958, 959 (Utah 1986).*

Alta consistently refused to extend its water lines outside its 1976 city limits without Salt Lake City's permission. Thus, Alta treats all persons in the class of **property** owners outside its 1976 city limits, including the Haiks, the same. Furthermore, Alta's and Salt Lake City's actions were reasonable.

Therefore, we hold that Alta and Salt Lake City did not violate the Haiks' equal protection rights under either federal or state law.

II. **Taking**

The Haiks contend that the district court erred in determining no **taking** occurred even though they are **[*19]** completely unable to build on their lots. The Haiks assert that it is immaterial that Alta has not expressly prohibited building in the Albion Basin because by *denying them a building permit for their lots without* culinary water, Alta has deprived them of all viable economic use of their **property.** Additionally, the Haiks point out that a regulatory **taking** can exist even when no exaction has been demanded by the state and that it is immaterial that the applicable regulations and ordinances predated their ownership as a **property** owner can "come" to a **taking.** n4

> n4 The Haiks brought this claim solely against Alta. Therefore, we will not consider the Haiks' statements on appeal that, "No **taking** of the full economic use of the Haiks' **property** occurred until Salt Lake City denied its consent to extend water to them in 1996. In refusing to consent, Salt Lake City went beyond what the relevant background principles would dictate and hence worked a **taking.**" (Brief for Appellants at 37) (internal quotation and citations omitted).

[*20]

The Haiks brought their **taking** claim exclusively under Article I, § 22 of the Utah Constitution, which provides, "Private **property** shall not be **taken or damaged** for public use without just compensation." n5 Utah Const. Art. I, § 22. "This provision is broader in its language than the similar provision in the Fifth Amendment of the United States Constitution." *Bagford v. Ephraim City, 904 P.2d 1095, 1097 (Utah 1995).* To recover, "a claimant must possess a protectable interest in **property that is taken or damaged** for a public use." *Id. See Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241, 1243-44 (Utah 1990); Colman v. Utah State Land Bd., 795 P.2d 622, 625 (Utah 1990).* In *Colman,* the Utah Supreme Court observed:

> Many statutes and ordinances regulate what a **property** owner can do with and on the owner's **property.** Those regulations may have a significant impact on the utility or value of **property,** yet they generally do not require compensation under article I, section 22. Only when governmental action rises **[*21]** to the level of a **taking** or damage under article I, section 22 is the State required to pay compensation.

Coleman, 795 P.2d at 627. "[A] '**taking**' is 'any substantial interference with private **property** which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed.'" *Id. at 626* (quoting *State ex rel., State Road Comm'n v. District Court, Fourth Judicial Dist. in and for Utah County, 94 Utah 384, 78 P.2d 502, 506 (Utah 1937)).*

> n5 Therefore, we will not consider the Haiks' appellate arguments that Alta's actions constitute a **taking** under the Fifth and Fourteenth Amendments to the United States Constitution. *See* Brief for Appellants at 32 ("The denial of a building permit to the Haiks constitutes a **taking** for which the Fifth and Fourteenth Amendments require just compensation, ..."); *id.* at 37.

The district court found that "the Haiks still have in October [*22] 1997 what they purchased from Marvin Melville in October of 1994: lots in Albion Basin Subdivision # 1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement. They retain the "full 'bundle' of **property** rights" they purchased." (Appellants' App. Vol. III at 875.) "They still lack the "one 'strand' of the bundle" that their predecessor in interest also did not have: a legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit." *Id.* at 876. The district court determined that "the Haiks cannot build on their **property,** not because Alta or Salt Lake City have changed the rules, but rather because the rules remain the same." *Id.*

The Haiks cannot maintain a **taking** claim because they did not have a protectable interest in **property that was taken or damaged** by Alta's denial of a building permit. Alta's denial of a building permit was based on the health department requirement of 400 gallons of water per day per unit, which the Haiks did not meet. As the Court in *Coleman* pointed out, "'many statutes and ordinances regulate what a **property** owner can do with and on the owner's [*23] **property** . . . yet they generally do not require compensation . . .." *Coleman, 795 P.2d at 627.* This is but one of many such regulations. *See Smith Inv. Co. v. Sandy City, 958 P.2d 245, 253 (Utah Ct. App. 1998)* ("If the ordinance and the state policies and reasons underlying it do, within reason, debatably promote the legitimate goals of increased public health, safety, or general welfare, we must allow . . . legislative judgment to control."). Furthermore, mere expectation of municipal water service in the future is not a legal right that constitutes **property** subject to **taking.** *See Bagford, 904 P.2d at 1099* (expectation of renewal of lease not **property** subject to **taking**). Therefore, we hold that no **taking** occurred under the Utah Constitution Article I, § 22.

AFFIRMED.

Entered for the Court:

James E. Barrett,

Senior United States

Circuit Judge