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Lloyd B. Gurney, Betty Gurney, Paul Gurney,
Donna S. Gurney, Lee A. Jeppson, LaRAE G.
Jeppson, and LaRee Smith v. Randy G. Young,
Blake Jumper, Stone River Development, LLC,
RCP Land Investment, LLC, and R.G. Young, Inc. :
Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LLOYD B. GURNEY, BETTY GURNEY, :
PAUL GURNEY, DONNA S. GURNEY, :
LEE A. JEPPSON, LaRAE G. JEPPSON :
and LaREE SMITH, :

Plaintiffs and Appellees, :

vs. :

RANDY G. YOUNG, BLAKE JUMPER, :
STONE RIVER DEVELOPMENT, LLC, :
RCP LAND INVESTMENT, LLC, and :
R.G. YOUNG, INC., :

Defendants and Appellants. :

Appellate Court No. 20070554-CA

RANDY G. YOUNG, STONE RIVER :
DEVELOPMENT, INC., and R.G. :
YOUNG, INC., :

Counterclaim Plaintiffs and :
Appellants, :

vs. :

LLOYD B. GURNEY, BETTY GURNEY, :
PAUL GURNEY, DONNA S. GURNEY, :
LEE A. JEPPSON, LaRAE G. JEPPSON :
and LaREE SMITH :

Counterclaim Defendants and :
Appellees. :

BRIEF OF APPELLANTS

FILED
UTAH APPELLATE COURTS

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BRIEF OF APPELLANTS

Appeal from the Recitation of Undisputed Facts and Conclusions of Law and the
Final Judgment entered in the Fourth Judicial District Court of Utah County,
State of Utah, The Honorable Stephen L. Hansen, District Judge

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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2001) and the Utah Supreme Court's pourover of the case on July 10, 2007.

STATEMENT OF THE ISSUES and THE STANDARD OF REVIEW

Issue #1: Did the Trial Court improperly resolve disputed, material facts on a Rule 56 Motion for Summary Judgment?

Issue #2: Where all of the parties, including the buyer, executed the Real Estate Purchase Contract ("REPC") on December 1, 2003, three days after the November 28, 2003 offer acceptance deadline contained in the REPC, and where the sellers accepted and retained the buyer's \$10,000 earnest money payment, did the trial court err in concluding as a matter of law that the REPC "lapsed" because it was signed after the November 28, 2003 offer acceptance deadline?

Issue #3: Where all of the parties later executed one or more addenda to the REPC in a timely manner, and where the parties performed the REPC for over two years following its execution, did the trial court err in concluding as a matter of law that the REPC was unenforceable?

Issue #4: Did the trial court err in concluding as a matter of law that the REPC was void due to the Buyers' failure to make a payment required in Addendum No. 1 to extend the closing date even though a subsequent addendum to the REPC extended the closing date without requiring an extension payment and the REPC did not close solely because of the sellers' breach and failure to perform?

Issues Preserved for Appeal: On June 25, 2007, Appellants filed a Notice of Appeal, appealing the trial court's Recitation of Undisputed Facts and Conclusions of Law and the Final Judgment, entered on June 4, 2007. (Attached at Addendum B). The Issues also were preserved through Appellants' Memorandum In Opposition to Motion for Partial Summary Judgment, the associated Affidavits of Randy G. Young, Paul Timothy and Lorin Powell (R 248-92) and Appellants' associated oral argument (R. 578). The Issues also were preserved through Defendants' and Counterclaim Plaintiffs' [first and second] Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law and Request for Award of Attorneys' Fees, filed on November 27, 2006 and January 10, 2007, respectively (R. 425-32 and 451-60) and Appellants' associated oral arguments (R. 577).

Standard of Review for All Issues: The applicable standard of review is correctness with no deference to the Trial Court's legal conclusions. See *Bonham v. Morgan*, 788 P.2d 497, 499 (Utah 1989) ("Inasmuch as a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, this Court reviews those conclusions for correctness, without according deference to the trial court's legal conclusions." (citation omitted)).

Further, the appellate court must review evidence in the light most favorable to the Appellants. See *Themy v. Seagull Enters., Inc.*, 595 P.2d 526, 528-29 (Utah 1979) ("As usual in reviewing a case disposed of in the district court by summary judgment, we consider the evidence in the light most favorable to the losing party,

and affirm only where it appears there is no genuine dispute as to any material issues of fact . . .”).

DETERMINATIVE STATUTES AND RULES

Rule 56 of the Utah Rules of Civil Procedure. (Attached as Addendum A.)

STATEMENT OF THE CASE

The parties signed a REPC and three Addenda, but rather than title the Addenda 1, 2 & 3, labeled them:

- a. “Addendum No. 1”;
- b. “Addendum No. III”;¹ and
- c. “Addendum No. 3.”

The second addendum is titled as Roman Numeral III, while the third of the three addenda is identified as arabic number 3.

After real estate prices increased, the Appellees commenced the case by filing a Complaint on February 23, 2006, seeking a declaratory judgment that the REPC was void and non-binding. (R. 1-30). Appellants counterclaimed seeking specific enforcement of the REPC. (R. 31-71).

Prior to the commencement of fact discovery, the Trial Court granted the Plaintiffs’ Motion for Partial Summary Judgment. The Trial Court issued a Memorandum Decision on Plaintiffs’ Motion on September 27, 2006. (R. 399-404, attached as Addendum D). This is an appeal from the Recitation of Undisputed

¹ Despite its name, Addendum No. III is the second addendum to the REPC. (R. 224 ¶ 22 and R. 210 ¶ 17). There was a proposed second addendum that was labeled “Addendum No. 2” which the parties never fully approved. (R. 104 and R. 134 ¶ 8).

Facts and Conclusions of Law and the Final Judgment entered in the Fourth Judicial District Court by the Honorable Stephen L. Hansen on June 4, 2007. (R. 548-56, attached as Addendum B and C, and incorporated by reference).

The trial court found that the parties' REPC and its Addenda were void and non-binding for two reasons: First, the Trial Court correctly noted that all of the parties executed the REPC on December 1, 2003. From that fact, however, the Trial Court found that the REPC "lapsed" because none of the parties executed the REPC prior to its November 28, 2003 offer acceptance deadline. *Id.*

Second, the Trial court found that the REPC ceased to exist for a failure of consideration. (*Id.*). Specifically, the Trial Court found that the Appellants did not timely make a \$10,000.00 extension payment Addendum No. 1 to the REPC required for extension of the agreement. *Id.*

Based upon these findings, the Trial Court entered Final Judgment against the Appellants and in favor of the Appellees. *Id.*

STATEMENT OF FACTS

A. Background

With the aim of developing a residential subdivision to be known as the Gurney Estates Subdivision, R.G. Young, Inc. and/or Assigns, as Buyers, contracted with Lloyd B. Gurney, Betty Gurney, Paul Gurney, Donna S. Gurney, Lee A. Jeppson, Larae G. Jeppson and Laree Smith (collectively "Gurneys"), as Sellers, for the purchase of approximately 36.57 acres of real property located in Utah County, Utah. (R. 189-206). To memorialize the transaction, R. G. Young, Inc. and/or

Assigns and the Gurneys executed a Real Estate Purchase Contract (“REPC”) and three Addenda. (R. 189-206, R. 212 ¶¶ 4-5, R. 227 ¶ 6, R. 224 ¶ 24 and R. 222 ¶ 32).

Stone River Development, Inc. and RCP Land Investments, LLC, are assignees of R.G. Young, Inc. in relation to the REPC and its Addenda. (R. 226 ¶¶ 7-8) (R.G. Young, Inc., Stone River Development, Inc. and RCP Land Investments, LLC collectively will be referred to as the “Young Entities”).²

Paul Timothy is a real estate agent that represented both the Young Entities and the Gurneys in relation to the REPC and its Addenda. (R. 212 ¶¶ 1-3). Mr. Timothy drafted the REPC and its Addenda with input from the parties. (*Id.* at ¶ 6). The final and fully executed version of REPC and its Addenda are attached as Exhibit 1 (R. 189-206) to Mr. Timothy’s Affidavit. (R. 212 ¶ 5, Mr. Timothy’s Affidavit and the associated verified full and final copy of REPC is attached as Addendum E).

As previously stated the REPC has three Addenda. (R. 212 ¶ 5). The First Addendum to the REPC is labeled “Addendum No. 1” and was executed at the same time as the REPC. (R. 189-206, R. 227 ¶ 6 and R. 212 ¶ 4). The parties also entered into a second and third Addendum to the REPC. (R. 191 and R. 189). The labels the parties used for the second and third Addenda can lead to confusion. The second Addendum to the REPC is labeled, and will be referred to, as “Addendum

² “Blake Jumper and/or Assigns” and “Stone River Development, LLC” appear at one or more locations in documents associated with the REPC. These are not parties to the REPC and their appearance on any REPC documents is the result of inadvertent scrivener’s errors. (R. 211 ¶ 8 and 226 ¶¶ 10-11).

No. III". (R. 191). The third Addendum to the REPC is labeled, and will be referred to, as "Addendum No. 3". (R. 189).

The parties partially performed under the REPC and its Addenda for nearly two and one-half years before the Gurneys commenced this lawsuit seeking to have the REPC declared void *ab initio*. (R. 208-228 and R. 1-30). As more fully set forth below, for over two years the Young Entities expended significant time and resources performing under the REPC and its Addenda and working to bring the transaction to the closing table. (R. 214-28, Randy Young's Affidavit is attached as Addendum F). The Gurneys, on the other hand, accepted both significant benefits from the REPC and its Addenda, as well as from the efforts of the Young Entities to secure Lehi City's approval of the Gurney Estates Subdivision. (R. 208-228). Not once during those two plus years, and while receiving those significant benefits, did the Gurneys suggest or complain that the REPC and its Addenda were invalid. *Id.*

B. The Parties Enter Into and Partially Perform the REPC and the First Addendum

The parties executed the REPC on December 1, 2003. (R. 189-206, R. 227 ¶ 6 and R. 212 ¶ 4). At that same time, the parties executed the first Addendum to the REPC, which was labeled "Addendum No. 1." *Id.* The parties executed the REPC on **December 1, 2003** despite the fact that it contains an acceptance deadline clause providing: "If Seller does not accept this offer by 5:00 p.m. Mountain Time on **November 28, 2003**, this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer." (R. 189-206, R. 227 ¶ 6 and R. 212 ¶ 4). The

parties also executed Addendum No. 1 on December 1, 2003, despite the fact that it contains a similar acceptance deadline clause. (*Id.*).

The Young Entities intended the REPC and Addendum No. 1 to be a valid and binding offer and contract with the Gurneys as of December 1, 2003. (R. 226 ¶ 12). The Young Entities, as offeror, waived any provision in the REPC or Addendum No. 1 that would have served to invalidate those documents, and the offer contained therein, prior to their execution on December 1, 2003. (R. 226 ¶ 13).

In reliance upon the Gurneys' commitment to the REPC and Addendum No. 1, the Young Entities deposited with Integrated Title Services the \$10,000.00 earnest money payment the REPC required. (R. 225 ¶ 17 and R. 175 ¶ 6). The Gurneys received and accepted such payment, never repudiating the payment or returning the \$10,000.00 to the Young Entities. (R. 225 ¶ 18 and R. 577 pg. 15).

Further, in reliance upon the Gurneys' approval and execution of the REPC and Addendum No. 1, the Young Entities undertook certain actions and incurred certain expenses, including but not limited to the following:

- (1) The Young entities moved forward with applying for and obtaining entitlement, zoning and annexation approval for the Gurney Property to be developed in Lehi City;
- (2) the Young entities expended time and resources in applying for such approvals; and
- (3) the Young Entities expended time and resources in planning and designing the proposed Gurney Estates Subdivision by commissioning engineering work and soil testing. (R. 225 ¶ 14).

At no time prior to the filing of this lawsuit in February 2006, did the Gurneys indicate they believed the REPC and Addenda were not binding. (R. 225 ¶ 15, R. 220 ¶ 42, R. 211 ¶ 10, R. 210 ¶ 20 and R. 209 ¶ 27). In fact, as recently as January 5, 2006, the Gurneys represented, through their counsel Rodney W. Rivers, that the REPC was a binding agreement between the parties.³ (R. 225 ¶ 16 and R. 216).

C. The Parties Enter Into and Partially Perform A Second Addendum: Labeled “Addendum No. III”

Addendum No. 1 provided that, “The initial closing (“herein closing”) shall occur within thirty (30) days of Buyer receiving final plat approval from Lehi City Council to construct the subdivision, but in no event later than August 1, 2004” (R. 198-99). Further, Addendum No. 1 provided for the extension of that closing deadline as follows:

In the event Buyer has not received final plat approval with 2.5 units/acre from Lehi by the closing date then the Buyer shall be granted one (1) extension to be paid as follows:

- a) Buyer to pay an additional ten thousand (\$10,000.00 dollars for non-refundable deposit to Integrated Title Services no later than July 30, 2004 to extend the closing date to October 1, 2004.

Id.

In approximately June 2004, Lehi City informed the Young Entities that the proposed Gurney Estates Subdivision would not be approved at a density of 2.5 units per acre, as anticipated and incorporated into the REPC and Addendum No.

³ The Gurneys’ counsel wrote on January 5, 2006, “Failure to provide such assurances will be considered an anticipatory repudiation by my clients **and may lead to the termination of the Real Estate Purchase Contract.**” (R. 215-16) (emphasis added).

1. (R. 224 ¶ 19). Randy Young, on behalf of the Young Entities, met with the Gurneys and Paul Timothy to discuss Lehi City's actions and to propose an adjustment to the purchase price of the Gurney property. (R. 224 ¶ 20). The Gurneys did not agree to an adjustment to the purchase price, but did agree to the extension of the REPC. (R. 224 ¶ 21). Accordingly, in June 2004, the Gurneys and the Young Entities entered into the second Addendum to the REPC, which was labeled "Addendum No. III".⁴ (R. 224 ¶ 22).

Addendum No. III contains an offer acceptance deadline of June 14, 2004. (R. 191). The Trial Court found that it was undisputed that "Neither the REPC, Addendum No. I, II or III were signed timely by any of the parties."⁵ (R. 551 ¶ 5). **Contrary to that finding, Addendum No. III was signed by all of the parties by**

⁴ Despite its name, Addendum No. III is the second addendum to the REPC. (R. 224 ¶ 22 and R. 210 ¶ 17). There was a proposed second addendum that was labeled "Addendum No. 2" which the parties never fully approved. (R. 104 and R. 134 ¶ 8).

⁵ It is unclear what exactly the Trial Court meant in the use of the term "Addendum No. II", but it is likely that the court was referring to the second Addendum to the REPC, which the parties labeled Addendum No. III.

June 8, 2004 - well before the June 14, 2004 deadline.⁶ (R. 191, R. 100 and R. 36).

Addendum No. III extended the REPC as follows: "Buyer and Seller each agree to extend said closing an additional 6 months from the initial closing not to exceed Feb. 1st 2005." (R. 191). Accordingly, Addendum No. III extended the contract beyond the optional and conditional extension through October 1, 2004 that was available under Addendum No. 1. (R. 198-99). Addendum No. III's extension of the REPC does not require a payment of \$10,000.00 for the extension of the closing date; it simply extended the closing date through February 1, 2005. (R. 191). Further, Addendum No. III provides, "To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including prior addenda and counteroffers, these terms shall control." (*Id.*)

In reliance upon the Gurneys' execution and approval of Addendum No. III and its extension of the REPC through February 1, 2005, the Young Entities did not make the \$10,000.00 deposit Addendum No. 1 required as a condition precedent to

⁶ As may be seen on the various copies of the Addendum No. III in the record, including the copy verified by Paul Timothy as the final and complete copy (R. 191), it was executed by Randy Young (for the Young Entities) on June 1, 2004, Donna and Paul Gurney on June 1, 2004, Lloyd and Betty Gurney on June 8, 2004, Lee Jeppson and LaRae Jeppson on June 5, 2004 and LaRee Smith on June 5, 2004. (R. 191, R. 100 and R. 36).

This was brought to the Trial Court's attention on multiple occasions, including but not limited to objections to the Recitation of Undisputed Facts and Conclusions of Law, and the related oral arguments. (R. 458-59 and 577 at pgs. 4-5).

the optional extension of the REPC through October 1, 2004.⁷ (R. 224 ¶ 24). Further, in reliance upon the execution and approval of Addendum No. III, the Young Entities did not close on the Gurney Property prior to the closing deadline established in Addendum No. 1 and continued to expend time and resources to secure entitlement, zoning and annexation approval for the proposed Gurney Estates Subdivision. (R. 222-23 ¶¶ 25-26).

Throughout the remainder of 2004, through 2005 and up to the filing of this lawsuit on February 23, 2006, the Gurneys never suggested that Addendum No. III was invalid, demand payment a second \$10,000.00 amount or hint that Addendum No. III did anything other than obviate Addendum No. 1's requirement of a second \$10,000.00 payment. (R. 225 ¶ 15, R. 210 ¶ 20, R. 223 ¶ 27 and R. 30). Rather, the Gurneys continued to work with the Young Entities in securing the approval of Lehi City for the Gurney Estates Subdivision, including but not limited to cooperating with the Young Entities in seeking entitlement, annexation and zoning approval. (R. 223 ¶ 28).

⁷ The Trial Court found that it was undisputed that the Young Entities did make a \$10,000.00 extension payment, but made it late. (R. 551 ¶ 4). The record shows, however, that in reliance on Addendum No. III, the Young Entities never made such a payment. (R. 224 ¶ 24 and R. 175 ¶ 7). This error was brought to the Trial Court's attention, but was not corrected. (R. 459).

D. The Parties Enter Into and Partially Perform a Third Addendum to the REPC: Labeled "Addendum No. 3"

Following the execution of Addendum No. III, and in late 2004, it appeared to the Young Entities that securing the approval of Lehi City for the Gurney Estates Subdivision would require additional time. Specifically, internal Gurney Family disputes as to water rights was delaying the transfer of those necessary water rights to Lehi City. (R. 222-23 ¶ 29). Accordingly, in December 2004, the Young Entities proposed a third Addendum to the REPC which was labeled "Addendum No. 3". (R. 222 ¶ 30). Addendum No. 3 was designed to facilitate the resolution of the water rights issues and extend the REPC until such issues were resolved. (R. 222 ¶ 31). The Young Entities and some of the Gurneys executed Addendum No. 3 in December 2004. Four of the Gurneys executed Addendum No. 3 in the following month.⁸ (R. 189, R. 209 ¶ 22 and R. 222 ¶ 32).

In reliance upon the execution and approval of Addendum No. 3 by the Gurneys, the Young Entities undertook the following actions:

- (1) The Young Entities continued to expend time and resources in seeking entitlement, annexation and zoning approval for the Gurney Estates Subdivision;
- (2) The Young Entities worked with the Gurneys to complete and submit an Annexation Request to Lehi City;

⁸ Paul, Betty, Lloyd and Donna Gurney executed Addendum No. 3 after its December 13, 2004 acceptance deadline. (R. 189 and R. 34). The Young entities, as offeror, waived any requirement that the offer contained in Addendum No. 3 be accepted by December 13, 2004. (R. 222 ¶ 33 see also R. 209 ¶ 23).

(3) the Young Entities entered into a Water Transfer Agreement with the Gurneys and Lehi Metropolitan Water District; and

(4) the Young Entities, elected to not close upon the Gurney Property prior to the expiration deadline set forth in Addendum No. III. (R. 222 ¶ 34).

Just as with the REPC and previous Addenda, prior to the filing of this lawsuit, the Gurneys never indicated to the Young Entities they did not consider Addendum No. 3 to be binding. (R. 222 ¶ 35 and R. 209 ¶ 25). Rather, the Gurneys continued to cooperate with and assist the Young Entities in securing the approval of the Gurney Estates Subdivision, including but not limited to cooperating with the Young Entities in the completion and submission of an Annexation Agreement to Lehi City and by entering into the Water Transfer Agreement. (R. 221-22 ¶ 36).

E. The Parties Enter Into a Water Transfer Agreement, and the REPC Was Extended Due to the Gurneys' Failure to Resolve Water Rights Issues

As previously stated, Addendum No. 3 was designed to facilitate the resolution of the water rights issues and extend the REPC until such issues were resolved. (R. 222 ¶ 31). Included for sale in the REPC were "53.82 shares of water or shares equal to the required amount by Lehi City for development." (R. 206). Lehi City required the dedication of 140.4 acre feet of water rights for final development approval of the Gurney Estates Subdivision. (R. 220 ¶ 40, R. 240 ¶ 2, R. 239 ¶ 7, R. 231-36 and R. 229, Lorin Powell's Affidavit is attached as Addendum G). Accordingly, to facilitate the resolution of water rights issues, Addendum No. 3 provided as follows:

1. Due to delays with water share agreement issues Buyer & Seller agree to extend the closing date to June 15, 2005.
2. Both parties will give full cooperation while working with the City & State entities through the entitlement process & water share assignments.
3. Since the Buyer has no control over the water issues between [Gurney] family members it is difficult, if not impossible to move the land forward until these issues are resolved. **[I]t is agreed, should such water resolution issues continue to delay progress through the City, for each day of delay, it will set the closing back for a day.**

(R. 189) (emphasis added).

In addition to entering into Addendum No. 3, the Young Entities and the Gurneys, along with Lehi Metropolitan Water District, entered into a Water Transfer Agreement on February 23, 2005. That Agreement specifies the manner in which Lehi City's water requirements for the Gurney Estates Subdivision would be satisfied. (R. 240 ¶ 3 and R. 231-36).

The Gurneys never fully complied with their obligations under the Water Transfer Agreement. (R. 239-40 ¶¶ 4-6). Lehi City refused to grant final approval of the Gurney Estates Subdivision until the water rights issues were resolved through the Gurneys full compliance with the Water Transfer Agreement. (R. 239 ¶ 7, R. 229 and R. 220 ¶ 40). Accordingly, pursuant to and in reliance upon Addendum No. 3's day to day extension provision, the Young Entities elected to extend the REPC pending a resolution of the water transfer issues. (R. 220 ¶ 41).

F. The Gurneys Raised No Objections to the Validity of the REPC and Continued to Accept the Benefits of the REPC

Prior to filing this lawsuit in February 2006, the Gurneys never indicated to the Young Entities, or the parties' agent Paul Timothy, that the REPC was not under extension pursuant to Addendum No. 3. (R. 220 ¶ 42 and R. 208-09 ¶¶ 26-29). Rather, they continued to conduct themselves as if the REPC was binding and continued to freely accept the benefits derived through the REPC and Addenda. (R. 221 ¶ 37 and R. 208-09 ¶¶ 26-29). Specifically:

- (1) The Gurneys received assistance from the Young Entities and its engineers in resolving water rights issues, including the completion of an Application for Permanent Water Change (R. 221 ¶ 37);
- (2) On or about February 14, 2005, the Gurneys and Lehi City entered into an Annexation Agreement (*Id.* and R. 248-54);
- (3) Lehi City granted zoning approval for the Gurney Estates Subdivision for ½ acres residential lots (R. 221 ¶ 37); and
- (4) On or about April 28, 2005, Lehi City granted preliminary Plat Approval to the Gurney Estates Subdivision. (*Id.* and R. 214).

The Young Entities efforts, in reliance upon the REPC and Addenda, made possible each of the preceding entitlement agreements and approvals for the Gurney Property. (R. 220 ¶ 39). Each of the preceding entitlement agreements and approvals from Lehi City benefit and enhance the value of the Gurney Property. (R. 220 ¶ 38).

After nearly two and one-half years of partial performance of the REPC and Addenda by the parties, after freely accepting numerous benefits derived through the REPC, and after failing to meet their own obligations under the REPC, the Gurneys

commenced this lawsuit seeking, among other things, to have the REPC declared invalid *ab initio*. (R. 1-30, R. 187-213, and R. 214-228).

SUMMARY OF THE ARGUMENT

How the REPC “lapsed” on November 28, 2003, three days before it was signed by anybody, remains unexplained. The offer contained in the REPC was created on December 1, 2003 and was accepted on that same day. An offer that does not exist cannot lapse. Further, all of the parties executed the REPC at the same time and proceeded to perform the REPC for more than two years. The Gurneys accepted and never returned the \$10,000.00 in earnest money. Moreover, the parties entered into two additional Addenda to the REPC. The Gurneys never complained that the REPC was invalid and allowed the Young Entities to perform the REPC, resulting in significant benefits the Gurneys freely accepted. Under these circumstances contract law and equitable principles make the REPC an enforceable and binding contract.

The trial court also erred in determining that the contract failed for lack of consideration based upon the Young Entities’ failure to make a \$10,000.00 extension payment. The second Addendum to the REPC, Addendum No. III, extended the contract and required no such payment. Addendum No. III superceded the conflicting terms of Addendum No. 1, such as its extension date and the requirement for an extension payment.

The trial court also improperly resolved significant disputes of material facts. For example, the trial court found that Addendum No. III was not timely signed by the parties. The record shows that all of the parties executed Addendum No. III before

its offer acceptance deadline. (R. 191). Once it is understood that Addendum No. III was executed in a timely manner, Addendum No. 1's terms relating to extension of the closing date become irrelevant, as does any issue regarding the timely signing of the REPC.

Finally, under the terms of the third Addendum to the REPC – Addendum No. 3 – the REPC is extended until the Gurneys provide cooperation in resolving the water rights issues necessary to secure final plat approval for the Gurney Estates Subdivision from Lehi City. The Gurneys have failed to provide such cooperation, breaching the REPC, and invoking the express day-to-day extension of the closing date contained in Addendum No. 3.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE REPC “LAPSED” BECAUSE THE PARTIES EXECUTED THE REPC ON DECEMBER 1, 2003, THREE DAYS AFTER THE NOVEMBER 28, 2003 OFFER ACCEPTANCE DEADLINE CONTAINED IN THE REPC

Paragraph 25 of the REPC provides: “Buyer offers to purchase the Property on the above terms and conditions. If seller does not accept this offer by 5:00 p.m. Mountain Time on November 28, 2003, this offer shall lapse; and the Brokerage shall return Earnest Money Deposit to Buyer.”⁹ (R. 202, R. 117 and R. 047). All of the parties executed the REPC and Addendum No. 1 at the same time: December

⁹ Addendum No. 1 contained an identical acceptance deadline clause. (R. 44, 115 and 199).

1, 2003 at 8:30 p.m. (R. 193-206). An offer, however, cannot lapse before it is extended.

The Trial Court, in essence, concluded as a matter of law that the REPC and Addendum No. 1 were void *ab initio* because the parties did not execute them prior to the offer acceptance deadline of November 28, 2003. Specifically, the Trial Court found, “the REPC and the incorporated Addendum No. 1 lapsed on November 28, 2003, since neither party signed the contract by that date.” (R. 550 ¶ 2).

The offer embodied in the REPC and Addendum No. 1, however, did not come into being until after the REPC’s offer acceptance deadline had expired. Further, the parties executed the REPC and Addendum No. 1 at the same time, the earnest money was paid and accepted, and the parties proceeded to partially perform the contract for more than two years afterwards.

The offer acceptance deadline was waived and could not retroactively invalidate the contract. Further, the Gurneys are estopped from denying the validity of the REPC because they accepted the benefits of the contract without complaint and allowed the Young Entities to perform the contract without complaint.

A. By Executing the REPC and Addendum No. 1 on December 1, 2003, and presenting it to the Gurneys for Acceptance on That Date, the Young Entities Waived the Offer Acceptance Deadline and a Binding Contract Was Formed

Utah Courts recognize that contractual provisions may be waived. See *Provo City Corp. v. Nielson Scott Co.*, 603 P.2d 803, 806 (Utah 1979) (“It is true that parties to a written contract may modify, waive, or make new contractual terms, even if the contract itself contains a provision to the contrary.”). Further, a party may waive

contractual provisions which run to its benefit. See *Taylor Bros. Co. v. Duden*, 199 P.2d 995, 997 (Utah 1948) (holding vendor could waive contractual limitation running to its benefit). As explained by the Supreme Court of Utah:

[A] party to a contract, who is entitled to demand performance of a condition precedent, may waive the same, either expressly or by acts evidencing such intention; and performance of a condition precedent to taking effect of the contract may be waived by the acts of the parties in treating the agreement as in effect.

Ahrendt v. Bobbitt, 229 P.2d 296, 297 (Utah 1951) (quoting 17 C.J.S. *Contracts* § 491).

The acceptance deadline clause is a condition precedent, specifying a deadline by which the offer must be accepted for the acceptance to be valid. The clause runs to the benefit of the Young Entities, as offeror. The Young Entities were free to waive the offer acceptance deadline because it was a limitation and condition precedent running to their benefit. By creating and presenting the offer contained in the REPC and Addendum No. 1 after the acceptance deadline specified in those documents had expired, the Young Entities waived the offer acceptance deadline. Additionally, the Young Entities' tender of the earnest money and further partial performance of the REPC also created a waiver of the offer acceptance deadline. The Young Entities recognize and accept their waiver of the deadline. (R. 226 ¶ 13).

In facing an issue nearly identical to that presented by this case, the Wisconsin Court of Appeals determined that the offer acceptance deadline in a real estate purchase contract counteroffer was waived by the offeror's presentation of the offer after the expiration of the offer acceptance deadline. See *C.G. Schmidt, Inc.*

v. Tiedke, 510 N.W.2d 756 (Wis. Ct. App. 1993). In *Tiedke*, the seller of the subject real property presented a counteroffer to the buyer after the offer acceptance deadline the in counteroffer had expired. See *id.* at 756-57. After the buyer had formally accepted the counteroffer and tendered the earnest money, the seller changed her mind, arguing “that the counteroffer became a legal nullity because it was delivered after expiration of the time for acceptance and, therefore, [the Buyers’] acceptance was of no effect.” *Id.* at 757. Noting that “a party to a contract can waive a condition that is for its benefit,” the court determined that, by presenting the Counteroffer to the Buyer after the expiration of the offer acceptance deadline, the Seller waived the deadline. *Id.* at 757-58. In essence, the court viewed “the counteroffer as one that, in effect, contained no restriction on time for acceptance because delivery occurred after the express deadline.” *Id.* at 758. Finally, the *Tiedke* court noted that to accept the seller’s suggestion that the offer acceptance deadline nullified the contract, despite the fact that the offer was presented and accepted after the deadline, “would be to allow one party to tender an offer after the express acceptance deadline has passed, then, if the offer is accepted, to enforce the contract relying on the acceptance or, at its pleasure, to escape the contract claiming that the acceptance was too late.” *Id.*

The offer in this case also was presented to the Gurneys after the lapse of the offer acceptance deadline. In fact, the offer was not even created until after the lapse of the offer acceptance deadline. Nonetheless, the parties formally accepted and proceeded to perform the contract. The Gurneys have done exactly what the *Tiedke* court warned against – they accepted the offer, enforced the contract by

accepting the earnest money and other benefits of the contract over the course of more than two years, then when their pleasure dictated, they relied upon the acceptance deadline clause to escape their obligations under the contract.

1. The REPC's "Time Is of the Essence" Clause Does Not Prevent Waiver of the Offer Acceptance Deadline

The Trial Court found that, "Time of performance was an essential element of the documents and could not be waived." (R. 551). The Trial Court supported this conclusion noting that the REPC provides, "Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all of the parties." (R. 550-51, R. 402, R. 202 and R. 117).

The REPC's "time is of the essence" clause does not prevent the waiver of the REPC's and Addendum No. 1's offer acceptance deadlines. As an initial matter, "parties to a written contract may modify, waive, or make new contractual terms, **even if the contract itself contains a provision to the contrary.**" *Provo City*, 603 P.2d at 806 (emphasis added). Further, time of performance is a condition that may be waived even where time is of the essence: "Even where time is of the essence, a breach of the contract in that respect by one of the parties may be waived by the other party subsequently treating the contract as still in force, through words or conduct indicating that the provision is no longer of importance, or by conduct that contributes to the delay." 17A Am. Jur. 2d *Contracts* § 609.

Both the Young Entities and the Gurneys demonstrated that the offer acceptance deadline was of no importance when they executed the REPC and Addendum No. 1, at the same time, on December 1, 2003. The Gurneys in

particular demonstrated conclusively that it was not an issue for them: They accepted the \$10,000 earnest money deposit and have never returned it. They still have it today.

The parties continued this demonstration by partially performing the contract and entering into additional Addenda over the course of more than two years. The Gurneys accepted significant benefits from the contract, including earnest money and development approvals secured through the Young Entities. Under these circumstances, the offer acceptance deadline was waived and cannot invalidate the contract.

B. The Doctrines of Equitable Estoppel and Ratification Prevent the Gurneys from Relying Upon the REPC's and Addendum No. 1's Offer Acceptance Deadlines to Invalidate the Contract

The Trial Court also erred in allowing the Gurneys to invalidate the parties' contract on the basis of the REPC and Addendum No. 1 offer acceptance deadlines when the Gurneys accepted the earnest money, partially performed the contract, accepted without complaint the benefits of the contract, and allowed the Young Entities to perform the REPC without complaint for over two years. Under these circumstances, the doctrines of ratification and estoppel prevent the Gurneys from voiding the contract through the offer acceptance deadlines, years after the fact.

The doctrine of equitable estoppel allows the Court to “to modify a contract or prevent a party from denying the validity of a contract when one party has relied on another party's conduct.” *Swan Creek Village Homeowners Assoc. v. Warne*, 2006 UT 22, ¶ 35, 34 P.3d 1122. Equitable estoppel is appropriate where “conduct by one

party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." *United Am. Life Ins. Co. v. Zions First Nat. Bank*, 641 P.2d 158, 161 (Utah 1982).

The elements necessary 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.

Holland v. Career Serv. Review Bd., 856 P.2d 678, 682 (Utah Ct. App. 1993).

Estoppel also is appropriate in instances of ratification: "Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice."

Tanner v. Provo Reservoir Co., 289 P. 151, 154 (Utah 1930) (citations omitted).

Estoppel through ratification has been found where a party accepts the benefits of a contract, a party acquiesces to a contract, or a party fails to promptly exercise a right to disaffirm a contract. *See id.*

Recognizing the binding nature of the REPC and Addendum No. 1, the parties entered into subsequent Addenda when they needed to modify the terms of their contract. Specifically, the parties entered into Addendum No. III in June 2004 and they entered into Addendum No. 3 in December 2005 and January 2006. (R. 191

and R. 189). Contrary to the Trial Court's recitation of undisputed facts, all of the parties executed Addendum No. III prior to the offer acceptance deadline in that Addendum. (R. 189). Also contrary to the Trial Court's recitation of undisputed facts, Addendum No. 3 was executed by most of the parties prior to its offer acceptance deadline. (R. 191). By entering into Addenda Nos. III and 3, the parties recognized and ratified the validity of the REPC and Addendum No. 1.

Moreover, the Gurneys did not object to the REPC and Addendum No. 1 on the basis of the offer acceptance deadlines at the time they were executed, nor at any other time during the two-plus years the parties performed the contract and worked to bring the transaction to closing. In fact, the Gurneys never once complained of the supposed invalidity of the contract because of the offer acceptance deadlines, or because of any other reason. (R. 225 ¶ 15 and 209 ¶ 27). Rather, they freely and without complaint accepted numerous benefits from the contract, including but not limited to: (1) \$10,000.00 earnest money; (2) assistance from the Young Entities and its engineers in resolving water rights issues, including the completion of an Application for Permanent Water Change; and (3) the work, resources and assistance of the Young Entities in securing development approval for the Gurney Property, resulting in an Annexation Agreement with Lehi City, zoning approval for ½ acre residential lots on the Property and Preliminary Plat Approval for the Gurney Estates Subdivision. (R. 220-28).

These benefits, especially the entitlement approvals from Lehi City, are the result of the hard work and investment the Young Entities rendered in reliance upon the REPC and Addenda. (R. 220-21). In fact, in reliance upon the Gurneys'

execution of the contractual documents, their long-standing lack of protest concerning the contract's validity, and their free acceptance of the contract's benefits, the Young Entities paid \$10,000.00 non-refundable earnest money to the Gurneys and spent years and significant resources necessary to engineer the development, resolve the water rights issues, secure development approvals for the property and bring the transaction to closing. (R. 220-28).

The Gurneys' late-breaking objection to the validity of the contract, on the basis of the offer acceptance deadlines, resulted in a complete loss of the Young Entities' contractual interest in the Gurney Property, the earnest money, and the years of time and expense the Young Entities dedicated to engineering the development and securing development approvals. Referring to the Gurneys' new position that the REPC was never enforceable as "late-breaking" actually approaches a platitude: It really is lawyer driven. As recently as January 5, 2006, the Gurneys represented, through their counsel Rodney W. Rivers, that the REPC was a binding agreement between the parties.¹⁰ (R. 225 ¶ 16 and R. 216).

This case demands application of the principles of ratification and estoppel. Utah Courts will not countenance the inequities inherent in the Gurneys' conduct:

Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct, to the prejudice of another, who has acted in reliance on

¹⁰ The Gurneys' counsel wrote on January 5, 2006, "Failure to provide such assurances will be considered an anticipatory repudiation by my clients **and may lead to the termination of the Real Estate Purchase Contract.**" (R. 215-16) (emphasis added).

such conduct or representation. It is upon this just and equitable principle that a person is said to be estopped to take advantage of his own fraud or wrong. The doctrine of estoppel requires of a party consistency of conduct, when inconsistency would work substantial injury to the other party.

Tanner, 289 P. at 154 (emphasis added) (citation omitted).

The Trial Court erred in invalidating the parties' contract on the basis of the offer acceptance deadlines. This is especially true when the facts are viewed in the light most favorable to the Young Entities.

POINT II

ADDENDUM NO. III DOES NOT REQUIRE A \$10,000 PAYMENT FOR AN EXTENSION OF THE CLOSING DATE FOR THE REPC

The Trial Court also found the parties' REPC to be invalid on the alternative basis of failure of consideration:

Even if the Contract and its Addenda had been signed timely by both parties, the Court finds that the REPC ceased to exist for failure of consideration because the Defendants did not pay the second \$10,000.00 in Earnest Money required by Addendum No. I to extend the closing date. Instead, Defendant first paid this second installment on June 7, 2006, long after the Contract and Addenda had lapsed, and therefore, the Court finds that this failure of consideration attacked the very existence of the Contract and proved it unenforceable.

(R. 550).

Addendum No. III superceded Addendum No. 1's extension terms and extended the REPC without requiring a \$10,000.00 payment.¹¹

A. The Contract Did Not Fail for Consideration Because Addendum No. III Extended the REPC Without Requiring An Extension Payment, Eliminating Addendum No. 1's Extension Payment Requirement

“A contract's interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent.” *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶14, 48 P.3d 918 (quotations and citations omitted). The Trial Court found that the relevant terms of the REPC and its Addenda were unambiguous. Accordingly, the Court interpreted the REPC and Addenda solely as a matter of law. “If a trial court interprets a contract as a matter of law, we accord its construction no particular weight, reviewing its action under a correctness standard.” *Id.* (quotations and citations omitted).

The Trial Court's interpretation of the REPC and Addenda in relation to the necessity of a \$10,000.00 extension payment conflicts with the plain and unambiguous language of Addendum No. III. Addendum No. III extended the contract closing date without requiring any payment. Accordingly, the extension requirements of Addendum No. 1 were modified and superceded.

Addendum No. 1 provided in relation to an extension:

¹¹ Naturally, by logical extension, Addendum No. 3 supercedes the terms of Addendum No. III, but due to the Trial Court's finding, Addendum No. III's impact upon Addendum No. 1 needs to be addressed. The same arguments apply to Addendum No. 3's impact upon Addendum No. 1. In reality, Addendum No. 1 has been superceded twice now, first by Addendum No. III and then again by Addendum No. 3.

In the event Buyer has not received final plat approval with 2.5 units/acre from Lehi by the closing date then the Buyer shall be granted one (1) extension to be paid as follows:

a) Buyer to pay an additional ten thousand \$10,000.00 dollars for non-refundable deposit to Integrated Title Services no later than July 30, 2004 to extend the closing date to October 1, 2004.

(R. 198-99) (emphasis added).

In approximately June of 2004, Lehi City informed the Young Entities that the proposed Gurney Estates Subdivision would not be approved at a density of 2.5 units per acre, as anticipated and incorporated into the REPC and Addendum No. 1. (R. 224 ¶ 19). This led to the parties entering into a second Addendum to the REPC, which was labeled "Addendum No. III".¹² (R. 224 ¶ 22).

Addendum No. III extended the REPC as follows: "Buyer and Seller each agree to extend said closing an additional 6 months from the initial closing not to exceed Feb. 1st 2005." (R. 191). Accordingly, Addendum No. III extended the contract beyond the conditional extension through October 1, 2004 available under Addendum No. 1. (R. 198-99). Addendum No. III's extension of the REPC makes no reference to the payment of \$10,000.00 as a pre-requisite for the extension of the closing date; it simply extended the closing date through February 1, 2005. (R. 191 and R. 551). Further, Addendum No. III provides, "To the extent the terms of this

¹² Addendum No. III contains an offer acceptance deadline of June 14, 2004. (R. 191). The Trial Court found that it was undisputed that "Neither the REPC, Addendum No. I, II or III were signed timely by any of the parties." (R. 551 ¶ 5). Contrary to that finding, Addendum No. III was timely signed by all of the parties, well before June 14, 2004. (R. 191, R. 100 and R. 36), See Point III, *supra*.

ADDENDUM modify or conflict with any provisions of the REPC, including prior addenda and counteroffers, these terms shall control.” *Id.*

Addendum No. III’s extension of the REPC through February 1, 2005, without requiring any additional payment, conflicts with Addendum No. 1’s requirement that \$10,000.00 be paid to extend the REPC through October 1, 2004. Further, Addendum No. III was entered into by the parties before the additional payment required by Addendum No. 1 was due. (R. 191-99).

Rather than reduce the selling price because Lehi City refused to approve the lot size – which occurred before Addendum No. 1’s \$10,000 payment was due – the parties agreed to extend the closing date without payment of any additional sums. Common sense suggests that the Young Entities were not required to pay \$10,000.00 to extend the REPC through October 1, 2004, when Addendum No. III extended the contract through February 1, 2005 without requiring payment. The law agrees with common sense:

It is well-settled law that the parties to a contract may, by mutual consent, alter all or any portion of that contract by agreeing upon a modification thereof. Where such a modification is agreed upon, the terms thereof govern the rights and obligations of the parties under the contract, **and any pre-modification contractual rights which conflict with the terms of the contract as modified must be deemed waived or excused.**

Rapp v. Mountain States Tel. & Tel. Co., 606 P.2d 1189, 1191 (Utah 1980) (emphasis added) (citations omitted).

The Trial Court erred in determining that Addendum No. 1 required a \$10,000.00 extension payment because Addendum No. III modified and superceded

Addendum No. 1 in relation to extension of the closing date, eliminating the formerly required extension payment.

B. Alternatively, the Doctrines of Estoppel, Ratification and Waiver Prevent the Gurneys From Relying Upon the Lack of an Extension Payment to Invalidate the Contract

Even if the \$10,000.00 payment obligation of Addendum No. 1 somehow survived Addendum No. III, the Gurneys lack of complaint regarding the non-payment of the \$10,000.00 coupled with their continued acceptance of the contract's benefits prevents them from denying the validity of the contract.

From the expiration of Addendum No. 1's \$10,000.00 extension payment deadline on July 30, 2004 through the date the Gurneys filed this lawsuit, on February 23, 2006, the Gurneys did not once demand the \$10,000.00 extension payment or indicate that the contract was invalidated by the lack of such payment. (R. 223 ¶ 7 and 210 ¶¶ 19-21). Rather during that 18 month plus period, the Gurneys continued to conduct themselves as if there was a binding contract – accepting without complaint the Young Entities continued performance of the contract, working with the Young Entities to secure development approvals from Lehi City, entering into a third Addendum, and entering into the Water Transfer Agreement which was designed to resolve water issues and allow the transaction to close. (R. 223 ¶¶ 26-27).

“[D]elay in repudiation gives rise to an implied or de facto ratification of [a] contract.” *Lowe v. April Indus. Inc.*, 531 P.2d 1297, 1299 (Utah 1974). The Gurneys lack of repudiation of the contract following the expiration of the Addendum No. 1

\$10,000.00 payment deadline, coupled with their continued performance of the contract and acceptance of its benefits, prevents them from denying the contract's validity under the doctrines of ratification, waiver and estoppel.

POINT III

THE TRIAL COURT IMPROPERLY RESOLVED MATERIAL FACTUAL DISPUTES

"[O]nly one material fact in dispute is required to reverse a summary judgment." *Yoho Auto., Inc. v. Shillington*, 784 P.2d 1253, 1255 (Utah Ct. App. 1989) (citation omitted). The Trial Court's grant of summary judgment should be reversed because it improperly resolved material factual disputes.

The Trial Court found it undisputed that, "Neither the REPC, Addendum I, II or III were signed timely by any of the parties."¹³ (R. 551 ¶ 5). By declaring this fact undisputed, the Trial Court actually resolved material disputes of fact. The record establishes that all of the parties executed the second Addendum to the REPC – "Addendum No. III" – in a timely manner. Addendum No. III's offer acceptance deadline was June 14, 2004. (R. 191, 100 and 36). All of the parties executed Addendum No. III by June 8, 2004 – several days prior to the June 14, 2004 deadline. (*Id.*). The last members of the Gurney family to execute Addendum No. III, Lloyd and Betty Gurney, executed it on June 8, 2004. (*Id.*). The Gurneys counsel suggested that LaRae Jeppson executed Addendum No. III on June 15, 2004. (R.

¹³ The Trial Court did not explain exactly what it meant in christening the Addenda as Addendums I, II and III. The context of the Court's Recitation of Undisputed Facts and Conclusions of Law, however, suggests that the Court is calling Addendum No. 1 "Addendum I", Addendum No. III "Addendum II" and Addendum No. 3 "Addendum III".

577 pg. 7). This suggestion does not comport with the evidentiary record.¹⁴ Nonetheless, at a minimum there is a dispute concerning this material fact.

The Court's determination that the REPC and Addenda were not signed timely by "any of the parties" also is incorrect as to third Addendum to the REPC, Addendum No. 3. (R. 551 ¶ 5). The evidentiary record shows that the Young Entities and three of the Gurneys executed Addendum No. 3 prior to its December 13, 2004 offer acceptance deadline.¹⁵ (R. 189). The Young Entities are not able to locate support for the notion that none of the parties executed Addendum No. 3 in a timely fashion anywhere in the evidentiary record. Again, at a minimum there is a dispute concerning this material fact.

In their opposition to the Plaintiffs' Motion for Partial Summary Judgment, the Young Entities disputed, with record support, twelve of the Gurneys' twenty-eight alleged material facts. (R. 284-90). We do not recite these "facts" and the record evidence disputing them here because the majority of the "facts" are of dubious materiality and admissibility. Nonetheless, the evidentiary record and the nature of

¹⁴ The date next to LaRae Jeppson's signature on Addendum No. III reads "6/5/04 6:15 p.m." not "615/04 6:15 p.m." (R. 191, 100 and 36). LaRae executed the Addendum at the same time as her husband, Lee. The date next to his signature also reads "6/5/04 6:15 p.m." Beyond misreading that date, Appellants are not sure from which source in the evidentiary record the Trial Court drew its conclusion that Addendum No. III was not executed timely by all of the parties. Although the Gurneys arguments, oral and written, suggest that Addendum No. III was not timely executed, Appellants cannot locate support for this assertion in the evidentiary record.

¹⁵ Early copies of Addendum No. 3, which are not fully executed, appear in the record at R. 4 and 98. These copies were not verified by any witness as fully completed and final copies of the Addendum, as was the copy at R. 189, which was verified as full and complete by the parties' agent, Paul Timothy. (R. 212 ¶ 5).

the complex two-plus year contractual relationship between the parties suggests that, at a minimum, the understanding, intention and consequences of the material facts are in dispute. In such a case, summary judgment is inappropriate. See *Sandberg v. Klein*, 576 P.2d 1291, 1292 (Utah 1978) (holding that while “the parties [are] not in complete conflict as to certain facts, the understanding, intention, and consequences of those facts [is] vigorously disputed” and the case may only be resolved by trial).

POINT IV

DUE TO THE GURNEYS FAILURE TO MEET THEIR WATER SHARE TRANSFER OBLIGATIONS, THE REPC IS UNDER AN EXTENSION PURSUANT TO ADDENDUM NO. 3

Lehi City will not grant final development approval to the Gurney Estates Subdivision until it receives the water rights necessary to support the development. (R. 239-41). Included for sale in the REPC were the water rights “equal to the amount required by Lehi City for development.” (R. 206 ¶ 1.3).

In late 2004, it appeared to the Young Entities that securing the approval of Lehi City for the Gurney Estates Subdivision would require a significant additional amount of time because the transfer of the necessary water rights to Lehi City was required and such transfer was being delayed by internal Gurney Family disputes as to water rights. (R. 222-23 ¶ 29). Accordingly, the parties entered into a third Addendum to the REPC which was labeled “Addendum No. 3” and was designed to facilitate the resolution of the water rights issues and extend the REPC until such issues were resolved . (R. 189 and 222 ¶¶ 30-31). Addendum No. 3 provides:

1. Due to delays with water share agreement issues Buyer & Seller agree to extend the closing date to June 15, 2005.
2. Both parties will give full cooperation while working with the City & State entities through the entitlement process & water share assignments.
3. Since the Buyer has no control over the water issues between [Gurney] family members it is difficult, if not impossible to move the land forward until these issues are resolved. [I]t is agreed, should such water resolution issues continue to delay progress through the City, for each day of delay, it will set the closing back for a day.

(R. 189) (emphasis added).

Addendum No. 3's day to day extension provision essentially is a memorialization of the common law contract principles dictating that the Gurneys cannot insist upon closing the contract when their own actions prevent a closing. "[T]here is implied in any contract a covenant of good faith and cooperation, which should prevent either party from impeding the other's performance of his obligations thereunder; and that one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." *Zion's Properties, Inc. v. Holt*, 538 P.2d 1319, 1321 (Utah 1975). As noted in Addendum No. 3, the Young Entities had no control over the Gurneys resolving the water issues necessary for Lehi City's final approval and the closing of the REPC.

To facilitate the resolution of water issues, the parties also entered into a Water Transfer Agreement on February 23, 2005, specifying the manner in which Lehi City's water requirements for the Gurney Estates Subdivision would be satisfied

by the Gurneys. (R. 240 ¶ 3 and R. 231-36). The Water Transfer Agreement requires the Gurneys to transfer shares in the Lehi Irrigation Company to the Lehi Metropolitan Water District, to transfer certain well water rights directly to Lehi City, and to pursue a water rights Change Application with the State Engineer. (R. 231-36). The Young entities facilitated the creation of and entered into the Water Transfer Agreement in reliance upon the REPC and moving it toward closing.

The Gurneys never fully complied with their obligations under the Water Transfer Agreement. (R. 239-40 ¶¶ 4-6). Lehi City refused to grant final approval of the Gurney Estates Subdivision until the water rights issues were resolved and the Water Transfer Agreement complied with. (R. 239 ¶ 7, R. 229 and R. 220 ¶ 40).

The plain and unambiguous language of Addendum No. 3 to the REPC indicates that as “water resolution issues continue to delay progress through the City, for each day of delay, it will set the closing back for a day.” (R. 189). Although Addendum No. 3’s default closing deadline was June 15, 2005, the continuing failure of the water issues to be resolved by the Gurneys extends that closing deadline. Accordingly, pursuant to and in reliance upon Addendum No. 3’s day to day extension provision, the Young Entities elected to extend the REPC pending a resolution of the water transfer issues. (R. 220 ¶ 41).

A. Addendum No. 3 Is Not Invalidated by Its Offer Acceptance Deadline Where the Parties Executed the Addendum and Continued to Perform the Contract

Addendum No. 3 contains an offer acceptance deadline of December 13, 2005. (R. 189). Addendum No. 3 was executed by all of the Gurneys. Four of the

seven members of the Gurney family, however, executed Addendum No. 3 after December 13, 2005. (R. 189). The parties' agent, Paul Timothy, noted that because some members of the Gurney family live outside of Utah, it often took some extra time to obtain signatures on the contract documents. (R. 209 ¶ 24).

As with the REPC and Addendum No. 1, the offer acceptance deadline in Addendum No. 3 is a provision and condition precedent running to the benefit of the Young Entities, as offeror. Accordingly, the Young Entities were free to waive this provision. See *Ahrendt v. Bobbitt*, 229 P.2d 296, 297 (Utah 1951) (quoting 17 C.J.S. *Contracts* § 491) (holding that a party entitled to demand performance of a condition precedent is free to waive the same). Further, the offer acceptance deadline was "waived by the acts of the parties in treating the agreement as in effect." *Id.*

After Addendum No. 3 was executed the parties continued to perform under the REPC and its Addenda. Specifically: (1) The Young Entities continued to expend time and resources in seeking entitlement, annexation and zoning approval for the Gurney Estates Subdivision; (2) The Young Entities and the Gurneys worked together to complete and submit an Annexation Request to Lehi City; and (3) the Young Entities and the Gurneys entered into a Water Transfer Agreement designed to resolve the water rights issues associated with the REPC.

B. The Doctrines of Ratification and Estoppel Prevent the Gurneys From Invalidating the Contract Based Upon the Offer Acceptance Deadline in Addendum No. 3

After the parties entered into Addendum No. 3, the Young Entities investment of time and resources over the course of more than a year began to bear fruit. On

or about February 14, 2005, the Gurneys and Lehi City entered into an Annexation Agreement. (R. 221 ¶¶ 37 and 248-54). Lehi City granted zoning approval for ½ acre residential lots in the Gurney Estates Subdivision. (R. 221 ¶¶ 37). The parties entered into the Water Transfer Agreement, providing a mechanism for the Gurneys to meet their water obligations under the REPC and supply the water necessary for the development. (R. 240 ¶¶ 3 and 231-36). Finally, on or about April 28, 2005, Lehi City granted preliminary plat approval to the Gurney Estates Subdivision. (R. 221 ¶¶ 37 and R. 214). All of these entitlement approvals and benefits to the Gurney Property were made possible by the efforts expended by the Young Entities in reliance upon and in performance of the REPC and Addenda. (R. 220 ¶¶ 39).

The Gurneys, in turn, accepted all of these benefits without complaint. Prior to filing this lawsuit on February 23, 2006, the Gurneys never suggested that the REPC and its Addenda, including Addendum No. 3, were invalid because of offer acceptance deadlines or for any other reason. (R. 220 ¶¶ 42, 222 ¶¶ 35, 223 ¶¶ 27, 225 ¶¶ 15, 209 ¶¶ 25-27, 210 ¶¶ 20 and 211 ¶¶ 10). As a matter of fact, as recently as January 5, 2006, the Gurneys represented, through their counsel Rodney W. Rivers, that the REPC was a binding agreement between the parties. (R. 225 ¶¶ 16 and R. 216). Again, under these circumstances, the Gurneys are estopped from denying the validity of the REPC and Addenda.

C. The Gurneys' Own Material Breach of the REPC, and Specifically Addendum No. 3, Prevents Them from Invalidating the REPC

As previously mentioned, the Gurneys have an obligation under Addendum No. 3 to “give full cooperation while working with City & State entities through the

entitlement process & water share assignments.” (R. 189). The Gurneys have failed to give such “full cooperation” in resolving the water share assignment issues, breaching their obligations under Addendum No. 3. Specifically, the Gurneys failed to meet their obligations under the Water Transfer Agreement that the parties entered into to provide a mechanism through which the water requirements of Lehi City could be met. (R. 229-41 and 222 ¶ 34). The Gurneys failure to resolve the water transfer issues, including their failure to comply with Addendum No. 3 and the Water Transfer Agreement, is a breach not only of Addendum No. 3's express terms but also of the covenant of good faith and fair dealing. See *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶14, 94 P.3d 193 (citation omitted) (“Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract.”).


Having breached their obligations under the contract, the Gurneys cannot rely upon terms of the REPC and Addenda to invalidate the contract. “The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party.” *Holbrook v. Master Prot. Corp.*, 883 P.2d 295, 310 (Utah Ct. App. 1994). Further, “[A] party seeking to enforce a contract must prove performance of its own obligations under the contract.” *Id.* at 301 (citing *Malot v. Hadley*, 740 P.2d 804, 805-06 (Or. Ct. App. 1987) and *Bell v. Elder*, 782 P.2d 545, 548 (Utah Ct. App. 1989)).

CONCLUSION

The Gurneys signed the REPC three days after the offer acceptance deadline, received the \$10,000 earnest money deposit and never returned it. They continued to received – without complaint – significant benefits over the subsequent years. Their attorney acknowledged that the REPC and its Addenda were enforceable, but their new attorneys argued to the contrary, and the Trial Court agreed. This Court should reverse and remand the Trial Court's entry of Summary Judgment: The REPC and its Addenda are enforceable. Any defects have been waived, and the Gurneys are estopped from suggesting otherwise.

Dated: ^{February 15}~~January 9~~, 2008.

LARSEN CHRISTENSEN & RICO



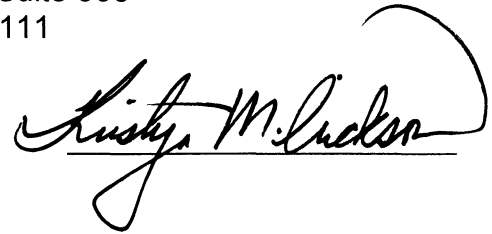
Mark A. Larsen
P/ Matthew Muir
Attorneys for Appellants

CERTIFICATE OF SERVICE

February 15

I certify that on ~~January 9~~, 2008, two copies of the foregoing Brief of Appellants was served upon the following parties of record via U.S. mail, first-class and postage pre-paid:

Lincoln W. Hobbs
Lisa M. McGarry
Hobbs & Olson, L.C.
466 East 500 South, Suite 300
Salt Lake City, UT 84111

A handwritten signature in black ink, reading "Kristy M. Luckson". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Tab A

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

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

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

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Tab B

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HOBBS & OLSON, L.C.
Attorneys for Plaintiffs
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FILED
MAY 24 2007
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY
JUN 04 2007
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, PROVO DEPARTMENT

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G. JEPPSON and
LaREE SMITH,

Plaintiffs,

v.

RANDY G. YOUNG, BLAKE JUMPER and
STONE RIVER DEVELOPMENT, L.L.C.,
RCP LAND INVESTMENTS, L.L.C. and R.
G. YOUNG, INC.

Defendants.

**RECITATION OF UNDISPUTED FACTS
AND
CONCLUSIONS OF LAW**

Case No. 060400548
Judge Steven L. Hansen

RANDY G. YOUNG, STONE RIVER
DEVELOPMENT, L.L.C., and R.G. YOUNG,
INC.,

Counterclaim Plaintiffs,

v.

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY, LEE
A. JEPPSON, LaRAE G. JEPPSON and
LaREE SMITH,

Counterclaim Defendants.

The above-entitled matter came before this Court for hearing upon Plaintiffs' Motion for Partial Summary Judgment on September 8, 2006. Lincoln W. Hobbs and Lisa M. McGarry represented the Plaintiffs. Mark A. Larsen represented the Defendants. Having heard oral argument, reviewed case law and read the Motions and Memoranda, the Court grants the Plaintiff's Motion for Partial Summary Judgment upon all of the bases argued therein, and the Court enters the following Recitation of Undisputed Facts and Conclusions of Law:

RECITATION OF UNDISPUTED FACTS

1. On December 1, 2003, the Plaintiffs and Defendants executed a REPC and Addendum I providing for the purchase of property in Utah County, referred to herein as the Gurney property.
2. Addendum I stipulated that the closing date of the Gurney property would be August 1, 2004, and to extend this date, the Buyer was required to pay an additional \$10,000.00 non-refundable earnest money to Integrated Title Services by July 30, 2004.
3. Upon written agreement of both parties, Addenda II and III extended the closing date of the Gurney property to February 15 and June 15, 2005, respectively.
4. The Defendants, however, did not deposit the second \$10,000.00 into an account with Integrated Title Services until June 7, 2006.
5. Neither the REPC, Addendum I, II nor III were signed timely by any of the parties.

CONCLUSIONS OF LAW

1. The Court finds that the relevant terms of the Agreement and the Addenda were unambiguous. Time of performance was an essential element of the documents and could not be

waived.

2. The Court finds that the REPC and incorporated Addendum No. I lapsed on November 28, 2003 since neither party signed the contract by that date. The REPC provided “[t]ime is of the essence regarding the date set forth in this Contract. Extensions must be agreed to in writing by all parties.”

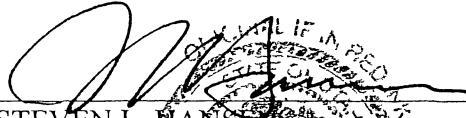
3. Even if the Contract and its Addenda had been signed timely by both parties, the Court finds that the REPC ceased to exist for failure of consideration because the Defendants did not pay the second \$10,000.00 in Earnest Money required by Addendum I to extend the closing date. Instead, Defendants first paid this second installment on June 7, 2006, long after the Contract and Addenda had lapsed and, therefore, the Court finds that this failure of consideration attacked the very existence of the Contract and proved it unenforceable.

4. The Court finds that the subsequent Addenda did not operate as waivers of the closing date of the REPC because the deadlines in the REPC were stated clearly in each of the Addenda. Therefore, the Court finds that “the time of the essence” clause is intended to give Sellers an immediate right to cancel the Contract if a Buyer is unable to timely demonstrate his ability to purchase.

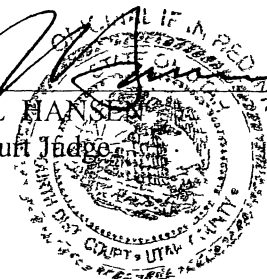
5. The Court also finds that the Affidavits submitted by the Defendants did not alter the terms of the Contracts in dispute, because the Defendants should have relied upon the Contract.

DATED this 4 day of June, 2007.

BY THE COURT:



STEVEN L. HANSEN
District Court Judge



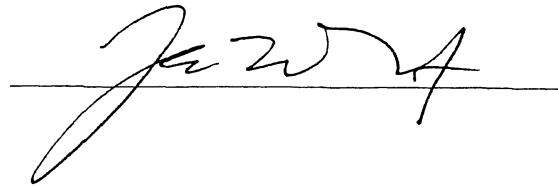
CERTIFICATE OF DELIVERY

I hereby certify that on the 11 day of May, 2007, I caused a true and correct copy of the foregoing RECITATION OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW to be served upon the following in the manner indicated:

- Mail
- Fax
- Fed Ex
- Hand Delivery
- Personally Served
- Email

Mark A. Larsen, Esq.
P. Matthew Muir, Esq.
LARSEN CHRISTENSEN & RICO, PLLC
50 West Broadway, Suite 100
Salt Lake City, UT 84101
Fax No. 364-3406
mmuir@larsenrico.com

Attorneys for Defendants



A handwritten signature in black ink, appearing to read "P. Muir", is written over a horizontal line.

Tab C

FILED

JUL 04 2007

STATE COURT
CLERK
PROVO, UTAH

LINCOLN W. HOBBS, ESQ. (4848)
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Attorneys for Plaintiffs
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Facsimile: (801) 519-2999

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, PROVO DEPARTMENT

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G. JEPPSON and
LaREE SMITH,

Plaintiffs,

v.

RANDY G. YOUNG, BLAKE JUMPER and
STONE RIVER DEVELOPMENT, L.L.C.,
RCP LAND INVESTMENTS, L.L.C. and R.
G. YOUNG, INC.

Defendants.

FINAL JUDGMENT

Case No. 060400548
Judge Steven L. Hansen

RANDY G. YOUNG, STONE RIVER
DEVELOPMENT, L.L.C., and R.G. YOUNG,
INC.,

Counterclaim Plaintiffs,

v.

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY, LEE
A. JEPPSON, LaRAE G. JEPPSON and
LaREE SMITH,

Counterclaim Defendants.

Defendants and Counterclaim Plaintiffs' Objection to the Plaintiffs' proposed Recitation of Facts and Conclusions of Law (Defendants' Objections) and the Plaintiffs' Motion for Attorneys Fees were heard, pursuant to notice, on March 26, 2007. The Plaintiffs were represented by their counsel Lincoln W. Hobbs; the Defendants were represented by their counsel Mark A. Larsen.

Having heard the arguments of counsel, having reviewed the pleadings offered to and received by the Court, and having considered the law, the Court enters the following Judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Defendants' Objections to the Recitation of Undisputed Facts and Conclusions of Law are denied. The Court will enter, with this Judgment, the Recitation of Undisputed Facts and Conclusions of Law as presented by the Plaintiffs.


2. Plaintiffs' Motion for Attorneys Fees is granted. Defendants had no objection to the amount of fees incurred through October 10, 2006, as was presented in the Affidavit of Lincoln W. Hobbs dated November 13, 2006. The Plaintiffs have subsequently submitted a Supplemental Affidavit of Lincoln W. Hobbs dated May 11, 2007, which includes fees and costs incurred through April 30, 2007 in the total amount of \$28,927.48. The Court finds these fees and costs to have been reasonably and necessarily incurred in the pursuit of the Plaintiffs' case and they are hereby awarded to the Plaintiffs.

3. Based upon the foregoing, and for good cause shown, the Court enters Final Judgment in favor of the Plaintiffs on their Complaint and against the Defendants herein in the amount of \$28,927.48, and dismisses the Defendants' counterclaims, no cause of action.

4. It is further ORDERED that the Plaintiffs' Judgment shall incur interest at the post judgment rate until paid; it is further ORDERED that this Final Judgment shall be augmented by reasonable costs and attorneys fees expended in connection with efforts that are necessitated in collecting this Judgment by execution or otherwise as shall be established by Affidavit.

DATED this 4 day of June, 2007.

BY THE COURT:


Honorable Steven L. Hansen
District Court Judge



APPROVED AS TO FORM:

LARSEN CHRISTENSEN & RICO, PLLC

By  5-21-07
Mark A. Larsen P. Matthew Muir
Attorneys for Defendants

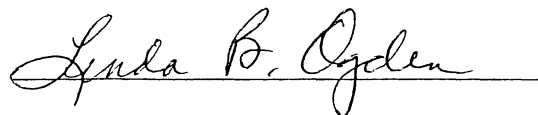
CERTIFICATE OF DELIVERY

I hereby certify that on the 22nd day of May, 2007, I caused a true and correct copy of the foregoing to be served upon the following in the manner indicated:

- Mail
- Fax
- Fed Ex
- Hand Delivery
- Personally Served
- Email

Mark A. Larsen, Esq.
P. Matthew Muir, Esq.
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Fax No. 364-3406
mmuir@larsenrico.com

Attorneys for Defendants



Tab D

**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH**

<p>LLOYB B. GURNEY, BETTY GURNEY, PAUL GURNEY, DONNA S. GURNEY, LEE A. JEPPSON, LaRAE G. JEPPSON and LaREE SMITH,</p> <p style="text-align:center">Plaintiffs,</p> <p>v.</p> <p>RANDY G. YOUNG, BLAKE JUMPER, STONE RIVER DEVELOPMENT, LLC, RCP LAND INVESTMENT, LLC, and R.G. YOUNG, INC.,</p> <p style="text-align:center">Defendants.</p>	<p>RULING REGARDING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT</p> <p>Date: September 27, 2006 Case No. 060400548 Judge Steven L. Hansen</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------

This matter comes before the Court upon Plaintiffs' Motion for Partial Summary Judgment. After reviewing the case law and reading the motions, this Court now grants Plaintiffs' Motion for Partial Summary Judgment.

RELEVANT FACTS

On December 1, 2003, the Plaintiffs and Defendants executed the REPC and Addendum I providing for the purchase of the Gurney property. Addendum I stipulated that the closing date of the property would be August 1, 2004, and to extend this date the buyer must pay an additional \$10,000 to Integrated Title Services by July 30, 2004. Upon written agreement of both parties, Addenda II and III extended the closing date of the Gurney property to February 15 and June 15, 2005 respectively. However, the Defendants did not deposit \$10,000 until June 7, 2006. Furthermore, neither the REPC, Addendum I, II, nor III were signed timely by any of the parties.

DISCUSSION

The Plaintiffs argue that the terms of the contract were unambiguous. “When the time of performance is an essential element of a contract for the sale of property, such a provision is for the benefit of both parties absent a specific provision to the contrary, and neither party may waive the time requirement.” *Local 112, I.B.E.W. Bldg. Ass’n v. Tomlinson Dairy-Mart, Inc.*, 632 P.2d 911, 913 (Wash. App. 1981). Furthermore, the REPC reads: “[t]ime is of the essence regarding the date set forth in this Contract. Extensions must be agreed to in writing by all the parties.” The Defendants argue that material facts such as deadlines were disputed, and therefore seek to introduce into evidence the affidavits of Paul Timothy and Randy G. Young.

The Defendants argue that the terms of the contract were extended by Addendum III stating: “Buyer and Seller agree to extend the closing date to June 15, 2005.” Additionally, Addendum III reads: “To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control.” The Defendants argue that they relied on the contract and that although the “parties [are] not in complete conflict as to certain facts, the understanding, intention, and consequences of those facts [is] vigorously disputed.” In such a case, “These matters can only be resolved by a trial.” *Sandberg v. Klein*, 576 P.2d 1291, 1292 (Utah 1978).

The Plaintiffs argue that the REPC and subsequent addenda lapsed because they were not signed timely by both parties. Moreover, the Plaintiffs argue that even if the time had not lapsed on the REPC and subsequent addenda, Addendum II and III are unenforceable since they are not supported by consideration. According to the Utah Supreme Court, “Evidence of failure of consideration does not vary or alter the terms of a contract; it attacks the very existence of the contract for the purpose of proving it unenforceable...In fact, it is entirely permissible for a party

to rescind a contract based upon failure of consideration.” *Aquagen Int’l v. Calrae Trust*, 972 P.2d 411, 414 (Utah 1998).

The Court agrees with the Plaintiffs’ argument that the REPC and incorporated Addendum I lapsed on November 28, 2003 since neither party signed the contract by that date. As the Plaintiffs point out, the REPC reads: “[t]ime is of the essence regarding the date set forth in this Contract. Extensions must be agreed to in writing by all the parties.”

Furthermore, even if the contract and its addenda had been signed timely by both parties, the REPC ceased to exist for a failure of consideration. The Defendants did not tender the \$10,000 in earnest money required by Addendum I to extend the closing date. Instead, they first paid the \$10,000 on June 7, 2006, long after the contract and addenda had lapsed. The Utah Supreme Court explains that a failure of consideration “attacks the very existence of the contract for the purpose of proving it unenforceable.” *Aquagen Int’l*, 972 P.2d at 414.

Subsequent addenda did not operate as waivers of the REPC’s closing date. Deadlines for signing were stated clearly in each of the documents. Therefore, the Court finds persuasive *Garcia v. Alfonzo*, explaining “the time of the essence clause is ‘not a stock phrase but [is] intended to give the sellers an immediate right to cancel the contract if the buyer [is] unable to timely demonstrate an ability to purchase.’” 490 So.2d 130, 131 (Fla. 1986). Similarly, affidavits setting forth evidence of the Plaintiffs’ actions and Defendants’ reliance on the contract do not alter the terms of the contracts in dispute. The contract and its terms were available to both parties and the contract itself, not the Plaintiffs’ actions, are the undisputable facts Defendants should have relied upon.

Conclusion

This Court finds for the Plaintiffs and grants the Plaintiffs’ Motion for Partial Summary

Judgment and orders Plaintiff's to prepare an order consistent with this ruling.

DATED this 27 day of September, 2006.


Steven R. Hall
District Court


Case No. 060400548

Judgment and orders Plaintiff's to prepare an order consistent with this ruling.

DATED this 27 day of September, 2006.


Steven K. Hagg
District Court

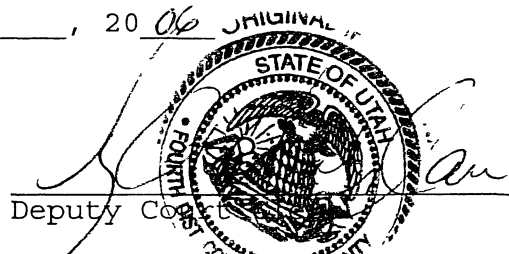


Case No. 060400548

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060400548 by the method and on the date specified.

METHOD	NAME
Mail	LINCOLN W HOBBS ATTORNEY PLA 466 E 500 S SALT LAKE CITY, UT 84111
Mail	LISA MARCY MCGARRY ATTORNEY PLA 466 E 500 S STE 300 SALT LAKE CITY UT 84111
Mail	MARK A LARSEN ATTD , UT

Dated this 28 day of Sept, 2006


Deputy Clerk


Tab E

4TH JUDICIAL DISTRICT
COUNTY OF UTAH

ORIGINAL

2006 JUL 17 P 3:28

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P. Matthew Muir (9560)
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50 West Broadway, Suite 100
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Telephone: (801) 364-6500

Attorneys for Defendants and Counterclaim Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT

COUNTY OF UTAH, STATE OF UTAH

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G.
JEPPSON and LaREE SMITH,

Plaintiffs,

vs.

RANDY G. YOUNG, BLAKE JUMPER,
STONE RIVER DEVELOPMENT, LLC,
RCP LAND INVESTMENT, LLC, and
R.G. YOUNG, INC.,

Defendants.

AFFIDAVIT OF PAUL TIMOTHY

Case No. 060400548

Division 7

Judge Steven L. Hansen

RANDY G. YOUNG, STONE RIVER
DEVELOPMENT, INC., and R.G.
YOUNG, INC.,

Counterclaim Plaintiffs,

vs.

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G.
JEPPSON and LaREE SMITH

Counterclaim Defendants.

Defendants and Counterclaim Plaintiffs submit the following Affidavit of Paul Timothy:

STATE OF UTAH)
)ss:
COUNTY OF SANPETE)

Paul Timothy, having been duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth in this Affidavit.
2. I am a licensed real estate agent since 2000.
3. I represent as a limited agent the Gurneys, as sellers, and R.G. Young, Inc. and/or Assigns, as buyers, in relation to the Real Estate Purchase Contract for the sale of the real property located at approximately 300 North and 1700 West in Lehi, Utah (the "Gurney Property").
4. The Gurneys and R.G. Young, Inc. and/or Assigns, entered into the REPC and Addendum No. 1 to that REPC on December 1, 2003.
5. The parties subsequently entered into two additional Addenda, which were styled Addendum No. III and Addendum No. 3. A true and correct copy of the final and fully executed version of the REPC and all Addenda is attached hereto as Exhibit 1.
6. I drafted the REPC and the Addenda with the input of the parties.
7. The REPC notes that "R.G. Young and/or Assigns" is the Buyer. The lack of "Inc." after R.G. Young in the REPC is the result of an inadvertent scrivener's error. The parties and I understood that R.G. Young, Inc. and/or Assigns was to be the Buyer.

8. Page 7 of Addendum No. 1 to the REPC notes that "Blake Jumper and/or Assigns" is the Buyer, as opposed to the other pages of Addendum No. 1, which reflect that "R.G. Young, Inc. and/or Assigns" is the Buyer. The use of "Blake Jumper and/or Assigns" as Buyer on Page 7 of the Addendum is the remnant of a previous draft of Addendum No. 1 and was included in the final draft as a result of an inadvertent scrivener's error. In drafting Addendum No. 1, I understood that "R.G. Young, Inc. and/or Assigns" was the Buyer.

9. It was and is my understanding as the parties agent, that they intended to and did enter into a binding contract on December 1, 2003, despite the fact that the REPC and Addendum No. 1 indicated an acceptance deadline of November 28, 2003.

10. None of the parties ever informed me that they believed the REPC and Addendum No. 1 to be void due to the lapse of the acceptance deadline.

11. In fact, the parties conducted themselves in accordance with the REPC and Addendum No. 1 being a binding contract including but not limited to in the following ways: meeting with government officials to effectuate water transfers and other necessary pre-development steps; exchanging the \$10,000.00 earnest money; and meeting with each other and with me on many occasions to discuss the effectuation of the contract.

12. Pursuant to the REPC, included in the sale of the Gurney property is "53.82 shares of water or shares equal to the required amount by Lehi City for development. See Exhibit 1 at 1.

13. The parties discussed on many occasions the fact that the water shares required by Lehi City would have to be transferred to the City prior to the City granting development approval to the Gurneys Estates project.

14. It is my understanding as the agent for the parties, that the parties intended for such water shares to be transferred prior to closing and that the REPC and Addenda require such transfers.

15. The water transfers required by the REPC and Addenda have been delayed by internal Gurney family disputes.

16. I met with the Gurney family members on countless occasions in an effort to help them resolve their water disputes so that the REPC and Addenda could be closed.

17. In June of 2004, the parties entered into the second Addendum to the REPC, which was styled "Addendum No. III" which extended the REPC through February 1, 2005.

18. Addendum No. III also notes that it is an amendment of the REPC and Addendum of December 1, 2003.

19. Neither the Gurneys, nor the terms of the Addendum No. III, conditioned the extension of the REPC on an additional payment of \$10,000.00.

20. At no time did the Gurneys indicate to me that they believed that Addendum No. III was not binding.

21. As before the parties continued to conduct themselves as if the REPC and Addenda were binding contracts.

22. In December and January of 2004, the parties entered into a third Addendum to the REPC, which was styled "Addendum No. 3".

23. It was and is my understanding as the parties agent, that they intended to and did enter into Addendum No. 3 as a binding Addendum to the REPC despite the fact that it was not executed by all of the parties prior to December 13, 2004.

24. Because of the fact that some members of the Gurney family live outside the State of Utah, it often took extra time to obtain signatures on documents.

25. The parties never indicated to me that they considered Addendum No. 3 to be non-binding or void due to the date of execution of the document.

26. After the execution of Addendum No. 3, the parties continued to conduct themselves as if the REPC and Addenda were binding documents, including but not limited to by working toward the closure of the property transfer and proposing modifications of the REPC to one another.

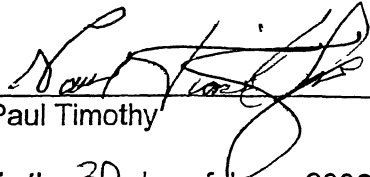
27. From December 1, 2003, through approximately six months ago, I met with the Gurneys many times, usually two to three times per week, to work with them in resolving the water transfer issues and other issues related to the closing of the REPC transaction. At no time did the Gurneys indicate that they thought the REPC and Addenda were invalid.

28. In fact, on October 29, 2005, I traveled to Boise, Idaho, to meet with the Gurney Family to discuss closing the transaction. I would not have traveled to Idaho and

incurred the expenses and time associated with such a trip, had there been any question among the parties concerning the validity of the REPC and Addenda.

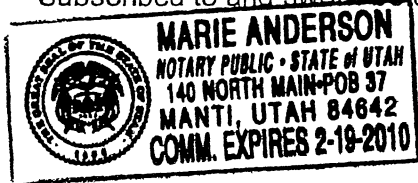
29. I also wanted to make sure at that time that my listing for the Gurney Property was up to date and that my interest in the REPC and Addenda was protected. At that time the Gurneys signed a listing agreement with me for an additional twelve months and did not indicate that they felt the REPC and Addenda to be void.

Dated: June 30, 2006.



Paul Timothy

Subscribed to and sworn before me on this the 30 day of June, 2006.





Marie Anderson
Notary Public

CERTIFICATE OF SERVICE

I certify that on July 14, 2006, a true and correct copy of the foregoing Affidavit of Paul Timothy was served upon the following parties of record via U.S. mail:

Lincoln W. Hobbs
Lisa M. McGarry
Hobbs & Olson, L.C.
466 East 500 South, Suite 300
Salt Lake City, UT 84111



Tab F

REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer R.G. Young & or Assigns offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$10,000.00 in the form of Check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: [Signature] on [Date] (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)
Brokerage: Allpro Realty Group, Inc./ Brickyard Phone Number 801-466-0678

OFFER TO PURCHASE

1. PROPERTY: 8812 n. 9150 W., Lehi 84043. ID#12:034:0035/32/36/13/38/40
also described as: Approx. 36.57 acres of undeveloped property.
City of Lehi, County of Utah, State of Utah, Zip 84043 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title:

1.2 Excluded Items. The following items are excluded from this sale:

1.3 Water Rights. The following water rights are included in this sale: 53.82 shares of water or shares equal to the required amount by Lehi City for development.

2. PURCHASE PRICE. The Purchase Price for the Property is \$1,737,075.00

2.1 Method of Payment. The Purchase Price will be paid as follows:
\$ 10,000.00 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.
\$ 1,727,075.00 (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: [X] CONVENTIONAL [] FHA [] VA [X] OTHER (specify) Private Funds
If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.
If the loan is to include any particular terms, then check below and give details: [] SPECIFIC LOAN TERMS
(c) Loan Assumption Addendum (See attached Assumption Addendum if applicable)
(d) Seller Financing (see attached Seller Financing Addendum if applicable)
(e) Other (specify)
(f) Balance of Purchase Price in Cash at Settlement

\$ 1,737,075.00 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)
(a) [] Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."
(b) [X] Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

Page 1 of 6 pages Seller's Initials [Signature] Date Dec 11 03 Buyer's Initials RGY Date 12-01-03

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2.3 Application for Loan.

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure If Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(e). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property [X] IS [] IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING.

Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: [] hours [] days after Closing; [X] Other (specify) Upon recording

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract:

P.A. D.B. Seller's Initials B.B. Buyer's Initials
P.A. D.B. Timothy The Listing Agent, Paul M. Timothy, represents [] Seller [] Buyer [X] both Buyer and Seller as a Limited Agent;
The Listing Broker, All Pro Realty, represents [] Seller [] Buyer [X] both Buyer and Seller as a Limited Agent;

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Seller's Initials P.A. Date 12/1/03 Buyer's Initials B.B. Date 12-01-03

The Selling Agent, Paul M. Timothy, represents Seller Buyer both Buyer and Seller as a Limited Agent;
 The Selling Broker, All Pro Realty, represents Seller Buyer both Buyer and Seller as a Limited Agent;

6. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. **SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify): _____

8. **BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS.** Buyer's obligation to purchase under this Contract (check applicable boxes):

- (a) IS IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) IS IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) IS IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) IS IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) IS IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) _____

Soil & environmental studies of the property.

If any of the above items are checked in the alternative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the alternative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 **Evaluations & Inspections Deadline.** No later than the Evaluations & Inspections Deadline referenced in Section 24(a) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 **Right to Cancel or Object.** If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 **Failure to Respond.** If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 **Response by Seller.** If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items mentioned in Section 10.

9. **ADDITIONAL TERMS.** There ARE ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: Addendum No. 1 _____

Seller Financing Addendum FHA/VA Loan Addendum Assumption Addendum Lead-Based Paint Disclosure & Acknowledgment (in some transactions this disclosure is required by law) Lead-Based Paint Addendum (in some transactions this addendum is required by law) Other (specify): _____

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 Seller's Initials PM Date 12/1/03 Buyer's Initials RJG Date 12-01-03

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10. SELLER WARRANTIES & REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 6. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanics liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:

- (a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;
- (b) the heating, cooling, electrical, plumbing and sewer systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;
- (c) the roof and foundation shall be free of leaks known to Seller;
- (d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and
- (e) the Property and improvements, including the landscaping, will be in the same general condition as if they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes: A one-year Home Warranty Plan WILL WILL NOT be included in this transaction. If included, the Home Warranty Plan shall be ordered by Buyer Seller and shall be issued by a company selected by Buyer Seller. The cost of the Home Warranty Plan shall not exceed \$_____ and shall be paid for at Settlement by Buyer Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 2.4 and 10.2 ("the items") are respectively present, repaired/replaced as agreed, and in the warranted condition. If the items are not as represented, Seller shall, prior to Settlement, replace, correct or repair the item or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

SHALL
 MAY AT THE OPTION OF THE PARTIES
first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and cause Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies.

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Seller's Initials: PLJ Date: 12/1/05 Buyer's Initials: PLJ Date: 12/01/05

available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.9(b).

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 28, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the closing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

- (a) Loan Application & Fee Deadline N.A. (Date)
- (b) Seller Disclosure Deadline December 10, 2003 (Date)
- (c) Evaluations & Inspections Deadline July 30, 2004 (Date)
- (d) Loan Denial Deadline N.A. (Date)
- (e) Appraisal Deadline May 1, 2004 (Date)
- (f) Settlement Deadline August 1, 2004 (Date)

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 5:00 PM [X] Mountain Time on November 28, 2003 (Date), this offer shall lapse, and the Brokerage shall return the Earned Money Deposit to Buyer.

Randy G. Young 12-01-03 (Buyer's Signature) (Offer Date) _____ (Seller's Signature) (Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

R.G. Young & Co. Realtors (Buyer's Name) (PLEASE PRINT) _____ (Notice Address) _____ (Zip Code) _____ (Phone)

Page 5 of 6 pages Seller's Initials: RG Date: 12/1/03 Buyer's Initials: RG Date: 12-01-03

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ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

ACCEPTANCE OF OFFER TO PURCHASE: Seller Accepts the foregoing offer on the terms and conditions specified above.

COUNTEROFFER: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____

Lloyd B Gurney 12/1/03 9:30PM *Betty Gurney* 12/1/03 9:30PM
 (Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

Lloyd B Gurney *Betty Gurney* 882091500 840439768-9627
 (Seller's Name) (PLEASE PRINT) (Morse Address) (Zip Code) (Phone)

REJECTION: Seller Rejects the foregoing offer.

 (Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

Randy G. Paine _____
 (Buyer's Signature) (Date) (Buyer's Signature) (Date)

Paul M. Gurney *Donna J. Gurney* *Lee A. Jeppson* *Sally Jeppson*
 (Seller's Signature) (Date) (Seller's Signature) (Date)

Lloyd B Gurney 12/1/03 *Betty Gurney* 12/1/03
 (Seller's Signature) (Date) (Seller's Signature) (Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be faxed mailed hand delivered on 12/2/03 (Date), postage prepaid, to the Seller Buyer.
 Sent/Delivered by (specify) AK

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 6, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

Page 6 of 6 pages Seller's Initials LG Date 12/1/03 Buyer's Initials RGY Date 12-01-03

Tab G

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ADDENDUM COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 30, 2003, including all prior addenda and counteroffers, between R.G. Young Inc. & or Assignee as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 W., Lehi, UT. 84043. The following terms are hereby incorporated as part of the REPC:

1. Within Seven (7) days of the execution of this Agreement, the Buyer shall pay the sum of ten thousand dollars (\$10,000.00) into Integrated Title Services, 6925 Union Park Center, Suite 160, Midvale, Utah 84047, to be placed in an interest bearing escrow account to be designed by the Buyer (the account & interest earned therein are herein collectively referred to as the "Deposit" & disbursed as herein set forth).
2. The initial closing ("herein closing") shall occur within thirty (30) days of Buyer receiving final plat approval from Lehi City Council to construct the subdivision, but in no event later than August 1, 2004 (herein the "initial closing date") at a location mutually convenient to Buyer & Seller. Buyer shall be permitted to close on the property in two (2) stages. The first (1) stage shall be the Initial Closing & shall contain a minimum of eighteen & three fourth (18.75) acres. The second (2) stage shall occur no later than eighteen (18) months from the initial closing. In the event Buyer has not received final plat approval with 2.5 units/acre from Lehi by the closing date then the Buyer shall be granted one (1) extension to be paid as follows:

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): REMAIN UNCHANGED ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. Seller Buyer shall have until 5:00 AM PM Mountain Time on November 28, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

<u>R.G. Young Inc.</u> <u>Paul Young</u>	<u>12-1-03</u>	<u>8:30am</u>	<u>Timothy Family LLC</u>	<u>12/1/03</u>	<u>8:00am</u>
<input type="checkbox"/> Buyer <input checked="" type="checkbox"/> Seller Signature	(Date)	(Time)	<input type="checkbox"/> Buyer <input checked="" type="checkbox"/> Seller Signature	(Date)	(Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

ACCEPTANCE: Seller Buyer hereby accepts the terms of this ADDENDUM.

COUNTEROFFER: Seller Buyer presents as a counteroffer the terms of attached ADDENDUM NO. ____.

<u>Ronald G. Young</u>	<u>12-1-03</u>	<u>8:30am</u>	<u>Timothy Family LLC</u>	<u>12/1/03</u>	<u>8:00am</u>
(Signature)	(Date)	(Time)	(Signature)	(Date)	(Time)

REJECTION: Seller Buyer rejects the foregoing ADDENDUM.

(Signature)	(Date)	(Time)	(Signature)	(Date)	(Time)
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THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 8, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

TIM000007

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN [X] ADDENDUM [] COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 30, 2003, including all prior addenda and counteroffers, between R.G. Young Inc. & or Assignee as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 W., Lehi, Utah 84043. The following terms are hereby incorporated as part of the REPC:

- a) Buyer to pay an additional ten thousand (\$10,000.00) dollars non-refundable deposit to Integrated Title Services no later than July 30, 2004 to extend the closing date to October 1, 2004. Deposit shall be applied to purchase price at initial closing & the Escrow Agent shall promptly deliver the deposit to the Seller.
3. Interest shall begin to accrue on August 1, 2004. The interest rate shall be eight (8%) percent simple interest & shall be due at each subsequent closing.
4. Buyer shall be permitted to accelerate this takedown with no pre-payment penalty to be assessed to Buyer.
5. For a period of one hundred and twenty (120) days after the date of acceptance by all parties, in Buyer's sole & absolute discretion, if the condition of the property is not suitable for Buyer's intended purpose & use of the property Buyer shall have the right to terminate this Agreement by written notice to Seller, in which event the Deposit shall be returned to Buyer & neither party shall have any further liability hereunder.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): [] REMAIN UNCHANGED [] ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller [] Buyer shall have until 5:00 [] AM [X] PM Mountain Time on November 28, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Handwritten signatures and dates for Buyer and Seller, including '12/1/03 8:30pm'.

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] ACCEPTANCE: [] Seller [X] Buyer hereby accepts the terms of this ADDENDUM.

[] COUNTEROFFER: [] Seller [] Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

Handwritten signature 'Randy G. Young' and date '12-01-03 8:30pm' with corresponding signature and date lines.

[] REJECTION: [] Seller [] Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ADDENDUM COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 30, 2003, including all prior addenda and counteroffers, between R.G. Young & or Assignee as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 W., Lehi 84043. The following terms are hereby incorporated as part of the REPC:

In the event Buyer terminates this contract after the one hundred and twenty (120) day period then the Escrow Agent shall promptly deliver the deposit to the Seller & neither party shall have any further liability hereunder, with no further force or effect, either at law or in equity.

5. Prior to closing, Buyer shall obtain at Buyer's expense a survey from a registered engineer or surveyor showing the exact amount of acreage to be purchased. The purchase price shall then be adjusted accordingly by multiplying the indicated acreage on said certified survey by forty-seven thousand, five hundred dollars (\$47,500.00) per acre, to constitute the property price for all purposes of this Agreement.

7. Seller & Buyer shall each bear one-half (1/2) of the cost of transfer, recordation & agricultural transfer taxes.

8. Sellers wish to retain two (2) building lots in the proposed development, one of which is to be three-fourths (3/4) of an acre & the other to be one-half (1/2) of an acre. One of the lots is to be adjacent to the proposed open space & to include on

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): REMAIN UNCHANGED ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. Seller Buyer shall have until 5:00 AM PM Mountain Time on November 28, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Handwritten signatures and dates]
 Buyer Seller Signature (Date) (Time) Buyer Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE

ACCEPTANCE: Seller Buyer hereby accepts the terms of this ADDENDUM.

COUNTEROFFER: Seller Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

[Handwritten signature and date]
(Signature) (Date) (Time) (Signature) (Date) (Time)

REJECTION: Seller Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 8, 2001. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ADDENDUM COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 30, 2003, including all prior addenda and counteroffers, between R.G. Young & or Assignee as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 W., Lehi 84043. The following terms are hereby incorporated as part of the REPC:

the 3/4 lot of Lloyd Gurney, the six (6") inch well. The six (6") inch well shall remain the property of Lloyd & Paul Gurney as specified by the Water Rights Division of the State of Utah.

9. Seller agrees to pay to Buyer the actual costs of development of Seller's two lots as outlined in Section 8 of this addendum based on a pro-rata share of the development costs for said development. The actual costs of the lot development as they impact the cost of their own individual costs will be shared in writing with the Gurney's

10. Buyer agrees that it will not interfere, in any material respect, with Sellers use of the property. Buyer further agrees to indemnify & hold Seller harmless from & against any & all claims, liabilities, or expense of any nature whatsoever arising out of such entry on the property. All test holes & borings shall be fenced in order to protect Seller's livestock from injury. In the unlikely event the land is returned to the Seller the land will be restored as close to its original condition as possible.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): REMAIN UNCHANGED ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. Seller Buyer shall have until 5:00 AM PM Mountain Time on November 28, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Gordon Gurney 12/1/03 8:30 PM Paul Gurney 12-1-03 8:30 P.M.
 Buyer Seller Signature (Date) (Time) Buyer Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

ACCEPTANCE: Seller Buyer hereby accepts the terms of this ADDENDUM.

COUNTEROFFER: Seller Buyer presents as a counteroffer the terms of attached ADDENDUM NO. _____

Randy G. Young 12-1-03 8:30pm _____
(Signature) (Date) (Time) (Signature) (Date) (Time)

REJECTION: Seller Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN [] ADDENDUM [] COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 30, 2003, including all prior addenda and counteroffers, between R.G. Young & or Assignee as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 N., Lahi 84043. The following terms are hereby incorporated as part of the REPC:

11. Buyer shall give to Seller a copy of the Survey upon its completion. In the event the Buyer elects not to proceed with the purchase of the property, all engineering, test reports & surveys shall be delivered promptly to the Seller. Copies of all tests & CC & R's shall be delivered to Seller upon request.

12. Seller may close this transaction as part of a 1031 like-kind exchange of properties. The Seller shall bear all costs associated with such exchange. Buyer hereby agrees to cooperate fully with the Seller & do all things reasonably required & requested by the Seller provided that such actions do not increase the Buyers obligations, liabilities, or cause any delay in the closing.

13. Buyer agrees to the placement of street improvements to the Sellers two (2) existing homes such as curb & gutter, drive apron, asphalt & utility stubs to the property. Buyer shall be responsible for the cost of said improvements.

14. Buyer & Seller mutually agree that the architectural requirements for the homes to be built in the development shall have stone, stucco, brick or a combination thereof on the front & two sides of the homes.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): [] REMAIN UNCHANGED [] ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller [] Buyer shall have until 5:00 [] AM [X] PM Mountain Time on November 28, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Handwritten signatures and dates: Buyer [X] Seller Signature (Date) (Time) and Buyer [] Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE: [X] ACCEPTANCE: [] Seller [X] Buyer hereby accepts the terms of this ADDENDUM.

[] COUNTEROFFER: [] Seller [] Buyer presents as a counteroffer the terms of attached ADDENDUM NO. ____.

Handwritten signature and date: Randy G. Young 12-01-03 6:30pm (Signature) (Date) (Time)

[] REJECTION: [] Seller [] Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 8, 2002. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN ADDENDUM COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 30, 2003, including all prior addenda and counteroffers, between R.G. Young & or Assignee as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 W., Lehi 840443. The following terms are hereby incorporated as part of the REPC:

- 15. Buyer agrees to work with both Lloyd & Paul Gurney on the dimensions of the property to their satisfaction.
- 16. The Sellers will have the right to review the plat plans prior to their being submitted to the City of Lehi. In addition, the Sellers' reserve the right to select their own builder if they so desire.
- 17. Both of the existing homes shall maintain an easement from the six inch well until new utilities are connected. When either one or both of the existing homes are sold the six inch well will be connected to the new building lots which will be dedicated to the Gurney's. In addition, when power is provided in the specific location of the well, a permanent hook-up will be installed by the developer at no cost to the Gurney's. Separate meter's will be provided to both Paul & Lloyd Gurney. An easement will be provided to the Gurney's new homes pertaining to the six inch well.
- 18. Three months prior to the first closing two appraisers will be selected, one by the Seller & the other by the Buyer to assess value to their respective homes. An average between the two will determine market value. Each of the homes will then be marketed through the the MLS sixty days prior

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): REMAIN UNCHANGED ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. Seller Buyer shall have until 5:00 AM PM Mountain Time on November 28, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

<i>Ronald G. Young</i> <i>Paul Gurney</i>	<i>Nov 28 2003</i>	<i>2:30 p.m.</i>	<i>Paul Gurney</i>	<i>12/03</i>	<i>7:30 P.M.</i>
<input type="checkbox"/> Buyer <input checked="" type="checkbox"/> Seller Signature	(Date)	(Time)	<input type="checkbox"/> Buyer <input checked="" type="checkbox"/> Seller Signature	(Date)	(Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:
 ACCEPTANCE: Seller Buyer hereby accepts the terms of this ADDENDUM.
 COUNTEROFFER: Seller Buyer presents as a counteroffer the terms of attached ADDENDUM NO. ____.

<i>Ronald G. Young</i>	<i>12/1/03</i>	<i>8:30am</i>			
(Signature)	(Date)	(Time)	(Signature)	(Date)	(Time)

REJECTION: Seller Buyer rejects the foregoing ADDENDUM.

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM NO. 1
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN [] ADDENDUM [] COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of September 30, 2003, including all prior addenda and counteroffers, between Blake Jumper & or Assignees as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 N. 9150 W., Lehi, Utah 84043. The following terms are hereby incorporated as part of the REPC:

to the projected completion date of their new homes. In the event either or both homes do not sale by the second and last closing, the Buyer will purchase the homes at the appraised value. In order to assure adequate & fair compensation for the two homes, there will be an APR of 3% from the time of the first closing until purchase price, should the Buyer in fact, purchase either one or both of the homes. The Seller of each of the homes shall have the option of having monies paid out to escrow, an LLC, a trust fund, or any other organ which would benefit him the most. Removal of the money will be at the Seller's convenience.

- 19. All greenbelt fees will be divided evenly between Buyer & Seller.
20. Both the state & city are vague as to the conversion of the wells to shares. Therefore, the Sellers' will have the option of using any portion of the wells or not to use the water within the wells at all to meet the demands of water for annexation.
21. While it is understood the Seller has agreed to provide ample water for the development, each of the Owners' own varying amounts of water, at least two who do not own enough to provide for their land sale. Therefore, the price of the land will be adjusted according to the amount of water dedicated to the sale.
22. This addendum will extend the contract through November 28, 2003.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): [] REMAIN UNCHANGED [] ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [] Seller [] Buyer shall have until 5:00 [] AM [x] PM Mountain Time on November 28, 2003 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Handwritten signatures and dates for Buyer and Seller, including dates like 11-03 8:30 p.m. and 12/1/03 8:25.

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:
[X] ACCEPTANCE: [] Seller [X] Buyer hereby accepts the terms of this ADDENDUM.
[] COUNTEROFFER: [] Seller [] Buyer presents as a counteroffer the terms of attached ADDENDUM NO. ____.

Handwritten signature and date for counteroffer: Randy G. Young 12-03 8:30 p.m.

[] REJECTION: [] Seller [] Buyer rejects the foregoing ADDENDUM.
(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2001. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

Tab H



ADDENDUM NO. III
TO
REAL ESTATE PURCHASE CONTRACT

Page 1 of 1

THIS IS AN ADDENDUM COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of 12-1-03, including all prior addenda and counteroffers, between RCP Land Investment as Buyer, and Gurney Family as Seller, regarding the Property located at 8812 North 9150 West, Lehi, Utah. The following terms are hereby incorporated as part of the REPC:

Buyer and Seller each agree to extend said closing an additional 6 months from the Initial closing. Not to exceed Feb. 1st 2005.

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. Seller Buyer shall have until June 14-04 AM PM Mountain Time on June 14-04 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

<u>RCP Land Investment LLC</u>	<u>Paul G. Gurney</u>	<u>6-1-04</u>	<u>7:45</u>	<u>Paul G. Gurney</u>	<u>6/6/04 6:15pm</u>
<input checked="" type="checkbox"/> Buyer	<input type="checkbox"/> Seller Signature	(Date)	(Time)	<input checked="" type="checkbox"/> Buyer	<input type="checkbox"/> Seller Signature

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:
 ACCEPTANCE: Seller Buyer hereby accepts the terms of this ADDENDUM.

COUNTEROFFER: Seller Buyer presents as a counteroffer the terms of attached ADDENDUM NO. 1

<u>Paul Gurney</u>	<u>6-1-04</u>	<u>5:00 pm</u>	<u>Paul G. Gurney</u>	<u>6/6/04 6:16pm</u>
(Signature)	(Date)	(Time)	(Signature)	(Date) (Time)

REJECTION: Seller Buyer rejects the foregoing ADDENDUM.

<u>Paul G. Gurney</u>	<u>6-7-04</u>	<u>6:25pm</u>	<u>Paul G. Gurney</u>	<u>6-5-04 6:28pm</u>
(Signature)	(Date)	(Time)	(Signature)	(Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 17, 1988. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

Form 1-A



TIM000015

Tab I

ADDENDUM NO. 1 TO REAL ESTATE PURCHASE CONTRACT

THIS IS AN [X] ADDENDUM [] COUNTEROFFER to the REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of December 1, 2003, including all prior addenda and counteroffers, between R.G. Young Inc. &/or Assignee as Buyer, and Garney Family as Seller, regarding the Property located at 8812 North 2180 West, Utah. The following terms are hereby incorporated as part of the REPC:

1. Due to delays with water share agreement issues Buyer & Seller agree to extend the closing date to June 15, 2005.

2. Both parties will give full cooperation while working with the City & State entities through the entitlement process & water share assignments.

3. Since the Buyer has no control over the water issues between family members, it is difficult, if not impossible to move the land forward until these issues are resolved, it is agreed, should such water resolution issues continue to delay progress through the City, for each day of delay, it will set the closing back for a day.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): [] REMAIN UNCHANGED [] ARE CHANGED AS FOLLOWS:

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller [] Buyer shall have until 5:00 [] AM [X] PM Mountain Time on December 13, 2004 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Handwritten signatures and dates for Buyer and Seller.

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE: [X] ACCEPTANCE: [X] Seller [] Buyer hereby accepts the terms of this ADDENDUM.

[] COUNTEROFFER: [] Seller [] Buyer presents as a counteroffer the terms of attached ADDENDUM NO. 1. Handwritten counteroffer details including signatures and dates.

[] REJECTION: [] Seller [] Buyer rejects the foregoing ADDENDUM.

Handwritten signatures and dates for rejection.

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 4, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



SELLER'S PROPERTY CONDITION DISCLOSURE (LAND)



[LISTING AGENT Complete This Section ONLY]

SELLER NAME Gurney Family (the "SELLER")
 PROPERTY ADDRESS / Tax I.D. # 9000 N 9150 W Lehi ID# 12:034:0035/38/32/13/88/4 (the "PROPERTY")
 LISTING BROKERAGE All Pro Realty (the "COMPANY")

[SELLER (ONLY) Complete and Sign Remainder of Form]

NOTICE TO SELLER. Each seller is obligated under law to disclose to the Buyer all facts known to Seller that materially or adversely affect the value of the Property and are not readily observable. This disclosure statement is designed to assist the Seller in complying with these disclosure requirements and to assist the buyer in evaluating the Property. The Company, and other real estate brokerages and agents will also rely upon the information contained in this disclosure statement.

NOTICE TO BUYER. This is a disclosure of the Seller's knowledge of the condition of the Property as of the date signed by the Seller and is not a substitute for any inspections or warranties that the buyer may wish to obtain. **THIS IS NOT A WARRANTY OF ANY KIND BY THE SELLER.**

COMPANY REPRESENTATIONS REGARDING THE PROPERTY. The Company and its agents are trained in the marketing of real estate. Neither the Company nor its agents are trained or licensed to provide the Buyer with professional advice regarding the physical condition of any property or regarding legal or tax matters. Accordingly, neither the Company nor any of its agents will make any representations or warranties regarding the physical or legal condition of the Property, including, but not limited to, the square footage, acreage, or the location of property lines. **THE COMPANY AND ITS AGENTS STRONGLY RECOMMEND THAT IN CONJUNCTION WITH ANY OFFER TO ACQUIRE THE PROPERTY SERVICES OF LEGAL AND/OR TAX ADVISORS, PROPERTY INSPECTORS, SURVEYORS, AND OTHER PROFESSIONALS TO SATISFY THE BUYER AS TO ANY AND ALL ASPECTS OF THE PHYSICAL AND LEGAL CONDITION OF THE PROPERTY.**

1. UTILITY SERVICE	Yes	No	Unknown
a. Does natural gas service the Property?	<input checked="" type="checkbox"/>		
b. Location of nearest gas line. _____			
c. Does public sewer service the Property?		<input checked="" type="checkbox"/>	
d. Location of nearest sewer line. _____			
e. Is the Property approved for septic tank use?	<input checked="" type="checkbox"/>		
f. Is there electrical service to the Property?	<input checked="" type="checkbox"/>		
g. Location of nearest electrical line. _____			
h. Is there telephone service to the Property?	<input checked="" type="checkbox"/>		
i. Location of nearest telephone service line. _____			
j. Is the Property assessed as Greenbelt?	<input checked="" type="checkbox"/>		
k. Have you received any notices by any governmental or quasi-governmental agency adversely affecting the Property?		<input checked="" type="checkbox"/>	

2. LAND (SOILS, DRAINAGE AND BOUNDARIES)	Yes	No	Unknown
Ⓐ Is there any fill or expansive soil on the Property?		<input checked="" type="checkbox"/>	
Ⓑ Do you know of any sliding, settling or earth movement on the Property?		<input checked="" type="checkbox"/>	

3. LAND (CONT.)	Yes	No	Unknown
Ⓒ Are there wetlands on the Property?		<input checked="" type="checkbox"/>	
Ⓓ Is the Property located in a flood zone?		<input checked="" type="checkbox"/>	
Ⓔ Do you know of any present or past drainage or flood problems affecting the Property?		<input checked="" type="checkbox"/>	
Ⓕ Do you know of any encroachments or boundary line disputes or easements affecting the Property?	<input checked="" type="checkbox"/>		

4. OTHER MATTERS	Yes	No	Unknown
a. Are there any existing or threatened legal action affecting the Property? [] Yes [] No [] Unknown		<input checked="" type="checkbox"/>	
b. Do you know of any violation of local, state or federal laws or regulations relating to the Property? [] Yes [] No		<input checked="" type="checkbox"/>	

5. HOMEOWNERS ASSOCIATIONS	Yes	No	Unknown
Ⓖ Is the Property part of a homeowners association? [] Yes [] No [] Unknown If the answer to this question is "No", disregard the remainder of this section.		<input checked="" type="checkbox"/>	
Ⓗ Does the homeowners association levy assessments for maintenance of common areas and/or other common expenses? [] Yes [] No [] Unknown		<input checked="" type="checkbox"/>	

Page 1 of 2 Seller's Initials U.G.H. Date 7/25/03 Buyer's Initials _____ Date _____ UAR Form 10A 2/98 Rev. 5/98

U.G.H.
U.G.H.
U.G.H.
U.G.H.

5 HOMEOWNERS ASSOCIATIONS (CONT.)

Ⓒ For any questions regarding the homeowners association, contact (if known)
 Name: _____
 Address: _____
 Phone: (____) _____
 Seller authorizes the release of information to Buyer regarding the condition of the Property and current and future assessments.

Ⓓ Is there a Master Association for the Property? If yes, provide name and contact person for association on an addendum.

6. WATER RIGHTS	Yes	No	Unknown	Water Right #	Well, Spring, Water Company or Other Water Source
a. Are there any culinary water rights with the Property?		X			
b. Is a culinary water source in place for the Property?	X				
c. Location of nearest culinary water line. _____					
d. Are there any irrigation water rights with the Property?	X				
e. Is there an irrigation water source and distribution facility in place for the Property such as canals, ditches or pressurized system?	X				
f. Are there separate shares in a water company with the Property? If yes, # of Shares _____ Name of Mutual Company _____	X		See contract		

IF THE ANSWER IS "YES" TO ANY OF THE QUESTIONS IN SECTIONS 1.K., 2, 3 AND 5 (WHICH ARE CIRCLED), PROVIDE AN EXPLANATION ON AN ATTACHED ADDENDUM.

Is there anything else which you should disclose to Buyer because it may materially or adversely affect the value or desirability of the Property: # 2 F Small easement on North side of property for drain ditch.

SELLER REPRESENTS THAT, TO THE BEST OF SELLER'S KNOWLEDGE, THE INFORMATION SET FORTH IN THE FOREGOING DISCLOSURE STATEMENT IS ACCURATE AND COMPLETE. THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OR GUARANTEE OF ANY KIND BY SELLER. SELLER HEREBY AUTHORIZES THE COMPANY TO PROVIDE THIS INFORMATION TO PROSPECTIVE BUYERS AND TO REAL ESTATE BROKERS AND AGENTS. SELLER UNDERSTANDS AND AGREES THAT SELLER WILL NOTIFY THE COMPANY IN WRITING IMMEDIATELY IF ANY INFORMATION SET FORTH IN THIS DISCLOSURE STATEMENT BECOMES INACCURATE OR INCORRECT IN ANY WAY.

Seller: Ronna L. Hurney Date: 6/25/03 Seller: J. C. Smith Date: _____

ANY REPRESENTATIONS REGARDING ACREAGE OF THE PROPERTY ARE APPROXIMATIONS ONLY. BUYER IS RESPONSIBLE TO VERIFY THE ACCURACY OF SAID APPROXIMATE ACREAGE TO BUYER'S SATISFACTION. FENCES MAY NOT CORRESPOND WITH ACTUAL BOUNDARIES OF THE PROPERTY.

RECEIPT AND ACKNOWLEDGEMENT OF BUYER

BUYER HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS DISCLOSURE STATEMENT. BUYER FURTHER ACKNOWLEDGES THAT BUYER HAS BEEN ADVISED BY THE COMPANY TO SEEK COMPETENT PROFESSIONAL ADVICE FROM PROPERTY INSPECTORS AND OTHER PROFESSIONALS IN ORDER TO EVALUATE THE CONDITION OF THE PROPERTY AND THE DISCLOSURES CONTAINED HEREIN. BUYER FURTHER ACKNOWLEDGES THAT NEITHER THE COMPANY, NOR ANY OF ITS AGENTS, WILL MAKE ANY REPRESENTATIONS OR WARRANTIES REGARDING THE CONDITION OF THE PROPERTY OR REGARDING THE ACCURACY OF ANY STATEMENTS RELATING TO THE CONDITION OF THE PROPERTY CONTAINED HEREIN.

Buyer: _____ Date: _____ Buyer: _____ Date: _____

Tab J

4TH JUDICIAL DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

2006 JUL 17 P 3: 28

ORIGINAL

Mark A. Larsen (3727)
P. Matthew Muir (9560)
LARSEN CHRISTENSEN & RICO, PLLC
50 West Broadway, Suite 100
Salt Lake City, Utah 84101
Telephone: (801) 364-6500

Attorneys for Defendants and Counterclaim Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G.
JEPPSON and LaREE SMITH,

Plaintiffs,

vs.

RANDY G. YOUNG, BLAKE JUMPER,
STONE RIVER DEVELOPMENT, LLC,
RCP LAND INVESTMENT, LLC, and
R.G. YOUNG, INC.,

Defendants.

**AFFIDAVIT OF RANDY G. YOUNG IN
SUPPORT OF DEFENDANTS'
OPPOSITION TO MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Case No. 060400548

Division 7

Judge Steven L. Hansen

RANDY G. YOUNG, STONE RIVER
DEVELOPMENT, INC., and R.G.
YOUNG, INC.,

Counterclaim Plaintiffs,

vs.

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G.
JEPPSON and LaREE SMITH

Counterclaim Defendants.

Defendants and Counterclaim Plaintiffs submit the following Affidavit of Randy G. Young in Support of Their Opposition to Motion for Partial Summary Judgment:

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

Randy G. Young, having been duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth in this Affidavit.
2. I am the President of R.G. Young, Inc., and I am authorized to act on its behalf.
3. I am the President of Stone River Development, Inc., and I am authorized to act on its behalf.
4. I am a member and registered agent of RCP Land Investments, LLC, and I am authorized to act on its behalf.
5. I have been involved in the residential real property development business for twelve years and I have developed residential real property for the last five years. Consequently, I have significant background and experience in developing residential real property and in securing the necessary governmental approvals for such development.
6. The Gurneys, as Sellers, and R.G. Young, Inc. and/or Assigns, as Buyers, executed both the REPC and Addendum No. 1 on December 1, 2003. The REPC and Addendum No. 1 provided for the purchase of certain real property owned by the Plaintiffs (the "Gurney Property") by R.G. Young, Inc. and/or Assigns.

7. Stone River Development, Inc., is an assignee of R.G. Young, Inc.'s rights and obligations in the REPC and Addenda.

8. RCP Land Investments, LLC, is an assignee of R.G. Young, Inc.'s rights and obligations in the REPC and Addenda.

9. Randy G. Young, Stone River Development, Inc., and RCP Land Investments, LLC, will hereafter be collectively referred to as the "Young Entities".

10. Stone River Development, Inc. appears in certain documents related to the REPC, the Gurneys and Gurney Estates as "Stone River Development, LLC". Stone River Development, Inc. is the real party in interest in all such documents and the misuse of "LLC" instead of "Inc." is the result of inadvertent scrivener's errors.

11. On Page 7 of Addendum No. 1 to the REPC "Blake Jumper & or Assigns" appears instead of "R.G. Young Inc. & or Assigns" as Buyer. The use of Blake Jumper's name on Page 7 of Addendum No. 1 is the result of an inadvertent scrivener's error, and the real parties in interest for Buyer in Addendum No. 1 are R.G. Young, Inc. and/or Assigns. In fact, Addendum No. 1 to the REPC was executed by R.G. Young, Inc. and/or Assigns.

12. R.G. Young, Inc. and/or Assigns intended the REPC and Addendum No. 1 to be a valid and binding offer and contract with the Gurneys as of December 1, 2003.

13. The Young Entities waived any provision in the REPC or Addendum that would have served to invalidate those documents prior to their execution on December 1, 2003.

14. In fact, in reliance upon the Gurneys' approval and execution of the REPC and Addendum No. 1, the Young Entities undertook certain actions and incurred certain expenses, including but not limited to the following: The Young entities moved forward with applying for an obtaining entitlement, zoning and annexation approval for the Gurney Property to be developed in Lehi City; The Young entities expended time and resources in applying for such approvals; and the Young Entities expended time and resources in planning and designing the proposed Gurney Estates Subdivision by commissioning engineering work and soil testing.

15. At no time prior to the filing of this lawsuit did the Gurneys indicate that they believed the REPC and Addenda were not binding.

16. In fact, as recently as January 5, 2006, the Gurneys represented, through counsel Rodney W. Rivers, that the REPC was a binding agreement between the parties. See Letter, Exhibit 1.

17. In reliance upon the Gurneys' commitment to the REPC and Addendum No. 1, the Young Entities deposited with Integrated Title Services the earnest money payment of \$10,000.00 required by the REPC.

18. The Gurneys never repudiated the payment of the \$10,000.00 or returned the \$10,000.00 to the Young Entities as they would be obligated to do had no REPC ever been entered into.

19. In approximately June of 2004, Lehi City informed the Young Entities that the proposed Gurney Estates Subdivision would not be approved at a density of 2.5 units per acre, as anticipated and incorporated into the REPC.

20. On behalf of the Young Entities, I met with the Gurneys and the parties' real estate agent, Paul Timothy, in June of 2004 to discuss Lehi City's actions. At that meeting, I proposed an adjustment to the purchase price for the Gurney Property due to Lehi City's actions.

21. The Gurneys would not agree to an alteration of the purchase price for the Gurney Property. However, in consideration of preserving the REPC, they did agree to allow an extension of the REPC.

22. Accordingly, in June of 2004, the Gurneys and the Young Entities entered into the second Addendum to the REPC, which was styled "Addendum No. III" which extended the REPC through February 1, 2005.

23. Neither the Gurneys, nor the terms of Addendum No. III, conditioned the extension of the REPC on an additional payment of \$10,000.00.

24. In reliance upon the execution and approval of Addendum No. III by the Gurneys, and the extension of the REPC by that Addendum, the Young Entities did not make the additional \$10,000.00 deposit that had been required by Addendum No. 1 for an extension of the REPC.

25. Further, in reliance upon the execution and approval of Addendum No. III by the Gurneys, and the extension of the REPC by that Addendum, the Young Entities

continued to expend time and resources to secure entitlement, zoning and annexation approval for the proposed Gurney Estates Subdivision. The Young Entities also facilitated meetings between Gurneys and water engineers to help with the formulation of an Application for Permanent Change of Water to be filed with the State of Utah.

26. Further, in reliance upon the execution and approval of Addendum No. III by the Gurneys, and the extension of the REPC by that Addendum, the Young Entities did not elect to close on the purchase of the Gurney Property prior to the original expiration date of the REPC and Addendum No. 1.

27. Prior to the filing of this lawsuit, the Gurneys never demanded payment of the second \$10,000.00 amount or indicate that Addendum No. III did not serve to waive the requirement of a second \$10,000.00 payment in consideration of an extension of the REPC.

28. Further, the Gurneys continued to work with the Young Entities in securing the approval of Lehi City for the Gurney Estates Subdivision, including but not limited to by cooperating with the Young Entities in seeking entitlement, annexation and zoning approval for the Gurney Estates Subdivision.

29. In late 2004 it appeared to the Young Entities that securing the approval of Lehi City for the Gurney Estates Subdivision would require a significant additional amount of time. Specifically, the transfer of the necessary water rights to Lehi City was required and such transfer was being delayed by internal Gurney Family disputes as to water rights.

30. Accordingly, in December of 2004, the Young Entities proposed a third Addendum to the REPC which was styled as "Addendum No. 3".

31. Addendum No. 3 was designed to facilitate the resolution of the water rights issues and extend the REPC until such issues were resolved.

32. Addendum No. 3 was executed by the Young Entities in December of 2004 and by all of the Gurneys.

33. The Young Entities ratified Addendum No. 3 and waived any requirement that the offer contained therein be accepted by December 13, 2004.

34. In reliance upon the execution and approval of Addendum No. 3 by the Gurneys, the Young Entities undertook the following actions: The Young Entities continued to expend time and resources in seeking entitlement, annexation and zoning approval for the Gurney Estates Subdivision; The Young Entities worked with the Gurneys to complete and submit an Annexation Request to Lehi City; the Young Entities entered into a Water Transfer Agreement with the Gurneys and Lehi Metropolitan Water District; and the Young Entities, elected to not close upon the Gurney Property prior to the expiration deadline set forth in Addendum No. III.

35. Prior to the filing of this lawsuit, the Gurneys never indicated to the Young Entities that they did not consider Addendum No. 3 to be binding.

36. Further, the Gurneys continued to cooperate with and assist the Young Entities in securing the approval of the Gurney Estates Subdivision, including but not

limited to by cooperating with the Young Entities in the completion and submission of an Annexation Agreement to Lehi City and by entering into the Water Transfer Agreement.

37. While the Gurneys never indicated that the REPC and Addenda were invalid, they accepted the benefits derived through the REPC and Addenda. Specifically:

- a. The Gurneys received assistance from the Young Entities and its engineers in resolving water rights issues, including in the completion of an Application for Permanent Water Change submitted to the State of Utah which will allow certain well water rights owned by the Gurneys to be used in connection with the development of the Gurney Estates Subdivision;
- b. On or about February 14, 2005, the Gurneys and Lehi City Corporation entered into an Annexation Agreement;
- c. On February 23, 2005, the Gurneys, the Young Entities and Lehi Metropolitan Water District entered into the Water Transfer Agreement;
- d. Lehi City granted zoning approval for the Gurney Estate Subdivision for 1/2 acre residential lots;
- e. On or about April 28, 2005, Lehi City granted preliminary approval to the Gurney Estates Subdivision. See Acknowledgment of Preliminary Approval, Exhibit 2.

38. Each of the foregoing entitlement agreements and approvals from Lehi City benefit and enhance the value of the Gurney Property.


39. Each of the foregoing entitlement agreements and approvals for the Gurney Property were made possible by the efforts expended by the Young Entities in reliance upon the REPC and Addenda.

40. The Young Entities cannot obtain final plat approval for Gurney Estates until the Gurneys comply with their obligations to transfer the necessary water rights under the REPC and the Water Transfer Agreement.

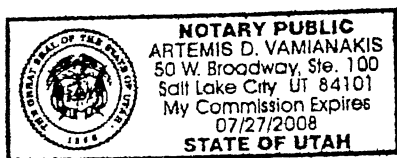
41. In reliance upon Addendum No. 3, the Young Entities have elected to extend the REPC pending the resolution of the water transfer issues.

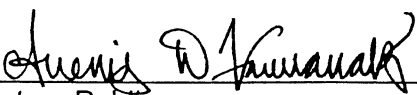
42. Prior to the filing of this lawsuit, the Gurneys never have indicated to the Young Entities that the REPC was not under extension pursuant to Addendum No. 3. Furthermore, they have accepted the benefits of the joint effort of the Young Entities and the Gurneys to obtain approval for the Gurney Estates Subdivision.

Dated: June 22, 2006.


Randy G. Young

Subscribed to and sworn before me on this the 22 day of June, 2006.

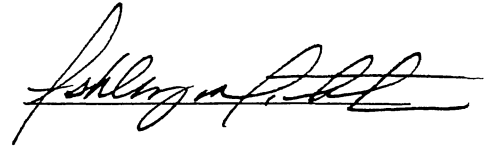



Notary Public

CERTIFICATE OF SERVICE

I certify that on July 14, 2006, a true and correct copy of the foregoing Affidavit was served upon the following parties of record via U.S. mail:

Lincoln W. Hobbs
Lisa M. McGarry
Hobbs & Olson, L.C.
466 East 500 South, Suite 300
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Richard A. Hill", written over a horizontal line.

Tab K

Jeffs & Jeffs

A Professional Corporation
Attorneys at Law

M. DAYLE JEFFS
DAVID D. JEFFS
ROBERT L. JEFFS
WILLIAM M. JEFFS
RODNEY W. RIVERS
JOHN H. ROMNEY

90 NORTH 100 EAST
P. O. BOX 888
PROVO, UTAH 84603

TELEPHONE (8 31) 373-8848
FACSIMILE (8 31) 373-8878

January 5, 2006

Blake Parrish
WRONA & PARRISH
1816 Prospector Avenue, Suite 100
Park City, Utah 84060

Re: RG Young, Inc., Stone River Development, LLC and Blake Jumper

Dear Mr. Parrish,

I am in receipt of letters from you to my clients Paul Gurney and Lloyd Gurney dated both August 23, 2005 and December 28, 2005. In your letter you have inquired concerning my clients' willingness to close on the property which is subject to a Real Estate Purchase Contract between them and RG Young. My clients have expressed a willingness to move forward with a closing on the property, but retain some reservations as to your clients' prior approach to this particular matter and the position which it is currently taking on substantive issues.

More specifically, my client strenuously disagreed with the representations of default set forth in your letter of August 23, 2005. The indications that my clients have caused the delay in the closing on this matter is without basis. I would refer you to the Real Estate Purchase Contract which imposes no obligation on my client to deliver water prior to the actual closing in this matter. Certainly, if water is required for the delivery to Lehi City prior to closing, your client can make its own arrangements to meet the city's requirements. My clients have no obligation to provide land or water until such time as closing takes place in this matter. My clients' prior efforts to assist RG Young, Inc. by providing water prior to the actual closing was done as an accommodation and a demonstration of good faith, not as a result of any legal obligation. Consequently, we believe the assertions previously taken by RG Young, Inc. that my clients are in default of the terms of the Real Estate Purchase Contract are unfounded.

I have also reviewed materials from Randy Young which reflect an unwillingness to meet the terms and conditions of the Real Estate Purchase Contract. More specifically, in prior communication Mr. Young appears to indicate that he is unwilling to meet the terms of paragraph 3 and 18 of Addendum 1 to the Real Estate Purchase Contract. Both of the referenced paragraphs are material to the underlying transaction and were inducements for my clients'

willingness to sign the Real Estate Purchase Contract. I would therefore request assurances from you that your clients are willing to perform under the cited paragraphs so that we can close the deal in a timely fashion. Failure to provide such assurances will be considered an anticipatory repudiation by my clients and may lead to the termination of the Real Estate Purchase Contract.

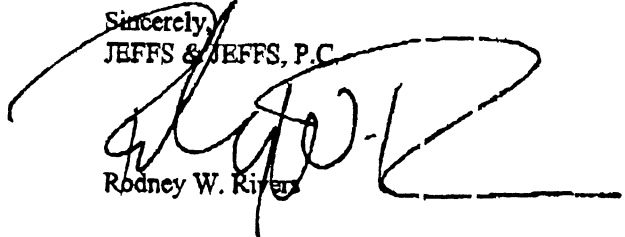
Finally, I have received a copy of the Notice of Interest which Stone River Development, LLC has filed against my clients' property. I am unaware of any interest which Stone River Development may have relating to my clients' ground. Even in the event that Stone River Development is an assignee under the REPC, such a position would not entitle them to file such a cloud on the title to my clients' property. The existence of a Real Estate Purchase Contract provides at most an equitable interest in property, not a legal one. Moreover, I have found no language in the Real Estate Purchase Contract or its addenda which would authorize either RG Young, Inc. or Stone River Development, LLC to place any sort of incumbrance on the ground to which my clients' maintain title. I therefore have no alternative but to consider your clients' Notice of Claim of Interest filed with the Utah County Recorder's Office on August 31, 2005 as Entry # 96864:2005 as a wrongful lien under Utah Code Annotated Section 38-9-1 et seq.

This letter shall also constitute a demand that the Notice of Claim of Interest be immediately removed. If the Notice of Claim of Interest is not removed within twenty (20) days of your receipt of this letter, my client reserves the right to proceed under Utah Code Annotated Section 38-9-4, as well as related provisions, to have the Notice of Interest removed and recover the statutory or actual damages which they may have incurred as a result of the cloud being placed upon their title.

I would appreciate you getting back to me as to how your clients intend to proceed with this matter. I certainly hope that the parties can work towards a successful closing in this matter.

If you have any questions or concerns, I would be happy to discuss them with you.

Sincerely,
JEFFS & JEFFS, P.C.



Rodney W. River

RWR/al
cc: Paul Gurney and Lloyd Gurney

Tab L



ACKNOWLEDGEMENT OF PRELIMINARY APPROVAL

Preliminary Subdivision Plat/Site Plan Approval Has Been Granted to

Gurney Estates
(Project Name)

Subject to the following:

DRC Redline and General Comments From Meeting Dated: 3/9/05

Planning Commission Recommendations From Meeting Dated: 3/24/05

City Council Requirements From Meeting Dated: 4/18/05

Applicant Acknowledgement

The Applicant hereby acknowledges that the above stated project has received preliminary approval based on this submitted set of preliminary plans dated: 3/3/05 and that the approval is subject to all comments and conditions from the review and approval bodies of Lehi City noted above. The applicant further acknowledges that approval of a preliminary plat shall be effective for a period of one (1) year from the date the preliminary plat is approved by the City Council, at the end of which time the applicant must have submitted a final subdivision plat for approval for the entire preliminary plat, or portion thereof.

Signature Randy G. Haug, Title President Date 4-28-2005

Tab M

4th DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

2006 JUL 17 P 3: 29

ORIGINAL

Mark A. Larsen (3727)
P. Matthew Muir (9560)
LARSEN CHRISTENSEN & RICO, PLLC
50 West Broadway, Suite 100
Salt Lake City, Utah 84101
Telephone: (801) 364-6500

Attorneys for Defendants and Counterclaim Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G.
JEPPSON and LaREE SMITH,

Plaintiffs,

vs.

RANDY G. YOUNG, BLAKE JUMPER,
STONE RIVER DEVELOPMENT, LLC,
RCP LAND INVESTMENT, LLC, and
R.G. YOUNG, INC.,

Defendants.

RANDY G. YOUNG, STONE RIVER
DEVELOPMENT, INC., and R.G.
YOUNG, INC.,

Counterclaim Plaintiffs,

vs.

LLOYD B. GURNEY, BETTY GURNEY,
PAUL GURNEY, DONNA S. GURNEY,
LEE A. JEPPSON, LaRAE G.
JEPPSON and LaREE SMITH

Counterclaim Defendants.

AFFIDAVIT OF LORIN POWELL

Case No. 060400548

Division 7

Judge Steven L. Hansen

Defendants and Counterclaim Plaintiffs submit the following Affidavit of Lorin Powell:

STATE OF UTAH)
)ss:
COUNTY OF UTAH)

Lorin Power, having been duly sworn, deposes and says as follows:

1. I am the Lehi City Engineer and I have personal knowledge of the facts set forth in this Affidavit.

2. Lehi City requires 140.4 acre feet of water dedication for annexation of the 38.477 acres of real property identified as the Gurney-Jeppson-Smith Annexation located at about 300 North and 1700 West. Such real property comprises the proposed Gurney Estates Subdivision.

3. Lehi Metropolitan Water District, Paul Gurney, Donna Gurney, Larae Lee Jeppson, Laree Smith, Lloyd Gurney, Betty Gurney and Stone River Development entered into a Water Transfer Agreement specifying the manner in which Lehi City's water requirements for the Gurney Estates Subdivision would be satisfied. A true and correct copy of that Water Transfer Agreement is attached.

4. On July 27, 2005, I sent a letter to Randy Young and Stone River Development indicating that the Water Rights Agreement had not yet been fully complied with and that all of the water rights required by Lehi City for the annexation and entitlement approval of the Gurney Estates Subdivision had not been transferred to Lehi City. A true and correct copy of that letter is attached as Exhibit 2.

5. Since that letter was sent, the situation with the water rights required by Lehi City for approval of the Gurney Estates Subdivision has not changed. The Water Rights Agreement has not yet been fully complied with and all of the necessary 140.4 acre feet of water rights have not been transferred to Lehi City.

6. Specifically the Gurney parties have not transferred to Lehi Metropolitan Water District the well water rights required as set forth in the Water Rights Agreement.


7. As set forth in the letter of July 27, 2005, until the water rights transactions are complete, the Gurney Estates Subdivision cannot be scheduled for final action of the Lehi City Council.

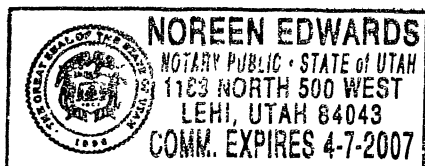
Dated: June 21, 2006.



Lorin Powell
Lehi City Engineer

Subscribed to and sworn before me on this the 21 day of June, 2006.



Notary Public

CERTIFICATE OF SERVICE

I certify that on July 14, 2006, a true and correct copy of the foregoing Affidavit of Lorin Powell was served upon the following parties of record via U.S. mail:

Lincoln W. Hobbs
Lisa M. McGarry
Hobbs & Olson, L.C.
466 East 500 South, Suite 300
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to be "Ashley M. [unclear]", written in a cursive style.

Tab N

AGREEMENT
BETWEEN LEHI METROPOLITAN WATER DISTRICT (MWD),
PAUL G. & DONNA S. GURNEY (PAUL); LARAE & LEE JEPPSON AND
LAREE SMITH (SMITH/JEPPSON) ; LLOYD & BETTY GURNEY (LLOYD)
AND STONE RIVER DEVELOPMENT L.L.C. (DEVELOPER)

WHEREAS, Smith/Jeppson, Paul, Lloyd and Developer are annexing approximately 38.477 acres of property Lehi City identified as the Gurney - Jeppson - Smith Annexation at about 300 North 1700 West; and

WHEREAS, Lehi City requires 140.4 acre feet of water dedication (54 equivalent Lehi Irrigation Company Shares) for this annexation to an R-1-22 zone; and

WHEREAS, Smith/Jeppson, Paul & Lloyd own 29 shares in Lehi Irrigation Company and Paul and Lloyd owns the water rights shown in the attached Change Application (55-1122); and

WHEREAS, Lloyd and Paul have not received approval of the above Water Right Change Application; and

WHEREAS, MWD has Water Rights that can be transferred to Lehi City to satisfy part of the aforementioned dedication requirement.

NOW, THEREFORE, the Parties hereto agree as follows:

1. Smith/Jeppson, Paul & Lloyd will transfer the 29 shares of Lehi Irrigation Company stock to Lehi City and Lloyd & Paul will prepare and sign a warranty deed transferring said Well water rights to MWD except A34003 and A53615, which are small home wells currently in use. The well water right deed must be recorded at Utah County and the State Engineer's Office evidencing proper legal title transfer to MWD.
2. MWD Paul and Lloyd will work cooperatively through the change application process to expedite the approval of the change application. Developer will be responsible for all costs related to the change application process.

The decision on the change application shall be considered final when the Utah State Engineer has issued his decision and all applicable time for judicial review or actions have expired in relation the change application.

3. MWD will provide to Lehi City 65 acre-feet of water rights which when added to the aforementioned Lehi Irrigation Shares will complete the annexation water right requirement. (25 Lehi Irrigation Company Shares equals 65 acre feet)
4. To satisfy Lehi City's water requirement of 140.4 acre-feet or 54 Lehi Irrigation Company Shares specified in the Gurney/Smith/Jeppson Annexation Agreement and according to acreage owned by each party, the following shares of water are required by each party:

YOUNG0036

236

Paul	23.723 Total Shares
Lloyd	15.7808 Total Shares
LaRee	7.1806 Total Shares
LaRae	7.1834 Total Shares

a. If it is determined there are insufficient well/irrigation water rights to meet the 140.4 acre-feet or 54 Lehi Irrigation Company Shares requirement of this agreement, each party lacking their total amount will pay MWD \$2308 per acre-foot for the additional water rights to bring the total water rights to 140.4 acre feet or 54 Lehi Irrigation Company Shares.

b. If there are additional Well Water Rights, MWD shall provide a check to Lloyd in the amount of \$2000/acre-foot for all of the well water right quantified above that exceeds the 65 acre-feet less whatever portion of the well water right Lloyd and Paul wants decided back.

c. In addition Developer will pay Lloyd \$308 per acre-foot for all the well water rights that are purchased by MWD.

4. Lloyd and Paul warrant that the well water right herein is free of all liens, encumbrances, etc.
5. Lloyd and Paul shall provide an affidavit that the water to be transferred herein has been beneficially used during the past 15 years.

Signed this 23 day of Feb, 2005.

Paul Peterson
Paul Peterson
Lehi Metropolitan Water District

Lloyd & Betty Gurney
Lloyd & Betty Gurney
Property Owners

Randy Young
Randy Young
Stone River Development, LLC

Paul G. & Donna S. Gurney
Paul G. & Donna S. Gurney
Property Owners

LaRee & Lee Jeppson
LaRee & Lee Jeppson
Property Owners

LaRee Smith
LaRee Smith
Property Owner

EXHIBIT "B"

LEHI CITY
WATER RIGHT TRANSFER PROCEDURES

The procedures in this exhibit pertain to all transfers of water rights to Lehi City such as transfers related to annexations, zone changes, etc.

1. General Requirements. The water right dedication for an annexation is based on the zoning designation assigned at the time of annexation. Should the zone be changed subsequent to annexation, an adjustment will be made in order to conform to the water dedication schedule for the new zone. Acre-feet will be rounded up if the shares/water rights do not exactly match the required amount. Lehi Irrigation Company shares shall be used as the standard in determining the number of shares of water stock to be dedicated. Owner warrants good and marketable title to the Stock/Water Rights and warrants that Stock/Water Rights will be transferred free of all liens, encumbrances and security interests. Owner shall pay all debts, taxes, charges and assessments against said Stock/Water Rights existing as of the date that the Owner transfers Stock/Water Rights to Lehi City.
2. Irrigation Company Shares. If the irrigation shares can be used directly in the Lehi pressurized irrigation system, the shares shall be transferred into the name of Lehi City through the Irrigation company and the certificates delivered to Lehi City. If the irrigation company shares cannot be used directly in the Lehi pressurized irrigation system, the change application procedure in item #4 must be followed. When the change application is final, Owner must transfer the shares into the name of Lehi City through the Irrigation company and deliver the certificates to Lehi City.
3. Fee in Lieu of Future Assessments. Shares of stock in mutual irrigation companies are subject to payment of an annual fee to cover assessments levied by the irrigation company board of directors pursuant to Utah Code Annotated 16-4-4 et seq. If the city incurs pumping costs in order to use the irrigation water in the city system, then there shall be an additional assessment. In consideration for the City's additional obligation created herein for all future assessments levied by the irrigation company, Owner agrees to make a one time payment to Lehi City equal to the most recent assessment levied against the shares being transferred to the City multiplied by 15.
4. Non-irrigation Company Shares. The Owner must prepare, submit, pay appropriate fees and receive approval from State Engineer's Office for a Joint Change of Water for said water right to be used from an existing City source for municipal use as approved by the Lehi City Engineer. (This will allow quantification and verification of the right by the State Engineer's Office.) The decision on the change application shall be considered final when the time for filing a request for reconsideration with the Utah State Engineer's office (20 days after issuance of the Utah State Engineer's decision) and the time for filing a judicial review action in the district court (30 days after the later of the issuance of the Utah State Engineer's decision or a denial of a request for reconsideration) has run and no judicial review action has been filed. When the change application is final, Owner must:
 - a. Prepare warranty deed to transfer title to Lehi City
 - b. Record deed at the Utah County Recorder's Office
 - c. Transfer title to Lehi City at the State Engineer's Office
 - d. Deliver recorded deed to Lehi City

APPLICATION FOR PERMANENT CHANGE OF WATER

STATE OF UTAH

Rec. by PM

Fee Paid \$125.00

Receipt # 04-04433

For the purpose of obtaining permission to make a permanent change of water in the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Section 7-3-3 Utah Code Annotated 1953, as amended.

CHANGE APPLICATION NUMBER: a29487

WATER RIGHT NUMBER: 55-1122

(c2220JRILEY)

This Change Application proposes to change the POINT(S) OF DIVERSION, PLACE OF USE, and NATURE OF USE.

1. OWNERSHIP INFORMATION.

A. NAME: Lehi City Corporation
ADDRESS: c/o Lorin Powell
153 North 100 East
Lehi, UT 84043

NAME: Lloyd Brent Gurney
ADDRESS: 8812 North 9150 West
Lehi UT 84043

INTEREST: 100%

NAME: Paul G. and Donna S. Gurney
ADDRESS: 9000 North 9150 West
Lehi UT 84043

INTEREST: 100%

B. PRIORITY OF CHANGE:

FILING DATE:

C. EVIDENCED BY:

55-1122(A34003), 55-3308(U13554), 55-3309(U13555), 55-3986(U21362), 55-4424(U13554), 55-6423(A53615)

* DESCRIPTION OF CURRENT WATER RIGHT: *

2. SOURCE INFORMATION.

A. QUANTITY OF WATER: 0.339 cfs

B. SOURCE: Underground Water Well

COUNTY: Utah

C. POINT(S) OF DIVERSION.

Permanent Change

YOUNG0033

CHANGE APPLICATION NUMBER: for Water Right: 55-1122 (c222(JRILEY) Page: 2

POINTS OF DIVERSION -- UNDERGROUND:

- (1) N 1,551 feet E 50 feet from W $\frac{1}{2}$ corner, Section 32, T 4S, R 5E, SLBM
WELL DIAMETER: 2 inches WELL DEPTH: 14 feet
- (2) N 270 feet E 1,020 feet from S $\frac{1}{2}$ corner, Section 07, T 4S, R 1E, SLBM
WELL DIAMETER: 6 inches WELL DEPTH: 227 feet
- (3) N 1,905 feet E 670 feet from S $\frac{1}{2}$ corner, Section 07, T 4S, R 1E, SLBM
WELL DIAMETER: inches WELL DEPTH:

3. WATER USE INFORMATION.

The Water Right represented by this change application is SUPPLEMENTAL to other Water Rights.

IRRIGATION: from Apr 1 to Oct 31. IRRIGATING: 27.0:300 acres.
 STOCKWATERING: from Jan 1 to Dec 31. EQUIVALENT LIVESTOCK UNITS: 136.
 DOMESTIC: from Jan 1 to Dec 31. FAMILIES: 2.

4. PLACE OF USE. (Which includes all or part of the following legal subdivisions:)

BASE TOWN RANG SEC	NORTH-WEST $\frac{1}{4}$				NORTH-EAST $\frac{1}{4}$				SOUTH-WEST $\frac{1}{4}$				SOUTH-EAST $\frac{1}{4}$			
	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE
SL 5S 1E 07																
18						X	X									X

 * THE FOLLOWING CHANGES ARE PROPOSED:

5. SOURCE INFORMATION.

- A. QUANTITY OF WATER: 112.9 acre-feet
- B. SOURCE: Underground Water Wells (7) COUNTY: Utah
- C. POINT(S) OF DIVERSION. Same as HERETOFORE. but ADDING the following:

POINTS OF DIVERSION -- UNDERGROUND:

- (1) S 50 feet W 2,250 feet from NE corner, Section 12, T 4S, R 1W, SLBM
WELL DIAMETER: 20 inches WELL DEPTH: 200 to 800 feet
- (2) S 2,600 feet W 1,900 feet from NE corner, Section 12, T 4S, R 1W, SLBM
WELL DIAMETER: 16 inches. WELL DEPTH: 200 to 800 feet
- (3) N 1,500 feet W 984 feet from SE corner, Section 26, T 4S, R 1W, SLBM
WELL DIAMETER: inches WELL DEPTH:
COMMENT: Existing Well
- (4) N 107 feet E 937 feet from S $\frac{1}{2}$ corner, Section 06, T 5S, R 1E, SLBM
WELL DIAMETER: inches WELL DEPTH:
COMMENT: Existing Well

D. COMMON DESCRIPTION: Lehi

CHANGE APPLICATION NUMBER: for Water Right: 55-1122 (c2220JI:LEY) Page: 3

6. WATER USE INFORMATION. Changed as Follows:

MUNICIPAL: from Jan 1 to Dec 31. Lehi City.

7. PLACE OF USE. Same as HERETOFORE, but ADDING the following:

8. EXPLANATORY.

This joint change application, if approved by the Utah State Engineer, will ultimately only be valid when the Water Rights are actually transferred to Lehi City. The place of use is proposed to be within the service area of Lehi City.

9. SIGNATURE OF APPLICANT(S).

The undersigned hereby acknowledges that even though he/she/they may have been assisted in the preparation of the above-numbered application, through the courtesy of the employees of the Division of Water Rights, all responsibility for the accuracy of the information contained herein, at the time of filing, rests with the applicant(s).

[Signature] City Engineer 10/11/04
Lehi City Corporation

[Signature]
Lloyd Brent Gurney

[Signature] *Donna S. Gurney*
Paul G. and Donna S. Gurney

Tab O



Pioneers Past and Present

*Building Inspection • 801-768-7120
Planning & Zoning • 801-768-7120
Fax • 801-768-7122*

BUILDING & PLANNING DEPARTMENTS

99 West Main • Suite 100 • Lehi, Utah 84043

July 27, 2005

Mr. Randy Young
Stone River Development, LLC
9537 South Misty Oaks Circle
South Jordan, Utah 84095

Subject: Gurney Estates Water Rights

Dear Mr. Young:

As I indicated to you last week, Paul Peterson and I were reviewing water right issues and discovered that the water rights for the Gurney, Jeppson, Smith Annexation have not been provided to Lehi City since Lehi Metropolitan Water District has not received a well water right deed from the Gurneys. Item No. 1 of the water agreement between Lehi MWD, the Gurneys and Developer must be completed (deeding of well water rights) before item No. 3 (MWD water right transfer to Lehi City).

Mr. Peterson stated that Lehi MWD does have the water rights to convey to Lehi City and will do so as soon as item No. 1 of the agreement is completed.

Until the above water right transactions are completed the Gurney Estates Subdivision cannot be scheduled for final action of the Lehi City Council.

Hopefully the above issues can be resolved soon so that the development process can continue.

Very Truly Yours,

Lorin Powell
Lehi City Engineer

cc: Lehi Metropolitan Water District

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