

1988

Mt. Olympus Investment v. Salt Lake County : Brief of Appellant

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Kent S. Lewis; attorney for respondent.

Richard G. Cook; attorney for appellant.

Recommended Citation

Brief of Appellant, *Mt. Olympus Investment v. Salt Lake County*, No. 880001 (Utah Court of Appeals, 1988).

https://digitalcommons.law.byu.edu/byu_ca1/798

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

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 88-0001-CA

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

88-0001-CA

MT. OLYMPUS INVESTMENT,
A Utah partnership,
Plaintiff, Appellant,

vs.

SALT LAKE COUNTY,
a political subdivision
the State of Utah,
Defendant, Respondent.

) Supreme Court No. 860233

) Category 13

) District Court No. C-86-847

APPELLANT'S BRIEF ON APPEAL

RICHARD G. COOK
2425 Catalina Dr.
Salt Lake City, Utah 84121
Telephone: 943-1716

Attorney for Appellant

KENT S. LEWIS
231 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

Attorney for Respondent

FILED
FEB 27 1987

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES PRESENTED ON APPEAL.....	1
STATEMENT OF FACTS.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	3
CONCLUSION.....	5
ADDENDUM	
APPELLANT'S COMPLAINT	R.2-13
APPELLANT'S AMENDED COMPLAINT	R.118-133
ORDER OF DISMISSAL	R.145-146
ORDER DENYING MOTION FOR LEAVE TO AMEND	R.142-143

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Johnson v. Brinkerhoft</u> , 89 U. 530, 57 P. 2d 1132.....	4
<u>Liquor Control Commission et al. v. Athas et al.</u> , 121 U. 457, 243 P.2d 441.	3,4

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

MT. OLYMPUS INVESTMENT,)	
A Utah partnership,)	Supreme Court No. 860233
Plaintiff, Appellant,)	
)	Category 13
vs.)	
)	District Court No. C-86-847
SALT LAKE COUNTY,)	
a political subdivision)	
the State of Utah,)	
Defendant, Respondent.)	

STATEMENT OF ISSUES PRESENTED ON APPEAL

There are two issues presented on this appeal: (1) Whether the Appellant's complaint states a cause of action upon which relief can be granted. (2) Whether the district court should have denied the Appellant's motion for leave to amend its complaint.

STATEMENT OF FACTS

The alleged facts of this case are in the Appellant's complaint and proposed amended complaint which are in the addendum hereto. R.2-13 and 118-133. In addition, the addendum contains the Order of Dismissal and Order Denying Motion for Leave to Amend. R. 145-146 and 142-143.

This case arises in connection with Mt. Olympus Hills #15 subdivision which is located in Salt Lake County. R. 118. Appellant and Respondent entered into a contract part of which was written and part of which was verbal. The Appellant alleged in its complaint the contract had been breached by the Respondent. R. 119 paragraphs 7 and 8.

The Salt Lake County Department of Highway and Flood Control required the Appellant to develop a flood control system based upon run off values of 180, 210, and 242 C.F.S. for 10, 25, and 50 year occurrence intervals respectfully. R. 123. It has now been determined that the correct values are 21, 41, and 60 C.F.S. for 10, 25, and 50 occurrence intervals respectfully. R. 125. The Respondent has breached its contract in determining to go ahead with the original flood control plan when they promised not to do so if it was not required by good engineering practices R. 119 paragraphs 7 and 8 and verbal representations not in record but alleged in complaint. The Appellant paid the Respondent \$78,977 of which \$34,950 was to be spent for flood control if necessary and if not it was to be returned to the Appellant. R. 130 paragraph 3 and verbal representations not in record but alleged in complaint. The rest was to be spent as follows: \$30,126 for curb and gutter, \$3,600 for boxes and pipe and \$10,301 for a contingency fund. R. 127 and 128. The Respondent has breached its contract by failing to install the curb and gutter, boxes, and pipe as agreed. R. 121 Paragraph 16.

After the Appellant's original complaint was filed the Respondent met with the Appellant. Cade F. Lockwood, an employee of the Respondent, was given a modified flood control plan in September of 1983 and did not review and respond to it until December 13, 1985 only after inquiry by the Appellant. R. 133. At

the meeting Mr. Lockwood stated that even though the original flood control system may be over designed that he did not have sufficient time to review another design and therefore concluded that the original plan should be implemented. R. 119 and 120, Paragraph 10. At this point the Appellant moved to amend its complaint and alleged that such conduct was arbitrary, unreasonable and capricious, and an abuse of discretion on the part of the Respondent and asked the court to issue a temporary injunction restraining the Respondent from implementing the original flood control plan pending the Appellant exhausting its administrative remedies through the Respondent's organization. R. 121, Paragraph 1.

SUMMARY OF ARGUMENT

A. APPELLANT'S COMPLAINT STATES A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED.

B. JUSTICE REQUIRES THAT APPELLANT BE GIVEN LEAVE TO AMEND ITS COMPLAINT.

ARGUMENT

A. APPELLANT'S COMPLAINT STATES A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED.

The law in Utah with respect to dismissing a complaint is as follows:
"A motion to dismiss should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of its claim. ... Under the Rules of Civil Procedure a claim upon which relief may be granted can be pleaded by the recitation of conclusions of law or fact or both." Liquor Control

Commission et al. v. Athas et al. 121 U. 457, 243 P. 2d 441. Headnotes 1-4.

The Appellant has alleged in its first complaint a contract that was based upon written and oral representations and has alleged that the covenants of that contract have been breached. Such states a cause of action.

B. JUSTICE REQUIRES THAT APPELLANT BE GIVEN LEAVE TO AMEND ITS COMPLAINT.

The law in Utah with respect to amending pleadings is stated as follows:

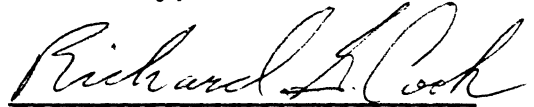
"The rule, however, is toward liberality in allowance of amendments to pleadings for the purpose of permitting a complete adjudication of the matters in controversy and in the furtherance of justice. ... Further, the liberality exercised in allowing amendments is greatest at the time the law suit is commenced and decreases as the suit progresses, and the rule granting amendments changes to the disadvantage of applicant upon each new amendment being allowed." Johnson v Brinkerhoft, 89 U, 530, 57 P. 2d 1132. Headnotes 1 and 2.

Appellant's amendment was made to obtain a restraining order so that it could exhaust its administrative remedies within the Respondent's organization because of the arbitrary, unreasonable and capricious decision of the Respondent's employee. This abuse of discretion would cause immediate and irreparable injury and loss to the Appellant if the original flood control plan was implemented.

CONCLUSION

For the above reasons the Appellant requests the reversal of the District Court and that the District Court be directed to reinstate Appellant's complaint and grant Appellant's motion to amend its complaint.

RESPECTFULLY SUBMITTED this 27th day of February, 1987.



Richard G. Cook
Richard G. Cook
2424 Catalina Dr.
Salt Lake City, Utah 84121
Telephone: 943-1716

MAILING CERTIFICATE

I hereby declare that I caused to be mailed four true and correct copies of the foregoing Brief On Appeal in this case postage prepaid this 27th day of February, 1987, to KENT S. LEWIS 231 East 400 South, Salt Lake City, Utah 84111.



ADDENDUM

FILED

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

FEB 3 9 56 AM '83

H. D. ... CLERK

BY *Charmé Petrus*
DEPUTY CLERK

RICHARD G. COOK (0718)
Attorney for Plaintiff
2425 Catalina Drive
Salt Lake City, UT 84121
(801) 943-1688

01

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

MT. OLYMPUS INVESTMENTS)	COMPLAINT
a general partnership,)	
Plaintiff,)	
vs.)	Civil No. <u>0860847</u>
SALT LAKE COUNTY)	Judge: <i>Uno</i>
a political subdivision of)	
the State of Utah,)	
Defendant.)	

COMES NOW the plaintiff for a cause against Salt Lake County and does hereby allege as follows:

- (1) That this cause of action concerns Mt. Olympus Hills #15 Sub-division which is located in Salt Lake County.
- (2) That on or about August 18, 1983 the plaintiff and Salt Lake County entered into an Agreement part of which is memorialized in the letter, attachments and Agreement attached hereto as Exhibit A and by this reference made a part hereof.
- (3) That in paragraph 3 of said Agreement, the County agreed to review a modified flood plan submitted by the plaintiff and in other verbal representations agreed not to put in gabions where they were originally proposed if engineering analysis showed that they were not necessary.
- (4) That on or about January 20, 1986, counsel for the plaintiff received the attached letter and interoffice memo, which by this reference are made a part hereof as Exhibits B and C.

000702

(5) That counsel for the plaintiff contacted L. Brent Tidwell to set up a meeting between the engineer for the plaintiff, James Denny, P.E.,L.S.; counsel for the plaintiff, Richard G. Cook; a partner of the plaintiff, Von R. Brockbank; and L. Brent Tidwell and Cade F. Lockwood of the defendant's Development Services Division to determine the factual or engineering basis which resulted in opposite conclusions of the plaintiff's and defendant's engineers as to the need for gabions in the Mt. Olympus Hills #15 Subdivision.

(6) That Mr. Tidwell suggested that a meeting be held with Cade F. Lockwood. Counsel for the plaintiff contacted Cade F. Lockwood who indicated to him that he would not meet and discuss this matter.

(7) That counsel for the plaintiff contacted L. Brent Tidwell again and he recommended that counsel contact Ken Jones, the Director of Development Services to try to set up a meeting and that he would do the same.

(8) That counsel for the plaintiff has attempted to contact Mr. Jones, but has not heard back from him or Mr. Tidwell concerning the meeting.

(9) That the plaintiff alleges that Salt Lake County has breached its contract in failing to provide it with sufficient information to determine whether its factual and engineering basis for installing gabions is correct or in error.

(10) That the plaintiff has submitted a study to the defendant by James Denny, a professional engineer qualified in hydrology which indicates that the gabions are not necessary and another study has been done by Hovik Baghoomian, a professional engineer in soils, which indicates that the gabions may increase the flooding and/or soil erosion problem with the disturbance of the soil covering by the equipment necessary to install them.

u0000

(11) That if the defendant were to begin to install or install the gabions in the subdivision, immediate and irreparable injury, loss, and damage would result to the plaintiff in that the subdivision's natural soil covering would be disturbed and marred permanently.

(12) Defendant has failed to make the other improvements agreed upon within a reasonable time for which the plaintiff paid to the defendant \$30,126 for curb and gutter, \$3,600 for boxes and pipe, and \$10,301 for a contingency fund.

WHEREFORE, plaintiff prays for the following relief:

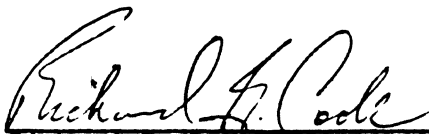
(1) That a Temporary Restraining Order be issued restraining the County from putting the gabions in pending a hearing within 10 days of the date of the Temporary Restraining Order at which hearing the plaintiff asks for a Temporary Injunction which shall continue until such time as a trial may be had on the issue of whether the gabions need to be installed or not and if it is determined at trial that they are not, that a Permanent Injunction be issued against the County from installing the gabions.

(2) That if it is determined that no additional flood control improvements are needed in Mt. Olympus Hills #15 Subdivision that the Court order the County to return to the plaintiff \$34,950.00 for gabions plus \$10,301 contingency fund or such portion as is not required for improvements.

(3) That the defendant be ordered to make the curb and gutter improvements within a specific time period and install the boxes and pipes or return the money to the plaintiff so that it can do so.

DATED this 31st day of January, 1986.

Plaintiff's Address:
MT. OLYMPUS INVESTMENTS
4646 Highland Drive
Salt Lake City, UT 84117


Richard G. Cook

000001

COUNTY OF SALT LAKE)
 : ss
STATE OF UTAH)

VON R. BROCKBANK, being duly sworn, deposes and says: That he is a General Partner of Mt. Olympus Investments, a general partnership which is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.



Von R. Brockbank

Sworn to before me this 31st day of January, 1986.

My Commission expires:
12/87



Notary Public
Residing in Salt Lake County

000001

EXHIBIT 7



Office of the Salt Lake County Attorney

TED CANNON
County Attorney



August 24, 1983

Board of County Commissioners
of Salt Lake County
407 City and County Building
Salt Lake City, Utah 84111

Attention: Commissioner Stewart

Re: Mt. Olympus Hills #15 Subdivision

Gentlemen:

We submit herewith an agreement authorizing the release of the bond guaranteeing construction of the improvements for Mt. Olympus Hills #15 Subdivision and a check in the amount of \$78,977.00 payable to Salt Lake County. This is the amount estimated by the Engineering Division to be necessary to complete the improvements (see attachment).

The agreement contains a provision whereby the County will return to the developer any portion of the funds collected which have not been allocated for a gabion cutoff ditch (\$34,950.00) which are not used in the installation of such requirement in the event the County modifies this requirement on the basis of a plan submitted to Flood Control by the developer which has not yet been reviewed by Flood Control.

We recommend the County execute this release and accept this sum in settlement of the bond dispute. The funds should be placed in account number 11-2463-100-000.

Very truly yours,

Kent S. Lewis
KENT S. LEWIS
Deputy County Attorney
Civil Division

KSL:rt
Encl.
cc: Brent Tidwell
Don Spencer
✓ Dick Cook

231 East 4th South Salt Lake City, Utah 84111 (801) 363-7900

000006

Investigative Agency
Don Harman
Special Agent in Charge
4th Floor

Administration
Roger Livingston
Chief Deputy County Attorney
4th Floor

Recovery Division
Donald Sawaya, Chief Deputy
4th Floor

Justice Division
John T. Nielsen, Chief Deputy
3rd Floor

Civil Division
William R. Hyde, Chief Deputy
2nd Floor

PURCHASED BY
MT. OLYMPUS INVESTMENTS
CASHIER'S CHECK

3
12

No 196596

COTTONWOOD
OFFICE

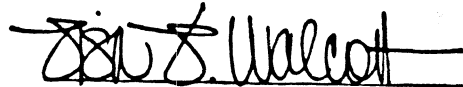
AUGUST 18 19 83

TO THE
ORDER OF ***SALT LAKE COUNTY***

\$ 78,977.00***

ZIONS FIRST NATIONAL BANK **78977 AND 00 CTS**

ZIONS
FIRST NATIONAL BANK
SALT LAKE CITY, UTAH



AUTHORIZED SIGNATURE

⑈ 1965965⑈ ⑆ 124000054⑆ 612000 0202⑈

SATISFACTION, DISCHARGE AND RELEASE OF SUBDIVISION BOND

This is to certify that the bond dated March 13, 1978 with Zion's First National Bank N. A. as surety and Salt Lake County as the beneficiary on Mt. Olympus Hills No. 15 Subdivision in the amount of \$304,000 has been fully satisfied and that the presentment and honoring of this check shall constitute the discharge and release of said bond which accompanying Satisfaction, Discharge and Release is by this reference made a part hereof. The undersigned is an authorized agent of Salt Lake County and the signature hereafter shall indicate consent to the foregoing release and discharge of said bond.

Authorized Signature

000007

Use amount shown below - B. Tidwell 26 July 83

\$ 14,326.75	(original) C&G.
15,800.00	(additional from 19 July inspection)
<u>30,126.75</u>	total for C&G, Road Repair
34,950.-	galvan cut-off ditch
3,600.-	inlets & pipe
<u>68,676.75</u>	Sub-total
10,301.51	15% contingency

\$ 78,978.26

Use \$ 78,978.-

AGREEMENT

THIS AGREEMENT is made and entered into this _____ day of August, 1983, by and between SALT LAKE COUNTY, a political subdivision of the State of Utah, hereinafter County, and MT. OLYMPUS INV., a partnership.

WHEREAS, on or about March 15, 1978, an agreement was entered into between Bernard P. Brockbank and Salt Lake County wherein Mr. Brockbank agreed to complete certain improvements required by County in Mt. Olympus Hills #15 Subdivision and deposited \$304,000.00 with Zions First National Bank to guarantee completion of the improvements within two years; and

WHEREAS, certain of the required improvements have not been completed pursuant to the terms of said agreement; and

WHEREAS, Mt. Olympus Inv., successor to the interest of Bernard P. Brockbank in Mt. Olympus Hills #15 Subdivision has agreed to pay County \$78,977.00 for completion of the improvements;

NOW, THEREFORE, and in consideration of the mutual agreements of the parties hereto, it is hereby agreed as follows:

1. Mt. Olympus Inv. agrees to pay County upon execution of this agreement the sum of \$78,977.00, which payment shall be accepted by County as full and complete payment by Mt. Olympus Inv. of all its and Bernard P. Brockbank's obligations and liabilities to COUNTY.

000009

2. COUNTY agrees to and hereby does hereby release Mt. Olympus Inv. and Bernard P. Brockbank from any further obligation, liability or responsibility under the March 15, 1978 agreement to complete or maintain improvements within the Mt. Olympus Hills #15 Subdivision.

3. County agrees to return to Mt. Olympus Inv. any funds not used by County in the cost to complete required flood control improvements for Mt. Olympus Hills #15 Subdivision in the event the County modifies such flood control requirements after reviewing a modified flood plan heretofore submitted by Mt. Olympus Inv. The cost for completion of flood control improvements within the subdivision shall include the County's administrative costs, including overhead, in reviewing the modified flood control plan and providing for the completion of flood control requirements within the subdivision. Any such funds shall be returned by County to Mt. Olympus Inv. within 30 days after completion of the required flood control improvements by County.

IN WITNESS WHEREOF, the parties have signed this Agreement or caused it to be signed by their duly authorized officers the day and year first hereinabove set forth.

SALT LAKE COUNTY

ATTEST:

By _____
Chairman
Board of County Commissioners

H. DIXON HINDLEY
Salt Lake County Clerk

MT. OLYMPUS INV.

By *Park Brockbank*
PARK BROCKBANK, Partner

STATE OF UTAH)
 : ss.
County of Salt Lake)

On this 18th day of August, 1983, personally appeared before me PARK BROCKBANK, who being by me duly sworn, did say that he is a Partner of Mt. Olympus Inv., a partnership, and that the foregoing instrument was signed in behalf of said partnership and that said partnership executed the same.

Mildred J. Platt
NOTARY PUBLIC
Residing in Salt Lake County, Utah

My Commission Expires:

6 - 6 - 86



SALT LAKE COUNTY PUBLIC WORKS DEPARTMENT

DEVELOPMENT SERVICES DIVISION

2033 South State
Salt Lake City, Utah 84115
Phone: 488-5000

**COMMISSIONER
BART BARKER**

**DIRECTOR OF PUBLIC WORKS
DONALD G. SPENCER**
Professional Engineer
County Engineer

**DIRECTOR
KEN JONES**

**PLATE DIRECTOR
of
Public Works
Clyde M. Stewart
488-5448**

**Administrative Support
Business License
Ron Rogers
Clyde Reese
488-5355**

**Planning Inspection
George R. Noble**

**Development Engineering
L. Brent Tidwell
488-5448**

**Public Information
Robert Cates**

January 20, 1986

Mr. Richard G. Cook
Attorney at Law
2425 Catalina Drive
Salt Lake City, Utah 84121

Dear Mr. Cook:

Subject: Mt. Olympus Hills #15 Subdivision Hydrology Study Evaluation

Attached for your information is a copy of an Inter-office-memo dated December 13, 1985 to Ken Jones, Director, Development Services Division from Cade Lockwood, Development Engineering Urban Hydrologist, regarding the gabion cut-off ditch in the subject subdivision.

Be advised that after yet "another review" of the various studies regarding this matter, the position of the Engineering Section remains unchanged from prior responses, and it is our intent to proceed with construction of the ditch in January/February 1986.

Should you have any questions, please contact me.

Yours truly,

L. Brent Tidwell
Engineering Section Administrator

LBT/ljs

Attachment

cc: Ken Jones
Cade F. Lockwood
Brent L. Tidwell
Terry Holzworth
Terry Baker
Kent Lewis
Neil Stack
file

000012

Exhibit C -

SALT LAKE COUNTY

DEVELOPMENT SERVICES DIVISION

INTER-OFFICE MEMO

DATE: December 13, 1985

TO: Ken Jones

FROM: *cf* Cade F. Lockwood

SUBJECT: Mt. Olympus Hills #15 Subdivision
Hydrology Study Evaluation

I have reviewed the three hydrology studies (Utah State, Bonneville Engineering, and Jim Denny) which have addressed the runoff potential of the area above the Mt. Olympus Hills #15 Subdivision. Although the studies may differ in estimating the quantity of runoff which will be generated, they all agree the 100+ acres of land above this subdivision will generate a substantial amount of runoff and that the subdivision should be protected.

After investigating the topography on maps as well as on site, it is my opinion that runoff generated from a 10 year return period (or greater) storm, will sheet flow over the drainage basin rather than being directed to a defined channel. Therefore, the homes should be protected by a cut-off ditch over the entire uphill side of the subdivision.

In summary, it is my professional opinion that the drainage solution prepared by the developer's engineer and subsequently approved by Salt Lake County applied sound engineering and should be constructed to protect the life and safety of the people of Mt. Olympus Hills #15.

CFL/ckc

000013

RICHARD G. COOK (0718)
Attorney for Plaintiff
2425 Catalina Drive
Salt Lake City, UT 84121
(801) 943-1688

FILED IN CLERK'S OFFICE
APR 4 4 28 PM '85
BY _____ CLERK

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

MT. OLYMPUS INVESTMENTS)	
)	AMENDED COMPLAINT
a general partnership,)	
Plaintiff,)	
vs.)	Civil No. C-86-847
)	
SALT LAKE COUNTY)	Judge: Raymond S. Uno
a political subdivision of)	
the State of Utah,)	
Defendant.)	

COMES NOW the plaintiff for a cause of action against Salt Lake County and does hereby allege as follows:

- (1) That this cause of action concerns Mt. Olympus Hills #15 Subdivision which is located in Salt Lake County.
- (2) That on or about March 31, 1977, Salt Lake County through its Department of Highways and Flood Control required a drainage system that would carry run-off values of 180, 210 and 242 CSF for 10, 25, and 50 years occurrence intervals respectively. (See Flood Control Requirements which are attached hereto and by this reference made a part hereof as Exhibit A.)
- (3) That based upon these requirements, the engineers for the Subdivision proposed that gabions and a 48" pipe be installed for flood control which was subsequently approved in the subdivision plat by Flood Control, the Planning Commission and the County Commission.

(4) That said requirements were based upon a hydrologic model study of Mt. Olympus Cove area of Salt Lake County done by the Utah Water Research Laboratory, College of Engineering, Utah State University dated December 1974 and were taken from a chart on page 35.

(5) That it has been subsequently determined that said chart was in error and that attached hereto and made a part hereof as Exhibit B is a chart with the correct values which indicates the flow rate to be 21, 41, and 60 CSF for 10, 25, and 50 year occurrence intervals respectively.

(6) That on or about August of 1983, a study was submitted to the County indicating this mistake in the original requirement.

(7) That on or about August 18, 1983, the plaintiff and Salt Lake County entered into an Agreement part of which is memorialized in the letter, attachments and Agreement attached hereto as Exhibit C and by this reference made a part hereof.

(8) That in Paragraph 3 of said Agreement, the County agreed to review a modified flood plan submitted by the plaintiff and in other verbal representations agreed not to put in gabions where they were originally proposed if engineering analysis showed that they were not necessary.

(9) That on or about January 20, 1986, counsel for the plaintiff received the attached letter and inter-office memo, which by this reference are made a part hereof as Exhibits D and E.

(10) That a meeting was held with representatives of the defendant on February 27, 1986, in which it was a recommendation of Cade F. Lockwood, an employee of the defendant, that even in light of the error in flow rate for the

000210

design of the flood system that it should still be implemented. He said it would solve the drainage problem even though it may be over-designed and that he did not have sufficient time to review it again. Even though it took the County from September of 1983 until January 20, 1985 to decide to put the gabions in, it was his opinion that to avoid the risk of flood hazard which now exists, time should not be taken now to design a new system based upon the present knowledge of the flows in the area.

(11) That to go ahead and install the gabions approved under the flood plan based on erroneous flows is an arbitrary, unreasonable and capricious decision and is an abuse of discretion.

(12) That the defendant is not willing to agree or stipulate that it will not put the gabions in pending a review of an alternate flood plan and the exhaustion of the plaintiff's administrative remedies.

(13) That the plaintiff alleges that Salt Lake County has breached its contract in failing to provide it with sufficient information to determine whether its factual and engineering basis for installing gabions is correct or in error. Plaintiff alleges that the facts and engineering analysis indicate that no gabions are necessary, that their installation is not only unnecessary but counter productive and that the defendant has breached its contract with the plaintiff in giving notice that it is going to install the gabions anyway.

(14) That the plaintiff has submitted a study to the defendant by James Denny, a professional engineer qualified in hydrology which indicates that the gabions are not necessary and another study has been done by Hovik Baghoomian, a professional engineer in soils, which indicates that the gabions may increase the flooding and/or soil erosion problem with the disturbance of the soil covering by the equipment necessary to install them.

(15) That if the defendant were to begin to install or install the gabions in the subdivision, immediate and irreparable injury, loss, and damage would result to the plaintiff in that the subdivision's natural soil covering would be disturbed and marred permanently.

(16) Defendant has failed to make the other improvements agreed upon in the contract within a reasonable time for which the plaintiff paid to the defendant \$30,126 for curb and gutter, \$3,600 for boxes and pipe, and \$10,301 for a contingency fund.

WHEREFORE, plaintiff prays for the following relief:

(1) That a Temporary Injunction be issued restraining the County from putting in the gabions pending the plaintiff exhausting its administrative remedies in attempting to get the County to accept a different flood control plan based upon the new facts on the basis that their current position is arbitrary, unreasonable, capricious and an abuse of discretion.

(2) That the Court issue a Writ of Mandamus requiring the defendant to state its approval or disapproval of the plaintiff's proposal in accordance with the defendant's ordinance Section 19-3-3 and proceed to let the plaintiff exhaust its administrative remedies with regard to a change in the design of the flood control system before proceeding to install the gabions.


(3) That the plaintiff asks for a Temporary Injunction which shall continue until such time as a trial may be had on the issue of whether the gabions need to be installed or not and if it is determined at trial that they are not, that a Permanent Injunction be issued against the County from installing the gabions.

(4) That if it is determined that no additional flood control improvements are needed in Mt. Olympus Hills #15 Subdivision that the Court order the County to return to the plaintiff \$34,950 for gabions plus \$10,301 contingency fund or such portion as is not required for improvements.

000101

(5) That the defendant be ordered to make the curb and gutter improvements within a specific time period and install the boxes and pipes or return the money to the plaintiff so that it can do so.

DATED this 3rd day of March, 1986.


Richard G. Cook

Plaintiff's Address
MT. OLYMPUS INVESTMENTS
4646 Highland Drive
Salt Lake City, UT 84117

000100

FLOOD CONTROL REQUIREMENTS

Attention: _____

Application # S-2502-72 Submitted by _____
For property at 5600 South 3700 East Size _____
Proposal: MT OLYMPUS HILLS NO. 15

Preliminary Drainage Approval (REV 3)

Flood Control approval of the surface drainage system proposed for this application is based upon the observations and resulting requirements shown below. The requirements listed are incumbent upon the applicant and when costs are involved the applicant shall be bonded to the extent of the total costs for installation including engineering, material, labor, etc.

The applicant has total responsibility for design of the proposed surface drainage system and the requirements are also listed to assist the applicant in bringing his system into line with existing ordinances for Flood Control approval.

REQUIREMENTS:

1. Final drainage approval for this subdivision is contingent upon an engineering review and acceptance of the final plan and grade sheet. This development is inside drainage basin A-5 of Mt. Olympus Cove flood hazard study. This basin generates runoff values of 180, 210 and 242 CFS for 10-, 25-, and 50 year occurrence intervals respectively.
2. The developer shall furnish Salt Lake County Flood Control with drainage easements for the natural drainage channels on this development.

Observations and Requirements by Ray Dillon
Flood Control Division

COUNTY SURVEYOR'S OFFICE

No Bond Required

Total Estimated Cost _____ Set Bond at _____
Estimated by _____ Bond amount approved by _____

Department: Flood Control

Approved by: Byron M. Parker Title Administ.

Date March 31, 1977

ROUTING: First Surveyor
Second _____
Third _____

NOTE: When installation costs are involved, this approval is not complete until the total estimated costs and the bond amount is established by the engineering section of the Surveyor's office.

000123

REQUIREMENTS

3. The restrictive covenants for this subdivision shall delineate County Ordinance and Planning Commission requirements for house construction in the Mt Olympus Cove Area. Each dwelling shall be flood proofed.
4. All pipe sizes referred to herein are based on re-inforced concrete pipe.
5. All pipe shall be Class 3 rubber gasketed concrete pipe, corrugated metal (steel or aluminum) pipe with water tight joints or helical metal (steel or aluminum) pipe with water tight joints.
6. If corrugated metal pipe is used, a 6" increment in diameter size for pipe sizes from 15" to 36" shall be required. Other pipe alternates can be used when justified by hydraulic calculations.
7. If helical metal pipe is used, a 3" increment in diameter size for pipe sizes from 15" to 36" shall be required. Other pipe alternates can be used when justified by hydraulic calculations.
8. All buried pipe shall have a minimum 1 ft. of cover. CMP and HMP shall have a minimum 18 inches of cover.
9. All catch basins and clean out boxes shall be constructed to County standards. See Salt Lake County Surveyor drawings 6930, 6931, 6932, 6882, 6883, 6884.
10. The developer shall be bonded for the complete storm drainage facilities to assure proper construction according to Flood Control requirements.
11. The developer will be required to purchase and install all the above mentioned requirements.
12. Flood Control shall be notified when beginning construction of this storm drainage system.

000124

TABLE 1. ESTIMATED PEAK RUNOFF RATES CORRESPONDING TO VARIOUS FREQUENCIES FOR DESIGNATED SOURCE AREAS ABOVE OLYMPUS COVE.

RETURN PERIOD	FROM FIGURE 7							NEFF'S CANYON
	ESTIMATED PEAK RATES OF OUTFLOW FROM SOURCE AREAS.	0.14 A-1	0.20 A-2	0.09 A-3	0.17 A-4	0.20 A-5	0.19 A-6	
10	15	21	10	18	21	20	20	270
25	29	41	20	35	41	39	40	640
50	42	60	29	50	60	57	58	920
100	55	76	33	66	75	70	72	1190

* ALL BUT NEFF'S CANYON READ FROM FIGURE 7.

NOTE: THE 100 YEAR STORM VALUES ARE CA-2-5 CFS LESS THAN FROM THE DRAWN HYDROGRAPHS.

EXHIBIT C



Office of the Salt Lake County Attorney

TED CANNON
County Attorney



August 24, 1983

Board of County Commissioners
of Salt Lake County
407 City and County Building
Salt Lake City, Utah 84111

Attention: Commissioner Stewart

Re: Mt. Olympus Hills #15 Subdivision

Gentlemen:

We submit herewith an agreement authorizing the release of the bond guaranteeing construction of the improvements for Mt. Olympus Hills #15 Subdivision and a check in the amount of \$78,977.00 payable to Salt Lake County. This is the amount estimated by the Engineering Division to be necessary to complete the improvements (see attachment).

The agreement contains a provision whereby the County will return to the developer any portion of the funds collected which have not been allocated for a gabion cutoff ditch (\$34,950.00) which are not used in the installation of such requirement in the event the County modifies this requirement on the basis of a plan submitted to Flood Control by the developer which has not yet been reviewed by Flood Control.

We recommend the County execute this release and accept this sum in settlement of the bond dispute. The funds should be placed in account number 11-2463-100-000.

Very truly yours,

KENT S. LEWIS
Deputy County Attorney
Civil Division

KSL:rt

Encl.

cc: Brent Tidwell

Don Spencer

✓ Dick Cook

231 East 4th South Salt Lake City, Utah 84111 (801) 363-7900

Investigative Agency
Don Harman
Special Agent in Charge
4th Floor

Administration
Roger Livingston
Chief Deputy County Attorney
4th Floor

Recovery Division
Donald Sawaya, Chief Deputy
4th Floor

Justice Division
John T. Nielsen, Chief Deputy
3rd Floor

Civil Division
William R. Hyde, Chief Deputy
2nd Floor

000126

MT. OLYMPUS INVESTMENTS
CASHIER'S CHECK

3/12

No 196596

COTTONWOOD
OFFICE

AUGUST 18 19 83

TO THE ORDER OF *****SALT LAKE COUNTY*****

\$ 78,977.00****

ZIONS
FIRST NATIONAL BANK
SALT LAKE CITY, UTAH

ZIONS FIRST NATIONAL BANK **78977 AND 00 CTS**

[Handwritten Signature]

AUTHORIZED SIGNATURE

⑈ 1965965⑈ ⑆ 124000054⑆ 612000 0202⑈

SATISFACTION, DISCHARGE AND RELEASE OF SUBDIVISION BOND

This is to certify that the bond dated March 13, 1978 with Zion's First National Bank N. A. as surety and Salt Lake County as the beneficiary on Mt. Olympus Hills No. 15 Subdivision in the amount of \$304,000 has been fully satisfied and that the presentment and honoring of this check shall constitute the discharge and release of said bond which accompanying Satisfaction, Discharge and Release is by this reference made a part hereof. The undersigned is an authorized agent of Salt Lake County and the signature hereafter shall indicate consent to the foregoing release and discharge of said bond.

Authorized Signature

000127

Use amount shown below - B. Tidwell 26 July 83

\$ 14,326.75	(original) C&G.
15,800.00	(additional from 19 July inspection)
<u>30,126.75</u>	total for C&G, Road Repair
34,950.-	galvan cut-off ditch
3,600.-	miter & pipe
<u>68,676.75</u>	Sub-total
10,301.51	15% contingency
<u>\$ 78,978.26</u>	
<u>Use \$ 78,978.-</u>	

AGREEMENT

THIS AGREEMENT is made and entered into this _____ day of August, 1983, by and between SALT LAKE COUNTY, a political subdivision of the State of Utah, hereinafter County, and MT. OLYMPUS INV., a partnership.

WHEREAS, on or about March 15, 1978, an agreement was entered into between Bernard P. Brockbank and Salt Lake County wherein Mr. Brockbank agreed to complete certain improvements required by County in Mt. Olympus Hills #15 Subdivision and deposited \$304,000.00 with Zions First National Bank to guarantee completion of the improvements within two years; and

WHEREAS, certain of the required improvements have not been completed pursuant to the terms of said agreement; and

WHEREAS, Mt. Olympus Inv., successor to the interest of Bernard P. Brockbank in Mt. Olympus Hills #15 Subdivision has agreed to pay County \$78,977.00 for completion of the improvements;

NOW, THEREFORE, and in consideration of the mutual agreements of the parties hereto, it is hereby agreed as follows:

1. Mt. Olympus Inv. agrees to pay County upon execution of this agreement the sum of \$78,977.00, which payment shall be accepted by County as full and complete payment by Mt. Olympus Inv. of all its and Bernard P. Brockbank's obligations and liabilities to COUNTY.

600129

2. COUNTY agrees to and hereby does hereby release Mt. Olympus Inv. and Bernard P. Brockbank from any further obligation, liability or responsibility under the March 15, 1978 agreement to complete or maintain improvements within the Mt. Olympus Hills #15 Subdivision.

3. County agrees to return to Mt. Olympus Inv. any funds not used by County in the cost to complete required flood control improvements for Mt. Olympus Hills #15 Subdivision in the event the County modifies such flood control requirements after reviewing a modified flood plan heretofore submitted by Mt. Olympus Inv. The cost for completion of flood control improvements within the subdivision shall include the County's administrative costs, including overhead, in reviewing the modified flood control plan and providing for the completion of flood control requirements within the subdivision. Any such funds shall be returned by County to Mt. Olympus Inv. within 30 days after completion of the required flood control improvements by County.

IN WITNESS WHEREOF, the parties have signed this Agreement or caused it to be signed by their duly authorized officers the day and year first hereinabove set forth.

SALT LAKE COUNTY

ATTEST:

By _____
Chairman
Board of County Commissioners

H. DIXON HINDLEY
Salt Lake County Clerk

MT. OLYMPUS INV.

By *Park Brockbank*
PARK BROCKBANK, Partner

STATE OF UTAH)
 : ss.
County of Salt Lake)

On this 18th day of August, 1983, personally appeared before me PARK BROCKBANK, who being by me duly sworn, did say that he is a Partner of Mt. Olympus Inv., a partnership, and that the foregoing instrument was signed in behalf of said partnership and that said partnership executed the same.

Malcolm J. Platt
NOTARY PUBLIC
Residing in Salt Lake County, Utah

My Commission Expires:
6 - 6 - 86



SALT LAKE COUNTY PUBLIC WORKS DEPARTMENT

DEVELOPMENT SERVICES DIVISION

2033 South State
Salt Lake City, Utah 84115
Phone: 488-5000

COMMISSIONER
BART BARKER

DIRECTOR OF PUBLIC WORKS
DONALD G. SPENCER
Professional Engineer
County Engineer

DIRECTOR
KEN JONES

TE DIRECTOR
of
lic Works
M. Stewart
8-5448

rative Support
ness License
Rogers
r Reese
8-5355

g Inspection
R. Noble

at Engineering
L Tidwell
8-5448

Information
rt Cates

January 20, 1986

Mr. Richard G. Cook
Attorney at Law
2425 Catalina Drive
Salt Lake City, Utah 84121

Dear Mr. Cook:

Subject: Mt. Olympus Hills #15 Subdivision Hydrology Study Evaluation

Attached for your information is a copy of an Inter-office-memo dated December 13, 1985 to Ken Jones, Director, Development Services Division from Cade Lockwood, Development Engineering Urban Hydrologist, regarding the gabion cut-off ditch in the subject subdivision.

Be advised that after yet "another review" of the various studies regarding this matter, the position of the Engineering Section remains unchanged from prior responses, and it is our intent to proceed with construction of the ditch in January/February 1986.

Should you have any questions, please contact me.

Yours truly,

L. Brent Tidwell
Engineering Section Administrator

LBT/lis
Attachment

cc: Ken Jones
Cade F. Lockwood
Brent L. Tidwell
Terry Holzworth
Terry Baker
Kent Lewis
Neil Stack
file

000132

EXHIBIT E

SALT LAKE COUNTY
DEVELOPMENT SERVICES DIVISION

INTER-OFFICE MEMO

DATE: December 13, 1985
TO: Ken Jones
FROM: *cf* Cade F. Lockwood
SUBJECT: Mt. Olympus Hills #15 Subdivision
Hydrology Study Evaluation

I have reviewed the three hydrology studies (Utah State, Bonneville Engineering, and Jim Denny) which have addressed the runoff potential of the area above the Mt. Olympus Hills #15 Subdivision. Although the studies may differ in estimating the quantity of runoff which will be generated, they all agree the 100+ acres of land above this subdivision will generate a substantial amount of runoff and that the subdivision should be protected.

After investigating the topography on maps as well as on site, it is my opinion that runoff generated from a 10 year return period (or greater) storm, will sheet flow over the drainage basin rather than being directed to a defined channel. Therefore, the homes should be protected by a cut-off ditch over the entire uphill side of the subdivision.

In summary, it is my professional opinion that the drainage solution prepared by the developer's engineer and subsequently approved by Salt Lake County applied sound engineering and should be constructed to protect the life and safety of the people of Mt. Olympus Hills #15.

CFL/ckc

000133

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiff's motion for leave to file an amended complaint is denied.

DATED this 16 day of April, 1986.

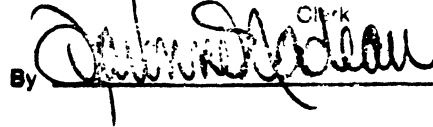
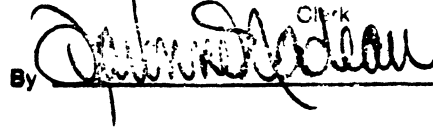
BY THE COURT:



Raymond S. Uno
District Court Judge

ATTEST

H. DIXON HINDLEY


By  Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, this 1 day of April, 1986, to the following:

Richard G. Cook
2425 Catalina Drive
Salt Lake City, Utah 84121
Attorney for Plaintiff

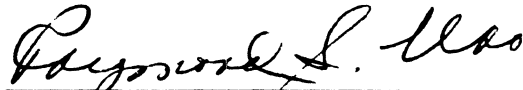


801G

IT IS HEREBY ORDERED that the above-entitled action is dismissed with prejudice and the Preliminary Injunction enjoining County from installing gabions within Mt. Olympus Hills #15 Subdivision is dissolved.

DATED this 16 day of April, 1986.

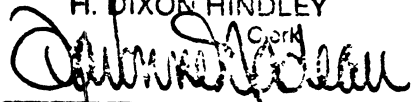
BY THE COURT:



Raymond S. Uno
District Court Judge

ATTEST


H. DIXON HINDLEY


By _____
Eputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, this 3 day of April, 1986, to the following:

Richard G. Cook
2425 Catalina Drive
Salt Lake City, Utah 84121
Attorney for Plaintiff



801G