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Lawrence M. Russell, Russell/Packard Development, Inc., Saratoga Springs Development, L.C., Merlin Smith, and Margie Smith v. John J. Thomas and PRP Development, L.C.: Brief of Appellant

Utah Court of Appeals

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David O. Black; Black, Smith & Argyle; Attorneys for Appellants.

Michael R. Carlston; Snow, Christensen & Martineau; Attorneys for Appellees.

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BRIEF

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IN THE UTAH COURT OF APPEALS

LAWRENCE M. RUSSELL; RUSSELL/PACKARD
DEVELOPMENT, INC., SARATOGA SPRINGS
DEVELOPMENT, L.C.; MERLIN SMITH and
MARGIE SMITH,

Plaintiffs - Appellees,

vs.

JOHN J. THOMAS and PRP DEVELOPMENT, L.C.

Defendants - Appellants

) APPELLANTS' BRIEF

) Case No. 981615

) Case No. 980404802

) Fourth Dist., Provo Dept.

APPEAL FROM THE FOURTH DISTRICT COURT OF THE STATE OF UTAH

David O. Black, #0346
BLACK, STITH & ARGYLE
5806 South 900 East
Salt Lake City, Utah 84121
Attorneys for Appellants

Michael R. Carlston #577
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Appellees



FILED

Utah Court of Appeals

JUL 30 1999

Julia D'Alessandro
Clerk of the Court

Black, Stith & Argyle, attorneys for Appellants,
John J. Thomas and PRP Development, L.C.,
respectfully submit Appellants' Brief.

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II.

TABLES OF CASES AND AUTHORITIES

CASES CITED:

Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989)

Commercial Investments Corp. v. Siggard, 936 P.2d 1105 (Ut Ct. App. 1997) 11,12

AUTHORITIES CITED:

STATUTES CITED:

38-9-1 of the Utah Code Ann. 8,
9, 10, 11

38-9-1(6) of the Utah Code Ann. 7,
10, 11

38-9-4 of the Utah Code Ann.10

38-9-7 of the Utah Code Ann. 5, 6, 7, 8, 9, 10, 11

57-9-4 of the Utah Code Ann. 7

57-9-5 of the Utah Code Ann. 7

78-2-2(3)(j) of the Utah Code Ann. 1953, as amended 6

78-2-2(4) of the Utah Code Ann. 1953, as amended 6

III.

STATEMENT OF JURISDICTION OF THE UTAH SUPREME COURT AND NATURE OF THE PROCEEDING BELOW

The Plaintiffs below and appellees here, Lawrence M. Russell; Russell/Packard Development, Inc.; Saratoga Springs Development, L.C.; Merlin Smith and Margie Smith, filed a motion for summary disposition pursuant to Utah Code Annotated §38-9-7 requesting the Court below to nullify the Notice of Interest filed by Petitioners and Appellants as a wrongful lien pursuant to said statute. The Appellants, John J. Thomas and PRP Development, L.C., objected to the request, requested a hearing and at the hearing the Court summarily, pursuant to §38-9-7 nullified and terminated the Notice of Interest filed by the Appellant. The District Court ruled from the bench, after oral argument, on the 4th day of August, 1998. The order was entered on the 14th day of August, 1998.

The Supreme Court has jurisdiction in this matter pursuant to §78-2-2(3)(j) Utah Code Ann. (1953) as amended, because the appeal is from a final order of the District Court, a court of record over which the Court of Appeals does not have original appellate jurisdiction. The Supreme Court has transferred this matter to the Court of Appeals pursuant to Subsection (4) of the above-referenced Statute.

IV.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether or not a Notice of Interest as authorized by Utah Code Annotated § 57-9-4 is a wrongful lien within the meaning of Utah Code Annotated §38-9-7 as further defined in §38-9-1(6) which states as follows:

“ “Wrongful lien” means any document that purports to create a lien or encumbrance on an owner’s interest in certain real property and at the time it is recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment or a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.”

Because the proceeding upon which Petitioner went forth in the above-entitled matter is a summary proceeding, the standard for appellate review is that of "correction of error" and no deference is to be given to the trial Court’s legal conclusions. *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"). (Ibid) The standard of appellate review then is that the appellate court must determine whether the trial court properly found that a Notice of Interest filed pursuant to Utah Code Annotated §57-9-4 and §57-9-5

is a wrongful lien subject to summary relief within the meaning of Utah Code Annotated §38-9-7.

V.

RULE

None

VI.

DETERMINATIVE STATUTES

Utah Code Annotated §38-9-7, Utah Code Annotated §38-9-1(6), Utah Code Annotated §57-9-4 and 57-9-5.

VII.

STATEMENT OF THE CASE

The Plaintiffs/Appellees filed their petition requesting immediate summary relief pursuant to Utah Code Annotated §38-9-7 arguing that the Claimants Notice of Interest was a wrongful lien. (Transcript P. 5; Appendices 1) (ROA at - .) The Appellants requested a hearing on the claims of the Plaintiff. At the hearing, upon presentation of the evidence by Petitioner/Appellee, Defendant/Appellant argued that the Notice of Interest was not a wrongful lien as required by Utah Code Annotated §38-9-1 in that a Notice of Interest was not a lien or encumbrance upon property and that Utah Code Annotated § 57-9-4 expressly authorized the Notice of Interest. The Notice of Interest was based upon a contract entered into by the parties which provided that

Appellants were entitled to a trust deed upon the property in question upon closing of a construction loan to be granted from Appellees. (Transcript P. 4-5; Appendices 2) The Plaintiff/Appellee admitted in his moving papers that he had not provided the trust deed as required by the contract.

VIII.

RELEVANT FACTS

The Appellants and Appellees entered into a Purchase and Development Agreement dated April 2, 1997 which provided for payment to PRP of approximately \$528,000 to be paid with closings from 66 lots located in the Saratoga Springs Subdivision Phase I, located in Utah County, State of Utah. (Transcript P. 4-5; Appendices 2) (See Memorandum in Support of Petition to Clear Title filed by the Plaintiff) The Purchase and Development Agreement provided at paragraph 2c that the amounts owed PRP were to be secured by trust deeds and trust deed notes to be recorded after the closing of the construction loan with American Legal Title. (Ibid)

The trust deeds and trust deed notes were never executed by the Appellee, nor were they recorded. (See Transcript P. 5) The Appellants recorded a Notice of Interest on the 22nd day of June, 1998, referring to the Purchase and Development Agreement, that it was entitled to a trust deed. upon the lots. (See Plaintiff's Petition and Appendices No. 3).

The Plaintiff/Appellee filed its Petition pursuant to Utah Code Annotated §38-9-7 to nullify the Notice of Interest as a wrongful lien within the meaning of that statute. The Court

at the hearing determined that a Notice of Interest is an encumbrance upon title, was not otherwise authorized by statute and that it was a wrongful lien within the definition of § 38-9-1, Utah Code Annotated, and ordered the lien to be nullified. (See Transcript P. 13-17).

X.

SUMMARY OF ARGUMENT

In the bringing of an action for nullification of a wrongful lien, pursuant to Utah Code Annotated §38-9-7, the Appellees made the assumption that the Notice of Interest was a wrongful lien in the sense that it was an encumbrance within the meaning of the statute and not otherwise expressly authorized by State or Federal statute. In fact, the law is clear that a Notice of Interest is not an encumbrance upon property, and in fact, even if it were an encumbrance upon property, is expressly authorized by Utah Code Annotated § 57-9-4. The Court's decision to include a Notice of Interest within the wrongful lien statute and make its determination available in summary proceedings, has the plain effect of making the filing of a Notice of Interest, pursuant to Utah Code Annotated §57-9-4, a nullity.

XI.

ARGUMENT

- A. *The trial court committed an error of law when it concluded that the Notice of Interest was a lien or encumbrance within the meaning of Utah Code Annotated §38-9-1 or that the Notice of Interest was not otherwise expressly authorized by State or Federal statute.*

The case is one of first impression before this Court to construe Utah Code Annotated §38-9-7. That statute permits a District Court to grant summary relief to nullify a lien if it

is a wrongful lien, as defined in §38-9-1. Wrongful lien is defined in §38-9-1(6) as follows:

“ “Wrongful lien” means any document that purports to create a lien or encumbrance on an owner’s interest in certain real property and at the time it is recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment or a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.”

The matter before the Court is simple, straight forward, and direct. Did the legislature, by passing Utah Code Annotated §38-9-7 and §38-9-1, intend to permit summary disposition of a Notice of Interest which is also specifically authorized by statute?

In the matter of *Commercial Investment Corp. v. Siggard*, 936 P.2nd 1105, UT Ct App 1997 the Court of Appeals construed the predecessor of §38-9-1 which is now §38-9-4 of Utah Code Annotated (1997). In that case the Court of Appeals upheld a jury verdict finding that a Notice of Interest was not groundless as required by statute. Since the Court of Appeals decided *Commercial Investment v. Siggard*, §38-9-1 was amended to that as set forth above. The statute, in Subsection 6(a), specifically states that a document is not a wrongful lien if it is expressly authorized by this chapter or another state or federal statute. Because §57-9-4 expressly provides for a Notice of Interest it cannot, under any circumstances, be in violation of §38-9-1.

Furthermore, even if this Court were to use the analysis set out by the Court of Appeal

in *Commercial Investment Corp.* Ibid the District Court did not determine that the Notice of Interest was groundless. In fact, the Court specifically stated in all likelihood the grounds for the Notice of Interest were not without merit, inasmuch as the Court directed the Respondent to file a lawsuit and file a Lis Pendens upon the property in question. In doing so the District Court has deprived the Appellant/Respondent of its right to file statutory Notice of Interest as set forth in the statute.

This Court can also take direction from *Commercial Investment Corp.*, *ibid*, in that the issue of the validity of the Notice of Interest was submitted to a Jury. In that case the result of a wrongful lien would have been enhanced damages.

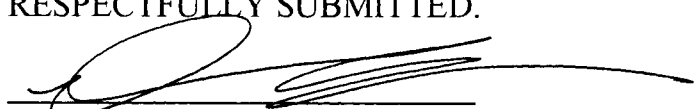
X.

CONCLUSION

Based upon the facts and the record, it is absolutely clear that the Notice of Interest filed by the Appellant/Defendant is not a wrongful lien as set out in §38-9-1(6) and Plaintiff/Appellee was not entitled to a summary relief as provided in §38-9-7, Utah Code Annotated. As a result, the District Court's decision should be reversed.

DATED this 30th day of July, 1999.

RESPECTFULLY SUBMITTED.



David O. Black
BLACK, STITH & ARGYLE
Attorneys for Appellants

CERTIFICATE OF MAILING

I certify that four true and correct copies of the foregoing APPELLANTS' BRIEF was sent via first class mail, postage prepaid to the following:

Michael R. Carlton, #A0577
Scott Keith Wilson, #A7347
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145

DATED this 30th day of July, 1999.

Ann Berumen

XI.

APPENDIX

1. Transcript - July 9, 1998
2. Objection to Petition to Clear Title
3. Memorandum in Support of Petition To Clear Title

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

_____)
LAWRENCE RUSSELL,)

Plaintiff,)

vs.)

JOHN J. THOMAS,)

Defendant.)
_____)

Case No. 980404802
Appellate No. 981615-CA

Hearing
Electronically Recorded on
July 9, 1998

BEFORE: THE HONORABLE GARY D. STOTT
Fourth District Court Judge

For the Plaintiff: Michael R. Carlston
SNOW, CHRISTENSEN &
MARTINEAU
10 Exchange Place #1100
Salt Lake City, UT 84111
Telephone: (801) 521-9000

For the Respondent: David O. Black
BLACK, STITH & ARGYLE
7069 S. Highland Dr.
Suite 250
Salt Lake City, UT 84121
Telephone: (801) 484-3017

Transcribed by: Beverly Lowe RPR/CSR/CCT

1641 SOUTH 350 WEST
OREM, UTAH 84058
TELEPHONE: (801) 225-0234

P R O C E E D I N G S

(Electronically recorded on July 9, 1998)

1
2
3 THE COURT: First matter for this afternoon
4 is that of Lawrence Russell vs. John J. Thomas.

5 MR. BLACK: I'm David Black, I'm
6 representing the defendant, John Thomas of TRT.

7 THE COURT: Anyone here on behalf of the
8 plaintiff? As I've read through the file it looks
9 like you've got a request to declare the lien that's
10 being claimed as unlawful and asking that that be
11 removed; is that correct?

12 MR. BLACK: That's what we're requesting.

13 THE COURT: Have you heard from anyone from
14 the plaintiff with respect to this hearing today?

15 MR. BLACK: I have not, your Honor.

16 THE COURT: You're resisting his request?

17 MR. RUSSELL: I am. I'll be happy to tell
18 you why.

19 THE COURT: We'll wait.

20 MR. CARLSTON: Your Honor, I'm Michael
21 Carlston, I apologize for being late.

22 THE COURT: Mr. Carlston, we are here with
23 respect to the request for a hearing that's been filed
24 by you concerning your request as to the objectionable
25 lien. Are you ready to proceed, sir?

1 MR. CARLSTON: Thank you. Your Honor, I
2 represent the petitioner, and in this case there has
3 been a cloud filed on a title, a copy of the notice of
4 interest is attached to our moving papers as Exhibit
5 No. 5. I have a notice of interest. The petitioners
6 are either Mr. Russell and his company that's
7 developing the lots where these are found, or the
8 parties having interest in such lots.

9 We seek a ruling based upon uncontroverted
10 evidence that this filing of notice of interest is a
11 wrongful lien pursuant to Utah Code Annotated Section
12 38-9-1, and that these liens be removed.

13 There is, as the Court knows, a perfectly
14 appropriate procedure that can be followed if one has
15 a claim of interest in property, and that would be to
16 institutue a legal proceeding, and thus proceed to
17 file a lis pendens.

18 To give the Court a little background on the
19 origin of this, the respondent was at one time in
20 business with Mr. Russell and they have an independent
21 agreement relating to some payments on some of these
22 lots. There is a dispute concerning those payments
23 that stems from the fact that the respondents did not
24 pay the costs of the businesses that were formerly
25 held together.

1 The petition of Mr. Russell, having signed
2 some of the guarantees in that, has been obligated to
3 date to pay over \$120,000 to settle those. So for
4 that reason, he has not consented to the respondents
5 filing a security interest on the lots in question.

6 So rather than (inaudible) them filing a
7 lawsuit and giving us a chance to do it by the
8 statutory rules, they've just filed their notice of
9 interest which is not an appropriate way to proceed.
10 We are here requesting that that be eliminated and
11 that if they do feel that they have an interest that
12 they assert it in the appropriate way where a title
13 company can evaluate it, let's say, and allow Mr.
14 Russell to bond around it while the proceedings go on
15 or not by virtue of the complaints that would be filed
16 and the notice of lis pendens.

17 I believe, your Honor, that the documents
18 that are attached clearly explain and are supportive
19 of the relief that's requested.

20 THE COURT: Thank you.

21 Mr. Black?

22 MR. BLACK: Thank you, your Honor. A few
23 more facts I think might help the Court in looking at
24 where we're at. Originally TRT bought about 72 lots
25 from an entity known as CNT. They bought them on a

1 uniform real estate contract that was between CNT as
2 sellers and TRT as buyers (inaudible) my client.

3 CNT is not a party to this action. They are
4 the ones that actually own the property that -- we
5 purchased it from them and much of it has not been
6 taken down. Now under that real estate contract there
7 were take downs that were supposed to happen over a
8 period of time. Some have happened and some haven't
9 happened.

10 At a certain point TRT sold or assigned an
11 interest in the lots to Lawrence Russell, one of the
12 petitioners here. That assignment is attached to our
13 notice of interest, along with the real estate
14 contract. So the two contracts of TRT as a party are
15 both attached to the notice of interest.

16 If the Court will take a close look at the
17 notice of interest all it says is we have an
18 interest as defined in both of those documents, the
19 real estate contract and the purchase contract between
20 TRT and Lawrence Russell.

21 Now the purchase contract -- in the purchase
22 contract Russell agreed to pay TRT \$528,000 in
23 paragraph 2. In paragraph 2(c) of the purchase
24 contract, Russell agrees to give TRT a trust deed of
25 \$8,000 each time Russell takes down one of the lots

1 under the underlying purchase contract that was
2 assigned to him.

3 We've asked Russell to do that, he hasn't
4 done it, and simply speaking, because he hasn't done
5 it, we don't know where they're at.

6 Now TRT has an interest in the real estate
7 contract if the underlying lots, when they are taken
8 down by Mr. Russell, and that interest is on CNT, and
9 they have to be the petitioner to complain about our
10 notice of interest with regard to that interest.

11 With regard to what's statutory and what's
12 not statutory, I think counsel has misread the
13 statute. 38-9-7 permits this Court to summarily void
14 a lien or incumbrance -- actually, the statute doesn't
15 talk about lien or incumbrance, it talks about
16 wrongful liens, and then it refers back to 38-9-1 that
17 talks about a definition of what a wrongful lien is.

18 And under 38-9-1 a wrongful lien is first
19 described as is it a lien or is it an incumbrance? I
20 submit that a lien or incumbrance is not a notice of
21 interest that is provided for by statute. In fact, a
22 notice of interest is a statutory creature that is
23 provided for by 57-9-4 where the statute specifically
24 authorizes that.

25 THE COURT: Let me interrupt you. If you

1 look at definition No. 2, doesn't that make your
2 clients the last phrase in that paragraph, or other
3 claim of interest in real property? You've got a lien
4 claimant. It defines a lien claimant to be--

5 MR. BLACK: Are you looking at definition
6 No. 2?

7 THE COURT: That's right.

8 MR. BLACK: Okay.

9 THE COURT: Your client is a lien claimant
10 by way of what's been filed here. Aren't they the "or
11 other claim of interest" in real property?

12 MR. BLACK: I think under that statute, if
13 they have another claim of interest, they are a lien
14 claimant, but that's not what the statute is focusing
15 on. If you look at where they're entitled to summary
16 disposition, it simply states where there's a wrongful
17 lien, so you then have to go and look at what a
18 wrongful lien is, and a wrongful lien is either a lien
19 or an incumbrance. There is no case law in the State
20 of Utah that says (inaudible) notice of interest is
21 either a lien or an incumbrance.

22 As a matter of fact, it's akin to a lis
23 pendens. In Hansen v. Koller -- let's see if I have
24 the cite here. The Utah Supreme Court specifically
25 held -- that's at 550 P.2d 186 -- the Utah Supreme

1 Court specifically held that's just constructive
2 notice if somebody claims an interest in the property
3 through the litigation, that is not an incumbrance.

4 That's the same as a notice of interest, and
5 if the Court will look at the section--

6 MR. CARLSTON: What page in Hansen v. Koller
7 is that? I've got the case here.

8 MR. BLACK: It's about halfway through it,
9 it's a fairly (inaudible) case (inaudible) that
10 conversation.

11 The statute says (inaudible) wrongful lien
12 claimant as defined by, and then it refers us to lien
13 claims, wrongful liens. Is it a lien or is it an
14 incumbrance?

15 I submit that if the legislature had
16 intended that it be a notice of interest they could
17 have said a lien, an incumbrance or a notice of
18 interest, but they didn't say that. They said if this
19 proceeding is entitled to a summary process, they are
20 entitled to it if and only if it's a lien or if it's
21 an incumbrance.

22 Then we go onto the next step, they don't
23 even -- even if they had complied with that aspect of
24 the law, which they haven't -- an remember, this is an
25 extraordinary remedy under the statute. The next step

1 is the wrongful lien has to be -- unless it's
2 expressly authorized by this chapter or another state
3 or federal statute. 57-9-4 is what they were talking
4 about.

5 This is authorized by 57-9-4 which states,
6 "Any person claiming an interest in land they preserve
7 and keep effective such interest by filing for a
8 record during the 40 year period immediately following
9 the respective date of writ of title (inaudible) the
10 record title would otherwise be marked (inaudible),"
11 and then it tells you how to do the notice of
12 interest, which we have done.

13 So even if they can argue ignoring all of
14 the laws that this is a lien or an incumbrance, this
15 statute that I just cited authorizes it. The next
16 section, 57-9-5 sets out how you file a notice of
17 interest, which we have complied with completely and
18 fully.

19 Now even if we hadn't complied with that,
20 even if we hadn't complied with that, at subsection
21 (c) -- and these are under disjunctive, (a), (b) and
22 (c) are the disjunctive -- unless it's signed by or
23 authorized pursuant to the document signed by the
24 owners of real property.

25 So the question is it's a also wrongful lien

1 if -- it could be a wrongful lien if it's not
2 authorized by statute if the parties haven't signed
3 it.

4 We are here today because my client sold
5 property to Mr. Russell, Mr. Russell agreed that he
6 would put trust deeds on the property. He hasn't done
7 it once, not one single time. We don't know how much
8 property has been sold or how much property hasn't
9 been sold, and I would -- I don't care if I have a
10 notice of interest even, I would be happy to do what
11 we thought the agreement said, have all (inaudible)
12 title company and say you can't take this down unless
13 you do what you promised to do.

14 But my client secured \$528,000, Mr. Russell
15 agreed to put a trust deed on the property, he has
16 failed to do it, and we exercised an appropriate
17 statutory right. It has nothing to do with the
18 summary proceeding that's before this Court today.
19 Unless the Court has any questions, I'll sit down.

20 THE COURT: I'll hear from you, Mr.
21 Carlston.

22 MR. CARLSTON: We simply disagree on the
23 statutory construction of a wrongful lien.

24 THE COURT: What is a wrongful lien?

25 MR. CARLSTON: A wrongful lien means any

1 document that purports to create a lien or incumbrance
2 on an owner's interest in real property, and at the
3 time it's recorded and filed, and I want to stop there
4 for a minute.

5 I thought I heard Mr. Black suggest that
6 this wasn't a lien or an incumbrance, and I believe
7 under all of the laws that I know it is a lien or
8 incumbrance if it clouds or has any effect on the
9 title.

10 So then the -- it being a lien or an
11 incumbrance affecting the real property, then the
12 question is is if it falls into one of the exceptions,
13 that is is it expressly authorized by this chapter or
14 another statute.

15 Mr. Black said that -- he argues that it's
16 authorized by his statute and that the contract is
17 then a contractual right to a deed of trust. That
18 doesn't authorize the filing of the lien, that's at a
19 minimum to them is a breach of contract action.

20 He then argues that it's authorized by
21 57-9-4 dealing with how you preserve the writ of
22 title. That's not an argument that they've made in
23 their papers until today, and actually (inaudible)
24 concept on his head.

25 It's not authorized either -- he points to

1 two arguments that this is not -- that a notice of
2 interest is authorized, and there is no support in the
3 law or in the statutes for either of these. A
4 wrongful lien is one that (inaudible) authorized by an
5 order or judgment of the Court. There's no such thing
6 here.

7 It's fascinating in hearing them say that
8 this is akin to a lis pendens, and then he cites the
9 Hansen vs. Koller case. The Hansen vs. Koller case
10 actually says that the sole purpose -- this is at page
11 190, your Honor. The sole purpose of recording a
12 notice of lis pendens is to give constructive notice
13 of the pendency of the proceeding. Its only
14 foundation is the action filed, it has no existence
15 independent of it.

16 I submit, your Honor, that it is a wrongful
17 lien, that we proceeded properly under the appropriate
18 statute to have it removed. This is not really a
19 serious setback for Mr. Thomas and PRP. If they feel
20 they have an interest and they desire to assert it,
21 there would be a well established procedure in this
22 case to do it simply by filing a lawsuit and filing a
23 lis pendens to go with it.

24 The disadvantage that my client has under
25 these circumstances is that -- you know, despite Mr.

1 Black's suggestion that they attached certain papers
2 to the notice of interest, we are unable to ascertain
3 and pin this down exactly as to the claim made for
4 purposes of either evaluating it with the title
5 company or taking other action.

6 I believe that's what litigation does, and
7 it's a little puzzling to me to see them use this
8 action rather than go through the front door. We're
9 just asking them to go through the front door, we're
10 not asking them to abandon any claims they may have.
11 This isn't the appropriate place or time to decide the
12 merits of what Mr. Russell says the situation is
13 versus what Mr. Thomas says it is. We acknowledge
14 that and (inaudible) to see that happen in a more
15 appropriate setting.

16 We would respectfully request that the Court
17 cause the notice of interest to be discharged under
18 the applicable statutory position.

19 THE COURT: Thank you. The material found
20 in the file and the arguments that counsel have
21 presented, Mr. Carlston I ask that you prepare the
22 order.

23 This Court is going to find that the notice
24 of interest that has been filed is an incumbrance on
25 the property, therefore subject to the petition that's

1 been filed and the plaintiff is entitled to the relief
2 as requested.

3 If there is a problem with respect to Mr.
4 Black's client's interest in the land, the subject of
5 the notice of interest, you have a remedy of pursuing
6 things by way of litigation of a breach of contract
7 action or whatever that may be with those folks, but I
8 don't think that the request that the plaintiff has
9 made is inappropriate based upon the statute as I read
10 it, and I find that it's an incumbrance on the
11 property.

12 MR. BLACK: Is the Court finding that this
13 is not otherwise authorized by statute as set out in
14 subparagraph (inaudible)?

15 THE COURT: Correct. 57-9-4 sets forth a
16 procedure whereby a notice of lien may be filed -- a
17 notice of interest may be filed. It sets forth a
18 process for which it can be established, but I don't
19 find that it is an exception to that which you argue
20 here today.

21 MR. BLACK: Your Honor, could I--

22 THE COURT: And I would like that in the
23 finding as well.

24 MR. BLACK: I appreciate that. Your Honor,
25 may I make a motion to stay this until one of two

1 things happen? Actually we would like to immediately
2 appeal it, and if the Court would consider staying it
3 because you're forcing my client to waive rights that
4 the statute clearly permits him to have, and we would
5 like to appeal that on an expedited basis.

6 THE COURT: Well, I don't have any problem
7 with your appeal. See if they'll take it on an
8 interlocutory appeal.

9 MR. BLACK: And I'm not -- because it's a
10 summary process I think it would be an interlocutory
11 appeal, but what I am saying is I'm asking the Court
12 to stay its nullification of the lien that's clearly
13 called for by statute. I understand where the Court's
14 coming from, but I think that there is significant
15 room to disagree with the Court's conclusion because
16 this Court is specifically saying that the legislature
17 didn't mean what it said when it passed the notice of
18 interest statute.

19 So all I'm saying is if the Court will stay
20 that until we can appeal it, I think it would be fair
21 for everybody.

22 THE COURT: Mr. Carlston, do you have any
23 objection to it?

24 MR. CARLSTON: Well, your Honor, Mr. Black
25 thinks through the back door he can get what he can't

1 get through the front door. We have a process here
2 for approving and preparing an order which would give
3 them plenty of time to appeal, if they wish to do so.

4 THE COURT: Why isn't that process
5 appropriate for your client, Mr. Black?

6 MR. BLACK: Because if you get rid of the
7 lien right now it is gone, and my client has lost --
8 these people are conveying property in breach of a
9 contract that this Court has before it, and it's
10 ignoring the contract, and this Court is saying in a
11 society that everybody says there's too much
12 litigation, you have to go sue to protect your
13 interest when the legislature already said this is how
14 you protect your interest. All I'm saying is my
15 client has a right to protect his interest.

16 THE COURT: File your breach of contract,
17 file your lis pendens and serve Mr. Russell.

18 MR. BLACK: Well, I understand that, but
19 what I'm saying is I think we're entitled to know
20 (inaudible) interest as well, and what I'm saying is
21 with all due respect I'm just asking this Court to
22 permit us to appeal that without you effecting the
23 rights of the parties.

24 THE COURT: You have the statutory right of
25 appeal, I'm going to sign the order.

1 MR. BLACK: And you're denying my request
2 for a stay?

3 THE COURT: Correct.

4 MR. BLACK: Okay.

5 (Hearing concluded)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
)
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That the foregoing proceedings were transcribed under my direction from the electronic tape recording made of these proceedings.


That this transcript is full, true, and correct and contains all of the evidence, all of the objections of Counsel and rulings of the Court and all matters to which the same relate which were audible through said tape recording.

I further certify that I am not interested in the outcome thereof.

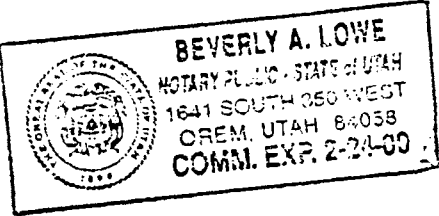
That certain parties were not identified in the record, and therefore the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 16th day of March 1999.

My commission expires:
February 24, 2000



NOTARY PUBLIC
residing in Utah County



DAVID O. BLACK, #0346
BLACK, STITH & ARGYLE, P.C.
1245 E. Brickyard Road, Suite 350
Salt Lake City, Utah 84106
Telephone: (801) 484-3017
Facsimile: (801) 484-3094

Attorney for Respondents

IN THE FOURTH JUDICIAL DISTRICT COURT

STATE OF UTAH, COUNTY OF UTAH

LAWRENCE M. RUSSELL;)	
RUSSELL/PACKARD DEVELOPMENT,)	OBJECTION TO PETITION
INC.; SARATOGA SPRINGS)	TO CLEAR TITLE
DEVELOPMENT, L.C.; MERLIN SMITH)	
and MARGIE SMITH,)	Case No. 9804-4802
)	
Petitioners,)	Judge: Stott
)	
vs.)	
)	
JOHN J. THOMAS and PRP)	
DEVELOPMENT, L.C.,)	
)	
Respondents.)	

The respondents, John J. Thomas and PRP Development, L.C., hereby object to Petitioners Petition to Clear Title and Memorandum in Support thereof. The Petitioners have requested this court enter an order voiding the Notice of Interest prior to hearing in direct contravention of 38-9-7 as cited by the Petitioners.

The Petitioners also object to the sufficiency of the Petition inasmuch as a Notice of Claim is not a wrongful lien within the meaning of 39-1-7 (6), inasmuch as the Notice of Claim does not create a lien, nor is it an encumbrance upon title. The Notice of Claim is

nothing more than a notice to the world that respondents are entitled to trust deeds upon the property pursuant to agreement between the parties. In the event the court determines the Petition is sufficient to award a hearing, the respondents hereby request a hearing pursuant to 39-1-7.

DATED this 20th day of July, 1998.

BLACK, STITH & ARGYLE, P.C.


David O. Black

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of July, 1998, I caused a true and correct copy of the within and foregoing Objection to Petition to Clear Title to be delivered, via first class mail, postage prepaid in an envelope addressed to the following named person(s):

Michael R. Carlston
Scott Keith Wilson
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, UT 84145


Ann Berumen

MICHAEL R. CARLSTON (A0577)
SCOTT KEITH WILSON (A7347)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Petitioners
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

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

LAWRENCE M. RUSSELL;
RUSSELL/PACKARD DEVELOPMENT,
INC.; SARATOGA SPRINGS
DEVELOPMENT, L.C; MERLIN SMITH
and MARGIE SMITH,

Petitioners,

vs.

JOHN J. THOMAS and PRP
DEVELOPMENT, L.C.,

Respondents.

MEMORANDUM IN SUPPORT OF
PETITION TO CLEAR TITLE

Case No. 9804-4802

Judge Stott

INTRODUCTION

This Petition has been filed to challenge defendants' recording of a "Notice of Claim" as to properties owned by or under a contract of sale to petitioners. Respondents have no legitimate legal claim to an interest in these properties, and no contractual or other legal right to file a so-called "Notice of Interest." By this petition, plaintiffs seek a ruling that the filing

of the Notice of Interest is a wrongful lien pursuant to Utah Code Ann. §38-9-1, and request an expedited hearing on this matter within ten days, and an immediate order nullifying this wrongful lien, as provided by Utah Code Ann. §38-9-7.

STATEMENT OF FACTS

1. On February 21, 1994, Respondent PRP Development, L.C. (PRP)¹ was formed in order to develop residential property. Its members were Russell/Packard Development, Inc., and Premier Homes, L.C., which is owned and operated by Respondent John Thomas. *See* Articles of Organization, attached as Exhibit 1.

2. In November 1996, PRP contracted to purchase 72 townhouse lots in the Saratoga Springs Phase I, located in Lehi, Utah, from C.M.T. Investments, who made the sale on behalf of the property owners, Saratoga Springs Development, L.C. The purchase contract provided that the individual lots would be closed according to an established schedule. *See* Real Estate Purchase Contract, attached as Exhibit 2.

3. On April 2, 1997, Larry Russell, on behalf of Russell/Packard, and Premier Homes, as the members of PRP, entered into a Purchase and Development Agreement which provided that Russell/Packard would sell its share of PRP to Premier for \$5,000.00, and would acquire PRP's interest in the Purchase Contract for the 72 Saratoga Springs townhouse lots. *See* Purchase and Development Agreement, ¶¶1-2, attached as Exhibit 3.

¹ The original name of this L.C. was Premier-Russell/Packard, L.C., but the name was later formally changed to PRP Development, L.C.

4. The Purchase and Development Agreement provided that Russell would pay a total of \$528,000.00 for the Saratoga Springs properties, to be paid in the future as the lots were sold. Specifically, Russell agreed to pay to PRP \$8,000.00 per lot at the time of the closing of each of the last of the 66 lots to be sold. Accordingly, Russell could sell the first 6 lots in the development without making any payment to PRP. *Id.*, ¶2.

5. The Purchase and Development Agreement further provides that “the amounts due PRP shall be secured by a standard trust deed and trust deed note in favor of PRP to be recorded after the closing of the construction loan and/or an escrow arrangement at American Legal Title, acceptable to PRP, which arrangement provides for the payment of \$8,000 to PRP upon the sale of each lot.” *Id.*, ¶2(c). Thus, the Purchase and Development agreement authorizes only that a trust deed for \$8,000 may be recorded on properties owned by Russell/Packard following the closing of a construction loan.

6. After Russell and Russell/Packard had ceased their association with PRP, PRP failed to meet certain of its obligations, including payments on a construction loan, payments for construction materials provided to PRP projects, and lease payments on a truck.

7. Pursuant to the terms of a Letter Agreement dated March 2, 1998, Russell agreed to pay these debts owed by PRP. John Thomas personally, and on behalf of PRP Development, acknowledged such debts, and agreed that \$110,173.45 would be deducted from the total amount to be paid to PRP under the terms of the Purchase and Development Agreement, and that no payments would be made to PRP until the \$110,173.45 plus interest had been fully set off against the amounts owed by Russell under the Purchase and

Development Agreement. If divided into \$8,000 increments, this Letter Agreement thus provided that Russell is not obligated to make payments for the Saratoga Springs properties until an additional 13-14 properties in the development had been sold, depending upon the amount of interest accrued. In addition, the Letter Agreement provides that there is no waiver of possible additional claims to be made by Russell which could also require a set-off of additional amounts otherwise owing under the Purchase and Development Agreement². *See* Letter Agreement, Exhibit 4.

8. Accordingly, pursuant to the terms of the Purchase and Development Agreement and the Letter Agreement, no monies would be owed by Russell to PRP, and no payments were to be made to PRP, until after the first 19-20 lots had been finally sold to home buyers.

9. On June 22, 1998, PRP recorded a "Notice of Interest" as to all but 10 of the 72 lots, including lots which had not been closed by Russell or Russell/Packard, and other lots which had been sold to homeowners. This Notice of Interest states that PRP claims an unspecified interest in these properties pursuant to the original purchase contract which had been fully conveyed to Russell, and pursuant to the Purchase and Development Agreement. *See* Exhibit 5.

10. PRP's Notice of Interest has been filed against these properties without any authorization or authority granted in any document or by any law. None of the owners of

²Indeed, it now appears that substantial additional claims may exist. *See* Affidavit of Lawrence M. Russell, ¶6.

properties affected by the Notice has conveyed to PRP an interest in the property. *See* Declarations of Petitioners attached as Exhibits 6 through 8.

ARGUMENT

Pursuant to Utah Code Ann. §38-9-7, petitioners are authorized to seek an order from this court nullifying the wrongful lien filed by Respondents in the form of a Notice of Interest. The statute requires that petitioners state with specificity the claim that the lien is a wrongful lien, and support this claim with an affidavit from the holder of an interest in the property subject to the wrongful lien.

1. Respondent's "Notice of Claim" Constitutes a Wrongful Lien Pursuant to § 38-9-1(6).

Utah Code Ann. § 38-9-1(6) provides as follows:

"Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Respondents' Notice of Claim is not purported to be based on either (a) or (b) above, as the Notice states, on its face, that it is based only upon "an agreement dated April 2, 1997, and a Uniform Real Estate Contract dated November 5, 1996, and November 8, 1996, copies

of which are attached” to the Notice. The “agreement” referred to is the Purchase and Development Agreement which is explained at ¶3 above, and is attached hereto as Exhibit 3. The “Uniform Real Estate Contract” referred to is the contract for the sale of the Saratoga Springs properties which is explained at ¶2 above, and is attached hereto as Exhibit 2. Neither of these documents provides any basis for Respondents to file a notice of interest in the Saratoga Springs properties.

With regard to the properties owned by Saratoga Springs Development, L.C., and Merlin and Margie Smith, Respondents have no claim to any interest, due to the simple fact that the documents cited in the Notice of Claim do not in any way purport to be “signed by or authorized pursuant to a document signed by the owner of the real property,” as required by Utah Code Ann. ¶ 38-9-1(6)(c).

With regard to those properties currently owned by Lawrence Russell and/or Russell/Packard, neither of the two cited documents purport to authorize Respondents to file their Notice of Interest.

(a) The Uniform Real Estate Contract. Under the clear terms of the Purchase and Development Agreement, which Respondents also rely upon, Respondents have transferred all interest in the “Uniform Real Estate Contract” for the Saratoga Springs properties to Lawrence Russell. The Agreement provides specifically that “PRP agrees to assign to Russell all of its right, title and interest in the Contract and its right to acquire the Saratoga property,” and this agreement has been fully executed. Accordingly, the sales

contract cannot form a legitimate basis for Respondent's claim of an interest in any of the properties.

(b) **The Purchase and Development Agreement.** The Purchase and Development Agreement cannot form the basis for Respondents' claim of interest, since this document does not of itself constitute or purport to create an interest in property. Rather, the document provides for a transfer of Respondents' interests in the contract to purchase the properties.

Although the Agreement states that sums owed to PRP may be secured by a trust deed, to be recorded only following the closing of a construction loan (and therefore purchase of the property) by Russell/Packard, such does not in any way constitute an authorization for Respondents to record an unspecified "claim" against the individual properties in the development. The Purchase and Development Agreement does not itself purport to create any property rights, and only constitutes an agreement that Respondent may cause a document (a trust deed) to be executed which would then create an interest in certain of the properties, under certain conditions. Respondents have not at any time caused a trust deed to be executed by Lawrence Russell or Russell/Packard and recorded on specific properties following the closing of a construction loan in order to secure amounts due and owing to PRP, and this is the only right which the Agreement purports to grant to PRP.

This is an important distinction. Under the Purchase and Development Agreement, PRP would only have a right to have a trust deed executed when a construction loan has already closed on a property as to which Russell/Packard owes an \$8,000 payment. The Agreement itself excludes the first six properties sold, and an additional 13-14 properties are to

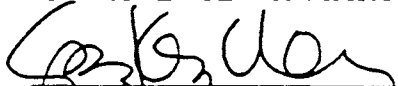
be excluded pursuant to the terms of the Letter Agreement cited above, at ¶7. Respondents have excluded from their notice only ten of the Saratoga Springs properties, and there is no logic to this exclusion, since the Notice of Claim applies to properties not yet owned by Russell/Packard, and to properties which have been transferred to home buyers. Thus, it is apparent that the procedure set out in the Agreement is very important; PRP is only given the right to seek a trust deed, and such would only be executed by Russell/Packard if it is agreed both that there are "amounts due" under the agreement, and that a specific property should be subject to a trust deed under the Agreement. The Agreement does not in any way authorize what Respondent has done, which is to file a broad claim of an unspecified interest in nearly all of the Saratoga Springs Properties, regardless of whether PRP is currently owed any money by Russell/Packard for the properties, and regardless of the identity of the actual owners of the properties at the time.

2. The Court Should Declare the Notice of Claim to Be Invalid, and Award Fees and Costs to Petitioner.

Utah Code Ann. ¶38-9-7(5)(a) authorizes the Court to issue an order declaring the wrongful lien void ab initio, releasing the property from the lien and to award costs and reasonable attorney's fees to the Petitioner. Petitioners request that the Court issue such an order, and set a hearing within ten days to resolve this issue.

Dated this 10 day of July, 1998.

SNOW CHRISTENSEN & MARTINEAU

By: 

Michael R. Carlston

Scott Keith Wilson

Attorneys for Petitioners

I certify that the foregoing has been filed
proved on the 27th day of Feb. 19 64
office of this Division and hereby issue
affidavit thereof.



Korla T. Woods
KORLA T. WOODS
Division Director

ARTICLES OF ORGANIZATION

OF

PREMIER-RUSSELL/PACKARD, L.C.

RECEIVED

FEB 22 11:10:40

We, the undersigned do hereby adopt the following Articles
of Organization for the purpose of forming a Utah Limited Liabil-
ity Company, to wit:

1. Name. The name of the Company shall be PREMIER-RUSSELL/
PACKARD, L.C.

2. Duration. The Company shall continue until terminated
as provided in the Operating Agreement.

3. Business Purpose. The business purpose for which the
Company is organized is to prepare and record a final tract map
with respect to certain property located in Salt Lake County,
Utah, to install required off tract and off-site street and
utility improvements and construct and sell single family resi-
dences to the general public and to engage in any other lawful
activity relating to the above purposes.

4. Registered Agent. The Company shall continuously
maintain an agent in the State of Utah for service of process who
is an individual residing in said state. The name and street
address of the initial registered agent shall be J. Craig Carman,
311 South State Street, Suite 380, Salt Lake City, Utah 84111.

ACCEPTANCE OF APPOINTMENT:

J. Craig Carman
J. Craig Carman

4053010007

The Director of the Division of Corporations and Commercial Code of the Department of Commerce for the State of Utah is appointed the registered agent of the Company for service of process if the registered agent has resigned, the registered agent's authority has been revoked, or the registered agent cannot be found or served with the exercise of reasonable diligence.

5. Members. The names and street addresses of the individuals ("Members") who shall constitute the initial Members of the Company are as follows:

Premier Homes, L.C.
7069 Highland Drive, Suite 100
Salt Lake City, UT 84121

Russell/Packard Development, Inc.
9007 Arrow Route, Suite 280
Rancho Cucamonga, CA 91730

6. Management. The Company shall be managed by its Members pursuant to the terms of the Operating Agreement, or any amendments thereto.

7. Records. The Company shall keep at its principal place of business all records required to be maintained by the Company pursuant to Section 48-2b-119 of the Utah Code Annotated, which records include, but are not limited to, the following:

7.1 A current list in alphabetical order of the names and last known business street addresses of each member.

7.2 A copy of the stamped articles of organization and all certificates of amendment thereto.

7.3 Copies of all tax returns and financial statements of the Company for the past 3 years.

8. Contributions. No member shall be obligated to make any contribution to the Company except those specifically set forth in the Operating Agreement adopted by the Members of the Company.

9. Dissolution. This Company shall be dissolved as provided in the Operating Agreement.

10. Annual Report. The Company shall file all annual reports required by Utah law during the month of its anniversary date of formation as required by Section 48-2b-120, Utah Code Annotated.


11. Amendments. The Articles of Organization shall be amended from time to time as required by Section 48-2b-121, Utah Code Annotated.

12. Operating Agreement. The Members shall enter into an operating agreement which shall set forth additional terms and conditions relating to the management, operation and ownership of the Company.

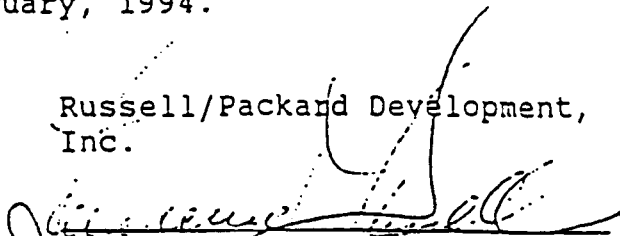
13. Signatures. All Members of the Company shall sign these Articles of Organization.

DATED this 21st day of February, 1994.

Premier Homes, L.C.


John J. Thomas, Member

Russell/Packard Development,
Inc.


Lawrence M. Russell,
President

FIRST AMENDMENT TO THE ARTICLES OF ORGANIZATION

OF

PREMIER-RUSSELL/PACKARD, L.C.

We, the undersigned, being all of the members of Premier-Russell/Packard, L.C. to hereby amend our Articles of Organization as follows:

A. Amendment. Paragraph 1 of the Articles of Organization is amended in its entirety to read as follows:

Name. The name of the company shall be PRP Development, L.C.

B. Ratification. Except for the amendment set forth above, the Articles of Organization previously filed for this limited liability company are hereby ratified, affirmed and approved.

Dated this 25th day of October, 1994.

PREMIER HOMES, L.C.

[Signature]
John J. Thomas, Member

RUSSELL/PACKARD DEVELOPMENT, INC.

[Signature]
Lawrence M. Russell, President

State of Utah
Department of Commerce
Division of Corporations and Commercial Code

I hereby certify that the foregoing has been filed and approved on the 25 day of October 1994 in the office of this Division and hereby issue this Certificate thereof.

Examiner

[Signature] Date 10/28/94



[Signature]

NOEL T. JOHNSON
Division Director

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1994 OCT 25 PM 12:48
DIVISION OF CORPORATIONS
STATE OF UTAH

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EARNEST MONEY RECEIPT

The Buyer PK Development offers to purchase the Property described below and delivers to Brokerage, as Earnest Money Deposit \$ 5,000.00 in the form of check to be held until closing to be deposited within three business days after Acceptance of this offer to purchase by all parties.

Superior Title 5665545 Received by Joel Carlson on 11-4-96 (Date)
Brokerage Phone Number

OFFER TO PURCHASE

1. PROPERTY: 72 Town home lots Salatoza Springs Phase 1
City Lehi County Utah Utah.

1.1 Included Items Unless excluded herein, this sale shall include all fixtures presently attached to the Property: plumbing, heating, air conditioning and venting fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antennas, satellite dishes and system, wall-to-wall carpets, automatic garage door opener and transmitter(s), fencing, trees and shrubs. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: See Addendum #1

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

2. PURCHASE PRICE AND FINANCING. Buyer agrees to pay for the Property as follows:

\$ 5,000.00 Earnest Money Deposit
\$ _____ Existing Loan: Buyer agrees to assume and pay an existing loan in this approximate amount presently payable at _____ per month including principal, interest (presently at _____ % per annum), real estate taxes, property insurance premium and mortgage insurance premium. Buyer agrees to pay any transfer and assumption fees. Seller shall shall not be released from liability on said loan. Any net differences between the approximate balance of the loan shown above and the actual balance at Closing shall be adjusted in Cash Other _____.
\$ _____ Proceeds from New Loan: Buyer reserves the right to apply for any of the following loans under the terms described below.
 Conventional FHA VA Other _____ Seller agrees to pay \$ _____ toward Discount Points and Buyer's other loan and closing costs, to be allocated at Buyer's discretion.
 For a fixed rate loan: Amortized and payable over _____ years, interest shall not exceed _____ % per annum, monthly principal and interest payment shall not exceed \$ _____, or
 For an Adjustable Rate Mortgage (ARM), Amortized and payable over _____ years; initial interest rate shall not exceed _____ % per annum; initial monthly principal and interest payments shall not exceed \$ _____. Maximum Life Time interest rate shall not exceed _____ % per annum.
\$ _____ Seller Financing: (See attached Seller Financing Addendum)
\$ _____ Other: _____

\$ 2,155,000.00 Balance of Purchase Price in Cash at Closing
\$ 2,160,000.00 Total Purchase Price 72 Lots at \$30,000.00

2.1 Existing / New Loan Application. Buyer agrees to make application for a loan specified above within N/A calendar days (Application Date) after Acceptance. Buyer will have made Loan Application only when Buyer has: (a) completed, signed, and delivered to the Lender the initial loan application and documentation required by the Lender; and (b) paid all loan application fees as required by the Lender. Buyer will continue to provide the Lender with any additional documentation as required by the Lender. If, within seven calendar days after receipt of written request from Seller, Buyer fails to provide to Seller written evidence that Buyer has made Loan Application by the Application Date, then Seller may, prior to the Qualification Date below, cancel this Contract by providing written notice to Buyer. The Brokerage, upon receipt of a copy of such written notice, shall release to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit without the requirement of any further written authorization from Buyer.

2.2 Qualification. Buyer and the Property must qualify for a loan for which application has been made under section 2.1 within N/A calendar days (Qualification Date) after Acceptance. The Property is deemed qualified if, on or before the Qualification Date, the Property, in its current condition and for the Buyer's intended use, has appraised at a value not less than the Total Purchase Price. Buyer is deemed qualified if, on or before the Qualification Date, the Lender verifies in writing that Buyer has been approved as of the verification date.

2.3 Qualification Contingency. If Seller has not previously voided this Contract as provided in Section 2.1, and either the Property or Buyer has failed to qualify on or before the Qualification Date, either party may cancel this Contract by providing written notice to the other party within three calendar days after the Qualification Date, otherwise Buyer and the Property are deemed qualified. The Brokerage, upon receipt of a copy of such written notice, shall return to Buyer the Earnest Money Deposit without the requirement of any further written authorization of Seller.

3. CLOSING. This transaction shall be closed on or before See Addendum #1. Closing shall occur when: (a) Buyer and Seller have signed and delivered to each other (or to the escrow/title company), all documents required by this Contract, by the Lender, by written escrow instructions and by applicable law; and (b) the monies required to be paid under these documents, have been delivered to the escrow/title company in the form of cashier's check, collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise agreed by the parties in writing. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated as set forth in this Section. Unearned deposits on tenancies shall be transferred to Buyer at Closing. Prorations set forth in this Section, shall be made as of: date of Closing date of possession other _____.

4. POSSESSION. Unless otherwise agreed in writing by the parties, Seller shall deliver possession to Buyer within 24 hours after Closing.

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract the listing agent _____ represents Seller. Buyer and Seller confirm that prior to signing this Contract written disclosure of the agency relationship(s) was provided to him/her Seller's initials _____.

6. TITLE TO PROPERTY AND TITLE INSURANCE. (a) Seller has, or shall have at Closing, full title to the Property and agrees to convey such title to Buyer by general warranty deed, free of financial encumbrances as warranted under Section 10.6; (b) Seller agrees to pay for and furnish Buyer at Closing with a current standard form owner's policy of title insurance in the amount of the Total Purchase Price; (c) the title policy shall conform with Seller's obligations under subsections (a) and (b) above. Unless otherwise agreed under subsection 8.4, the commitment shall conform with the title insurance commitment provided under Section 7.

7. SELLER DISCLOSURES. No later than N/A calendar days after Acceptance, Seller will deliver to Buyer the following 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 required under Section 6; to be issued by the title insurance company chosen by Seller, including copies of all documents listed as Exceptions on the Commitment; (c) a copy of all loan documents relating to any loan now existing which will encumber the Property after Closing, and (d) a copy of all leases affecting the Property not expiring prior to Closing. Seller agrees to pay any title commitment cancellation charge under subsection (b).

8. GENERAL CONTINGENCIES. In addition to Qualification under Section 2.2 this offer is: (a) subject to Buyer's approval of the content of each of the items referenced in Section 7 above; and (b) is is not subject to Buyer's approval of an inspection of the Property. The inspection shall be paid for by Buyer and shall be conducted by an individual / company of Buyer's choice. Seller agrees to fully cooperate with such inspection and a walk-through inspection under Section 11 and to make the Property available for the same.

8.1 Buyer shall have N/A calendar days after Acceptance in which to review the content of Seller Disclosures, and, if the inspection contingency applies to complete and evaluate the inspection of the Property, and to determine, if in Buyer's sole discretion, the content of all Seller Disclosures (including the Property inspection) is acceptable.

8.2 If Buyer does not deliver a written objection to Seller regarding a Seller Disclosure or the Property inspection within the time provided in subsection 8.1 above, that document or inspection will be deemed approved or waived by Buyer.

8.3 If Buyer objects, Buyer and Seller shall have seven calendar days after receipt of the objections to resolve Buyer's objections. Seller may, but shall not be required to, resolve Buyer's objections. If Buyer's objections are not resolved within the seven calendar days, Buyer may void this Contract by providing written notice to Seller within the same seven calendar days. The Brokerage, upon receipt of a copy of Buyer's written notice, shall return to Buyer the Earnest Money Deposit without the requirement of any further written authorization from Seller. If this Contract is not voided by Buyer, Buyer's objection is deemed to have been waived. However, this waiver does not affect those items warranted in Section 11.

10. SELLER'S LIMITED WARRANTY. Seller's warranties to Buyer regarding the condition of the Property are limited to the following:
- 10.1 When seller delivers possession of the Property to Buyer, it will be broom-clean and free of debts and personal belongings.
 - 10.2 Seller will deliver possession of the Property to Buyer with the plumbing, plumbed fixtures, heating, cooling, ventilating, electrical and sprinkler systems, appliances and fireplaces in working order.
 - 10.3 Seller will deliver possession of the Property to Buyer with the roof and foundation free of leaks known to Seller.
 - 10.4 Seller will deliver possession of the Property to Buyer with any private well or septic tank serving the Property in working order and in compliance with governmental regulations.
 - 10.5 Seller will be responsible for repairing any of Seller's moving-related damage to the Property.
 - 10.6 At Closing, Seller will bring current all financial obligations encumbering the Property which are assumed in writing by Buyer and will discharge all such obligations which Buyer has not so assumed; and
 - 10.7 As of Closing, Seller has no knowledge of any claim or notice of an environmental, building or zoning code violation regarding the Property which has not been resolved.

11. VERIFICATION OF WARRANTED AND INCLUDED ITEMS. Before Closing, Buyer may conduct a "walk-through" inspection of the Property to determine whether or not items warranted by Seller in Section 10.1, 10.2, 10.3 and 10.4 are in the warranted condition and to verify items included in Section 1.1 are presently on the Property. If any item is not in the warranted condition, Seller will correct, repair or replace it as necessary or, with the consent of Buyer, escrow an amount at Closing to provide for such repair or replacement. The Buyer's failure to conduct a "walk-through" inspection, or to claim during the "walk-through" inspection that the Property does not include all items referenced in Section 1.1, or is not in the condition warranted in Section 10, shall not constitute a waiver by Buyer of Buyer's rights under Section 1.1 or of the warranties contained in Section 10.

12. CHANGES DURING TRANSACTION. Seller agrees that no changes in any existing leases shall be made, no new leases entered into, and no substantial alterations or improvements to the Property shall be made or undertaken without the written consent of the Buyer.

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

14. COMPLETE CONTRACT. This instrument together with its addenda, any attached exhibits, and Seller Disclosures constitute the entire Contract between the parties and supercedes 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 or claim relating to this Contract, including but not limited to the disposition of the Earnest Money Deposit, the breach or termination of this Contract, or the services relating to this transaction, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. Disputes shall include representations made by the parties, any Broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the Property to which this Contract pertains, including without limitation, allegations of concealment, misrepresentation, negligence and/or fraud. Each party agrees to bear its own costs of mediation. Any agreement signed by the parties pursuant to the mediation shall be binding. If mediation fails, the procedures applicable and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation. By marking this box , and adding their initials, the Buyer (), and the Seller (), agree that mediation under this Section 15 is not mandatory, but is optional upon agreement of all parties.

16. DEFAULT. If Buyer defaults, Seller may elect to either retain the Earnest Money Deposit as liquidated damages or to return the Earnest Money Deposit and sue Buyer to enforce Seller's rights. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect to either accept from Seller as liquidated damages, a sum equal to the Earnest Money Deposit, or to sue Seller for specific performance and/or damages. If Buyer elects to accept the liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. Where a Section of this Contract provides a specific remedy the parties intend that the remedy shall be exclusive regardless of rights which might otherwise be available under common law.

17. ATTORNEY'S FEES. In any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney's fees.

18. DISPOSITION OF EARNEST MONEY. The Earnest Money Deposit shall not be released unless it is authorized by: (a) Section 2, Section 8.3 or Section 15; (b) separate written agreement of the parties; or (c) court order.

19. ABROGATION. Except for express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss or damage to the Property shall be borne by Seller until Closing.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this transaction. Extensions must be agreed to in writing by all parties. Performance under each Section of this Contract which references a date shall be required absolutely by 5:00 PM Mountain Time on the stated date.

22. FACSIMILE (FAX) DOCUMENTS. Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original. If the transaction involves multiple Buyers or Sellers, facsimile transmissions 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 the other party's agent that the offer or counteroffer has been signed as required.

24. 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 AM PM Mountain Time 11-8 19 96, this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

Buyer's Signature: [Signature] (Buyer's Signature) 11/8/96 (Offer Date)
 The above date shall be the Offer Reference Date.

(Notice Address) (Phone) (Notice Address) (Phone)

ACCEPTANCE/REJECTION/COUNTER OFFER

CHECK ONE:
 Acceptance of Offer to Purchase: Seller Accepts the foregoing offer on the terms and conditions specified above.

Seller's Signature: [Signature] (Date) 11/8/96 (Time) _____ (Date) _____ (Time)

(Notice Address) (Notice Address)
 Rejection: Seller Rejects the foregoing offer. _____ (Seller's Initials) _____ (Date) _____ (Time)
 Counter Offer: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached Counter Offer # _____.

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures (One of the following alternatives must therefore be completed).

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:
 SIGNATURE OF SELLER: [Signature] Date: 11/8/96
 SIGNATURE OF BUYER: _____ Date: _____

I personally caused a final copy of the foregoing Contract bearing all signatures to be mailed on _____ 19 ____ by certified mail and return receipt attached hereto to the Seller, Buyer, Sent by _____

**ADDENDUM #1
TO
REAL ESTATE PURCHASE CONTRACT**

By reference, this is an ADDENDUM to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of August 14, 1996, including all addenda and counter offers, between P.R.P Development, Inc., as Buyer and C.H.T. Investments, as Seller on property known as: "Saratoga Springs No. 1" Subdivision, Lehi City, UT. (72 fully improved town home building lots).

The following terms are hereby incorporated as part of the REPC, and to the extent these terms modify or conflict with any provisions of the REPC, these terms shall control. All other terms of the REPC not modified shall remain the same:

1. Buyer to close on any 9 lots within 30 days from time that a building permit can be obtained from pertinent city and all improvements are installed including but not limited to pavement.
2. Buyer to close on any 9 lots every 90 days thereafter until all lots are closed.
3. At closing, Buyer will close 9 lots X \$30,000.00 = \$270,000.00. This will release nine (9) lots.
4. Seller's release of lots will be determined at Buyer and Seller's discretion, prior to closing.
5. No lot to be closed on prior to any and all improvements being installed, including pavement and a building permit being obtainable from pertinent city.
6. All construction debris on all lots to be removed by Seller prior to closing on each lot.
7. Seller to approve Buyer's site plan, architectural plan, elevations and exterior materials. Buyer understands that he will be responsible for all costs related to any changes to site plan if changes are required to fit Buyer's home plans.
8. NOTE: Some principals, managers and/or employees of buyer are licensed real estate agents or brokers with the State of Utah.

() Buyer (X) Seller shall have until 5:00 () am (X) PM Mountain Time, November 8, 1996 to accept these terms. Unless so accepted, this offer shall lapse.

PRP Development, L.C.

[Signature]
(X) Buyer () Seller Signature General Manager

11/5/96
Date

ACCEPTANCE / REJECTION / COUNTER OFFER

Check One:

(X) Acceptance: (X) Seller () Buyer hereby accepts these terms.

[Signature]
() Buyer (X) Seller Signature

11/6/96
Date

() Rejection: () Seller () Buyer rejects these terms.

____ (Initials) _____ (Date)

() Counter Offer: () Seller () Buyer presents as a counter offer the terms set forth on the attached Counter Offer # _____.

PRP DEVELOPMENT, L.C.
 7069 HIGHLAND DRIVE 3-94
 SALT LAKE CITY, UT 84121-3701
 (801) 944-9191

DATE	INVOICE	AMOUNT
	Downhouse	
	lots	

31

047

PAY Five thousand and no/100 DOLLARS

CHECK
AMOUNT

DATE	TO THE ORDER OF	DESCRIPTION	CHECK NO.	
11/96	Superior Title	EM. Saratoga	476	\$ 5,000

check to be held until closing



KEY BANK OF UTAH SUGAR HOUSE OFFICE
 2299 HIGHLAND DRIVE SALT LAKE CITY, UTAH 84106

[Signature]

⑈000476⑈ ⑆124000737⑆ 440520054550⑈

SECURITY FEATURES: MICRO PRINT BORDERS · COLORED BRICK PATTERN · WATERMARK ON REVERSE SIDE · MISSING FEATURE INDICATES A COPY

PURCHASE AND DEVELOPMENT AGREEMENT

This Purchase and Development Agreement ("Agreement") is made and entered into this 2nd day of April, 1997 by and between PRP Development, LC ("PRP"), a Utah Limited Liability Company, Russell-Packard Development, Inc. ("RPI"), a California Corporation, Premier Homes Construction, LC. ("Premier"), a Utah Corporation and Lawrence M. Russell ("Russell"). Premier Homes, LC and Premier Homes Construction, LC are two separate entities.

RECITALS

WHEREAS, Russell and Premier Homes, LC are the sole members of PRP, and

WHEREAS, Russell desires to sell all of his right, title and interest in PRP to Premier on the terms and conditions set forth herein, and

WHEREAS, Russell desires the right to acquire from PRP Lots 1 to 72 in the Saratoga Springs Subdivision, Phase 1 located in Utah County, Utah (said lots are hereinafter collectively referred to the "Saratoga Property" and the individual lots are referred to as the "Lots") pursuant to the terms of a real estate purchase contract ("Contract") signed by PRP on November 5, 1996 and signed by CMT Investments as Seller on November 8, 1996 which Contract names PRP as Buyer, and

WHEREAS, Russell is willing to pay PRP to acquire said Property.

NOW, THEREFORE, in consideration of the covenants and promises set forth herein, the parties mutually agree as follows:

1. Purchase of Interest in PRP. Premier agrees to pay and Russell agrees to accept the sum of \$5,000 for Russell's remaining interest in PRP. Russell shall transfer it's interest in PRP to Premier at the time of closing. Premier shall pay Russell the purchase price at the time of closing. The parties represent that the purchase prices set forth herein represents a fair estimate of the value of Russell's remaining interest in PRP as of the date hereof.
2. Saratoga Property. PRP agrees to assign to Russell all of its right, title and interest in the Contract and its right to acquire the Saratoga Property at the time of closing. Russell agrees to pay PRP the sum of \$528,000 for PRP's interest in the Saratoga Property. Said sum shall be paid as follows:
 - a. Russell shall pay PRP the sum of \$8,000 for each Lot on 66 Lots of the Saratoga Property. In such an event, Russell shall be entitled to sell the first 6 lots without making any payment to PRP. On the last 66 lots, Russell shall pay PRP the sum of

\$8,000 at the time of closing of the sale of each Lot. No interest shall accrue on the unpaid balance.

- b. In the event Russell sells, assigns or transfers the Saratoga Property other than through the sale of an individual Lot, the amounts due PRP shall become due and payable upon such in such event.
 - c. The amounts due PRP shall be secured by a standard trust deed and trust deed note in favor of PRP to be recorded after the closing of the construction loan and/or an escrow arrangement at American Legal Title, acceptable to PRP, which arrangement provides for the payment of \$8,000 to PRP upon the sale of each Lot.
 - d. Russell shall have until April 1, 1999 to pay the principal sum of \$528,000 at no interest. Interest shall accrue after April 1, 1999 at the rate of 8 percent per annum on the unpaid principal balance. After April 1, 2000, the principal sum, together with all accrued interest, shall become due and payable
3. Disclaimer of Interest. As a material part of the consideration of this Agreement, Russell and RPI acknowledge and agree that upon the consummation of the transaction set forth in this Agreement, neither Russell nor RPI shall have any further interest in and to PRP or any of its assets, projects or properties.
 4. Notice. All demands and notices to be given hereunder, if any, shall be personally delivered or sent by registered mail addressed to the respective parties at their postal addresses as of the date of this Agreement or to such other address as each may hereafter designate in writing.
 5. Successors. Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.
 6. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties hereto and supersedes all prior agreements or understandings.
 7. Amendment. This Agreement may not be altered or amended except by a subsequent written agreement executed by all of the parties hereto.
 8. Attorney's Fees. In the event of any controversy or claim or dispute between the parties hereto arising out of or relating to this Agreement or any of the documents provided for herein, or the breach thereof, the prevailing party shall be entitled to recover from the losing party reasonable attorneys' fees, expenses and costs, whether incurred prior to, during or subsequent to trial including appeals.

9. Additional Documents. The parties hereto agree to execute such additional documents as may be necessary or desirable to carry out the intent of this Agreement.
10. Nonwaiver. The failure of any party to enforce the provisions of this Agreement shall not constitute a waiver unless specifically stated in writing, signed by the party whose rights are deemed waived, regardless of a party's knowledge of a breach hereunder.
11. Governing Law. The terms of the Agreement shall be governed by and construed in accordance with Utah law. The parties agree that any legal proceedings relating to the subject matter of this Agreement shall be brought exclusively in the State of Utah. The parties represent to each other that the Agreement to bring legal proceedings exclusively in the State of Utah will not place a serious inconvenience or be unfair or unreasonable to any of the parties hereto. Because the State of Utah has a substantial relationship to both the parties and this transaction, it is appropriate to select the Utah Courts to handle any and all legal proceedings relating hereto.
12. Severability. If any of the terms and conditions of this Agreement shall be declared invalid by a court, agency, commission or other tribunal or entity having jurisdiction thereof, the application of such provisions to parties or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each of them not so declared invalid or unenforceable shall be valid and be enforced to the fullest extent permitted by law and the rights and obligations of the parties shall be reasonable terms consistent with the undertakings of the parties under this Agreement has been substituted in place of the invalid provision.
13. Paragraph Headings. Paragraph headings in this Agreement are for convenience only and shall not be deemed to modify, interpret or limit the provisions hereof.
14. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same instrument.
15. Time of the Essence. Time is of the essence in this Agreement.
16. Authorization. The individuals who have signed this Agreement represent and warrant that they are duly authorized to execute this Agreement, in either their individual or representative capacity as indicated, and that this Agreement is enforceable according to its terms.
17. Survival. The provisions, promises, warranties, representations, and covenants set forth herein shall survive any execution, settlement, delivery or recording of any instrument and shall not be merged therein.

18. Legal Counsel. The parties hereto have engaged the law firm of Carman & Associates, P.C. to prepare this Agreement. All parties acknowledge that they have been advised to seek independent legal advice to represent their individual interests to the extent they deem it necessary.
19. Costs. Each of the parties shall pay their own costs and expenses incurred, or to be incurred, in negotiating and preparing this Agreement and in closing and carrying out the transactions contemplated by this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year above written.

PRP Development, LC
PREMIER HOMES, L.C., MEMBER
By: [Signature] managing member
Member *BY JOHN F. THOMAS, MANAGING MEMBER*

Russell-Packard Development, Inc.
[Signature]
President

Premier Homes Construction, LC
[Signature]
Member
[Signature]
Lawrence M. Russell

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU
A PROFESSIONAL CORPORATION
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145-5000
TELEPHONE (801) 521-9000
FACSIMILE (801) 363-0400

writer's direct number:
(801) 322-7115

Scott Keith Wilson

March 2, 1998

J. Craig Carman
311 South State Street, Suite 380
Salt Lake City, UT 84111

Re: Burton Lumber v. PRP, et al.

Dear Craig:

As we discussed yesterday, I am writing to set out the terms of our proposed settlement of the lawsuit filed against PRP Development (PRP), John Thomas, and Larry Russell by Burton Lumber, which arises out of PRP's unpaid account with Burton Lumber, which now totals \$90,009.00. As you know, the amounts owed to Burton Lumber are the debts of PRP, and any payments made by Larry Russell in order to settle this account must be set off against amounts payable to PRP under the terms of the Purchase and Development Agreement executed on April 2, 1987. Although we understand that PRP and John Thomas dispute some of the charges claimed by Burton Lumber, the total of these disputed amounts is less than \$11,000. Thus, even under PRP's view of the debt, the amount owed is still at least \$79,009.00.

In addition to the Burton Lumber account, Larry Russell has also paid off certain other debts owed by PRP. These obligations include \$12,364.45, arising out of Larry's payoff of the construction loan for Lot 15, Lake Park Meadows, and \$18,800 in lease payments and mileage penalties arising out of PRP's lease of a 1996 GMC truck.

In light of these listed obligations of PRP and its principals, Larry Russell is willing to resolve the current litigation with Burton Lumber, provided that these PRP obligations thereby satisfied are deducted from amounts payable to PRP under the terms of the Purchase and Development Agreement. These amounts are as follows:

\$79,009.00	Burton Lumber
12,364.45	Lot 15, Lake Park Meadows
<u>18,800.00</u>	GMC truck lease
\$110,173.45	Total

Larry Russell will be solely responsible for all other lease obligations related to the 1996 GMC truck.

J. Craig Carman
March 2, 1998
Page 2

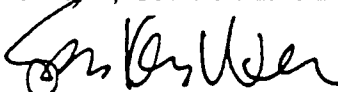
Accordingly, \$110,173.45 will be deducted from the total amount to be paid to PRP under the terms of the Purchase and Development Agreement, and no payments will be made to PRP until the \$110,173.45 plus interest at the rate of 8 percent per annum has been fully set off against the \$8,000.00 payments specified by the Purchase and Development Agreement. In addition, Larry Russell will retain ownership of the GMC truck. The settlement as stated in this letter resolves only those three debts listed above, and does not waive or affect any other claims which have arisen or which may arise between Larry Russell and John Thomas, PRP, its present principals or others. This agreement is conditioned on Larry Russell's complete settlement of the Burton Lumber litigation and complete release of Larry Russell, John Thomas, and PRP from said lawsuit.

There is currently a limited window of opportunity for Larry Russell to settle the Burton Lumber case on PRP's behalf, and so this offer will remain open only until close of business on Monday, March 2, 1998.

If this agreement is acceptable to you and your clients, please execute this agreement by signing below as indicated and returning it to me. If you have any questions, please call.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Michael R. Carlston

Scott Keith Wilson

Counsel for Lawrence M. Russell

APPROVED AND ACCEPTED:



John J. Thomas, personally and
on behalf of PRP Development, LC



J. Craig Carman
Counsel for John J. Thomas and PRP

NA1959812ISKWCARMAN2.LTR

Mail TO:
David G Black
1245 Brickyard Rd #600
Salt Lake City, UT
54106


← M

UT 68030 K 4627 P 738
RANDALL A COULINGTON
UTAH COUNTY RECORDER
1998 JUN 22 9:00 AM FEE 30.00 BY JB
RECORD FOR DAVID G BLACK

NOTICE OF INTEREST

NOTICE OF INTEREST is hereby given that PRP Development, L.C., a Utah limited liability company, pursuant to an agreement dated April 2, 1997, and a Uniform Real Estate Contract dated November 5, 1996 and November 8, 1996, copies of each of which are attached hereto as Exhibit "A", claims an interest in and to lots 1, 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 4154, 56, 57, 58, 59, 60, 61, 62, 67, 69, 70, 71, of Saratoga Springs Plat A, Plat 4, Sheet 2, Planned Unit Development located in Utah County, State of Utah.

DATED this 18th day of June, 1998.

PRP DEVELOPMENT, L.C.
By: 
John Thomas

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

On this 18th day of June, 1998, before me the undersigned, a Notary Public in and for said County and State, personally appeared John Thomas, known to me to be the Manager of PRP Development, L.C., and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

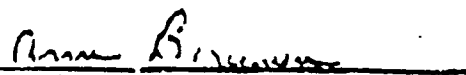

Notary Public for Utah



Exhibit "A"

CMT INVESTMENTS

CMT

BT 68030 X 4677 M 789

PURCHASE AND DEVELOPMENT AGREEMENT

This Purchase and Development Agreement ("Agreement") is made and entered into this 2nd day of April, 1997 by and between PRP Development, LC ("PRP"), a Utah Limited Liability Company, Russell-Packard Development, Inc. ("RPD"), a California Corporation, Premier Homes Construction, LC ("Premier"), a Utah Corporation and Lawrence M. Russell ("Russell"). Premier Homes, LC and Premier Homes Construction, LC are two separate entities.

RECITALS

WHEREAS, Russell and Premier Homes, LC are the sole members of PRP, and

WHEREAS, Russell desires to sell all of his right, title and interest in PRP to Premier on the terms and conditions set forth herein, and

WHEREAS, Russell desires the right to acquire from PRP Lots 1 to 72 in the Saratoga Springs Subdivision, Phase 1 located in Utah County, Utah (said lots are hereinafter collectively referred to as the "Saratoga Property" and the individual lots are referred to as the "Lots") pursuant to the terms of a real estate purchase contract ("Contract") signed by PRP on November 3, 1996 and signed by CMT Investments as Seller on November 8, 1996 which Contract names PRP as Buyer, and

WHEREAS, Russell is willing to pay PRP to acquire said Property.

NOW, THEREFORE, in consideration of the covenants and promises set forth herein, the parties mutually agree as follows:

1. Purchase of Interest in PRP. Premier agrees to pay and Russell agrees to accept the sum of \$5,000 for Russell's remaining interest in PRP. Russell shall transfer his interest in PRP to Premier at the time of closing. Premier shall pay Russell the purchase price at the time of closing. The parties represent that the purchase price set forth herein represents a fair estimate of the value of Russell's remaining interest in PRP as of the date hereof.
2. Saratoga Property. PRP agrees to assign to Russell all of its right, title and interest in the Contract and its right to acquire the Saratoga Property at the time of closing. Russell agrees to pay PRP the sum of \$538,000 for PRP's interest in the Saratoga Property. Said sum shall be paid as follows:
 - a. Russell shall pay PRP the sum of \$8,000 for each Lot on 66 Lots of the Saratoga Property. In such an event, Russell shall be entitled to sell the first 6 lots without making any payment to PRP. On the last 66 lots, Russell shall pay PRP the sum of

ENT 62030 X 4677 M 760

\$8,000 at the time of closing of the sale of each Lot. No interest shall accrue on the unpaid balance.

- b. In the event Russell sells, assigns or transfers the Saratoga Property other than through the sale of an individual Lot, the amounts due PRP shall become due and payable upon such in such event.
 - c. The amounts due PRP shall be secured by a standard trust deed and trust deed note in favor of PRP to be recorded after the closing of the construction loan and/or an escrow arrangement at American Legal Title, acceptable to PRP, which arrangement provides for the payment of \$8,000 to PRP upon the sale of each Lot.
 - d. Russell shall have until April 1, 1999 to pay the principal sum of \$528,000 at no interest. Interest shall accrue after April 1, 1999 at the rate of 8 percent per annum on the unpaid principal balance. After April 1, 2000, the principal sum, together with all accrued interest, shall become due and payable.
3. **Disclaimer of Interest.** As a material part of the consideration of this Agreement, Russell and RPI acknowledge and agree that upon the consummation of the transaction set forth in this Agreement, neither Russell nor RPI shall have any further interest in and to PRP or any of its assets, projects or properties.
 4. **Notice.** All demands and notices to be given hereunder, if any, shall be personally delivered or sent by registered mail addressed to the respective parties at their postal addresses as of the date of this Agreement or to such other address as each may hereafter designate in writing.
 5. **Successors.** Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.
 6. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding between the parties hereto and supersedes all prior agreements or understandings.
 7. **Amendment.** This Agreement may not be altered or amended except by a subsequent written agreement executed by all of the parties hereto.
 8. **Attorney's Fees.** In the event of any controversy or claim or dispute between the parties hereto arising out of or relating to this Agreement or any of the documents provided for herein, or the breach thereof, the prevailing party shall be entitled to recover from the losing party reasonable attorneys' fees, expenses and costs, whether incurred prior to, during or subsequent to trial including appeals.

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9. Additional Documents. The parties hereto agree to execute such additional documents as may be necessary or desirable to carry out the intent of this Agreement.
10. Nonwaiver. The failure of any party to enforce the provisions of this Agreement shall not constitute a waiver unless specifically stated in writing, signed by the party whose rights are deemed waived, regardless of a party's knowledge of a breach hereunder.
11. Governing Law. The terms of the Agreement shall be governed by and construed in accordance with Utah law. The parties agree that any legal proceedings relating to the subject matter of this Agreement shall be brought exclusively in the State of Utah. The parties represent to each other that the Agreement to bring legal proceedings exclusively in the State of Utah will not place a serious inconvenience or be unfair or unreasonable to any of the parties hereto. Because the State of Utah has a substantial relationship to both the parties and this transaction, it is appropriate to select the Utah Courts to handle any and all legal proceedings relating hereto.
12. Severability. If any of the terms and conditions of this Agreement shall be declared invalid by a court, agency, commission or other tribunal or entity having jurisdiction thereof, the application of such provisions to parties or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each of them not so declared invalid or unenforceable shall be valid and be enforced to the fullest extent permitted by law and the rights and obligations of the parties shall be reasonable terms consistent with the undertakings of the parties under this Agreement has been substituted in place of the invalid provision.
13. Paragraph Headings. Paragraph headings in this Agreement are for convenience only and shall not be deemed to modify, interpret or limit the provisions hereof.
14. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same instrument.
15. Time of the Essence. Time is of the essence in this Agreement.
16. Authorization. The individuals who have signed this Agreement represent and warrant that they are duly authorized to execute this Agreement, in either their individual or representative capacity as indicated, and that this Agreement is enforceable according to its terms.
17. Survival. The provisions, promises, warranties, representations, and covenants set forth herein shall survive any execution, settlement, delivery or recording of any instrument and shall not be merged therein.

DT 68030 R 4677 M 762

18. **Legal Counsel.** The parties hereto have engaged the law firm of Carman & Associates, P.C. to prepare this Agreement. All parties acknowledge that they have been advised to seek independent legal advice to represent their individual interests to the extent they deem it necessary.
19. **Costs.** Each of the parties shall pay their own costs and expenses incurred, or to be incurred, in negotiating and preparing this Agreement and in closing and carrying out the transactions contemplated by this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year above written.

BLACK, SMITH & ARYLE 801 4642224

62030 N 4577 W 763

18. **Legal Counsel:** The parties hereto have engaged the law firm of Corman & Associates, P.C. to prepare this Agreement. All parties acknowledge that they have been advised to seek independent legal advice to represent their individual interests to the extent they deem it necessary.

19. **COSTS:** Each of the parties shall pay their own costs and expenses incurred, or to be incurred, in negotiating and preparing this Agreement and in closing and carrying out the transactions contemplated by this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year above written.

PRP Development, LC
Premier Homes, L.C., ALBANY
[Signature]
Member BY *[Signature]* THOMAS, ALBANY

Russell-Peckoff Development, Inc.
[Signature]
President

Premier Homes Construction, LC
[Signature]
Member
[Signature]
Lawrence M. Russell

BLACK, SMITH & BOYLE 4848094

THIS INSTRUMENT BEING MADE THIS 12th DAY OF JULY 1988 BETWEEN THE PARTIES HEREIN AND THE STATE OF TEXAS...

The State of Texas, County of Tarrant, State of Texas, in and for the County of Tarrant, State of Texas, do hereby certify that the following is a true and correct copy of the original instrument...

Subscribed and sworn to before me on this 12th day of July 1988 at the City of Fort Worth, Texas.

I, Notary Public in and for the State of Texas, do hereby certify that the foregoing is a true and correct copy of the original instrument...

Witness my hand and the seal of my office this 12th day of July 1988 at the City of Fort Worth, Texas.

Notary Public in and for the State of Texas

ENT 62030 M 4677 M 75A

1. The following is a true and correct copy of the original instrument...

2. The following is a true and correct copy of the original instrument...

3. The following is a true and correct copy of the original instrument...

4. The following is a true and correct copy of the original instrument...

5. The following is a true and correct copy of the original instrument...

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16. The following is a true and correct copy of the original instrument...

17. The following is a true and correct copy of the original instrument...

18. The following is a true and correct copy of the original instrument...

19. The following is a true and correct copy of the original instrument...

PRP DEVELOPMENT, L.C.
100 HIGHLAND DRIVE, 3rd FL
SALT LAKE CITY, UT 84119-3786
(801)581-8801

DATE	AMOUNT	REMARKS
		TDunk
		476

PRP Five Thousand 100/100

TO THE ORDER OF

311/106 Superior Title

AMOUNT \$ 476

REMARKS

DATE

Check to be held until clearing

AT BANK OF UTAH BRANCH OFFICE
200 HIGHLAND DRIVE, SALT LAKE CITY, UTAH 84119

#0001,767 #1240007376 4605200 54,550

[Handwritten signature]

0176

6E030 N 4577 N 767

BLACK, STITH & BRYLE 661 4843004

P. 08

1. A recitation of Buyer's obligations under Section 1.1 shall be a binding contract by operation of law in favor of the Seller.

2. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

3. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

4. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

5. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

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27. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

28. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

29. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

30. The Seller shall be deemed to have accepted the goods when the goods are delivered to the Buyer by the Seller.

62030 N 4677 W 765

 Name Address Phone Name Address Phone

ACCEPTANCE / ALLOCATION / COUNTER OFFER

 Name Address Phone Name Address Phone

 Name Address Phone Name Address Phone

DOCUMENT RECEIPT

 Name Address Phone Name Address Phone

 Name Address Phone Name Address Phone

EXT 62030 X 4677 M 766

APPENDUM #1
REAL ESTATE PURCHASE CONTRACT

By reference, this is an ADDENDUM to the REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Release Date of August 14, 1996, including all exhibits and counter offers, between P.R.P. Development, Inc., as Buyer and W.S. Investments, as Seller on property known as: "Saratoga Springs No. 1" subdivision, Lehigh, NJ. (72 fully improved town home building lots).

The following terms are hereby incorporated as part of the REPC, and in the event there is any conflict with any provisions of the REPC, these terms shall control. All other terms of the REPC not modified shall remain the same:

- Buyer to close on any 9 lots within 30 days from time that a building permit can be obtained from pertinent city and all improvements are installed including but not limited to pavement.
- Buyer to close on any 9 lots every 90 days thereafter until all lots are closed.
- At closing, Buyer will close 9 lots X \$30,000.00 = \$270,000.00. This will release nine (9) lots.
- Seller's release of lots will be determined at Buyer and Seller's discretion, prior to closing.
- No lot to be closed on prior to any and all improvements being installed, including pavement and a building permit being obtainable from pertinent city.
- All construction debris on all lots to be removed by Seller prior to closing on each lot.
- Seller to approve Buyer's site plan, architectural plan, elevations and exterior materials. Buyer understands that he will be responsible for all costs related to any changes to site plan if changes are required to fit Buyer's home plan.
- NOTE: Some principals, managers and/or employees of Buyer are licensed real estate agents or brokers with the State of Utah.

Buyer Seller shall have until 5:00 (AM PM Mountain Time, November 8, 1996 to accept these terms. Unless so amended, this offer shall lapse.

P.R.P. Development, L.P.

[Signature]
Buyer Seller Signature [Signature]

11/17/96
Date

ACCEPTANCE / REJECTION / COUNTER OFFER

Buyer Seller Buyer hereby accepts these terms.

Buyer Seller Signature [Signature]

Rejection Seller Buyer rejects these terms.

Counter Offer Seller Buyer presents as a counter offer the terms set forth on the attached Counter Offer # _____.