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GREEN HILLS HOME OWNER'S ASSOCIATION'S OBJECTION AND PROTEST TO  
CONDITIONAL USE PERMIT

Applicant: Timothy Charlwood  
File: CUP 2016-11

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COMES NOW the Green Hills Home Owners' Association, by and through its attorney Zane S. Froerer, and respectfully submits this Brief in support of their Appeal of the Decision made by the Ogden Valley Planning Commission's granting of a Conditional Use Permit submitted by Timothy Charlwood. The Application seeks allowance to construct a recreational lodge rather than a single family home on Lot 6 within Sanctuary.

Lot 6 is located within the F-40 zone which lists single family dwellings as a "permitted" use. However, the proposed use of a recreational lodge is only permitted by conditional use permit. If the Applicant can demonstrate compliance with the Ordinances, including the Conditional Use Permit ("CUP") Ordinance, then the Application should be granted.

These specific standards are set forth in the first section of at Section 108-4-1 et. seq. Approval of any particular application is on a *case by case* basis that take into account the unique characteristics of any particular proposal. Therefore, reliance upon the inclusion of the use as a conditioned use when the Plat was approved does not satisfy the need to evaluate all of the CUP

mitigation factors. In this case, the incorporation of a private street is one such unique characteristic that the Commission failed to adequately address and in fact ignored.

The potential use of that private street to access Lot 6 and a recreational lodge is governed not only by the County's Ordinances, but by the Easement Agreement and Declaration of Covenants ("Agreement"). *See* Easement Agreement and Declaration of Covenants as Exhibit 1. This Agreement is also incorporated by reference in the Sanctuary Plat where it refers to the right-of-way itself as well as the Loop Trail Agreement. *See* Sanctuary Plat. Both are incorporated into the Plat by reference, implied and express.

By taking a position that there is access for a recreational lodge via the right-of-way, the County is forcing the HOA to challenge that determination and avoid the adverse affects of that land use decision from becoming *res judicata*.<sup>1</sup> Therefore, the HOA has filed its appeal to exhaust its administrative remedies and preserve any objection to the scope of the access granted in the Agreement. In making its decision, the Planning Commission failed to considered the scope of the right-of-way as defined by the Agreement, whether detrimental impacts to the HOA's property interests should be first mitigated as a condition of the conditional use, and the nature of property rights that vested with the application subject to approval.

The County's attempt to limit the Board's review is also in error. The County's Ordinances must be construed in light of the governing statutes that authorize the County's authority.

Utah Code Ann. §17-27a-801(8) states as follows:

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<sup>1</sup> *See Career Services Review Board v. Utah Department of Corrections*, 942 P.2d 933, 938 (Utah 1997).

(8) (a) (i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.

(ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

Review of a land use decision is based upon the record of the “land use authority *or* the appeal authority...” The court may consider whether evidence was improperly excluded. That is the case here. The Commission improperly excluded the Agreement and the Board’s review cannot be limited to what the Commission did consider. It must also take into account what the Commission *did not* consider.

The issues that form the basis for the appeal are set forth in the Application to the Board of Adjustments. This brief will further address those issues in anticipation of a hearing before the Board. Further, the brief will also respond to some points made in the Staff Report.

1. *The Application was incomplete.*

The Applicant was entitled to review of his application only after he submitted a complete application. Utah Code Ann. §17-27a-508. Weber County requires that site development plans address vehicular and pedestrian circulation and streets. Weber County Ordinance Section 108-1-2(a). Further, for any buildings covered by a conditional use permit, a full design review is required to verify that the requirements of the entire design review chapter are met. Weber County Ordinance Section 108-1-3.

Where the lot will be accessed through a private street, not covered by the County ordinances setting forth street standards and minimums, the Applicant was required to submit the Agreement defining the scope of access along with his Application to show that Maple Drive, as

the right-of-way is known, permits sufficient access to not require mitigation. Instead, the Application relied upon Mr. Charlewood's personal statement that he had access to meet the use of a recreational lodge.

At the hearing before the Planning Commission, the Applicant and the Planning staff relied upon the Sanctuary Plat to support the position that there was sufficient access to meet the requirements of the CUP review. In fact, the County and members of the Commission took the erroneous position that the Applicant's access rights associated with the CUP had actually vested with the Plat when it was approved by the Weber County Commission on July 16<sup>th</sup>, 2013.<sup>2</sup>

There is no evidence that the Plat was even reviewed by the Commissioners and it was not attached to the Staff Report or the Application, nor was it even offered at the hearing for the Commission to review. Therefore, as per §108-4-3(2)(b)(2), the Application should not even have been accepted in its current form where one of the permit considerations was traffic safety and congestion.

Therefore, the Application was incomplete in that it failed to support the claim of adequate access with anything other than the contested opinion of the Applicant.

- 2. The Commission failed to properly considered mitigation of the "detrimental impacts" of the CUP upon the right-of-way.*

Utah Code defines a "Conditional Use" as follows:

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<sup>2</sup> See comments by Commissioner Parson at the top of page 8 of the July 5, 2016 Commission Minutes; his comments were reinforced by Commissioner Howell who repeatedly took the position that because the Heli-pad was previously approved, there was no question of access. Further, staff also represented that because access was approved with the Plat, there was no requirement to further consider the impacts upon the privately owned section of Maple Drive.

“means a land use that, because of its unique characteristics or potential impact on the county, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.” Utah Code Ann. §17-27a-101.

This does not limit mitigation of conditions to issues of safety. At the hearing, the Staff and the Commission took the position that their review was limited to mitigate issues of public safety rather than mitigating or eliminating any “detrimental impacts.” Further, in the Staff Report to the Board, the County continues to ignore its own ordinances and argues that the Commission has discretion to “determine what the detrimental effects are and the conditions needed to mitigate them.” See Staff Report to the BOA at ¶ 11 page 5 and footnote 13. Even the County’s own Ordinances set forth a broad review of what conditions are to be mitigated. Weber County Ordinance Section 108-1-4.

These are not guidelines that can be dismissed at the whim of the Commission as suggested; rather they are mandatory and ignoring them is an arbitrary, capricious, and illegal act.<sup>3</sup> Those conditions include traffic safety and congestion. Specifically, the Commission “shall” consider “the effect of development on traffic conditions on abutting streets.” In this case, the abutting street is Maple Drive, the private street owned by the HOA. By completely disregarding the scope of the right-of-way, the Commission failed to adequately consider any deficiencies regarding access for a recreational lodge. The Ordinance does not limit the Commission’s consideration to exclude private streets. Where an Ordinance has omitted terms

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<sup>3</sup> “Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof.” *Springville Citizens for a Better Comty. V. City of Springville*, 979 P.2d 332 (1999).

that would otherwise limit its scope, the Commission, nor this Board, should read such terms back into the Ordinance.

Further, the Commission was also required to consider circulation patterns within the development. This necessarily includes the use of Maple Drive as a private street. It is even included on the Plat as a feature of the development. In deciding whether a separate ingress/egress would be required to meet the needs of a recreational lodge, the Commission should have also considered whether the scope of the right-of-way was sufficient to meet the needs of the recreational lodge by itself or at all.

In fact, the County's own review of its roads and streets undermines the position taken by the Commission. Even the County conducted a study and a review of the adequacy of the turn out and turn around up to the private portion of Maple Drive. However, when it came to the use of the private section of the Drive, the Commission ignored and refused to even discuss the impact the permit would have upon it.

3. *The land use rights associated with the CUP could not have vested with the Plat.*

In granting the CUP, the Commission relied in part upon the County's advice that the land use rights related to access under the CUP vested when the Plat was recorded rather than at the time the Application was filed. This is categorically incorrect. The County's response to this is to merely summarize the vesting doctrine and reassert that because the conditional use predated the plat by several decades, the Applicants land use rights to a recreational lodge vested

with the plat. The reasoning in their Report to this Board is illogical and not consistent with the actual law.<sup>4</sup>

The CUP Application is a land use application as defined by Utah Code §17-27a-103(26). Therefore, it is subject to the “vesting” rules of that Statute. The applicant was entitled to approval of his application only if it “conforms to the requirements of the county’s land use maps, zoning maps, and applicable land use ordinances in effect *when* a complete application is submitted...” Utah Code §17-27a-508. (Emphasis added).

Utah Code is clear, the Applicant’s rights vest upon submission of the application. Utah Code §17-27a-508(1)(a)(i). Weber County has set forth two general categories of uses in the F-40 Zone. There are “permitted” uses, and “conditional” uses. The County has more or less adopted the definition of “conditional use” from the State and has defined “permitted use” as those not requiring a conditional use permit.

A recreational lodge is defined as a “conditional use” requiring a conditional use permit. As defined by both the State and the County Ordinances, a conditional use permit requires a land use application to be submitted. Therefore, at the time the Plat was recorded and approved, the right to access for *any* possible use allowed under the F-40 zone could not have vested because each conditional use requires a separate land use application to be submitted. That was, however, the Commissions position and continues to be the County’s position. That full access rights had vested for all possible future uses. If that was the case, then the County’s requirement

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<sup>4</sup> The Ordinances must not be interpreted or construed in a way that would result in illogical or contradictory meanings. *M & S Cox Investments, LLC v. Provo City Corporation*, 169 P.3d 789 (Utah App. 2007).

that a land owner obtain conditional use permits, land use permits, or building permits would be unnecessary and even an illegal interference in the exercise of those vested land use rights.

Yet that is not the case. The County *does* require that even after a plat has been approved, a land owner seek a building permit, a land use permit, or a conditional use permit before such rights may vest.

The Application was not submitted until long after the Plat was approved and that did not create what the Supreme Court called “free-floating” rights. The review requirements of a conditional use permit are entirely different than those for a plat and by the County’s own Ordinance to be done on a “case by case” basis. Weber County Ordinance Section 108-4-1(b).

Further, the idea expressed by the Planning Commission and the Planning Staff that with the approval of the Plat came an approval of all prospective and possible uses under the F-40 zones is wrong. The Utah Supreme Court rejected this idea when it held that “the right created was the right not to have the county revoke approval of the development based upon a change in the applicable zoning laws. A development approval does not create independent free-floating vested property rights—rights obtained by the submission and later approval of a development plan are necessarily conditioned upon compliance with the approved plan.” *Keith v. Mountain Resort Development, LLC*, 337 P.3d 213, ¶31 (2014).

Yet, the creation of free-floating vested rights is precisely what the County now argues as a basis for upholding the Commissions’ decision. The decision to ignore the Agreement and rely upon the Plat or to rely upon the approval of the Heli-pad was illegal and circumvented the requirements to mitigate *any* detrimental effects. The approval of the Plat and the approval of the Heli-pad vested specific rights but did not create “free-floating” property rights. Specifically,



they could not have vested any rights with respect to the considerations of granting the later filed application for a recreational lodge.

It is the HOA's position that development of the Lot 6 is limited to a single family dwelling. Where the proposed CUP use is a 10 bedroom recreational lodge with food service, repair services, and equipment rentals, on its face this demonstrates a detrimental impact upon Maple Drive. The Commission was wrong to dismiss consideration of these impacts on the basis that the Applicant's land use rights regarding access for a prospective conditional use had vested prior to the filing of his Application. The Commission also was wrong to not consider whether the increased traffic expected with what amounts to a hotel at the top of the mountain would have a detrimental impact upon the HOA and its obligation to maintain Maple Drive. If it had been a County road, no doubt the Commission would have address the detrimental impacts to the County's own roads and in fact did just that.

Therefore, it was an error to not consider whether the access Sanctuary has to Lot 6 is appropriate for a recreational lodge or whether the impacts upon the right-of-way should be mitigated prior to or as a condition of granting the permit.

4. *The Planning Commission made a land use decision that adversely affects the HOA's property interests and the HOA is entitled to have those affects mitigated and the matter decided by the County or have the County reject the application.*

In coming to its decision, the Planning Commission decided that it was not able to interpret or rely upon the Agreement in its evaluation. Ultimately, because they went ahead and decided the scope of access the right-of-way permitted, the Planning Commission put its stamp of interpretation upon the Agreement anyway.

The Supreme Court has recognized that when a land use decision has been made, each person who has property rights which are adversely effected must timely and specifically challenge that land use decision. *Gillmor v. Summit County*, 246 P.3d 102 (2010). Similarly, as in *Green v. Brown* where the Court of Appeals held that whether the planning department's decision to use a right-of-way that adversely affected Brown's property interests was the exact type of question the Board of Adjustments could have considered. *Green v. Brown*, 330 P.3d 737 (App. 2014).

In many respects this case is very similar to the situation presented in that case. There is a private right-of-way that is demarcated as access on a plat without the scope of the right-of-way set forth in the Plat. Rather, in this case, the scope of the right-of-way is set forth in the Agreement which is incorporated by reference in the Plat (Loop Trail Agreement).

Further, by entering a land use decision that has adverse consequences upon the HOA's property interests to limit the scope of the right-of-way to the terms of the Agreement, the County has given grounds to the HOA to challenge that decision. Just as in with *Green v. Brown*, if the HOA wants relief from those adverse consequences, it must challenge the decision to approve the CUP or risk the issue becoming subject to the doctrine of collateral estoppel and forever barred from further review.

Not only is the challenge fully justified, but the Planning Commission's decision to grant a CUP that directly impacts the scope and use of the HOA's right-of-way without even considering the documents that govern the use of that right-of-way is in complete error. In fact, that is the precise ruling from the Court of Appeals in its holding where it stated that the question

of the use of the ROW was the exact type of question that should have been answered by the Board of Adjustments.

Therefore, the HOA requests that the Board either remand the matter back to the Planning Commission with instructions to consider the terms of the Agreement, or that the Board itself considers the language of the Agreement and thereby reject the CUP unless the impacts upon the private street are mitigated.

5. *The Agreement limits development to 13 single family dwellings.*

Since the Board may also make its own determinations regarding the issue, the Board should itself consider how the Agreement affects the scope of access and whether the CUP adversely or may adversely affect the HOA's right to limit development and thereby limit the use and wear and tear of the right-of-way.

The language of the Agreement sets forth a single clear limitation on development within the Sanctuary which applies to Lot 6 and whether the CUP should be granted. In paragraph 6, this prohibition is stated as follows:

Specifically, but not by way of limitation, Nass agrees that no more than 13 single family dwellings **shall be built on the Nass Property** (Sanctuary) and agrees not to apply for any zoning change that would allow a higher density than one unit per 40 acres as allowed by the current FR-40 zone. (Emphasis added). *See* Easement Agreement and Declaration of Covenants as Exhibit 1.

The phrasing, "specifically, but not by way of limitation," should be read to mean "includes specifically, but are not limited to...." *Curtis Ambulance of Florida, Inc. v. Board of County Commissioners*, 811 F.2d 1371 (10<sup>th</sup> Cir. 1987). Therefore, this was a threshold limitation imposed upon the Sanctuary to control the scope of the right-of-way.

Further, it was agreed that application would not even be made for a residential density higher than one unit per 40 acres as then allowed by the F-40 zone. A recreational lodge clearly exceeds this limitation and would clearly have a detrimental impact upon the use, maintenance, ingress/egress, and congestion of Maple Dr.

These restrictions are in place to define the scope of use for the private roads owned exclusively by Green Hills and Green Hills has a direct interest in enforcing the limits on the scope of use. Under paragraph 2 of the Agreement, Green Hills has the duty to maintain and repair their roads only subject to a ratable contribution from the lot owners within the Sanctuary.

When the parties developed the formula for this ratable contribution, they mutually relied upon the development limits in paragraph 6. This is innately incorporated into the paragraph 2 formula where the contribution from the Sanctuary owners was required to be the same as the monthly contributions of the Green Hills owners. Green Hills is uniformly residential with no commercial use and no use beyond that of single family residential units. Where development of the Sanctuary lots was expressly limited to similar single family dwellings, this parity made sense.

The Applicant implicitly recognizes that his Application is in violation of the express terms and the spirit of the Agreement by proposing an increase in the monthly contribution. However, that is not for the Applicant to unilaterally decide nor is it for the County to ignore. By imposing the use of a Recreational Lodge upon the right-of-way, the County has adversely affected the HOA's property interests in controlling the use of the right-of-way. This will directly impact the HOA's obligation to maintain the Maple drive at its cost.

In addition to considerations of maintenance costs, the Agreement also embodies the desires to limit the traffic and use of the Green Hills roads. Under paragraph 3, even while being permitted use of the roads during construction, Sanctuary is required to comply with strict limits on its use including seeking a surety bond for any damage that it may cause to the roads. The amount of the surety bond agreed to was directly related to the anticipated construction loads of a single family dwelling construction not a ten-bedroom recreational lodge with kitchen service and underground parking.

By his own admission, the Applicant is seeking to expand his use from that of a single family dwelling to a “high quality retreat for guest to enjoy.” The mere necessity of the Conditional Use Permit demonstrates that his proposed use far exceeds the scope of development imposed by the Agreement and the scope of use for the roads.

Finally, this decision sets a precedent for each of the other lots in Sanctuary. The land use decision establishes that the scope of the right-of-way is expanded from single family dwellings to what amounts to a 16 room hotel with food service, repair shop, and rental shop not just for Lot 6, but for all currently platted lots.

6. *The Commission’s decision was not supported by substantial evidence and is therefore arbitrary, capricious, or illegal.*

A land use decision must be supported by substantial evidence. Utah Code §17-27a-801(5); *Fox v. Park City*, 200 P.3d 182, 185 (2008). Here, the Commission lacked the necessary documents to support its finding that there was access Lot 6 at all. The Agreement was expressly not considered. Yet, it is the basis for access to Lot 6 and any proposed CUP is impacted by its terms of use and maintenance of Maple Drive. This Agreement is incorporated into the Plat by

reference to the existence of the right-of-way and the reference to the Loop Trail Agreement on the Plat itself. Without the Agreement, the access to Lot 6 wouldn't exist and the Plat was approved subject to the existence of the use terms in that Agreement. By refusing to consider the provisions of that document, the Commission's decision was arbitrary, capricious, and illegal. Therefore, the approval of the CUP should be reversed.

#### CONCLUSION

Therefore, the Board of Adjustments should overturn the decision and reject the application or it should remand to have the Planning Commission properly evaluate the scope of the right-of-way as set forth in the Agreement and whether there is a need for any mitigation. In the alternative, the Board itself may consider the terms of the Agreement and require the Applicant to mitigate the detrimental impacts upon the right-of-way *before* the CUP is approved.

Dated the 22<sup>nd</sup> day of August, 2016.

BENJAMIN LEGAL, LLC

/s/Zane S. Froerer  
Zane S. Froerer  
Attorney for *Green Hills Estates Home Owners'*  
*Association*

# Exhibit 1

10/1/2004 4:35:49 PM 7204

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SECOND DISTRICT COURT

2004 SEP 23 A 9:42

SEP 23 2004

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IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY

STATE OF UTAH

DON KELLY; ROXANNE TAYLOR; TERRY )  
MURPHY; BRADLEY NELSON; DIANE )  
NELSON; LYNN TURNER; IAN HUETON; )  
VICTORIA BARRETT; and GREEN HILL )  
COUNTRY ESTATES HOMEOWNER'S )  
ASSOCIATION, )

Plaintiffs, )

vs. )

JAMES ALAND; THOMAS NASS; GREEN )  
HILL DEVELOPMENT COMPANY, INC.; )  
GREEN HILL DEVELOPMENT )  
COMPANY, a partnership; and JOHN )  
DOES 1 through 10, )

Defendants. )

DECLARATORY JUDGMENT

Declaratory Judgment



VD18089543  
010905924 ALAND, JAMES

Civil No. 010905924  
Judge Michael D. Lyon

Based on the Stipulation of counsel, the record herein, and for good cause  
appearing, the court ORDERS, ADJUDGES, AND DECREES as follows:



1. Title to the following-described real property located in Weber County, Utah (the "Nass Property") is hereby quieted in defendant Thomas J. Nass and the court declares that defendant Thomas J. Nass is the owner of fee title to the Nass Property free and clear of any claim or interest of plaintiffs (with the exception of the non-exclusive right-of-way and easement in favor of the Green Hills Country Estates Homeowner's Association described in paragraph 4 below) and that the Nass Property is not subject to, encumbered by, or otherwise affected by that certain Declaration of Covenants, Conditions, and Restrictions of Green Hill Country Estates Planned Cluster Subdivision recorded October 1, 1981 as Entry No. 844801, in Book 1390, at Page 1284 of the official records of the Weber County, Utah Recorder:

Serial # 21-001-0008

All of Lots 4 and 5, Section 4, Township 6 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey. (Being the East half of the Northeast quarter of said Section 4.)

Serial # 21-001-0009

The Northwest quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey.

Serial # 21-001-0010

The North one half of the Southwest quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Meridian. U.S. Survey.

Serial # 21-001-0011

The North one half of the South one half of the Southwest quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Meridian. U.S. Survey.

Serial # 21-001-0012

The Northeast quarter of Lot 6, Section 4, Township 6 North, Range 2 East, Salt Lake Base and Meridian. U.S. Survey.

Serial # 23-012-0022

The Southwest quarter of Section 34, Township 7 North, Range 2 East, Salt Lake Meridian. U.S. Survey. Containing 160 acres.

2. Title to the private roads and common areas depicted in the following plats on file with the Weber County, Utah Recorder:

Green Hill Country Estates Phase Nos. 1 through 7, according to the official plats thereof and recorded at the Weber County Recorder's office.

is hereby quieted in favor of plaintiff Green Hill Country Estates Homeowner's Association and the court declares that said plaintiff is the owner of fee title to said private roads and common areas free and clear of any claim or interest of Thomas J. Nass and that Thomas J. Nass has no developer's rights, rights-of-way or other, right, title, claim or interest in Green Hill Country Estates Phase Nos. 1 through 7 (with the exception of the non-exclusive rights-of-way and easements in favor of Thomas J. Nass described in paragraphs 3 and 4 below).

3. The court adjudicates and decrees that Thomas J. Nass is the owner and holder of a perpetual, nonexclusive right-of-way and easement on, under and across (1) the private roads and utility easements adjacent thereto as depicted on the official plats of Green Hill Country Estates Phase Nos. 1 through 7, and (2) a 50' wide extension of Maple Drive between Lots 99 and 100-R of Green Hill Country Estates Phase No. 6 and continuing northerly to the southerly boundary of Parcel No. 21-001-0012, which easement and

right-of-way benefits the Nass Property. The location, scope and terms of this easement and right of way are specified in the Easement Agreement and Declaration of Covenants between Thomas J. Nass and Green Hill Country Estates Homeowner's Association, to be recorded at the Weber County Recorder's office concurrently with this Declaratory Judgment.

4. The court adjudicates and decrees that Thomas J. Nass and the Green Hill Country Estates Homeowner's Association are the owners and holders of a perpetual, nonexclusive right-of-way and easement on, over and across the "Loop Trail," the location, scope and terms of which are specified in the Easement Agreement and Declaration of Covenants between Thomas J. Nass and Green Hill Country Estates Homeowner's Association, to be recorded at the Weber County Recorder's office concurrently with this Declaratory Judgment.

5. The court adjudicates and decrees that Nass holds no right, title or interest in the following parcels of property located in Weber County, Utah:

Serial # 21-001-004

The Northeast Quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Base & Meridian.

Serial # 21-001-006

The Southeast Quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Base & Meridian.

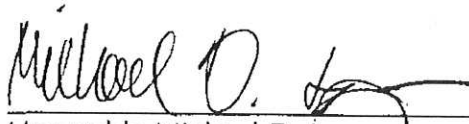
Serial # 21-001-007

The Northwest Quarter of Lot 6, Section 4, Township 6 North, Range 2 East, Salt Lake Base & Meridian.


6. All claims and issues between plaintiffs and defendant Thomas J. Nass are adjudicated hereby and the court, finding no reason for delay, hereby certifies this Declaratory Judgment to be a final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the parties to bear their own costs and attorney's fees.

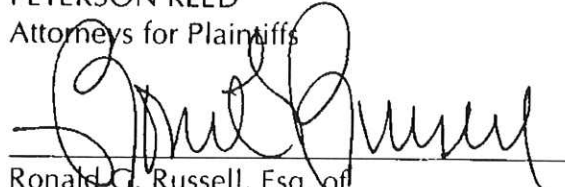
DATED this 14 day of Sept, 2004.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Michael D. Lyon  
District Court Judge

APPROVED AS TO FORM:

  
\_\_\_\_\_  
James L. Warlaumont, Esq. of  
PETERSON REED  
Attorneys for Plaintiffs

  
\_\_\_\_\_  
Ronald G. Russell, Esq. of  
PARR WADDOUPS BROWN GEE & LOVELESS  
Attorneys for Defendant Thomas J. Nass

AFTER RECORDING PLEASE RETURN TO:

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Salt Lake City, Utah 84147-0019

EASEMENT AGREEMENT AND DECLARATION OF COVENANTS

This Easement Agreement and Declaration of Covenants is made and entered into between Thomas J. Nass ("Nass") and Green Hill Country Estates Homeowner's Association, a Utah corporation ("Green Hill").

RECITALS:

A. Nass is the record owner of the following-described property located in Weber County, Utah:

Serial # 21-001-0008

All of Lots 4 and 5, Section 4, Township 6 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey. (Being the East half of the Northeast quarter of said Section 4.)

Serial # 21-001-0009

The Northwest quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Base and Meridian, U.S. Survey.

Serial # 21-001-0010

The North one half of the Southwest quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Meridian. U.S. Survey.

Serial # 21-001-0011

The North one half of the South one half of the Southwest quarter of Section 3, Township 6 North, Range 2 East, Salt Lake Meridian. U.S. Survey.

Serial # 21-001-0012

The Northeast quarter of Lot 6, Section 4, Township 6 North, Range 2 East, Salt Lake Base and Meridian. U.S. Survey.

Serial # 23-012-0022

The Southwest quarter of Section 34, Township 7 North, Range 2 East,  
Salt Lake Meridian. U.S. Survey. Containing 160 acres.  
Serial # 21-001-0008

Said property is hereinafter referred to as the "Nass Property."

B. Green Hill is the record owner of all of the private roads and common areas depicted on the following subdivision plats:

Green Hill Country Estates Phase Nos.1 through 7, according to the official plats thereof on record at the office of the Weber County, Utah Recorder.

Said property is hereinafter referred to as the "Green Hill Country Estates."

C. The Second Judicial District Court for Weber County, Utah has entered a Declaratory Judgment in the action entitled Don Kelly, et al. v. James Aland, et al., Civil No. 010905924, adjudicating that Nass is the owner and holder of a perpetual, nonexclusive right-of-way and easement on, under and across (1) the private roads and utility easements adjacent thereto as depicted on the official plats of Green Hill Country Estates Phase Nos. 1 through 7, and (2) a 50' wide extension of Maple Drive between Lots 99 and 100-R of Green Hill Country Estates Phase No. 6 and continuing northerly to the southerly boundary of Parcel No. 21-001-0012, which easement and right-of-way benefits the Nass Property (hereinafter collectively referred to as the "Nass Easement"), and that Nass and Green Hill are the owners and holders of a perpetual, nonexclusive right-of-way and easement on, over and across the "Loop Trail," the location, scope and terms of which are specified in this Easement Agreement and Declaration of Covenants, to be recorded at the Weber County Recorder's office concurrently with the Declaratory Judgment. A certified copy of said Declaratory Judgment has been recorded at the Weber County, Utah Recorder's office on \_\_\_\_\_, 2003 as Entry No. \_\_\_\_\_.

D. The parties, by this Easement Agreement and Declaration of Covenants, desire to define and limit the Nass Easement, to define and limit the Loop Trail, to grant one another certain rights-of way, and to declare certain covenants with respect to the Nass Property and Green Hill Country Estates.

NOW, THEREFORE, for such purposes and in consideration of the covenants contained herein and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Nass Easement. The parties, for themselves, their successors and assigns, hereby recognize, grant, convey and define the Nass Easement as follows: (a) a perpetual, nonexclusive right-of-way and easement for ingress and egress, and (b) a perpetual,

nonexclusive right-of-way and easement for the laying, installation, operation, servicing, maintenance, repair, removal, relocation, and replacement of utility lines, wires, conduits, and related facilities (including, without limitation, lines, wires, conduits, and related facilities for electricity, lighting, natural gas, and other fuels or power sources, telephone, sewage, storm drainage, and all types of water), on, under, and across (1) the private roads and utility easements adjacent thereto as depicted on the official plats of Green Hill Country Estates Phase Nos. 1 through 7, and (2) a 50' wide extension of Maple Drive between Lots 99 and 100-R of Green Hill Country Estates Phase No. 6 and continuing northerly to the southerly boundary of Parcel No. 21-001-0012. The Nass Easement is appurtenant to the Nass Property. No properties past the Nass Property will be allowed by Nass, his heirs, successors, or assigns to use the Nass Easement for access to such properties by virtue of the easement and right-of-way recognized herein.

2. Maintenance of Green Hill Roads. Green Hill shall repair and maintain the Green Hill roads in a good and passable condition, including snow removal. So long as no building permits are issued for a home or permanent structure to be constructed on the Nass Property, neither Nass nor his successors shall have any obligation to pay for the cost of repair and maintenance of the Green Hill roads. Commencing at such time as a building permit is issued for construction of a permanent dwelling on the Nass Property, the then current owner(s) of the Nass Property on lots for which a building permit has been issued for the construction of a permanent dwelling (the "Nass Owners") shall contribute ratably with the lot owners in Green Hill Country Estates subject to assessment under the restrictions and covenants applicable to Green Hills (the "Green Hills Owners") for the cost of repair and maintenance of the Green Hills roads. The amount paid to Green Hill for the repair and maintenance of the Green Hill roads by the Nass Owners, shall be the same as the regular dues paid by the Green Hills Owners, which amount is presently \$49.00 per month subject to periodic adjustment by the Green Hill Country Estates Homeowner's Association; provided, however, that the Nass Owners shall not be required to pay assessments for capital expenses unrelated to road use and maintenance or other costs and expenses unrelated to road use and maintenance if the monthly dues are adjusted to an amount greater than \$49.00. Expenses related to road use and maintenance shall include all amounts paid for the repair, maintenance, and upkeep of the roads as well as the costs for liability insurance. In the event Green Hills adjusts the monthly dues paid by the Green Hills Owners to an amount greater than \$49.00 per month, the amount paid by a Nass Owner shall be calculated by multiplying the total Green Hills road maintenance expense by a fraction, the numerator of which is one and the denominator of which is the total of the Green Hills Owners' and Nass Owners' lots.

3. Use of Green Hill Roads During Construction. Nass and his successors shall be entitled to use the Green Hill roads for ingress and egress to the Nass Property for construction purposes. Thirty (30) days prior to commencing any construction on the Nass Property requiring the issuance of a building permit or county approval, the owner of the Nass Property or portion thereof on which the construction is to occur shall provide written notice to Green Hill reasonably describing the construction and the type of equipment to be used so that the impacts on the roads can be ascertained. The owner of the Nass Property shall make reasonable efforts to minimize impact to the Green Hill roads and

adjacent utility easements from heavy equipment and vehicles and shall not off-load or park equipment on Green Hill roads or common areas without authorization from Green Hills. The owner of the Nass Property and, in the case of construction of a home or structure on a lot within the Nass Property, the owner of such lot, shall promptly repair, or cause to be repaired, any Green Hill road or utility easement that is damaged by construction use and shall indemnify Green Hill against any damage that may be caused to the Green Hill roads or utility easements by the owner or the owner's contractors, subcontractors, or suppliers during such construction. In the event that Weber County approves a subdivision or grants a land use or building permit that will require the construction of roads or other subdivision improvements that will entail the use of heavy equipment, the owner of the Nass Property shall, at least thirty (30) days prior to the commencement of construction of roads and subdivision improvements within the Nass Property, provide notice to Green Hills that construction is to commence and cause its contractor to furnish to Green Hill a surety bond in the amount of \$100,000 (or such lesser amount as may be mutually agreed) to insure the repair of any damage that may be caused to the Green Hill roads or utility easements by the contractor or its subcontractors and suppliers during such construction. Upon commencement of construction of a home or other structure on the Nass Property, the owner of the property on which the construction is to occur shall cause his or her contractor to furnish to Green Hill a surety bond in the amount of \$10,000, or such lesser amount as may be agreed, to secure the repair of any damage that may be caused to the Green Hill roads or utility easements by the contractor or its subcontractors or suppliers during such construction. All bonds (the \$100,000.00, \$10,000.00 or agreed upon lesser amounts) shall be in a form reasonably satisfactory to Green Hill with a surety qualified to transact business in the State of Utah. Any damage caused to Green Hill roads or utility easements by any owner of the Nass Property, or a contractor, subcontractor, or supplier of such owner during construction, shall be timely repaired and the roads or utility easements restored to a condition at least as good as the condition that existed prior to such damage.

4. Grant of Reciprocal Easements for "Loop Trail." Nass and Green Hill hereby recognize, grant and convey to one another, their grantees, transferees, heirs, successors, and assigns, a perpetual, nonexclusive right-of-way and easement fifteen feet in width for pedestrian, equestrian, and nonmotorized vehicle ingress and egress, and for emergency and maintenance vehicular access only, over and across the "Loop Trail" at the location depicted on Exhibit "A" attached hereto and incorporated herein by this reference. The right-of-way and easement for the Loop Trail is subject to the following terms and conditions:

(a) The Loop Trail shall be used only by owners of the Nass Property and owners of lots in Green Hills Country Estates, their families and invited guests.

(b) Buildings, fences and structures shall not be constructed within 25 feet of the centerline of the Loop Trail without the consent of both Green Hill and Nass.

(c) Both Green Hill and Nass reserve the right to use motorized vehicles on the portions of the Loop Trail that cross their own respective properties. Motorized vehicle use



of the Loop Trail for maintenance shall be allowed upon advance notice to and consent by the owner of the affected portion, which consent may not be unreasonably withheld.

(d) Either Nass or Green Hill may relocate the portion of the Loop Trail on their respective properties to accommodate the location of lots, homes, roads, or other uses, with the consent of the other, which consent may not be unreasonably withheld. The party seeking to relocate any portion of the Loop Trail shall provide sixty days (60) written notice of its intent to relocate with a map and specific description of the proposed relocation. The party receiving the notice shall have sixty days after receipt of notice, to consent or object. If the party does not respond, consent shall be deemed given. In the event a portion of the Loop Trail is relocated, the party relocating the trail shall bear all cost of relocation and shall build the new portion to at least the same condition as the portion relocated.

(e) It is the parties' intent and desire that, wherever possible, the loop trail shall be separate from, and shall not overlap, vehicular roadways. However, the parties recognize that from the current end of pavement in Maple Canyon to the intersection of the road to Section 34, a distance of approximately 3,170 feet, the terrain may not allow sufficient width to separate the trail from the road. For this section the trail may be located directly adjacent to the roadway and may only overlap the roadway if the terrain does not allow for the trail to be adjacent.

5. Entrance Gates. Green Hill shall have the right to place a gate and/or gated entrance at the entrance to Green Hill Country Estates as may be permitted by and in compliance with all applicable fire safety and other state, county, and local laws and regulations. In the event that Green Hill places such a gate at the entrance to its property, Green Hill shall furnish to the owners of the Nass Property all cards, combinations, or other means needed to operate the gate as is provided for other Green Hill property owners. If Green Hill installs a gated entry with signage, such signage shall be mutually agreeable to Nass and Green Hill indicating that it is the entrance to both Green Hill and the Nass Property.

6. Development of Nass Property. Development of the Nass Property shall be consistent with the uses and density permitted by Weber County ordinances for the zoning that presently applies to the Nass Property on the date this document is executed, which is FR-40. Specifically, but not by way of limitation, Nass agrees that no more than 13 single family dwellings shall be built on the Nass Property and agrees not to apply for any zoning change that would allow a higher density than one unit per 40 acres as allowed by the current FR-40 zone. So long as any development proposal for the Nass Property is consistent with the uses and density allowed by the current FR-40 zone, Green Hill agrees not to oppose any development plan for the Nass Property that is consistent with the uses and density for such zone and with the terms of this agreement. Green Hill reserves all rights that it may have, if any, to support or oppose any application that may be made to Weber County for planning and zoning approval of any development that is inconsistent with the uses and density allowed by the FR-40 zone or with the terms of this agreement. Nass may elect, with the consent of Green Hills, which consent may not be unreasonably

withheld, to develop the Nass Property as an additional phase of Green Hills, upon such terms and conditions as may be approved by Weber County and agreed to by Green Hills.

7. Nass Property "Common Open Space." Nass reserves the right to develop the Nass Property in any manner consistent with the uses and density permitted by the current FR-40 zone under Weber County ordinances and has no obligation to develop the property as a cluster subdivision. In the event that Nass or his successors choose to develop the Nass Property as a cluster subdivision as defined by Weber County ordinance, and such cluster subdivision contains common open space for the use and benefit of the lot owners within the cluster subdivision, such common open spaces shall be preserved as natural open spaces without fences or other impediments to the natural migration of wildlife.

8. Building Restrictions. No structure shall be built on the Nass Property in violation of Weber County planning and zoning ordinances or other applicable law. No dwelling shall be constructed on any lot in the Nass Property at a cost less than \$125,000 (based on construction costs prevailing in the area) and the ground floor area of any dwelling, exclusive of porches and garages, shall not be less than 1,200 square feet on the main floor of a one story dwelling and no less than 1,000 square feet on the main floor of a dwelling with more than one story. The owner of the Nass Property reserves the right to impose development standards more stringent than the foregoing.

9. Covenants Run With Land. The covenants contained herein shall constitute covenants running with the land and shall bind and inure to the benefit of the parties hereto, their heirs, personal representatives, successors, and assigns.

10. Integration. This agreement constitutes the entire agreement among the parties relating to the subject matter hereof. No covenant, representation, or condition not expressed in this agreement shall affect or be deemed to interpret, change, or restrict the express provisions hereof.

11. Counterparts. This instrument may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed to be an original. The executed pages from each such original may be joined together and attached to one such original and shall thereupon constitute one and the same instrument.

12. Venue. This agreement shall be governed by and construed in accordance with the laws of the State of Utah. The parties agree that the Second Judicial District Court in and for Weber County is and shall be the appropriate venue for resolution of any dispute concerning interpretation, implementation, enforcement, or construction of this agreement.

13. Equitable Remedy and Injunctive Relief. The Parties hereto agree that each one shall have the absolute right to seek and be granted equitable relief, including a temporary restraining order and injunction, from the Second Judicial District Court in and for Weber County, State of Utah, preventing any violation of this agreement, and that should the Second Judicial District Court grant a temporary restraining order and/or injunction, it shall remain in effect until such time as the Court enters an Order finding that

the violation is no longer occurring. Each party agrees that a breach of this Agreement by itself will cause irreparable harm to the other party and it shall not be a defense to a request for injunctive relief that the party seeking such relief has an adequate remedy at law. Nothing herein, however, shall in any way limit the damages that may be recovered by the non-breaching party, or the attorney's fees that may be recovered under this Agreement. Further, the failure of a party to seek a temporary restraining order, an injunction or other equitable relief shall not in any way limit that party to seek such relief under this provision or constitute a waiver of the same, or any other or further violation of this agreement.

14. Notices. All notices under this Agreement shall be in writing and delivered personally or sent by prepaid mail to the addresses indicated below. Until a change of address is so given, notices shall be sent as follows:

If to Nass:

Thomas J. Nass  
8992 East 100 South  
Huntsville, Utah 84317

With a copy to:

Ronald G. Russell, Esq.  
Parr Waddoups Brown Gee & Loveless  
185 South State Street Suite 1300  
Salt Lake City, Utah 84111

If to Green Hills:

Green Hill Country Estate Homeowner's  
Association  
[Insert Address]

With a copy to:

James L. Warlaumont, Esq.  
Peterson Reed & Warlaumont  
9 Exchange Place Suite 800  
Salt Lake City, Utah 84111

The date of Notice shall be the date of delivery or the date of placed into the prepaid mail.

15. Attorney's Fees. In the event of a breach of this Agreement, the prevailing party in any court action brought to enforce this agreement shall be entitled to recover reasonable attorney's fees and reasonable costs arising from or related to such breach. However, it is agreed that only the signatories hereto shall be liable for their conduct only and that the individuals and homeowners association shall not be subject to an award of attorney's fees arising out of the conduct of a homeowner in the Green Hills subdivision who has not executed this document.

16. Authority to Enter Agreement. The signature of the representatives of the parties hereto shall constitute a warranty that each signatory for the party has the requisite authority to enter into this agreement and to bind that party.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
Thomas J. Nass

STATE OF UTAH            )  
                                      : ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2003. by Thomas J. Nass.

\_\_\_\_\_  
NOTARY PUBLIC  
Residing In \_\_\_\_\_

My Commission Expires:  
\_\_\_\_\_

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

GREEN HILL COUNTRY ESTATES  
HOMEOWNER'S ASSOCIATION

By: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF UTAH            )  
  : ss.  
COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2003 by \_\_\_\_\_, the \_\_\_\_\_ of Green Hill Country Estates Homeowner's Association.

\_\_\_\_\_  
NOTARY PUBLIC  
Residing In \_\_\_\_\_

My Commission Expires:

\_\_\_\_\_

Exhibit "A"

