ROBERT A. BENTLEY (0299)
Attorney for Plaintiff
50 West Broadway, #1000
Salt Lake City, UT 84101
Telephone: (801) 328-9085

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

HI-COUNTRY HOMEOWNERS ASSOCIATION, a Utah Corporation, Plaintiff, vs. STEVEN MAXFIELD, RICHARD JAMES, PAUL STROH and FRED KWIATKOWSKI, Defendants.	PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES ON DISPUTED LEGAL ISSUES Case No. C84-5500 Judge Timothy Hansen

COMES NOW the plaintiff, by and through its attorney of record, Robert A. Bentley, who pursuant to Court order submits this Memorandum of Points and Authorities on Disputed Legal Issues.

FACTS

Hi-Country Estates, Phase I is a planned residential subdivision consisting of one hundred twenty (120) lots covering six hundred sixty (660) acres in the rural unincorporated area of Salt Lake County, near Riverton. The subdivision created in January of 1972 was intended to be an exclusive area preserving a "country" living life style and lots size was restricted to five acre minimum. Entrance to the subdivision is possible at only one point which is controlled by an electronic security gate, one must know the combination which is periodically changed in order to gain access. The over five miles of interior roads are improved and paved but remain private having never been dedicated to the county. There are also miles of bridle

paths for horseback riding. The county provides no services to the subdivision other than police and fire protection and so the homeowners must cooperatively maintain the roads, provide snow removal, maintain the fence and electronic gate, dispose of garbage and other refuse, insure an adequate water supply and delivery system, and pay for legal fees incurred on projects of mutual benefit.

The plaintiff, Hi-Country Estates Homeowner's Association, a non-profit corporation, was created on May 17, 1973 by the filing of Articles of Incorporation and Bylaws, a copy of which are attached hereto as Exhibits "A" and "B" respectively. The Restrictive Covenants (Exhibit C) although dated April 6, 1973 were not recorded until March 22, 1974. On or about September 25, 1979 the original developer deeded the roads and common areas to the plaintiff. A copy of that deed is attached hereto as Exhibit "D".

This dispute concerns the levy of annual assessments by the plaintiff Association upon lot owners in the subject subdivision. Every February 28th, the Association holds its annual meeting at which all lot owners, as members, are eligible to attend, speak and vote. A line-item budget (a copy of the 1987 budget is attached hereto as Exhibit "E" for illustration) is presented to the members for ratification and approval of the required assessment to meet the budgeted expenditures. Prior to the filing of this action, the four defendants, two of whom had previously served as directors of the plaintiff Association, refused to pay their annual $115.00 assessments (increased to $120.00 per year in 1986). The Association brought suit in the Small Claims Division of the 7th Precinct Justice Court for Salt Lake County, State of Utah, and prevailed in obtaining

judgments against the defendants from which they have subsequently appealed to this Court. The four previously separate cases were consolidated for convenient consideration here and an Amended Complaint, Answer and Counterclaim were subsequently filed.

By way of background to the following legal arguments a quick summary of the nature and purpose of homeowner's associations may be helpful. The following comes from the Wake Forest Law Review 12:915-77, Winter 1976.

> . . . In initially considering the nature and purpose of the association, one should bear in mind that both the condominium and homeowner's association are mandatory membership associations. With the purchase of each unit or lot, the new owner accepts the deed which is subject to either a declaration of condominium or a declaration of covenants, conditions and restrictions. By his acceptance, the purchaser automatically becomes a member of the association created by the declaration and submits to the authority of the association and to the restrictions upon the use and enjoyment of the property contained in the declaration. Because each owner automatically becomes a member of the association upon taking title and because the association is empowered to levy and collect assessments, to make and enforce rules, and to permit or to deny certain uses of the property, the association has the power, and in may cases the obligation, to assert tremendous influence on the bundle of rights normally enjoyed as a co-concomitant part of the simple ownership of property.
>
> The association has two distinct roles. In appreciation of both, it is necessary to understand the questions of liability involved in the development and administration of the project. First the association provides a vehicle for individual owners to work together "as a privately owned and operated vehicle of service to a specific community". The other essential rule directly relates to the association regulatory power and upon analysis of the associations functions, one clearly sees the association as a quasi governmental entity paralleling almost in every case the powers,

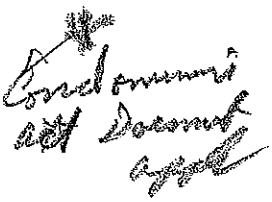
> duties, and responsibilities of a municipal government. As a "mini-government" the association provides to its members, in almost every case utility services, road maintenance, street and area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, more over, clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality . . . (Emphasis added) Ibid at 917-18.

I. MEMBERSHIP IN THE PLAINTIFF'S HOMEOWNER'S ASSOCIATION IS MANDATORY AND THE DEFENDANTS ARE LIABLE FOR ASSESSMENTS.

Addressed under this point are the first five disputed issues identified in Plaintiff's List of Facts and Legal Issues dated May 15, 1987 and previously filed herein pursuant to Court Order. Specifically: number one Is membership mandatory? number two; Are plaintiff's estopped from denying they are members? number three; Can homeowners resign from the association? number four; Does the association have the power to levy assessments? and number five; Can the association sue lot owners for non-payment?

There is a scarcity of legal authority on the mandatory membership issue nationwide and particularly in Utah. Most Courts, scholars and commentators appear to take it for granted that mandatory membership is inherent to the very concept of homeowner associations. Illustrative is

> Condominium and Homeowner's Association Practice: Community Association Law, ALI - ABA Committee on Professional Education, 1985 . . . The first characteristic that gives rise to the unique roll of the association is its nature as a mandatory membership association. Upon taking title each property owner automatically



> becomes a member of the association and is subject to the obligations of membership as set out in the declaration, bylaws, rules and regulations and articles of incorporation, if applicable. Clearly individual owners could not be compelled to be active members of the association, but just as clearly they can be compelled to comply with the rules and regulations and to satisfy their financial obligations to the association . . . Ibid at 35.

The source of this mandatory ownership obligation is not an presumed and illusory obligation but rather a real and binding obligation created by contract and the operation of law. The following is non-exclusive list of the various ways this obligations comes into existence.

(a) Articles of Incorporation, Bylaws and Protective Covenants.

As noted above, the plaintiff is a nonprofit corporation and accordingly, pursuant to state law, has Articles of Incorporation and Bylaws. Those Articles executed in January, 1972, predate the defendants acquisition of their property by deed and state in relevant part of Article III, that the purpose of the association is to:

> . . . provide for the maintenance, upkeep and preservation of the streets, roads and common areas within that certain track of property described as Hi-Country Estates, located in Salt Lake County, State of Utah, Phase I, . . . this association is also formed to promote health, safety and welfare of the residence within Hi-Country Estates . . .

The Articles further provide on page 3:

> . . . every member or entity who is a record owner of a fee or undivided fee interest in any lot which is subject by covenants or record by assessment to the association, including purchasers under contract, shall be a member of the association. . . . Membership shall be appurtenant to and may not be separated from

> ownership of any lot which is subject to assessment by the association . . . (Emphasis added)

Further the Articles specifically create the ability to levy and enforce levy assessments. Article III, (B) dealing with the powers of the association provide as follows:

> . . . Fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Protective Covenants as amended and as provided in the Bylaws adopted by the association; to pay all expenses in connection herewith and all office and other expenses incident to the conduct of business of the association, including all licenses, taxes, or governmental charges levied or imposed against the property of the association . . .

A reasonable reading of the Articles indicate that the developer clearly and unequivably intended, and did in fact, create a homeowner's association in which membership was mandatory for Hi-Country Estate, Phase I lot owners.

The Bylaws of the association also referred to mandatory membership and the ability of the association to levy assessments. Article II, section 6 defines member as ". . . those persons entitled to membership as provided in the Protective Covenants and Certificate of Incorporation". The Articles of Incorporation have already been discussed above. No specific definition is included in the Protective Covenants although they refer to "owners of the heretofore described property". The definition of owner in Section 4 of the Bylaws is ". . . the record owner, whether one or more persons or entities of the fee simple title to any lot which is a part of the property, including person or entities purchasing a lot under contract". Further in Section 2, the Bylaws impose a duty upon the Board of Directors to fix an amount of annual assessment against each lot, notify each owner

subject to the assessment and to bring a legal action against the owner personally obligated to pay the assessment in the event of non-payment. Article II makes clear that:

> "each member is obligated to pay the association annual and special assessments which are secured by a continuing lien against the property against which the assessment is made. Any assessments which are not paid when due are delinquent. . . . The association may bring a action at law against the owner personally obligated to pay the same or forclose the lien against the property and interest, costs and reasonable attorney's fees of any such action shall be added to the amount of such assessment. No owner may waive or otherwise escape the liability for the assessment provided for herein by non-use of the common area roads or abandonment of his lot."

A subsequent amendment to the bylaws states that "each grantee or lot owner for himself, his assigns agrees to pay his annual pro rata of the share of his cost to maintain the roads, common areas . . . grantee's assessment in this regard shall be paid promptly when the same comes due as provided in the bylaws of the homeowner's association and the grantee failure to pay promptly constitute a lien on the owners premises and the same may be enforced in equity or at law as in the case of a lien foreclosure".

Although the usual way to expedite the levy of assessments is through separate covenants, nothing requires the covenants to be in a document specifically labeled as Protective Covenants. Indeed the courts have found valid covenants in a variety of documents: In warranty deeds, St. Paul Title Ins. Corp., v. Bowen, 452 So.2d 482 (Alabama, 1984), lease agreements Moore v. McCaleb, Inc., v. Gaines, 489 So.2d 491 (Mississippi, 1986), Condemnation Decrees, Commissioner of Highways and Towns of Annawana v. U.S. 653 Fed.2d 292 (C.A. Ill, 1981), and Bylaws, Lovering v. Seabrook Island Property Owners

Association, 344 S.E. 862, 289 S.C. 77 affirmed as modified 352 S.E. 2d 702 (S.C. App. (1986)).

In order to be binding the covenant must be real and run with the land. This requires the following conditions be met:

> (i) the covenant must touch or concern land; (ii) there must be privity of estate between the promisee and the promisor and (iii) there must be an intent that the grantor or grantee intended to covenant to run with the land. Restatement of Property §534.

In regards to the first requirement it is clear that the obligations and duties contained in the Articles and Bylaws touch upon and concern the land. The Articles and Bylaws contain covenants which involve negative and positive duties which substantially affects the use and ownership of land. As to privity of estate, the coventor must be shown to have some estate, title or interest in or position of the subject property; this mutuality is required to make the covenants run with the land, however, there need not be privity as far as the party trying to enforce the covenants is concerned; a mere beneficiary may enforce the covenants. Neponsit Property Owners Association v. Emigrant Industrial Savings Bank, 278 New York 248, 15 N.E. 2d 793 (1938). There is clear privity of estate in our case as the covenants in the Articles and Bylaws were propounded by the original developers from whom all subsequent property owners took title. The final requirement that there be an intent that the covenant run with the land may be shown from the language of the declaration creating the covenant and from surrounding circumstances. Nicholson v. 300 Broadway Reality Corp., 7 New York 2d 240, 164 N.E. 2d 832, (1959). As noted above the Articles effect every person who is a "record owner of a fee or undivided fee interest in any lot" . .

membership shall be appurtenant to and may not be separated from ownership of land lot is subject to assessment by the association". The parties clearly intended that the covenants in the Articles and Bylaws run with the land.

Thus covenants creating mandatory membership in the association may be found in Articles of Incorporation and Bylaws. Although protective covenants have been filed on the subject property, they do not create a mandatory membership obligation in the association and are discussed in Point III below in regards to the arguments of collateral estoppel and res judicata.

Even if we assume, that the obligations created in the Articles and Bylaws are not covenants which run with the land, still they create equitable servitudes upon the property. "Even when a covenant does not run with the land, equity will enforce the obligation by an injunction against breach. The burden of the covenant thus becomes a "equitable easement or servitude" upon the land of the covenants. Privity between the parties is not required for an equitable servitude to be enforced. The real basis for the enforcement of equitable servitudes is the doctrine that one who takes land with notice of a restriction therefrom cannot in good conscience be permitted to violate that restriction. Summary of Utah Real Property Law, volume 1, chapter 4, pg. 136. (Brigham Young University legal studies, 1978).

(b) Property Deeds.

This concept of mandatory membership have shown an evolution over time. In one of the earliest cases Rochelle Park v. Insinger, 138 Appellate Division 81, 122 N.Y.S. 556 (1910), wherein a subsequent grantee of property whose deed was made subject to a covenant in the

original deed requiring membership in a homeowner's association was held not to be liable for dues. The Court reasoned that the subject dues were only made "subject" to the covenants and restrictions in the original deed, but since they did not specifically contain those covenants and restrictions in their respective text, the subsequent grantees did not have proper notice. The Court found that the covenant requiring membership was personal to the original grantee, who affirmatively agreed to join the association and the subsequent grantees did not affirmatively agree to the covenants.

Subsequently the same Court in the landmark case of Lawrence Park Reality Co., v. Crichton, 218 Appellate Division 374, 218 N.Y.S. 278 (New York, 1926), held that a covenant in deeds requiring payment by grantees for the maintenance and repairs for roads, roadways, walks, sewers, drains, and street lights run with the land. The Court distinguished its ruling from that in Rochelle Park on the grounds that the covenant was enforceable in the grantor; and any neglect in the maintenance and repairs would materially affect the use and enjoyment of the general improvements; and the covenants materially touched upon and concerned the property demised; and, in general it would be unjust and inequitable to permit the defendant to accept the benefits of the covenants without accepting responsibilities on his part. Perhaps the siminal case is Nesponit Property Owners Association v. the Emigrant Industrial Savings Bank (supra) in which it was held the covenants in deeds subjecting homeowners to annual charges for improvements, including roads, parks, beach and sewers, which were maintained by homeowner's

Issued after purchase

association ran with the land and were enforceable against the defendant, which had foreclosed on to the property.

All of the defendant's deeds (which the exception of defendant Stroh) require membership in the association by reference to the Articles of Incorporation. Copies of the deeds for each defendant are attached as exhibits (Maxfield, dated June 23, 1978, Exhibit "F", Kwiatkoski, dated August 26, 1975, Exhibit "G", and James, dated August 21, 1972, exhibit "H").

(c) Common Plan.

The developer in carrying out a uniform plan and development for residential subdivision, may arrange for the provision of services to the subdivision or for the maintenance of facilities for the common use, and may bind the purchasers of homes there to pay for them. Wood v. McElvey, 296 So.2d 106 (Florida, 1974).

The Articles, Bylaws and Protective covenants relevant to this action clearly demonstrate the existence of a common plan. The Protective Covenants limit lot size, building type, location, provide for the imposition of easements, abates nuisances, prevents temporary structures, signs, oil and mining operations, limits the possession of livestock and poultry, and deals with garbage disposal, water supply and landscaping. An architectural committee is further created in order to create uniformity in design and construction.

Sold Mined Land

"Developers satisfactorily established a general plan or common scheme to render restriction covenants, requiring property owners to pay monthly or annual fees for maintenance of subdivision common area or amenities was enforceable were the plat showing residential lots and common area was duly filed and reported". Selected Lands

Corp., v. Speich, 702 So.W.2d 197, supplemented 709 So.W. 2d 1 (Texas, 1985). This common scheme and purpose is further illustrated by the developer conveying all of the common areas including miles of undedicated road to the homeowner's association.

(c) Mutual Benefit.

Some Courts in fashioning the associations ability to enforce covenants and levy assessments when faced with the lack of specific authority have forged the theory of implied covenants through mutual benefits. In essence, much like the common scheme theory, the Court has found the inherent nature of the homeowner's association by the mutual benefit it conferres upon its members, implies a restrictive covenant, mandatory membership and the right to levy assessments. "Were money raised by the homeowner's association lease of unfenced land was spent on road maintenance, rather than on the maintenance of pastures and open spaces as required by protective covenants, special assessment to replenish the pasture fund was not required were expenditures on roads benefited that all individual lot owners, and neither the subdivision as a whole nor any lot owner was damaged thereby." Wilson v. Goldman, 699 P.2d 420 (Colorado, App., 1985). In like regard is Perry v. Bridge Town Community Association, Inc., which provided "requirement of assessment for reasonable maintenance of common property was within contemplation of covenant of homeowner's association and there was an implied covenant for such an assessment by necessity. 486 So.2d 1230 (Mississippi, 1986).

Such a theory has application to the instant facts. As noted above, the homeowner's association is charged with a wide range of duties including the maintenance of roads, snow removal, refuse and

garbage disposal, electronic gate maintenance and other duties. These services cannot be reasonable provided by the individual homeowners. In the cases of roads alone, individual property owners may have to drive over several miles of homeowners's association roads to reach their individual units, County garbage removal is also not available, and only one entity can reasonable be in charge of the maintaining and changing the combination on the security gate. For all of the services provided for by the association (others enumerated in the association budget at Exhibit "E"), the individual homeowners are only now assessed $120.00 per year. The great scope of the services rendered and the minor amount of the assessment indicates the creation of a constructive trust with an implied covenant due to the mutual benefit incurred.

(e) Successor in Interest.

It is important to keep in mind that the plaintiff association is the successor in interest to the original developer/grantor. The original developer at one time had possession of the whole of the property, including the common areas roads, bridal paths, et cetera, which were designated on the subdivision plat. After conveying specified certain lots, the developers conveyed to the homeowner's association all of the common areas and the plaintiff association thus became the successor in interest to the original developer. As such the plaintiff association was entitled to certain benefits such as the right to restrict, regulate and limit the use of the common areas but to also incurred certain obligations such as the tax burden on the common areas. A specific item of the plaintiff's association budget involves the payment of property taxes on common areas and a

Not so

representative sample of a tax assessment on common areas is attached hereto as Exhibit "I". This obligation entitles the plaintiff to enforce assessments against lot owners to recover the reasonable costs of maintaining the common areas. "It is appropriate for the successor in interest to the grantor, as the party with the duty of paying rent on the recreational land, to enforce the covenant against a lot owner". Bessemer v. Gersten, 381 So.2d 1344 (Florida, 1980).

Finally, plaintiff allege that defendant not only cannot resign from membership in the association, they should be estopped from alleging that they are not members. If membership is mandatory, it stands to reason that the defendants cannot resign. Membership and assessment liability is tied to lot ownership. The only way a member can voluntarily resign is by selling his lot. The Bylaws, as cited alone, make it clear that mere non use of services is not a defense to liability for the assessment. Even if defendants can resign, they would still be liable for all assesments incurred up to the time of their resignations, which would render them still liable for the amounts sued upon herein.

"Under the doctrine of estoppel in pais one may be his acts or conduct away from Court prevent himself from denying in Court the effect or result of those acts. Grover v. Garn, 464 P.2d 595, 23 Ut 2d441 (Utah, 1970). Each of the defendants for years have represented that they are members of the asociation, they attended meetings, voted and paid assessments. Defendants Maxfield and James have even served as Directors of the association. By their actions and conduct they induced the association to incur expenses and liabilities based on their votes and claims to memebership. The

defendants having engaged in a pattern of membership for years, should now be prevented from disavowing the only logical conclusion from their conduct i.e., that they are members and thus liable for assessments.

II. PLAINTIFFS CAN RECOVER ON A THEORY OF RESTITUTION IN QUASI-CONTRACT.

Addressed under this point are disputed legal issues number six; Can plaintiff charge lot owners for services under the theory of quantum meruit? and number seven; If plaintiff proceeds under the theory of quantum meruit must there be a showing of the exact value of the services rendered for each individual?

The Restatement of Restitution, Section 1 sets out the premises: "a person who has been unjustly enriched at the expense of another is required to make restitution to another". The Utah Supreme Court has specifically adopted this principle in Harline v. Daines, 562 P.2d 1120 (Utah, 1977). In a later case, the Court observed that "unjust enrichment occurs whenever a person has and retains money or benefits which justly and equitably belong to another". L & A Drywall v. Whitmore Construction Co., 608 P.2d 626 (630) (Utah, 1980). (Finding on the facts of the case there was no showing of unjust enrichment).

The Utah Supreme Court has indicated that restitution is appropriate for "the provision of property or services in circumstances of exigency, for benefits which the recipient has requested or has acquiesced in their benefits, creates an implied contract to pay their reasonable cost. General Leasing Company v. Manivest Corp., 667 P.2d 596 (Utah, 1983). In fact recovery may be

had for both implied in fact contracts and implied in law (or quasi contracts). The implied in fact contract exists where the conduct of the parties bears evidence a contract although no express agreement is reached. For example see Quality Performance v. Yoho Automotive, Inc., 609 P.2d 1340, (Utah, 1980)". Quasi-contracts exist only were there is no contract express or implied. In actions involving services rendered the action lays in quantum meruit. The Court will award the market value of the services irrespective of its value to the defendant. Restatement of Restitution §152. See generally, County of Champaign v. Hanks, 41 IL. App 3d 679, 353 N.E. 2d 405 (1976).

The Utah Courts have set out the specific elements which must be established in order to entitle someone to recovery in unjust enrichment. Those elements are: (1) A benefit conferred on one person by another, (2) appreciation or knowledge by the conferee of the benefit, and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment for its value. Berrett v. Stevens, 690 P.2d 553 (Utah, 1984).

Those elements are clearly applicable to our facts. Plaintiffs conferred a significant benefit upon the defendants. Plaintiffs maintain the electrical security gate and notified the owners of changes in the access code providing security for the homeowners and enhanced property values. Plaintiff maintains and improves miles of private road providing costly snow removal in the winter. Plaintiff provides garbage and refuse removal, it is engaged in negotiation and legal actions to obtain a reasonable and adequate water supply and is engaged in a broad range of activities to promote the health,

safety and welfare of residents within Hi-Country Estates as directed by the Articles of Incorporation. Defendants are aware of the benefits provided for they use the gates and roads daily and get benefits from their maintenance. It is inequitable for defendants to retain benefits for the use of the roads, access to garbage disposal and legal representation on issues of common interest without paying for their value.

Each of the defendants in prior affidavits have indicated that they do not desire any of the services offered by the association. That position is convient but is mere subterfuge. The defendants neglect to make mention that they continue to use the private roads owned by the association to reach their respective properties. It is easy to look at services provided by government or associations and reject those that have little meaning to you as an individual. Many might chose to not have their taxes support national defense or social programs that they do not support or utilize, however, the essence of citizenship and membership in an association is that the individual is liable for the expenses which benefit the majority. As noted in the fact statement quoting the Wake Forest Law Review, a homeowner's association provide a quasi-governmental function paralleling in almost every case the powers, duties, and responsibilities of a municipal government. All of these functions are financed through assessments or taxes levied upon the members of the community with powers vested in the board of directors a body clearly analogous to the governing body of the municipality.

If there were no homeowner's association and the subdivision was within an incorporated area the services provided by the plaintiff

would be assumed and discharged by a municipality. It is difficult to believe that in such a case the defendants would retain the advantages of exclusivity of their present development or that they would receive the same services for the extremely small amount the homeowner's association charges them.

In providing the services mandated by the Articles, Bylaws and Protective Convenants, plaintiff has to be prepared to make them available to all property owners. It is impracticle in providing services such as gate access, road maintenance and snow removal to carve out and exclude certain non-participating lot owners. Defendants have access to all services and mere fact that they opt to perform certain services, such as garbage removal, themselves, does not excuse them from the uniform levy. In fact the specific type of service - garbage removal - has been litigated elsewhere between residents who desired to perform the service themselves and the municipality charged with providing it. The Missiouri Supreme Court in Craig v. City of Macon, 543 S.W.2d 772 (1976), held that although the city resident did not avail himself to the city provided garbage removal he nonetheless would be liable for the uniform cost of the service. The Court reasoned that the City was providing the service to all residents and that the resident even if he did not utilize the service received benefit of enhance proprety value and greater health and safety due to the removal of garbage and refuse. "The public health is menaced and endangered by the aggrevation of filth and refuse of the entire district, and is not limited to accumulation thereof upon or about each separate lot or tract of ground located therein. The same result requiring mandatory payment of waste

disposal charges has been reached in other jurisdictions". (citations omitted) Ibid at 775. In like regard are cases holding that one is liable for uniform school levies despite the fact that ones children attend private schools or that one does not have any children in the public school system.

In determining the value of the services rendered the appropriate measure is the market value of the services, rather than its particular value to the defendant. Utah Remedies Guide, Donald N. Zellmen, editor, University of College of Law, 1985 pg. 408. See also County of Champaign v. Hanks, 41 Ill App. 3d 679 353 N.E. 2d 405 (1976). In homeowner's association cases it would be difficult to make a showing that the exact value of each service rendered for each individual due to the the vast number of variables involved. For example, those living farthest from the entrance gate get a greater benefit from the existence and maintenance of the private roads then an individual living right next to the gate since they travel greater distances upon them. The reasonable value of the services can be demonstrated most equitably by taking the total of all approved budget amounts and dividing that number by the number of occupied residences. Of course, as a corollary the association should be prepared to demonstrate that the budgetary process is fair, equitable and democratic.

III. PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE EQUITABLE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL.

This point discusses legal issues number eight; the defense res judicata and number nine; collateral estoppel. Defendant's Answer raised each as separate affirmative defense to plaintiff's claims.

In order to determine which, or if either, of these doctrines is to be properly applied, one must focus on whether the second claim, demand or cause of action claimed to be barred is different from its alleged predecessor:

> In order for res judicata to apply both suits must involve the same parties or their privies and also the same cause of action; and if it applies, it precludes the relitigation of all issues that could have been litigated as well as those that were litigated in the prior action . . .
>
> Collateral estoppel on the other hand rises from a different cause of action and prevents parties or their privies from relitigating facts and issues in a second suit that were fully litigated in a prior different cause of action Searle Brothers v. Searle, Utah 588 P.2d 689, 690 (1978)(citations omitted).

"Thus it is important to recognize that although the doctrine of res judicata and collateral estoppel are closely related, they are usually mutually exclusive. Where the claim, demand, or cause of action are the same in both cases, res judicata applies. But were the claim, demand, or cause of action is different in the two cases, then collateral estoppel is applicable. "Schaer v. State by and through Utah Department, Utah, 657 P.2d 1337, 1340 (1983). The defendants have plead both defenses and should be forced to elect one rather than forcing opposing counsel and the Court to differentiate their defense.

Defendants claims are based upon a prior proceeding, James et al., v. Davies et al., filed in November of 1981 in the Third District Court of Salt Lake County, State of Utah, Civil No. C81-8560 and assigned to Judge Daniels. Copies of the relevant pleadings are attached hereto as exhibits, the Second Amended Complaint as Exhibit

"J", the Answer and Counterclaim as Exhibit "K", and Findings of Fact and Conclusions of Law as Exhibit "L", the Judgment as Exhibit "M" and the Transcript of Ruling as Exhibit "N".

A review of the Complaint in that action reveals that it does not concern the same cause of action as the instant case. James v. Davies concerned alleged irregularities in the election of certain directors, and the enforcement of land use restrictions in the Protective Covenants. Although there was no issues raised by the pleadings as to homeowner's assessments, the Court looked to the amended covenants as a source of mandatory membership as that was one of its provisions but mandatory membership was not an issue in that litigation. The amended covenants declared invalid in that action are not cited or relied upon here. The original covenants relied upon herein were expressly found to be valid. The only way res judicata could apply to this action would be if the Court stretched the requirement that the prior action involved the same issues that "could or should have been raised therein", Krofcheck v. Downy State Bank, 580 P.2d 243 (Utah, 1978), Wheadon v. Pierson, 14 Utah 2d 45, 376 P.2d 946 (1962). Res judicata was never intended to play "what could have been" but rather what did occur. At the time Davies case was filed in 1981, none of the defendants were delinquent in their homeowner's assessments. It would not have been possible for plaintiff to raise this issue nor had any individual against whom the association had levied assessments in 1981 or previously raise this particular issue. Without the opportunity for the issue to come before the Court, res judicata could not apply.

In regards to the collateral estoppel "a prior decision may be used against the party to preclude further litigation of the issue by him only when four questions are answered in the affirmative: (1) was the issue decided in the prior ajudication identical with the one presented in the action in question?, (2) Was there a final judgment on the merits?, (3) Was the party against whom the plea is asserted a party or in privity with the party in the prior adjucation and (4) Was the issue in the first case completely, fully and fairly litigated? White Pine Ranchs v. Osguthorpe, 731 P.2d 1076 (Utah, 1986).

The first requirement; that the issue decided in the prior adjucation be identical with the one presented in the action in question, is not met here. As argued above with regards to res judicata, the issue in the prior adjucation was not the ability of the association to levy assessments and sue to collect them, but rather procedural matters in regards to the elections of directors and the use of the Protective Covenants by the association rather than individual lot owners to enforce alleged violations. The issues are not even remotely similar to those presented herein. The only area of convergence between both actions is that the five parties herein where numbered among the 49 in the prior action. However, even if one is assumes that there was some similarity between the issues sufficient to satisfy the first requirement, the fourth requirement that the issues in the first case be completely, fully and fairly litigated cannot be satisfied.

Judge Daniels in his oral ruling (Exhibit "N") recognized that the association continued as a viable enity and could take action

outside the Protective Covenants to collect for its services rendered to the lot owners. His suggestion that the homeowners preclude nonpayers from using the roads is not practical or equitable but does indicate that the issue of the mandatory nature of assessment was not adressed or completely and fully litigated. Since the issue of assesments was not before the Court it could not rule on that issue. For this reason the doctrine of collateral estoppel should not apply.

SUMMARY

The very purpose and nature of homeowner's associations is to require mandatory membership and the ability to levy assessments. A homeowner's association would not be created unless it could reasonable expect to levy assessments against all lot owners. A voluntary association would lack the means to generate adequate and consistent funds to meet common needs and would result in chaos and anarchy. Membership in the association insofar as its subjects one to levies for reasonable and uniform assessments is required by the Articles of Incorporation, the Bylaws, property deeds, the common plan, implied/mutual benefits and plaintiff's role as successor in interest to the original grantor.

Even should plaintiff fail in its attempts to have a basis at law to collect the assessments, it can still recover against defendants in equity on the theory of quatum meruit, recognizing that the equitable recovery may, and probable would be more than the uniform assessments, since the market value of the service may exceed the cost of the service to the association due to the economies it can obtain by reason of its greater size and economy of operation.

Finally, although some of the parties to this action have been involved in other litigations involving the property and the association there is not a sufficient identity of issues between the actions to justify the imposition of the doctrine of res judicata or collateral estoppel.

DATED this 20th day of August, 1987.

Robert Bentley
ROBERT A. BENTLEY
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true and correct copy of the foregoing Plaintiff's Memorandum of Points and Authorities to R. Clark Arnold, PARSON AND CROWTHER, 455 South 300 East, Salt Lake City, UT 84111 on this 20 day of August, 1987.

Robert Bentley

CERTIFICATE OF INCORPORATION

OF

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION

KNOW ALL MEN BY THESE PRESENTS:

I, CHARLES E. LEWTON, acting as the incorporator of a corporation under the Utah act governing the formation of non-profit corporations, do hereby adopt the following Certificate of Incorporation for such corporation:

FIRST: The name of this Corporation is Hi-Country Estates Homeowners Association, hereafter called the "Association."

SECOND: The term of existence of this Association will be perpetual.

THIRD: This Association is not organized for pecuniary profit or gain to the members thereof, and the specific purposes for which it is formed are to provide for maintenance, upkeep and preservation of the streets, roads and common area within that certain tract of property described as:

> Hi-Country Estates, located in Salt Lake County, State of Utah, Phase 1,

and also to include additional phases of Hi-Country Estates and the homeowners located within such additional subdivisions as may be mutually beneficial for the members hereof and the homeowners of the adjoining subdivisions. This Association is also formed to promote the health, safety and welfare of the residents within Hi-Country Estates and any additions thereto as may hereafter be brought within the jurisdiction of this Association for this purpose to:

(a) Exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that cer-

EVERETT E. DAHL
ATTORNEY AT LAW
750 EAST CENTER STREET
(SUITE 2)
MIDVALE, UTAH 84047

EXHIBIT A

tain Protective Covenants for Hi-Country Estates, located in Salt Lake County, State of Utah, Phase 1, as amended, which is applicable to the property, and as the same may be amended from time to time as therein provided;

(b) Fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Protective Covenants, as amended, and as provided in the By-Laws adopted by the Association; to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes or governmental charges levied or imposed against the property of the Association;

(c) Acquire by gift, purchase or otherwise own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property in connection with the affairs of the Association,

(d) Borrow money, and with the assent of two-thirds of the members mortgage, pledge, deed in trust or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred;

(e) Dedicate, sell or transfer all or any part of the common area or road system to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members;

(f) Participate in mergers and consolidations with other non-profit corporations organized for the same purposes or annex additional residential property, road systems and common area, for any contiguous areas;

(g) Have and to exercise any and all powers, rights and privileges which a corporation organized under the Non-Profit Corporation Law of the State of Utah may now or hereafter have or exercise;

(h) The Association shall have no capital stock and no divi-

dends or other pecuniary profits shall be declared or paid to any member or director of the Association as such;

(i) The Association has no power to carry on propaganda attempt to influence legislation, or take part in a political campaign.

Every person or entity who is a record owner of a fee or undivided fee interest in any Lot which is subject by covenants or record to assessment by the Association, including purchasers under contract, shall be a member of the Association. The foregoing is not intended to include persons or entities who hold an interest merely as security for the performance of an obligation, such as Mortgagees. Membership shall be appurtenant to and may not be separated from ownership of any lot which is subject to assessment by the Association.

Members shall be entitled to one vote for each Lot owned. A Lot shall mean any Lot as platted and/or divided as provided in the protective covenants. When more than one person holds an interest in any Lot, all such persons shall be members. The vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any Lot.

The affairs of this Association shall be managed by a Board of three Directors, who need not be members of the Association. The number of Directors may be changed by amendment of the By-Laws of the Association. The names and addresses of the persons who are to act in the capacity of Directors until the selection of their successors are:

Name	Address
Charles E. Lawton	P. O. Box 1901 Jackson, Wyoming
Keith Spencer	Casper, Wyoming
Tony Mascaro	4505 West 12600 South Riverton, Utah