2010

Grassy Meadows Sky Ranch Landowners Association v. Grassy Meadows Airport, Sky Ranch Development and Michael O. Longley: Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GRASSY MEADOWS SKY RANCH LANDOWNERS ASSOCIATION, Plaintiff/Appellee, vs. GRASSY MEADOWS AIRPORT, INC.; SKY RANCH DEVELOPMENT, INC.; and MICHAEL O. LONGLEY Defendants/Appellants.	Case No. 20100925-CA

BRIEF OF APPELLEE

Appeal from a Final Judgment of the
Fifth District Court, Salt Lake County, State of Utah,
the Honorable G. Rand Beacham Presiding

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has original jurisdiction to decide this appeal pursuant to Utah Code section 78A-3-102(3)(j). The Utah Supreme Court transferred this appeal to the Utah Court of Appeals pursuant to Rule 42 of the Utah Rules of Appellate Procedure, thereby conferring jurisdiction on this Court pursuant to Utah Code section 78a-4-103(2)(j).

STATEMENT OF THE ISSUES

1. Whether the trial court correctly ruled that the 2002 Declaration[1] of covenants, conditions and restrictions for Grassy Meadows Sky Ranch was void *ab initio*.

Standard of Review: Whether a party complied with the terms of a contract is a question of fact, reviewed for clear error. *Saudners v. Sharp*, 793 P.2d 927, 931 (Utah Ct. App. 1990). "Questions of contract interpretation not requiring resort to extrinsic evidence" are matters of law, which are reviewed for correctness. *Zions First Nat'l Bank, N.A. v. Nat'l Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988).

Preservation of Issue: The Association[2] does not dispute that Sky Ranch[3] preserved this issue below.

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[1] As used herein, the "2002 Declaration" shall refer to the Second Restated Supplementary and Amended Declaration of Covenants, Conditions & Restrictions for Grassy Meadows Sky Ranch, a Planned Development in Washington County, Utah. R. 375a, Ex. 6.

[2] As used herein, the "Association" shall refer to Plaintiff/Appellee Grassy Meadows Sky Ranch Landowners Association.

[3] As used herein,"Sky Ranch" shall refer to Defendant/Appellee Grassy Meadows Airport, Inc.; Sky Ranch Development, Inc.; and Michael O. Longley, collectively.

2. Whether the trial court correctly ruled that Sky Ranch's claim for tortious interference failed as a matter of law.

Standard of Review: Whether the trial court correctly granted judgment as a matter of law is reviewed for correctness. *Archuleta v. Galetka*, 2008 UT 76, ¶ 6, 197 P.3d 650.

Preservation of Issue: The Association does not dispute that Sky Ranch preserved this issue below.

3. Whether the trial court correctly ruled that Sky Ranch was not entitled to terminate the Airport Lease Agreement based upon the evidence presented at trial.

Standard of Review: Whether a party complied with the terms of a contract is a question of fact, reviewed for clear error. *Saudners*, 793 P.2d at 931.

Preservation of Issue: The Association does not dispute that Sky Ranch preserved this issue below.

4. Whether the trial court properly adjudicated the entirety of Sky Ranch's breach of contract claim, including its allegation that the Association had failed to pay certain lease payments.

Standard of Review: Whether an issue is properly before the trial court is a question of law, reviewed for correctness. *Lee v. Sanders*, 2002 UT App 281, ¶ 6, 55 P.3d 1127.

Preservation of Issue: This issue was not raised in Sky Ranch's docketing statement, but the Association does not dispute that Sky Ranch preserved it below.

CONSTITUTIONAL PROVISIONS AND DETERMINATIVE STATUTES

There are no constitutional provisions or determinative statutes that are determinative or of central importance to the issues raised in this appeal.

STATEMENT OF THE CASE

I. Nature of the Case.

At its core, this case is about retaliation. This case arises out of Sky Ranch's desire to retake control over the airstrip it had leased to the Association and transform the Grassy Meadows development, a sleepy community surrounding a private and restricted airstrip nestled in a remote area of Hurricane, Utah, into a bustling hub of commercial activity. For more than a decade, Sky Ranch, as the developer of Grassy Meadows, and the Association, comprising the homeowners and landowners of Grassy Meadows, coexisted peacefully. Sky Ranch leased the airstrip, which it had constructed to be the centerpiece of the community, to the Association, and, in return, the Association maintained it in good operating condition. *See* Grassy Meadows Sky Ranch Airport Lease Agreement ("Lease"), R. 375a, Ex. 1.

Then, in approximately 2002, Sky Ranch began to take steps that would radically alter and forever change the nature of the community. Sky Ranch had grand plans to expand the "Fixed Base Operations" at the airstrip to include restaurants, stores, maintenance facilities and even hotels to cater to a greatly expanded number of authorized airport users flying a greatly expanded category of authorized aircraft. To accomplish this transformation, Sky Ranch unilaterally filed and recorded a new declaration of covenants, conditions and restrictions, which disenfranchised the Association, allowing Sky Ranch to effect these changes in the community unchecked.

Concerned about Sky Ranch's unabashed power-grab and the radical changes the new declaration would cause to the nature of their quiet community, and believing Sky Ranch no longer had the authority to amend the declaration unilaterally, the Association challenged the declaration's validity. The Association and its members also resisted Sky Ranch's efforts to change zoning ordinances to effect its plan. Irate at the Association's opposition to its efforts to overhaul the community and retake control of the airstrip, Sky Ranch sent the Association a notice of its intent to terminate the Lease. The notice alleged that the Association had been deficient in maintaining the airstrip. This was the first time the Association had received such a notice since entering into the Lease more than a decade before.

II. The Course of Proceedings.

After receiving Sky Ranch's notice terminating the Lease, the Association filed a peremptory lawsuit to protect its right to continue to use the airstrip. Sky Ranch responded by filing numerous counterclaims and cross-claims. Seven years of litigation ensued. After extensive and protracted litigation, including a number of dispositive motions, the issues that were ultimately tried were relatively simple and straightforward: (1) whether Sky Ranch had the authority to record the 2002 Declaration or whether the 2002 Declaration was void; (2) whether the Association tortiously interfered with the legitimate business interests of Sky Ranch by opposing proposed zoning ordinance changes affecting the Association; and (3) whether the airstrip Lease was materially breached by the Association and then properly terminated by Sky Ranch or whether the Lease remains in full force and effect. R. 746 at 2.

III. Disposition in the Trial Court.

The case was tried before the Honorable G. Rand Beacham sitting without a jury on April 19 and 20, 2010. Following the trial, the court entered judgment in favor of the Association on each of the issues tried. R. 746 at 3.

IV. Statement of Facts Relevant to the Issue Presented.

The following facts comprise a summary of the trial court's Findings of Fact and Conclusions of Law entered on August 6, 2010:

1. The Grassy Meadows Sky Ranch Planned Development is a planned residential development near Hurricane, Utah, consisting of lots with access to a private, restricted airstrip.

2. The airport is the centerpiece of the Community and the primary purpose for which the Community was built.

3. In order to ensure the Association access to the airport, Sky Ranch entered into a 99-year lease with the Association on November 25, 1990, pursuant to which the Association became the "exclusive occupant" of the Airport.

4. The Lease contains a termination provision, which can only be invoked after the lessor follows certain specific procedures outlined in the Lease.

5. Sky Ranch drafted and recorded a declaration of covenants, conditions and restrictions for the Association on July 16, 1990 (the "1990 Declaration"), which superceded a similar declaration it had previously drafted and recorded.

6. The 1990 Declaration allows the declarant, Sky Ranch, to amend the declaration unilaterally during a specified period of time until 80 percent of the lots in the Community have been sold.

7. Any such amendment must accomplish at least one of three specifically enumerated purposes: "(i) to more accurately express the intent of any provision of [the 1990 Declaration] in light of then existing circumstances, information or mortgagee requirements, (ii) to better insure, in light of then existing circumstances or information, workability of the arrangement which is contemplated by this Declaration; or (iii) to facilitate the practical, technical, administrative or functional integration of any additional tract of subdivision into the Community." R. 375a, Ex. 5 at art. XI, § 4 (pp. 26–27).

8. In approximately June 2002, 75 of the 92 lots platted in the Community had been sold, bringing the number of lots sold in the Community to 81.5 percent.

9. Soon thereafter, Sky Ranch unilaterally amended and restated the 1990 Declaration.

10. During this same time period, Sky Ranch had been laying the groundwork for an expanded fixed base operation ("FBO") area within the Grassy Meadows community and a new development ("Copper Rock") located adjacent to the community.

11. Copper Rock had more than 1,600 planned lots and a 27-hole golf course.

12. Sky Ranch wanted to provide access to the Grassy Meadows Airport to the future residents of Copper Rock, despite the 99-year lease that Grassy Meadows Airport, Inc. had entered into with the Association providing that the Association members would have

exclusive access to the Airport and despite the 1990 Declaration, which restricted access to the Airport to the owners of the up to 150 lots of the Grassy Meadows Community.

13. To accomplish these development objectives, Sky Ranch included terms in the 2002 Declaration that were dramatically different from key provisions of the 1990 Declaration and added new provisions, none of which were mentioned, contemplated or addressed in any manner in the 1990 Declaration.

14. Sky Ranch also inserted a number of terms that deprived the Association of its right to be self-governed by vesting control of the Association in Sky Ranch.

15. The Association and its members resisted Sky Ranch's efforts to disenfranchise them and radically change the nature of their community.

16. Almost immediately upon the heels of the Association's and its members' resistance, Sky Ranch sent a Notice of Termination of Lease dated March 31, 2003 alleging various breaches of the Lease.

17. The Notice of Termination was the first such notice Sky Ranch sent to the Association during the approximately 12 years that had passed since the parties had entered into the Lease.

18. The Association denied any breach of the Lease as alleged by Sky Ranch, but nevertheless made concerted efforts to address the issues Sky Ranch brought to its attention in order to attempt to appease Sky Ranch.

19. Evidence presented at trial shows that the Association timely resolved any maintenance issues that needed to be addressed and that it has always substantially complied with the terms of the Lease.

20. The Association has continued to use the airstrip since the Notice of Termination without incident or further complaint from Sky Ranch, just as it did prior to the Notice of Termination.

SUMMARY OF THE ARGUMENTS

1. The trial court correctly ruled that the 2002 Declaration was void *ab initio*. Sky Ranch no longer had the authority to amend the declaration unilaterally when it recorded 2002 Declaration. Additionally, the 2002 Declaration did not comply with the amendment restrictions set forth in the 1990 Declaration, which require unilateral amendments to be consistent with the general plan and scheme of the community. The 2002 Declaration also constituted a brazen and improper attempt to disenfranchise the Association members of their right to vote on community affairs. Because Sky Ranch lacked the authority to file the 2002 Declaration, it was void *ab initio*.

2. Sky Ranch's claim for tortious interference fails as a matter of law. Tortious interference is a tort that applies only to contracts entered into by third parties. Sky Ranch's claim is based on a contract that it had allegedly entered into with the Association. Even if Sky Ranch could prove the existence of such a contract, and even if it could prove that the Association breached the same, Sky Ranch's cause of action would be for breach of contract, not tortious interference. Additionally, Sky Ranch is immune from any liability related to a tortious interference claim under the *Noerr-Pennington* doctrine. As such, the trial court rightly dismissed Sky Ranch's tortious interference claim as a matter of law.

3. The trial court correctly ruled that Sky Ranch was not entitled to terminate the Airport Lease Agreement. First, Sky Ranch failed to comply with the termination provisions

of the Lease. Second, the Association substantially complied with all its obligations under the Lease. Moreover, Sky Ranch failed in its duty to marshal all the evidence in support of the trial court's findings.

4. The trial court properly adjudicated all the issues related to Sky Ranch's breach of contract claim, including ruling that the Association was current in all its lease payments. Even though Sky Ranch did not put on any evidence at trial regarding lack of payment, Sky Ranch's counterclaim alleged that the Association had failed in this regard. Accordingly, the issue was properly before the trial court, and the court was obliged to resolve the same. In any event, Sky Ranch would be precluded from asserting lack of payment in a subsequent action given *res judicata* principles and its duty to assert all compulsory counterclaims. Thus, whether or not adjudicated by the trial court, Sky Ranch is precluded from asserting this issue again all the same.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE 2002 DECLARATION WAS VOID *AB INITIO.*

The trial court correctly ruled that the 2002 Declaration was void ab initio for three reasons: (1) Sky Ranch did not have the authority to amend the 1990 Declaration; (2) the 2002 Declaration effected a drastic change to the character of the Grassy Meadows community; and (3) the 2002 Declaration disenfranchised the Association members of their right to control matters pertaining to their association.

A. Sky Ranch Did Not Have the Authority to File the 2002 Declaration.

Sky Ranch's right to amend the 1990 Declaration terminated on June 11, 2002. The 1990 Declaration allowed the declarant to amend the declaration unilaterally "until eighty percent (80%) of the lots in the Development (including additional phases as may be added) have been sold to purchasers." R. 375a, Ex. 5 at art. XII, § 3 (p. 28). The trial court found this provision to be ambiguous because it was unclear whether the number of lots from which the 80 percent calculation would be made should include only the then-existing lots or all possible future lots. As the court explained "[t]he phrase, 'as may be added,' could be interpreted to include lots (1) 'as are permitted to be added in the future, no matter how many have already been added at any point in time,' or (2) 'as may have been added at any point in time, no matter how many may be permitted in the future.'" R. 741 at 19, ¶ 3.

The trial court concluded: "Because this language is susceptible to two different interpretations, it creates an ambiguity in the contract that must be construed against the drafter, in this case Mr. Longley [on behalf of Sky Ranch]." *Id.* at ¶ 4 (citing *U.S. Fid. And*

Guar. Cov. v. Sandt, 854 P.2d 519, 525 (Utah 1993); *Culbertson v. Board of County Comm'rs*, 2001 UT 108, ¶ 15, 44 P.3d 642). Consistent with fundamental rules of contract construction, the Court interpreted this provision to mean that once 80 percent of the platted and approved lots had been sold, Sky Ranch would no longer have the right unilaterally to amend the declaration. *Id.* at ¶ 5.

Evidence introduced at trial showed that as of June 2002 only 92 residential lots in the community had been platted and approved by Washington County.[4] R. 741 at 4, ¶ 18. On June 11, 2002, the seventy-fifth lot had been sold, bringing the number of lots sold in the community to 81.5 percent. *Id.* Accordingly, the trial court ruled that the 2002 Declaration, which Sky Ranch filed unilaterally on October 25, 2002, was void *ab initio*.

Sky Ranch takes issue with this ruling, arguing that the trial court failed to harmonize the 80-percent limitation contained within the amendment provision with other provisions of the 1990 Declaration. Specifically, Sky Ranch argues that the trial court's interpretation of the 80-percent limitation contradicts an earlier provision stating that the developer could amend unilaterally until its right to annex land terminates. Brief of Appellant at 17 (citing R. 375a, Ex. 5 at art. XI, § 4 (pp. 26–27)). Sky Ranch concludes that the only interpretation that harmonizes all the provisions of the 1990 Declaration would be that the developer is allowed to amend unilaterally until "it has finished developing *and* 80% of the lots are sold." Brief of Appellant at 17.

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[4] Nor was any evidence admitted at trial showing that any additional lots were ever platted and approved thereafter.

However, Sky Ranch's argument overlooks key language preceding the 80-percent limitation, which eliminates any possible contradiction between the two provisions addressing unilateral amendment. The introductory clause to the 80-percent limitation expressly states: "Notwithstanding anything herein contained to the contrary . . . ." R. 375a, Ex. 5 at art. XII, § 3 (p. 28). In other words, the 1990 Declaration specifically clarifies that there can be no contradiction with the 80-percent limitation because the limitation is to be read without regard to any other provision in the Declaration. Therefore, Sky Ranch's argument that the limitation needs to be harmonized with other, would-be contradictory provisions in the 1990 Declaration is belied by the express language of the declaration itself.

Moreover, Sky Ranch's argument betrays a fundamental misapprehension of the trial court's ruling. Sky Ranch argues in essence that its interpretation of the 80-percent limitation is better than "the trial court's interpretation" and must therefore be adopted. Brief of Appellant at 18. However, the trial court never ruled which interpretation was the best interpretation, nor did it need to. Rather, the trial court simply recognized that there was reasonable support for *both* interpretations of the 80-percent limitation; hence, its conclusion that the provision was ambiguous. *See Daines v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269 ("A contractual term or provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.") (internal quotations omitted).

Sky Ranch fails to explain in its brief why the trial court's allegedly less correct interpretation was not at least reasonable. Indeed, the interpretation adopted by the trial court is squarely supported by the express and unambiguous qualifying clause preceding the 80-

percent limitation. Therefore, the trial court properly construed the 80-percent limitation against Sky Ranch in light of the inherent ambiguity contained within the provision and fundamental principles of contract construction.[5]

B. The 2002 Declaration Is Void Because it Sought to Materially Change the Character of the Community.

Even had Sky Ranch the authority to amend the 2002 Declaration unilaterally, the amendment would still be void because it was contrary to all three enumerated purposes that were supposed to advanced in order to justify unilateral amendment. The 1990 Declaration allowed the declarant to amend only

> (i) to more accurately express the intent of any provision of this Declaration in light of then existing circumstances, information or mortgagee requirements, (ii) to better insure, in light of then existing circumstances or information, workability of the arrangement which is contemplated by this Declaration; or (iii) to facilitate the practical, technical, administrative or functional integration of any additional tract of subdivision into the Development.

R. 375a, Ex. 5 at art. XI, § 4 (pp. 26–27). In other words, the 1990 Declaration prohibited Sky Ranch from amending the declaration in any way that would "materially change the character of the development." *See* Restatement (Third) of Property: Servitudes, § 6.21 (2000) (noting limitations to developer's power to amend declarations). Despite this prohibition, this is exactly what Sky Ranch did. Far from more accurately expressing the intent of the 1990 Declaration, the 2002 Declaration radically transforms the character of this small residential community in a number of significant ways.

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[5] Sky Ranch clarified in the 2002 Declaration that the 80-percent limitation referred to all "150 lots in the development," not just those currently platted and approved. R. 375a, Ex. 6 at art. XII, § 3. (p. 32). That Sky Ranch felt this provision needed clarification by amendment repudiates its argument that the provision was unambiguous.

1. Greatly expanded commercial development.

It was contemplated from the beginning that Sky Ranch would develop a limited commercial area that would include things such as a "fixed base operations" ("FBO") area for refueling airplanes and a limited number of hangars for aircraft storage. Thus, the 1990 Declaration stated:

> Declarant may . . . conduct certain commercial operations on lands owned by it adjacent to the airstrip, including, but not limited to, fixed base operations for refueling aircraft and purposes incident thereto, construction and sale or leasing of aircraft storage and hanger [sic] space, scenic tour flights and such other business operations as it may deem necessary and appropriate; *provided however, that any such commercial operations or activities conducted by the Declarant . . . shall be consistent with, and shall not unreasonably interfere or restrict the Owner's beneficial use and enjoyment of their Lots or the Property, as set forth in this Declaration.*

R. 375a, Ex. 5 at art. VII, § 6 (p. 18) (emphasis added). The key part of this section—and the part omitted from Appellant's Brief—is the last half of the paragraph, which provides a check on what would otherwise be close to unfettered power to engage in commercial development in any manner Sky Ranch "deem[ed] necessary and appropriate."

In a blatant attempt to circumvent this check on power, Sky Ranch inserted a new definition of "FBO" into the 2002 Declaration to include, without limitation, "facilities for the sale of airplane fuel, a convenience store, lodging units ("casitas"), airplane repair facilities, airplane washing facilities, and any other related facilities deemed *appropriate or desirable* by the Declarant." R. 375a, Ex. 6 at art. I, § 13 (p. 4) (emphasis added). In addition to changing the nature of the limited commercial area contemplated by the 1990 Declaration by adding such things as airplane repair facilities and commercial lodging, this definition eviscerates all other limitations that previously existed on Sky Ranch's power to

engage in commercial development. First, it greatly expands the qualifying standard of any proposed development from "*necessary and* appropriate" to "appropriate *or desirable*." *Id.* Second, it drops the limitation to keep business development "consistent with" the Association members' "beneficial use and enjoyment of their" property. *Id.* Moreover, the impact of this wholesale change is exacerbated by the reservation of rights section, which states that Sky Ranch may wield its expanded right to engage in commercial development in any way "Declarant *in its sole discretion deems to be appropriate*." R. 375a, Ex. 6 at art. II (p. 6) (emphasis added). In other words, the 2002 Declaration makes it so Sky Ranch can engage in any commercial development it wants.[6]

Other provisions further pave the way for a level of commercial development in the community never intended by the 1990 Declaration. First, the 2002 Declaration greatly expands the "additional land" that can be annexed into the development. In the 1990 Declaration, Sky Ranch delineated a small part of "Section 28, Township 42 south, range 13 West, SLB&M" as additional land that could be annexed. R. 375a, Ex. 5 at Exhibit B. In contrast, the 2002 Declaration opens up all land in Section 28 as well as Section 33 for annexation. R. 375a, Ex. 6 at Exhibit B ("[a]ny and all property . . . located within Sections 28 and 33, Township 42 South, Range 13 West, Salt Lake Base and Meridian").

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[6] Sky Ranch argues that it is "uncontested" that the Association agreed to at least some of these uses in agreement signed in 1994. Nothing could be further from the truth. Not only did the Association contest that such an agreement was ever made, the trial court sustained the Association's objection to admit a writing purported to be this agreement, as it was unsigned, unauthenticated and clearly not final (there were markings and edits all over the document). R. 754:104:15–105:6; 107:16–23; 113:16–18; 114:16–115:16; 116:22–117:7.

This land expansion would probably not mean much absent an additional provision Sky Ranch added stating that "there is no restriction regarding the number of hangar and commercial units allowed." R. 375a, Ex. 6 at XI, § 2(a) (p. 30).[7] The combination of these two provisions allows potentially hundreds more commercial lots to be built on an increased land area never contemplated by the 1990 Declaration. These provisions fundamentally alter the nature of what was supposed to be a small community with a very limited number of owners having exclusive access to a private airport.

2. Transformation of airstrip character and role.

The 2002 Declaration also broadens the definitions of "Lot" and "Member" to include hangars and hangar owners. R. 375a, Ex. 6 at art. I, § 16–17 (p. 5). This, coupled with the above-two provisions vastly increasing the total number of potential owners, allows potentially hundreds of additional people who do not even live at Grassy Meadows to use the airstrip.[8] This transforms what was supposed to be a private airstrip restricted to a limited number of users into the equivalent of a general aviation airport open to hundreds of additional users. This also escalates maintenance needs for the airstrip, thereby creating an

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[7] This not only directly undermines the lot limitation set forth in the 1990 Declaration ("150 total lots"), but it is internally inconsistent with the clarification made in the 2002 Declaration to the 80-percent limitation, which still presumes a maximum of 150 total lots in the development. *Id.* at art. XII, art. 3 (p.32) ("including proposed lots in additional phases, or in other words, 80% of the contemplated 150 lots in the development").

[8] Sky Ranch argues that this change simply "clarified" the voting rights of hangar owners as outlined in the "Phase 5C Declaration." Appellant Brief at 27. Sky Ranch's argument overlooks the fact that the Phase 5C Declaration defined only the rights of hangar owners in Phase 5C, not the owners of hangars located elsewhere in the development, including the vast land expansion. R. 375a, Ex. 36 at § 3.

impermissible increased financial burden on the Association, which is responsible under the Lease for all airstrip maintenance. R. 375a, Ex. 1, § 8.

3. Introduction of jet aircraft into the community.

The 2002 Declaration also allows for the first time "the Declarant and any member, or any guests and invitees of the Declarant or any member, to land jets and large aircraft on the airstrip and park the same in the FBO area or on other property in the project." R. 375a, Ex. 6 at art. IV, § 4(k) (p. 11). Indeed, the 2002 Declaration removes any restriction whatsoever over the type of aircraft allowed to land and park in the community. *Id.* at art. IV, § 2 (allowing "aircraft of any type or size"). Previously, the Association was able to put appropriate restrictions on the type of aircraft that could land in the community. R. 375a, Ex. 5 at art. XII, § 2 (p. 27); R. 375a, Ex. 1, § 2.

The deleterious effects of this sweeping change are profound. First, jet engines are significantly louder than propellers, prompting Sky Ranch to exclude the noise generated by such aircraft from the Association's right of quiet enjoyment. *Id.* at art. VII, §§ 8 and 22 (pp. 22, 24). The 2002 Declaration unilaterally waives this and any other legal right the members of the Association "otherwise may have had against use of the airstrip by . . . jet and large aircraft," including but not limited to any claims "related to any harm to person or property resulting from . . . noise, noxious fumes, or any other damage or harm." *Id.*

Moreover, evidence introduced at trial established that the airstrip was not designed for and cannot accommodate jets, which are substantially heavier than propeller aircraft and require a much longer runway to land and takeoff safely. R. 375a, Ex. 16 (noting runway

was insufficient in terms of strength, length and geometry to handle aircraft weighing more than 10,000 pounds or "aircraft with high approach speeds").

Needless to say, none of these provisions more accurately expresses the intent of the 1990 Declaration; rather, they effect a wholesale and illegitimate change in the nature of the community. In short, the trial court correctly ruled that Sky Ranch was prohibited from transforming what was intended to be a small residential community with limited commerical development into a bustling commercial hub with hotels, jet aircraft, hundreds of additional lots, hundreds of additional (non-resident) airstrip users and whatever other commercial development Sky Ranch "in its sole discretion" saw fit to develop. *See, e.g., La Esperanza Townhome Ass'n, Inv. v. Title Sec. Agency*, 689 P.2d 178, 181 (Ariz. App. 1984) (holding amended declaration allowing developer to construct multifamily homes in community designed for single family residences would upset "orderly plan" of community and was, therefore, void); *Moore v. Megginson*, 416 So. 2d 993 (Ala. 1982) (holding amendment allowing industrial warehouse and maintenance facility in residential community was "not in keeping with the area and neighborhood" and therefore void); *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450 (Del. 1982) (holding developer's power to amend declaration did not include power to change total number of units specified in original declaration).

C. The 2002 Declaration Disenfranchises Association Members.

In addition to fundamentally altering the nature of the community, the 2002 Declaration amounts to a power-grab by Sky Ranch resulting in the disenfranchisement of all the Association's members. The 1990 Declaration designated Sky Ranch as the "Class

B Member" and all other members as either "Class A" or "Class C" members. R. 375a, Ex. 5 at art. III, § 2 (pp. 6–7). Class A and C members were entitled to one vote for each lot owned by them, whereas the Class B member was entitled to five votes for each lot it owned. *Id.* This ensured that Sky Ranch would enjoy a majority of votes for an appropriate period of time to elect trustees and decide all other issues affecting the Association. *E.g.*, *id.* at art. IV, § 4(d) (p. 9); art. V, § 4 (p. 10); art. VI § 2 (p. 13); art. VII, § 1 (p. 17); art. X, §§ 2 and 10 (p. 23, 25); art. XII, § 3 (p. 27). Additionally, so long as it had Class B member status, Sky Ranch had the power to reject any proposed amendment to the declaration adopted by a majority vote of the members. *Id.* at art. XII, § 3 (p. 27).

Sky Ranch was to lose its Class B status and become a Class A member, when either (1) the total number of votes held by Class A and C Members equaled the total number of votes held by Sky Ranch, or (2) the expiration of 15 years after the 1990 Declaration was recorded, whichever occurred first. *Id.* at art. III, § 2. This is a watershed moment under any such arrangement because the developer not only loses control, but the vast majority of its votes, as Class A members are entitled to only one vote per lot, not five. By the time Sky Ranch drafted the 2002 Declaration, the number of votes held by individual members of the Association equaled the number of votes held by Sky Ranch, and Sky Ranch had therefore lost its Class B member status and accompanying control over the Association. R. 754 at 135:8, 17–22 (Mr. Longley testifying that he signed the Association's Bylaws, which acknowledged that Class B membership had terminated on or abut June 16, 1994).

1. Resurrecting Class B member status.

The 2002 Declaration changed all this. First, Sky Ranch asserted that it now had 203 lots compared to 77 held by the Association's members. R. 375a, Ex. 6 at art. III, § 2 (pp. 7–8). Sky Ranch could have only come up with these numbers based on the altered voting scheme it instituted simultaneously discussed below. Sky Ranch then unilaterally declared that "notwithstanding any statement the Board of Trustees may have inserted in the Bylaws to the contrary, Declarant has Class B votes as of the of execution of this Declaration." R. 375a, Ex. 6 at art. III, § 2 (pp. 7–8). Not only was this statement contrary to the acknowledgment in the Bylaws Mr. Longley signed himself, it was also contrary to the 1990 Declaration, which unlike the 2002 Declaration, had no provision whereby the declarant could reassert its Class B member status once it expired. *Compare* R. 375a, Ex. 5 at art. III (pp. 6–7) *with* R. 375a, Ex. 6 at art. III, § 5 (p. 9). To dissuade anyone from challenging this unauthorized action, Sky Ranch further declared: "It shall be cause for automatic dismissal from membership on the Board of Trustees of the Association for board members to fail to recognize Declarant's votes, including those held in trust for Declarant." *Id.*

2. Altering voting scheme to retain Class B member status.

Having resurrected its Class B membership, Sky Ranch then sought to ensure that it would never again lose its control based on vote totals. Sky Ranch did this by (1) dramatically expanding the land area and commercial lot numbers of the Association, and (2) expanding the definition of "Lot" to include hangars, as discussed above in Part I.B.1. As owner of all these additional commercial and hangar lots, Sky Ranch greatly increased

its number of votes, particularly in light of the vote multiplier afforded the Class B member.[9] Sky Ranch also extended the date when its Class B status will terminate regardless of vote totals by *seven years*. *Compare* R. 375a, Ex. 5, art. III, § 2 (b) (p. 7) *with* R. 375a, Ex. 6, art. III, § 2 (p. 8). By giving Sky Ranch hundreds of additional votes, the 2002 Declaration ensures that Sky Ranch will always be able to at least out vote the residents of the community, even after its Class B status eventually terminates. In this way, Sky Ranch not only illegitimately resurrected and then extended its ability to veto any community rules or declaration amendments passed by the Association, it ensured it would be able to exercise control over the entire community indefinitely, thus rendering the Association impotent and completely symbolic.

3. Extension of Sky Ranch's power beyond Class B member rights.

As if unilaterally reinstating and extending its Class B member power were not enough, the 2002 Declaration also gave Sky Ranch the right to promulgate and enforce its own rules and regulations for the Association in perpetuity and "the right to unconditionally veto" any rules or regulations promulgated by the Association for 15 years. R. 375a, Ex. 6 at art. IV, § 4(i) (p. 11) and R. 375a, Ex. 6 at art. XII, § 2 (pp. 31–32). Although, the Lease gives Sky Ranch, as Lessor, the right to promulgate rules and regulations affecting the airstrip, no document prior to the 2002 Declaration gave Sky Ranch the power to promulgate rules and regulations affecting the entire community. R. 375a, Ex. 1, § 2. Rather, the 1990 Declaration made it clear that this right was within the exclusive province of the Association.

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[9] The 2002 Declaration also made it so that Sky Ranch could "vot[e] all or any portion of [its Class C votes] as Class B votes" in its "discretion." R. 375a, Ex. 6, art. III, § 2 (p. 8).

R. 375a, Ex. 5 at art. XII, § 2 (p. 27). Moreover, the 2002 Declaration makes it so any rule Sky Ranch adopts regarding the airstrip will trump any inconsistent rule adopted by the Association in perpetuity. R. 375a, Ex. 6 at art. XII, § 2 (p. 32).

Similarly, the 2002 Declaration allows Sky Ranch for the first time to "charge reasonable admission and other fees of Association Members for the use of the airstrip . . . ." *Id.* at art. IV, § 4(d). This effected a unilateral and unauthorized amendment to the Lease entered into with the Association, which set forth specifically what the lease payments would be and did not give Sky Ranch the authority to charge additional use fees. R. 375a, Ex. 1. Sky Ranch attempts to justify this illegitimate provision by arguing: "While this language seems vague, it seems unlikely that it would give Sky Ranch a right to charge fees for the use of the airstrip . . . ." Brief of Appellant at 33. In fact, there is nothing at all ambiguous about this provision, which specifically refers to "the Declarant," or, in other words, Sky Ranch, having this power. R. 375a, Ex. 6, art. IV, §4(d) (p. 10).

Sky Ranch culminated its power-grab by littering the 2002 Declaration with a number of provisions requiring the automatic dismissal of board members for acting in any way contrary to Sky Ranch's desires. As discussed above, the 2002 Declaration requires the automatic dismissal of trustees for challenging Sky Ranch's unauthorized reinstatement of Class B member status. It also requires automatic dismissal for the following: (1) failing to maintain taxiways (as opposed to the airstrip), even though the taxiways are privately owned, some by Sky Ranch itself, R. 375a, Ex. 6 at art. VI, § 2 (p. 16); (2) refusing to sign Sky Ranch's proposed "addendum to the lease agreement," R. 375a, Ex. 6 at art. VI, § 5 (p. 19); and (3) allowing lawsuits by the Association against Sky Ranch, among other lawsuits, unless

approved by a super majority of members. R. 375a, Ex. 6 at art. V, § 2 (p. 12). Sky Ranch attempts to justify these extraordinary provisions by comparing them to *in terrorem* clauses sometimes found in wills. However, there is a world of difference between a clause in a will designed to prevent family infighting resulting from dissatisfaction over one's inheritance and provisions set forth in a contract designed to chill a party's right to challenge illegal provisions in that contract.

In short, the 2002 Declaration hijacked the Association's autonomy and made Sky Ranch (*i.e.*, Mr. Longley) the supreme overlord of the Grassy Meadows community. Needless to say, this does not advance or more accurately express the intent of the 1990 Declaration—it undermines it. Thus, this further confirms that the trial court correctly ruled that the 2002 Declaration is void. *See Holiday Pines Prop. Owners Ass'n v. Wetherington*, 596 So. 2d 84, 87–88 (Fla. Ct. App.) (voiding amendment undermining property owners' "right of individual control").

D. Sky Ranch Never Argued below to Have the Offending Provisions of the 2002 Declaration Severed, Nor Is Severance Practical.

Finally, Sky Ranch asserts error on the trial court's part for failing to sever the offending provisions of the 2002 Declaration instead of declaring the entire document to be void. Sky Ranch is precluded from making this argument on appeal because it never made this argument below. It is fundamental that, "'in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.'" *Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366 (citations omitted).

Here, the trial court never had an opportunity to consider this argument because Sky Ranch never raised it. Accordingly, Sky Ranch is precluded from raising it here.

Additionally, if this Court were to sever each offending provision form the 2002 Declaration it would be rendered meaningless. *See, e.g., State v. Lopes*, 980 P.2d 191, 196 (Utah 1999) (holding provisions may not be severed if it would render remaining provisions inoperable). This is not a case, for example, where an offending noncompete provision can be severed from an otherwise enforceable employment agreement. Severing all the offending provisions from the 2002 Declaration, which include the provisions governing membership and voting rights among many other key provisions discussed above, would leave nothing but a patchwork of isolated provisions having no continuity and giving no meaningful guidance to governance of the Association. As such, severance is simply not an option.

II. THE TRIAL COURT RIGHTLY DISMISSED SKY RANCH'S CLAIM FOR TORTIOUS INTERFERENCE.

Sky Ranch argues that the trial court denied its due process rights by dismissing its tortious interference claim without an opportunity to be heard. In reality, the trial court dismissed the tortious interference claim only after being argued by both parties at the conclusion of trial. R. 755 at 182:13–183:18; 205:8–206:9. The trial court had earlier agreed to give Sky Ranch another day (essentially another chance) to produce evidence to prove a contract between Sky Ranch and the Association "*if necessary*." *Id.* at 171:10–23 (emphasis added). The need to schedule another day of trial was contingent on the court's rulings related to "the part of the trial [it had already] heard." *Id.* After considering the parties' respective proposed findings of fact and conclusions of law, the court ruled that it was

"unnecessary to reconvene the trial to receive more evidence on this issue," because the Association could not be liable for tortious interference as a matter of law. R. 746 at 2 n.1.

The trial court's ruling was correct. "It is settled that one party to a contract cannot be liable for the tort of interference with contract for inducing a breach by himself or the other contracting party." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 301 (Utah 1982) (citations omitted). Sky Ranch sued the Association for opposing a change in zoning ordinances needed for Sky Ranch to expand the FBO area within the Grassy Meadows community. R. 489 at ¶¶ 62–84. Sky Ranch alleged that the Association had previously agreed not to oppose Sky Ranch's efforts to expand the FBO area. *Id.* at ¶¶ 66–67. Instead of suing the Association for breaching this alleged agreement, however, Sky Ranch sued the Association for tortious interference of contract. No evidence Sky Ranch could offer at trial could remedy this fundamental flaw. Accordingly, Sky Ranch's argument on appeal that "the Association is attempting to avoid liability for *breaching* its contractual obligation . . . ," Brief of Appellant at 32–33 (emphasis added), is of no avail because there is no claim for breach of contract at issue. For this reason alone, the trial court's ruling should be affirmed.

Additionally, a key element of tortious interference is lacking in this case even were tortious interference the correct cause of action under the circumstances. To prevail on a claim for tortious interference, a claimant must prove that the defendant interfered for "an improper purpose or by improper means." *Leigh Furniture*, 657 P.2d at 304. In light of this element, Sky Ranch's claim fails on its face because the Association acted entirely within its rights in opposing the proposed zoning. Specifically, the *Noerr-Pennington* doctrine immunizes the Association and its members from liability that might otherwise arise from

petitioning the government, as in opposing zoning ordinance changes before a county planning commission. *See Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 25, 116 P.3d 323 (holding developer's tortious interference claim brought against individuals resisting zoning changes barred by *Noerr-Pennington* immunity). The Utah Supreme Court explained:

> The First Amendment to the United States Constitution guarantees citizens the right to "petition the Government for a redress of grievances." U.S. CONST. amend. I. In recognition of this right, the United States Supreme Court has held that individuals and organizations are immune from liability under antitrust laws for actions constituting petitions to the government. *See United Mine Workers v. Pennington*, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed.2d 626 (1965); E. R.R. Presidents *Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138, 81 S. Ct. 523, 5 L. Ed.2d 464 (1961). Over the years, courts have extended this immunity doctrine, referred to as the *Noerr-Pennington* Doctrine, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 420, 112 S. Ct. 2538, 120 L. Ed.2d 305 (1992), to "protect . . . political activity against tort claims as well as antitrust claims," *Searle v. Johnson*, 646 P.2d 682, 684 (Utah 1982).

Id. at ¶ 26; *see also Kovac v. Crooked River Ranch Club and Maintenance Ass'n*, 63 P.3d 1197, 1200–01 (Or. Ct. App. 2003) (holding homeowner association's actions in opposing homeowner's application for a conditional use permit amounted to nothing more than constitutionally protected participation in the political process and were therefore immune from antitrust liability under the *Noerr-Pennington* doctrine."); *Leigh Furniture*, 657 P.2d at 308 (reaffirming "constitutionally protected activity, like the exercise of First Amendment rights," absolves individuals of liability even if the improper purpose/unlawful means test is satisfied).

Thus, even had the trial court committed some technical procedural error in dismissing Sky Ranch's tortious interference claim before Sky Ranch had finished putting on all its evidence in support of the existence of a contract between itself and the Association, such

an error would be harmless given the above two reasons compelling dismissal of the claim as a matter of law. *See Jones v. Cyprus Plateau Min. Corp.*, 944 P.2d 357, 360 (Utah 1997) ("Harmless errors are those that are sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings.") (citations omitted).

III. THE TRIAL COURT CORRECTLY RULED THAT SKY RANCH WAS NOT ENTITLED TO TERMINATE THE AIRPORT LEASE AGREEMENT.

Frustrated with the Association's opposition to Sky Ranch's attempted power-grab and commercial development plans, Sky Ranch sought to terminate the Lease. Termination, or forfeiture, is a drastic remedy and consequently "not favored in the law." *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105, 1109 (Utah Ct. App. 1997); *Cache County v. Beus*, 1999 UT App 134, ¶ 28, 978 P.2d 1043 ("Utah's courts have generally disfavored forfeitures in landlord-tenant cases"); *Madsen v. Anderson*, 667 P.2d 44, 47 (Utah 1983) ("The undesirability of [forfeiture] is well-stated by the legal maxim that 'the law abhors forfeiture.'"). The trial court correctly held that forfeiture was not an appropriate remedy in this case for at least two independent reasons: (1) Sky Ranch failed to give the Association proper notice of its intent to terminate the lease and (2); the Association substantially complied with all its obligations under the Lease terms. Additionally, the trial court's findings should be affirmed because Sky Ranch failed in its duty to marshal all the evidence in support of the these findings.

A. Sky Ranch Did Not Give the Association Proper Notice.

In order to avail itself of the drastic remedy of forfeiture, a party must strictly comply with the contract's notice requirements. *See, Siggard*, 936 P.2d at 1109 (holding where

forfeiture is a possible remedy, person seeking forfeiture "'*must comply strictly* with the notice provisions of the contract.'") (emphasis in *Siggard*) (citations omitted). Here, the Lease required Sky Ranch to provide the Association with notice of any alleged breach and its intention to terminate the Lease in writing and sent via "certified letter, return receipt requested," to each member of the Association's Board of Trustees. R. 375a, Ex. 1, § 4. Sky Ranch failed to present any evidence at trial to show that it complied with this most basic contractual requirement. R. 741 at 22, ¶¶ 20–21; R. 754–755. Because Utah law requires parties to "comply strictly" with all notice provisions of a contract, this failure alone confirms the correctness of the trial court's decision not to terminate the Lease.

The correctness of the trial court's decision is further confirmed by the fact that Sky Ranch's notice was also deficient in other respects. The Utah Supreme Court has held that "forfeiture should be refused" when the notice is "indefinite or uncertain" as to the alleged breach that needs curing. *See First Sec. Bank of Utah v. Maxwell*, 659 P.2d 1078, 1081 (1983). Here, the Lease provided that Sky Ranch could not terminate the lease unless the Association failed to cure the alleged breach within 30 days of being given notice of the same. R. 375a, Ex. 1, § 4. With one exception, Sky Ranch failed to give sufficient notice to the Association in order to apprise it sufficiently what alleged breaches needed to be cured.[10]

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[10] Sky Ranch specifically asserted that the Association was not current on its lease payments. The Association denied this allegation and Sky Ranch failed to produce any evidence at trial to substantiate this claim. R. 754–755.

For example, Sky Ranch alleged in the Notice of Termination (the "Notice") that "For a prolonged period of time, Lessee has failed to maintain the airstrip and runway lights anywhere near the same condition they were in when they were received, normal wear and tear excepted." R. 375a, Ex. 2 at 1. Yet nowhere in the Notice does Sky Ranch allege what specific maintenance issues needed to be corrected. Similarly, Sky Ranch wrote: "Lessee has failed to meet the necessary insurance requirements as outlined in section 10," Notice at 2, without specifying what specific insurance requirements it felt were lacking. Without knowing exactly what Sky Ranch claimed needed to be cured, the Association could not be expected to take appropriate remedial action, assuming that such action was even necessary. As the trial court noted, "A cure period is meaningless and of no effect if the lessee is not apprised specifically of the alleged problems that need curing." R. 741 at 22, ¶ 23.

B. The Association Substantially Complied with All Aspects of the Lease.

Even had Sky Ranch strictly complied with the Lease's termination provision, termination would still not be an appropriate remedy in this case, because the Association substantially complied with all its obligations under the Lease. In furtherance of the policy disfavoring forfeiture, Utah courts look to see if a lessee has substantially, rather than strictly, complied with the terms of the Lease before considering termination. If the lessee has exercised good faith efforts to comply with the Lease, the "substantial compliance doctrine" instructs against terminating the Lease. *Cache County v. Beus*, 1999 UT App 134 at ¶ 28. The *Cache County* court explained:

> [A]n overwhelming majority of courts [has] concluded, without reference to a specific statutory provision, that a Lease may not be forfeited for a trivial or

> technical breach even where the parties have specifically agreed that "any breach" gives rise to the right of termination. These courts note the sophistication and complexity of most business interactions and are concerned, therefore, that the possibilities for breach of a modern commercial Lease are virtually limitless. In their view, the parties to the Lease did not intend that every minor or technical failure to adhere to complicated Lease provisions could cause forfeiture. Accordingly, nearly all courts hold that, regardless of the language of the Lease, to justify forfeiture, the breach must be "material," "serious," or "substantial."

Id. at 35 (citations omitted).

The court thus held that "a trial court should determine the materiality of the breach, and then decide whether the breaching party had substantially complied with the [lease]." *Id.* at ¶ 36. Factors to be considered in determining the materiality of a breach are:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer [from] forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. at ¶ 37 (quoting Restatement (Second) of Contracts, § 241 (1981)).

Applying these factors to this case, it is obvious that the breaches by the Association, if any, were immaterial and not the kind that would justify the drastic remedy of forfeiture.

1. Sky Ranch was not deprived of the benefits of its bargain.

The benefits to which Sky Ranch was entitled under the lease included lease payments, having its property properly maintained and having its exposure to liability mitigated through insurance coverage. R. 375a, Ex. 1, §§ 3, 8 and 10. The trial court made

detailed factual findings supported by record evidence that the Association substantially complied with its contractual obligation to provide each of these benefits to Sky Ranch:

> 33. The Notice of Termination was the first such notice Mr. Longley sent to the Association during the approximately 12 years that had passed since the parties entered in the Lease. [*see* Longley Testimony.]
>
> 34. The only other letter Mr. Longley sent to the Association outlining alleged deficiencies regarding the Airport came one month prior to the Notice of Termination. [Longley Testimony; Exhibit 273.]
>
> 35. It was only after the Association resisted Mr. Longley's efforts to amend the covenants, conditions and restrictions and zoning ordinances applicable to the community to facilitate his Copper Rock Development that Mr. Longley sent the Association any kind of written complaint about the Airport's maintenance or any other issue pertaining to the Airport. [Longley Testimony; Murdock Testimony.]
>
> 36. The Association denied any breach of the Lease as alleged by Mr. Longley, but nevertheless made concerted efforts to address the issues Mr. Longley brought to its attention in order to attempt to appease Mr. Longley, including replacing all broken lights, removing weeds growing next to the Airport and addressing other minor maintenance issues. [Murdock Testimony.]
>
> . . . .
>
> 38. Evidence presented at trial shows that the Association substantially complied with all the terms of the Lease.
>
> 39. Although maintenance issues arose from time to time, including at the time the Notice of Termination was sent, such maintenance items fall within what would reasonably be expected as normal wear and tear of improvements on real property of this type.
>
> 40. Nevertheless, the Airport was always in reasonably good working order and condition. [*See* Holt Testimony; McCarroll Testimony; Habberfield Affidavit; Murdock Testimony; Batson Affidavit; Santosuosso Affidavit.]

41. The Association engaged in regular and frequent maintenance, and even improvements, of the Airport throughout the lease period, including the following, among other things:

a. added paint markings as an improvement to the Airport;

b. funded an apron composed of crushed stone and sterilant pellets to be placed on each side of the Airport for the length of the airstrip to repair undercutting to the airstrip that had occurred;

c. took measures to abate and remove weeds, including spraying and cleaning the Airport in March, July, August and September of 2003;

d. kept the rail fences surrounding the Airport in good repair, including repairing them after they were damaged due to a lightning strike and automobile accident;

e. kept most of the airport lights in good working condition, including repairing lights on taxiways, even though not required to do so by the Lease; and

f. paid to have portions of the Airport needing attention crack-sealed almost every year, including in 2000, 2001, 2002 and 2003.

[*See* Habberfield Affidavit at ¶¶ 13, 14, 16–25, 33–35 and 38; Batson Affidavit at ¶¶ 10–18 and 21; Santosuosso Affidavit at ¶¶ 6, 9 and 18; McCarroll Testimony; Murdock Testimony.]

42. Wayne Rogers, one of Mr. Longley's experts, testified that the Airport had "definitely" been maintained. [*See* Wayne Rogers testimony.]

43. Mr. Rogers also testified that:

g. asphalt inevitably shrinks and cracks due to environmental conditions;

h. the cracking he observed at Grassy Meadows was consistent with an airport of its age;

i. shrinkage and cracks by themselves do not indicate a lack of maintenance but are just a result of natural aging;

j. he had no reason to believe that the weeds or drainage issues he observed posed any kind of hazard;

k. the Airport was in fairly good condition compared to the other runways he has inspected.

[*See id.*]

44. Craig Ide, one of the Association's experts and the person in charge of inspecting the pavement at municipal airports across the state on behalf of the aeronautical division of the Utah Department of Transportation, testified that the Airport rated a 69 or "good" on the Pavement Condition Index. [*See* Exhibit 161 (Craig Ide Affidavit) at ¶ 7.]

45. Mr. Ide testified that the average score for municipal airports in 2003 was 59. [*Id.*]

46. With respect to the lighting on the Airport, Mr. Longley conceded that the lighting system was a military surplus system, which he bought on the cheap and installed himself. [*See* Longley Testimony.]

47. All the evidence introduced established that, while the lighting system was showing its age, it was generally kept in good working order—at least in the same condition as when it was installed, "normal wear and tear excepted,"[11] as permitted by the Lease. [*See* Exhibit 1 (Lease) at ¶ 8; Holt Testimony; Batson Affidavit; McCarroll Testimony.]

48. In addition to witnesses for the Association, another one of Mr. Longley's experts, Ryan Christensen, testified that, although there were some lights on the airport that needed replacing and others that needed cleaning and polishing, the lighting system worked when tested and performed the function is was designed to perform. [*See* Ryan Christensen testimony.]

49. Mr. Christensen acknowledged that when he was deposed shortly after inspecting the runway in late 2003 he testified that he "wouldn't be concerned about" landing on the Airport at night. [*See id.*]

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[11] Normal wear and tear is a significant factor to be kept in mind as it relates to the Airport and the lighting system in particular given the testimony of the harsh desert conditions that plagued the Airport. [*See* Longley Testimony; Christensen Testimony; Brewer Testimony.]

50. There are no lights on any of the taxiways, except for those in the FBO area owned and controlled by Mr. Longley. [*see* Brewer Testimony.]

51. Any lights on the Airport that were broken in March 2003, were subsequently and timely repaired by the Association. [*See* Murdock Testimony.]

52. At least one witness, a pilot and real estate expert who no longer has ties to any party in this matter, testified that he inspected the Airport at the very time Mr. Longley alleged it was in disarray and concluded that the Airport was in good condition and decided to purchase a lot in the community based thereon. [*See* Holt Testimony.]

53. Another witness, a pilot with no continuing ties to any party, testified that he also inspected the Airport around this same time and found it to be in "very good condition." [*See* Brewer Testimony.]

54. At no time have maintenance issues affected flight operations or compromised the safety of those using the Airport in any way. [*See* Longley Testimony; Murdock Testimony; Brewer Testimony; Holt Testimony, McCarroll Testimony; Habberfield Affidavit; Batson Affidavit and Santosuosso Affidavit.]

. . . .

62. Mr. Longley also asserted that the Association has failed to meet the "necessary insurance requirements" outlined in the lease. Once again, however, Mr. Longley did not specify what insurance requirements were not met other than to assert that the Association failed to seek his approval and provide him a copy of the policy. [*See* Exhibit 2 (Notice) at 2.]

63. Once the Association was apprised of Mr. Longley's concerns, it immediately made arrangements to have a copy of the insurance policy forwarded to Mr. Longley. [*See* Murdock Testimony.]

64. In fact, in his Final Notice, Mr. Longley states: "A mere statement in Lessee's counsel's letter of April 15, 2003 that the required insurance has been maintained and that a copy of the same is now belatedly being provided, is not enough." [*See* Exhibit 4 (Final Notice) at 2, ¶ 3.]

65. Contrary to Mr. Longley's statement, providing a copy of the insurance policy after being given notice of the outstanding need to do so is precisely what is contemplated in the Lease's notice and cure provision.

Moreover, the Association had little ability to cure its alleged failure to seek Mr. Longley's prior approval of the policy until it was time to renew the policy.

66. There is no evidence in the record that the Association failed to do this after being put on notice by Mr. Longley.

. . . .

72. Finally, Mr. Longley asserted that the Association's current lease payment was past due, but no evidence was presented at trial and no mention of any outstanding or delinquent lease payments was even made at trial.

73. Despite the deficiencies in Mr. Longley's allegations about the Airport, Mr. Longley sent a letter to the Association shortly after purportedly terminating the lease, stating: "Grassy Meadows Airport, Inc. [the lessor] has no desire to prohibit lot owners [the Association] from use of the runway . . . ." [*See* Exhibit 283 (Duane Ostler Letter of June 6, 2003).]

74. The Association thus continued to use the Airport virtually uninterrupted and has continued to use the Airport over the past seven-plus years without accident or undesirable incident of any kind. [*See* Longley Testimony.]

75. Mr. Longley has made no further assertions of breach by the Association during this time. [*See* Longley Testimony.]

R. 741 at 10–17.

Despite this overwhelming evidence, Sky Ranch asserts that the trial court clearly erred in finding that the Association substantially complied with its obligations under the lease. In so arguing, Sky Ranch does not assert that the above findings are not supported by sufficient evidence. Rather, it simply points to other evidence presented at trial that supports Sky Ranch's position. However, this in no way demonstrates that the trial court acted clearly erroneously in concluding that the evidence in support of substantial compliance outweighed the evidence in support of material breach.

Indeed, much of Sky Ranch's evidence of material breach is simply unpersuasive. For example, permeating throughout Sky Ranch's case is the argument that Sky Ranch failed in its "maintenance" obligation to repave the runway. *E.g.*, Brief of Appellant at 34. Sky Ranch thus argues: "The Lease did not provide for Sky Ranch to repave the runway—all maintenance responsibilities were in the hands of the Association." *Id.* at 36. In fact, resurfacing the runway is *not* included among any of the Association's maintenance responsibilities. R. 375a, Ex. 1, § 8 (detailing duty to "paint, level, compact, remove weeds, repair and oil the surface," but not resurface the runway). Rather, the Lease designated resurfacing as an "improvement," which the Association had the discretion to perform only if it wanted to. R. 375a, Ex. 1, § 6 ("Lessee *may* make improvements to the common areas, such as resurfacing the runway . . . .") (emphasis added). It is not surprising, therefore, that the trial court was unpersuaded by Sky Ranch's arguments, especially in light of the overwhelming evidence showing that the Association complied with all its contractual obligations to Sky Ranch.

2. Sky Ranch did not prove that it suffered any injury.

The second issue to analyze in determining whether or not a breach is material is to determine if the injured party can be adequately compensated for the benefits of which it was deprived. As set forth above, however, Sky Ranch was not deprived of any benefit under the lease. The Association (1) made all its lease payments; (2) maintained the airstrip in significantly better condition than the average municipal airport; and (3) corrected the clerical error resulting in Sky Ranch not being a named insured before Sky Ranch ever incurred any liability related to the airstrip.

In fact, the only evidence Sky Ranch put on in the entire trial regarding damages it allegedly incurred was Mr. Longley's cursory testimony that he "spent about $12,000" on cleaning up weeds and oiling fences. R. 755 at 22:16–20. However, Sky Ranch never produced any receipts or other documents to substantiate Mr. Longley's testimony.[12] *Id.* at 48:18–19. Thus, there is no credible evidence that Sky Ranch was harmed at all by any of the alleged breaches. Moreover, even if there were, Sky Ranch could easily be compensated for this loss by an award of damages. The availability of this standard remedy eliminates the justification for the drastic remedy of forfeiture.[13]

3. The Association would be damaged significantly if the Lease were terminated.

The Association would suffer greatly if the Lease were terminated. The very purpose for the development was to have access to a private airstrip. R. 741 at 2–3, ¶¶ 5-7. If access to the airstrip were now denied, the sole purpose for the development's existence would be eliminated, airplane hangars built by the Association's members would have no use, transportation to and from the development would be restricted and property values would decrease significantly. These reasons weigh strongly against forfeiture.

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[12] Mr. Longley initially claimed he had the receipts in a "file somewhere" but then accused his attorney of losing them only to finally admit that he did not know where they were—all in the same sentence. R. 755 at 48:21–23.

[13] This is not to say that Sky Ranch was, in fact, damaged. It had the burden to prove its damages with "reasonable certainty." *Cook Associates, Inc. v. Utah Sch. & Institutional Trust Lands Admin.*, 2010 UT App 284, ¶ 36, 243 P.3d 888 ("[Claimant] must also prove the fact of damage with reasonable certainty, and the amount of damages may not be speculative.") (citations omitted). Mr. Longley's unsubstantiated testimony fell far short of this standard. Thus, this Court should also affirm the trial court's decision not to award any monetary damages to Sky Ranch.

4. The Association has already cured whatever minor deficiencies that may have existed.

The question regarding the likelihood that the Association will cure its alleged breaches also weighs against forfeiture. This case provides a unique insight into this factor given that the Association has already cured all the alleged deficiencies. Indeed, Sky Ranch has not alleged any further deficiencies during the eight-plus years that have passed since it served its Notice of Termination on the Association in March of 2003. During this time the Association has continued to use the airstrip with Sky Ranch's acquiescence as it did during the 12 years preceding Sky Ranch's Notice, all without incident of any kind.

5. The Association always acted in good faith.

Despite whatever deficiencies that may have existed in the Association's efforts to comply with its obligations under the Lease, the evidence showed that the Association always acted in good faith. First, it must be noted that whatever deficiencies that may have existed were temporary or otherwise de minimis in nature. Moreover, as Sky Ranch itself noted, the Association engaged in "frenzied" efforts to cure the maintenance deficiencies once Sky Ranch brought them to the Association's attention. R. 741 at 10, ¶¶ 36–38. The Court also found that the Association "exercised good faith efforts to name Mr. Longley's development entity, Sky Ranch Development, Inc., as an additional insured in a timely fashion after being notified of the fact that the entity, for whatever reason, had been omitted as an additional insured." *Id.* at 16, ¶¶ 67–69.

The best evidence of good faith, however, lies in the fact that the Association has now operated the airstrip for over twenty years without any incident being attributed to

insufficient maintenance of any kind, and that with the exception of one brief period in 2003—at a time when the Association was resisting Sky Ranch's commercial development efforts—Sky Ranch has never asserted that the Association's has been lacking in its maintenance responsibilities or other obligations under the lease.

In short, far from clearly erring, the trial court correctly found that any breach of the Lease that may have occurred was immaterial and that termination of the Lease would be inappropriate in light of the substantial compliance doctrine. *Cache County*, 1999 UT App 134 at ¶¶ 28, 35–38; *see also State Dept. of Human Services ex rel. Parker v. Irizarry*, 945 P.2d 676, 678 (Utah 1997) ("An appellate court will not reverse the findings of fact of a trial court sitting without a jury unless they are against the clear weight of the evidence, thus making them clearly erroneous.") (internal quotations and citations omitted). The trial court also correctly held that Sky Ranch was not entitled to any monetary damages.

C. Sky Ranch Has Failed to Marshal the Evidence.

Finally, Sky Ranch has failed in its responsibility to marshal all the evidence in support of the trial court's findings. The Utah Rules of Appellate Procedure state that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." UTAH R. APP. P. 24(a)(9). The Utah Court of Appeals has elaborated on this requirement:

> Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. *In order to properly discharge the [marshaling] duty . . . , the challenger must present, in comprehensive and fastidious order, every scrap*

> *of competent evidence introduced at trial which supports the very findings the appellant resists*." Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Oneida/SLIC, 872 P.2d at1052–53 (emphasis added) (citations omitted); *see also Chipman v. Miller*, 934 P.2d 1158, 1162 (Utah Ct. App. 1997) (noting appellant's requirement to marshal all the evidence and then show that "the evidence, viewed in a light most favorable to the trial court, is legally insufficient to support the contested finding").

In this case, Sky Ranch has only cited to the trial court's findings. Sky Ranch has failed to marshal the actual record evidence supporting those findings. For example, as indicated by the detailed citations supporting each of its findings, the trial court relied on a number of affidavits and deposition transcripts admitted at trial, none of which were marshaled by Sky Ranch. Sky Ranch has also failed to marshal other record evidence not cited by the trial court that provides additional support to its findings. Because Sky Ranch has failed in its duty to marshal all the evidence in support of the trial court's findings, this Court should not countenance Sky Ranch's argument that the trial court's findings were clearly erroneous.[14]

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[14] For these same reasons, this Court should disregard Sky Ranch's argument that the trial court blindly adopted the Association's proposed findings of fact. Sky Ranch failed to marshal Plaintiff's actual proposed findings, which compared to the trial court's findings, reveal no fewer than 42 changes made by the trial court. The changes range from minor to major, and they all reveal the tedious process the trial court underwent in scrutinizing and modifying the proposed findings before adopting the modified version as his own.

IV. THE TRIAL COURT PROPERLY ADJUDICATED THE ENTIRETY OF SKY RANCH'S BREACH OF CONTRACT CLAIM.

Finally, Sky Ranch asserts the trial court erred in determining that the Association had paid all the lease payments to which Sky Ranch was entitled under the Lease because this issue was not before the court. Again, Sky Ranch's assertion is not supported by the facts of this case. As discussed throughout this brief, Sky Ranch brought a counterclaim against the Association for breach of the Lease. R. 489 at 5, ¶ 16. In support of this claim, Sky Ranch incorporated its Notice of Termination of Lease. *Id.* The Notice, in turn, alleged: "Breach of section 3, lease fee. The lease fee specified in section 3 has frequently been overdue over the years, and is currently past due." *Id.* at Exhibit 2 (R. 375a, Ex. 2 at 2, ¶ 4). That Sky Ranch failed to put on any evidence at trial in support of this claim does not mean the trial court erred in adjudicating the same. Indeed, the trial court would have been derelict in its duty not to resolve all the issues relating to Sky Ranch's claim.

In any event, were this claim not properly before the trial court for some reason, the trial court's ruling would constitute harmless error given the doctrine of *res judicata* and Sky Ranch's obligation to assert all compulsory counterclaims arising "out of the transaction or occurrence that is the subject-matter of the opposing party's claim." Utah R. Civ. P. 13(a). The Association's Complaint sought relief under a number of different causes of action based on the premise that it had not breached the Lease in any way and it was therefore improper of Sky Ranch to try to terminate the same. R. 1. Thus, the issue of breach was squarely a part of the complaint's subject-matter, and Sky Ranch had the obligation to raise all counterclaims in response to that issue or waive the right to raise them in a separate action.

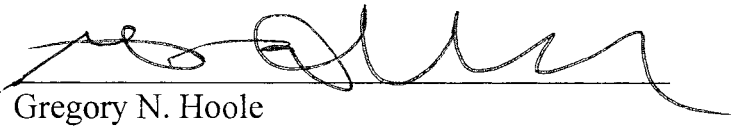
Raile Family Trust ex rel. Raile v. Promax Dev. Corp., 2001 UT 40, ¶ 12, 24 P.3d 980. Thus, whether bound by the trial court's judgment that the Lease was not breached for lack of payment or precluded to raise this issue in a separate action, the effect is the same and would therefore constitute harmless error. *Jones*, 944 P.2d at 360.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's findings and judgment.

RESPECTFULLY SUBMITTED this 20 day October, 2011.

HOOLE & KING, L.C.



Gregory N. Hoole
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of October, 2011, I caused two true and correct copies of the foregoing to be placed in the United States Mail, postage pre-paid and addressed to the following:

Nathan Whittaker
DAY SHELL & LILJENQUIST, L.C.
45 E. Vine St.
Murray, Utah 84107

✓ U.S. Mail
_____ Hand Delivery
_____ Overnight
_____ Facsimile

SUPPLEMENTAL ADDENDUM

Trial Transcript Excerpts (April 19, 2010)

CASE NO. 030501171
APPELLATE CASE NO. 20100925
DEPT. ST. GEORGE - #3A

IN THE FIFTH DISTRICT COURT IN AND
FOR WASHINGTON COUNTY, STATE OF UTAH

----ooOoo----

GRASSY MEADOWS SKY RANCH LANDOWNERS ASSOCIATION,

Plaintiff,

vs.

GRASSY MEADOWS AIRPORT, INC.,

Defendant.

TRANSCRIPT
OF
BENCH TRIAL

BEFORE THE HONORABLE G. RAND BEACHAM
DISTRICT COURT JUDGE

MONDAY, APRIL 19, 2010
9:30 A.M.

APPEARANCES:

For the Plaintiff: GREGORY HOOLE, ESQ.
JOHN RICHARDS, ESQ.

For the Defendant: CRAIG SMITH, ESQ.
CHRISTOPHER PRESTON, ESQ.

Transcribed by: Mary Beth Cook, CSR, RPR

know how to charge for the commercial areas and so forth. It's just that we hadn't had any commercial areas, but in '93 we had a fellow that owned a lot out at Sky Ranch that was actually an aircraft mechanic that wanted to put a building up there at Sky Ranch.

I've never talked to you about this before, Craig.

And so he had a building that it's actually at the Hurricane airport right now, and he wanted to put it in up there, and so we started to get together with the board to draft up these agreements. At the same time we did another set of agreements, and these were all signed at the same time.

MR. SMITH: I guess I would just move for admission of Exhibit 7.

MR. HOOLE: We object, Your Honor. Exhibit 7 I don't think is an executed contract. If you look at the signature lines, for the association it's written in by someone, Al Conger or Paul Mathias or Mathis. And then if you look through the document, it's red lined with all sorts of corrections and annotations.

It looks like this was a work in progress. In fact, that's our understanding is that this was a work in progress. It was never a fully executed or even agreed to document, so we would object on that basis.

THE COURT: It is in the stipulated group.

MR. HOOLE: No, Your Honor. As Mr. Smith began to talk this morning, this binder he thought contained a bunch of stipulated documents. As Mr. Preston corrected him, it actually has some that are not stipulated, and this is one of them that we certainly do not stipulate to its authenticity or validity.

THE COURT: Can Mr. Longley tell us more about this document that's here?

BY MR. SMITH:

Q Can you just tell us more about this document and how it came to be?

A Yeah. So then we started working on this. It took us maybe a year or a little less than a year, maybe a little more, and it was basically drafts that went back and forth between the board and myself. And like I say, it had to do with a lot of other important documents that they were interested in getting, like water connections that I gave them. Also when we included the runway safety -- the 10-acre runway safety zone at the end that I bought the property for and everything.

Q Did you perform your obligations under this agreement?

A Yes, I did. And we've got copies of the notes and the meeting minutes that show that this was done and approved to be signed and so forth. In fact, it was signed.

you see that says (inaudible) board of trustees meeting minutes July 9, 1994?

A No, I didn't see that. Let me find that. You've got those, huh?

Q Look at Exhibit 201.

A I see you guys have everything organized properly.

Q Identify Exhibit 201 for us.

A 201 is one of the meeting minutes that reflect this dated July 9, 1994.

Q What's important about that date?

A Well, it's a date when -- let me look at it a second here.

Q Let me have you go to page 3 of Exhibit 201.

A All right, yes. This is when -- yeah, they had a vote on that day. It was moved, seconded and carried --

MR. HOOLE: I have to object on foundation. The first page of the exhibit says that Mr. Longley was absent that day, so I think his rendering of any testimony regarding this exhibit is beyond his ability.

THE WITNESS: It says that I wasn't there at the meeting?

MR. HOOLE: That's what it says.

THE WITNESS: Yeah, I don't think I was either.

MR. SMITH: I just move for the admission of the exhibit.

going to work to put documents together in binders and all that kind of stuff, and with some of the documents we could stipulate as to authenticity to expedite things, but we were reserving all objections on whether it be hearsay or relevance or what ever. And Your Honor, I'm sure, has tried many, many cases. It's impracticable for an attorney to raise every conceivable objection to a document prior to -- even if they don't raise an objection, which we did, and no court is going to allow documents to come into trial without some foundation that's laid. I don't think that's waived in this case, Your Honor.

MR. SMITH: Your Honor, that's exactly what the rules apply for, so we don't waste all this time laying foundation on documents that there's no really real objection to foundation.

THE COURT: Well, there is a real objection to the foundation for this document. It's not a final document. It purports to be an agreement, but it's not signed.

MR. SMITH: I'm not talking about that document.

THE COURT: But you're talking about a document you're trying to use to then provide the foundation for another one. If you can show me in those minutes even if they were entered that say this document with all this scribbling on it is a final document or is an accurate expression of the parties' agreement, I'll be really

surprised. And so --

MR. SMITH: Can I read (inaudible), Your Honor?

THE COURT: I don't know whether it's appropriate to do that either. I'm looking at the pretrial order. All it says is exchange lists of witnesses and proposed exhibits. It doesn't say anything about objections.

MR. HOOLE: And why is it so, Your Honor?

MR. SMITH: Your Honor, we've already argued the point. How many times are we going to argue the same point over?

THE COURT: Calm yourself, Mr. Smith. It's not that big a deal. I don't see anything in the pretrial order that cuts one way or the other on that.

THE WITNESS: We've got more stuff that show that that's a good document.

THE COURT: So the answer to my question is nobody is really sure where even there is an original of this document, this agreement regarding development of FBO area and other phases, with original ink on it.

MR. HOOLE: That's true.

THE COURT: All anybody has is a copy of what ever that thing was that has been identified so far as not a final document and not a legibly signed document. You're referring to page 4 on these minutes.

MR. SMITH: Page 3, Your Honor. What that shows,

Your Honor, is that they did agree to an FBO improvement. That's the assent that they were just saying never existed and couldn't show. It's right there in that document. That's why they don't want the document in.

THE COURT: It doesn't show that that document existed. It shows that a document existed. "Provided a current Attachment A is made part of the document and provided there is at the end the landowners association acknowledges responsibility," and I don't know if that language is even in this thing. What about that? Have you tried to stitch these two document together? The minutes say provided there's added to the end of Paragraph 4, quote, the landowners association, and there's an indication there that says add sentence on draft page 3.

I really don't see what this exhibit does for me, Mr. Smith.

THE WITNESS: We have other documents --

MR. SMITH: (inaudible). What it does for you it shows that back in 1994, eight years before 2002, that the association was agreed to allow commercial use they now claim is in violation of the CC&Rs.

THE COURT: Mr. Longley can testify to that from his own knowledge. Again, I'm not certain that this document itself helps because this isn't the agreement. This is something that might have led to the agreement, but this

isn't the agreement itself. It's evidence that they talked about an agreement. There's evidence in the minutes, if they were admitted, that they talked about and approved an agreement if it had this and if it had that, and we don't even have a draft copy that has the this and that from the minutes. So it's just not really connected.

MR. SMITH: I withdraw Exhibit 7. I am going to move for the admission of Exhibit 201 because I think I'm entitled to have that in evidence.

MR. HOOLE: Same objection, Your Honor.

THE COURT: Don't we have anybody who can give us foundation for minutes from the association?

MR. SMITH: Not unless they object to it, Your Honor. That's why the rule says what it says.

THE COURT: I'm not talking about that rule because, again, I don't think it's a very practical provision, and I'll tell you why. It should be obvious. The way you employ that rule if you really want to be a pain or if you want to get away with something is you file in response to the rule 500 exhibits, and then give the party 15 days to respond or 14 days or what ever it is to make objections to it. It's idiotic. People can't do that. That's not realistic. That's something some committee in Salt Lake thought was a really snazzy idea, and it's stupid. It doesn't work. So now in this case what do we get out of

that rule? I'm just not --

MR. SMITH: If I would have known we were going to have foundational objections, I would have noticed up witnesses to be able to be here to lay foundation.

THE COURT: We've already talked about foundational testimony on other documents. Why were you not then saying I think Documents 1 through 35 and 202 through 319 and all these other piles of them?

MR. SMITH: I thought we were past that. If I knew they were raising foundational objections admitting some of those documents, I would have raised foundational objections. I thought we were past that because I followed the rule.

MR. HOOLE: I'm not sure what his exception for foundational objection. I know there's a rule that says all objections except for Rule 402 and 403 (inaudible) unless --

MR. SMITH: (inaudible).

MR. HOOLE: Excuse me. Unless there a pretrial order says differently or unless the parties stipulate to admit.

MR. SMITH: Don't say we stipulated. (inaudible).

MR. HOOLE: I'm not about to say that, Your Honor. I know Mr. Smith is pretty excited about this, and my apologies to the extent that Mr. Smith didn't understand that we were reserving all objections, but we told you we were reserving all objections with respect --

about it, that he --

Q That's fine.

A A lot it was that.

Q So your testimony is that 1997 creates the LLC though had nothing to do with the filing of the 2002 CC&Rs (inaudible)?

A Absolutely not.

Q If I can refer to the bylaws very, very quick. I have a blown-up copy here. I believe they're Tab 12 in the combined binder. We talked about briefly earlier the changes that came out of 2002 CC&Rs. This is the recorded -- actually I take that back. The bylaws have this parenthetical here down at the bottom. I understand the association has been operating under those for years and years and years that Class B membership automatically ceased on or about June 16, 1994. Now, I will acknowledge that in and of itself is nothing. Is this your signature here on the last page?

A It sure is.

Q Why did you sign it? Why did you allow your Class B votes to go away?

A Have's you ever seen how big Al Conger is?

Q That's all I wanted to ask on that question.

A I objected in the meeting to --

Q All I wanted to know is that your signature.

Trial Transcript Excerpts (April 20, 2010)

CASE NO. 030501171
APPELLATE CASE NO. 20100925
DEPT. ST. GEORGE - #3A

IN THE FIFTH DISTRICT COURT IN AND
FOR WASHINGTON COUNTY, STATE OF UTAH

----ooOoo----

GRASSY MEADOWS SKY RANCH LANDOWNERS ASSOCIATION,

Plaintiff,

vs.

GRASSY MEADOWS AIRPORT, INC.,

Defendant.

TRANSCRIPT
OF
BENCH TRIAL

BEFORE THE HONORABLE G. RAND BEACHAM
DISTRICT COURT JUDGE

TUESDAY, APRIL 20, 2010
9:14 A.M.

APPEARANCES:

For the Plaintiff: GREGORY HOOLE, ESQ.
JOHN RICHARDS, ESQ.

For the Defendant: CRAIG SMITH, ESQ.
CHRISTOPHER PRESTON, ESQ.

Transcribed by: Mary Beth Cook, CSR, RPR

see if it was safe and check out the runway lights -- well, the lighting system came after that, but I had a couple of things done. It's been a long time now.

Q And why don't you go to Exhibit 207.

THE COURT: Were you going to offer 293?

MR. SMITH: Yeah, we'll offer 293.

MR. HOOLE: No objection.

THE COURT: 293 is received.

(Thereupon, Trial Exhibit 293 was admitted into evidence.)

BY MR. SMITH:

Q What does Exhibit 207 show?

A That's a very nice shot -- those are a couple of guys I hired from Job Service to clean up weeds and probably about the second day or third day.

Q How much money did you spend to clean up the weeds (inaudible)?

A Between cleaning up the weeds and oiling the fences, buying a bunch of oil or some of the oil and hiring different people to come out there, I spent about $12,000.

Q Go to Exhibit 208 and ask if you can identify that exhibit.

A Yeah. That is -- these are pictures taken after the other ones were taken because we had gone through and cleaned it up. See there's a guy walking down the runway

THE COURT: Well, I think that, Mr. Richards, is an argument you can make just based on the documents without asking Mr. Longley about it unless there's some relevance to his view of them.

MR. RICHARDS: I will leave that as the document stands for itself.

BY MR. RICHARDS:

Q You indicated -- I believe you indicated that after the cure period expired, you hired some folks or gentlemen to help clean up the weeds, and you paid them about $12,000; is that correct?

A No.

Q What was your testimony?

A I hired about seven guys to help clean up the weeds, and altogether with all the activities I did during that period of time, hiring engineers and others, it cost about $12,000.

Q Do you have any receipts that would evidence that?

A Yes. I don't have them with me though.

Q (inaudible)?

A No. I think they're in a file somewhere. I think I gave them to Craig, and he lost them. I don't know. They're somewhere.

Q I'd like to turn your attention to the insurance policy that was discussed just a moment ago. We've already

enough time to do it today. If there's enough time, we can push forward; otherwise, maybe we can come back on a morning next week or so and do closing arguments.

THE COURT: That's a possibility.

MR. SMITH: We've got some -- I don't know that we can get it done quite that quickly, Your Honor. I'd like to think we could, but I don't think we could, and I would prefer just waiting until another day that we can come put on our evidence on that.

THE COURT: Okay. Then do you want me to try to work up some -- of course, starting with your proposed findings of fact and conclusions of law, do you want me to do those on the part of the trial I've heard, or do you want to reserve all of that and have one set of findings and conclusions?

MR. SMITH: I was going to say go forward.

MR. HOOLE: I think based on evidence that's come in, I would probably request submit a revised version. But I think I need to conform some of those findings that I would propose to the Court based upon the evidence that's actually been admitted so.

THE COURT: And then do that and then later try, if necessary, the issue of damages and tortious interference?

MR. SMITH: Tortious interference I think is in play no matter what we do.

was specifically provided in the declaration. That is exactly what the restatement of property says in every case that has applied to that restatement in a courtroom and has come to the exact same conclusion.

So we would submit, Your Honor, that not only is the declaration void because of the unambiguous language that says notwithstanding any other provision you can't amend once you pass the 80 percent threshold, but the proposed 2002 declaration -- not proposed. He filed it, and recorded it. The 2002 declaration was so far removed from the original plan and intent of that community that it would be void under all applicable law.

Tortious interference was the next thing that I was going to address. There hasn't been evidence on this point, but I believe I can make a brief argument by way of strict application of the law as far as (inaudible) is concerned. And the reason I think I can do this is regardless of what testimony comes in as to planning commissions and what the association did, the association is immune -- it's citizens are immune from liability for engaging in governing process, engaging in local process. The Utah Supreme Court is very clear on this point.

To quote, the Court says, The First Amendment to the United States Constitution guarantees citizens the right to, quote, petition the government for a redress grievances.

In recognition of this right, the United States Supreme Court has held that individuals and organizations -- and the reason I emphasize organization is because I thought I heard an argument in the restatement that First Amendment rights only apply to individuals, but the United States Supreme Court, as quoted by the Utah Supreme Court, says individuals and organizations are immune from liability and from antitrust laws for actions constituting petitions to the government.

And then the Court goes on and says, Over the years courts have extended this immunity doctrine referred to (inaudible) doctrine to protect political activity against tort claims as well as antitrust claims. And this quote came from a case where members of an association were getting sued for tortious interference because they opposed zoning ordinance changes, exactly what has happened in this case. So we would submit summarily that even regardless of what ever evidence is introduced by Mr. Longley, that claim must fail.

Let me just now move to the contract that we've heard so much about. And I want to emphasize, Your Honor, in talking about the lease that we're not talking strictly about a breach of contract here. What we're talking about, Your Honor, is the termination provision, sometimes referred to in the law as a forfeiture provision. So what we're really talking about is what is the proper remedy.

say, well, he'd be in the position if he got the lease terminated who else is he going to lease the place to? It's a Mexican standoff, Your Honor. He can't pick up the runway and take it somewhere else and market it somewhere else. The only people that he could lease or let use the runway are the people that live. He doesn't have any choice on that. He doesn't have any way to do that.

Okay, let's take a minute and talk about the, quote, citizen's right of redress. I think there's confusion here, Your Honor. We're confusing the fact that the association last time I checked wasn't a citizen. We're not suing Mr. Ron what ever his name was that went out there -- you know, trying to stop this. We haven't even gotten all that evidence on. I think it's all premature because we haven't had a chance to put our evidence on about tortious interference.

But let me think. Did we say anybody -- again, people can go do things. I think I said this in my opening. I thought I cleared this up, but I guess not. People can go and exercise their constitutional rights. No doubt about that. There's Utah case involving Anderson (inaudible). Those people had (inaudible) agreement. Now, they claim they weren't in agreement. Mr. Longley the only testimony we heard is that there was an agreement. I didn't hear anybody say there wasn't an agreement, and that (inaudible). He said

he performed on it. Did we hear any evidence that he didn't perform on it? Partial performance, we don't have to have a written agreement.

Let's see what else did he say? He said that the head of the association came over and took his copy that was signed and never gave it back. I think that's called spoliation of evidence in this state, but, you know, put all those together. Mr. Longley doesn't hold all the cards, and there's not all of that sort of thing.

Now we have to talk about materiality of the covenant defaults. Let's talk about that for a minute. First of all, let's read the lease the way it's written. I never saw any clause in the lease that said you only had to maintain the airport to allow (inaudible) safe. That's not in the lease. Again, let's go back to the documents themselves. Let's don't spend our time making up language that isn't there. That's what's happened here. They say, well, we think it's quote safe, so no harm no foul. We believe the runway was safe.

Well, also they have two depositions in record, one of Jesse Debusschere and one Nick Berg. Both of those who are residents of Sky Ranch said they felt that there was problems with the lights. The bigger problems they said they sometimes shut off, shut on, sometimes it works and wouldn't work. And how much maintenance did we have of the lights?