Rec'd. 3-16-87
Peggy Rabeler
Per request - Steve Rogers

STEVEN E. ROGERS
ATTORNEY AT LAW
8002-B DOWLING COVE
AUSTIN, TEXAS 78745
(512) 445-5728

March 10, 1987

VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED # P-582-306-423

The Commissioners Court of
Jeff Davis County, Texas
c/o Honrable Ann Scudday
County Judge, Jeff Davis County
Jeff Davis Courthouse
Fort Davis, Texas 79734

Re: Your recent approval on July 14, 1986, of certain plats and replats of the Davis Mountains Resort by L.J.B. Enterprises and J. Larry Stewart.

Dear Judge and Commissioners:

I am writing this letter on behalf of Richard L. McLaren, a resident and taxpayer in Jeff Davis County, Texas. I am sending it to you as a collective body through your presiding judge and chief administrative officer of Jeff Davis County, Ann Scudday. This letter is directed solely to your actions taken on July 14, 1986, in approving the plats and replats of certain lands in the Davis Mountains Resort, Precinct One, Jeff Davis County, Texas.

This letter serves two distinct purposes. The first is to obtain from you a written basis for approval of these plats. The second is to inform you that your actions are not "done in good faith reliance upon well settled law." Accordingly, pursuant to federal precedent, these actions become the actions of you personally, and not actions done in your official capacity as elected representatives of the people of Jeff Davis County, Texas.

Texas Revised Civil Statutes 6702-1, sec. 2.401(b) is the basis for a commissioners court's approval of a plat for a subdivision. Since your authority in approving or disapproving

plats flows from this statute, it is the controlling standard for you to employ in approving or disapproving plats for filing. See Tex. Const. art. V, sec. 18; Canales v. Laughlin, 214 S.W.2d 451, 453 (Tex. 1948). If your actions are found to conflict with this statute, your action is automatically voided. Brown v. Meeks, 96 S.W.2d 839, 842 (Tex. Civ. App. -- San Antonio 1936, writ dism'd.).

Texas Revised Civil Statute 6702-1, sec. 2.401(b), the County Bridge and Road Act, expressly states:

> (b) **The owner of any tract of land** situated without the corporate limits of any city in the State of Texas, who may hereafter divide the same in two or more parts for the purpose of laying out any subdivision of any such tract of land, . . **shall cause a plat to be made thereof , which shall accurately describe all of said subdivision or addition by metes and bounds and locate the same with respect to an original corner of the original survey of which it is a part.**

This statute then continues:

> (c) **Subject to the provisions contained in this section, such plat shall be filed for record in the office of the County Clerk.**

This statute then continues:

> (e) **The commissioners court of the county shall have the authority to refuse to approve and authorize any map or plat of any such subdivision unless such map or plat meets the requirements as set forth in this section.**

Accordingly, L.J.B. Enterprises' plats must be accurately described "with respect to an original survey corner of the original survey of which it is a part" in order for the commissioners court to lawfully approve the plats for filing. In the event that the plats are legally defective, the commisioners court shall exercise its authority and not approve the plats.

The original surveys of the land upon which these plats are to be further developed, as established by the General Land Office of the State of Texas, are as follows:

(1). Steven Archer's original surveys of 1856 recorded in the abstracts of each survey block in the General Land Office, as well as in the Presidio County Survey Book 1 of the records of Jeff Davis County;

(2). W. J. Glenn's 1881 survey system W.J.G. 1 (E.L. & R.R. Ry. Co.) recorded in the abstracts of each survey block in the General Land Office, as well as Field Note Book D of the records of Jeff Davis County;

(3). S. A. Thompson's 1882 survey system 224 (T. & St.L. Ry. Co.) recorded in the abstracts of each survey block in the General Land Office, as well as Field Notes Book A of the records of Jeff Davis County; and,

(4). William C. Wilson, Jr.'s 1969 reconstruction and correction survey of the W.J.G. 1 survey system (E.L. & R.R. Ry. Co.) recorded in the abstracts of each survey block in the General Land Office, as well as the Field Note Book J and Patent Book 4 of Jeff Davis County.

Even a layman's cursory examination of the L.J.B. Enterprises plats reveals that none of the plats are tied to a point that is locatable upon the ground, much less to any original corner of any original survey. Accordingly, these plats are defective based upon the controlling Tex. Rev. Civ. Stat. art. 6702-1, sec. 2.401(b); and, your acceptance and approval of these plats is additionally unlawful.

My examintaion of the minutes of the July 14, 1986 meeting, as well as my discussion with the people present at the meeting, reveals your collective belief, based upon legal counsel's advice, that you must file these plats. This is simply wrong.

The only basis for such a misunderstanding might be your reliance upon Texas Property Code 12.002(b)'s statement that "the commissioner's court of the county in which the land is located must authorize the map or plat by order duly entered in the minutes of the court." However, this statute, which provides for the procedural and formal mechanics of how a plat is filed of public record, does not control the substantive requirements for the filing of a plat. This, as shown, is controlled solely by Tex. Rev. Civ. Stat. 6702-1, sec. 2.401(b).

You must understand that this is not some academic exercise in county government "i" dotting and "t" crossing. Your official stamp of approval on the continued development of the Davis Mountains Resort only lays another thin layer of veneer to the rotting wood of the title to lands in the Resort. Your constituents shall be the people to suffer by your failure to diligently exmaine the claims made by them.

The simple fact is that state school lands are under the development; that the developers have known of this throughout the development of the Resort; that the developers have employed surveys voided and cancelled by the General Land Office to conceal this fact; that the developers have sought to conceal these facts so that they can further line their pockets with the hard earned wages of your constituents without having to pay for the proper development of the land; and, that not a single piece of land's title conveyed in the Resort is valid.

The hard, honest truth is that the developers have employed their money, their personal influence, and even -- tragically -- your own court to further their fraudulent acts and practices. Accordingly, you are hereby given notice of these facts, as set forth in historical detail, and as supported by the public records cited in class action Cause No. 1395, Richard L. McLaren et. al. vs. L.J.B. Enterprises et. al., filed in the 83rd Judicial District Court, Jeff Davis County, Texas.

Your actions, being now personal actions not taken as commissioners of Jeff Davis County, are not based upon "good faith reliance upon clearly settled law." Your actions appear to be based upon erroneous legal advice and a clear misunderstanding of your responsibilites imposed by state consitituion and statute.

I look forward to your written reply. I am, as always,

Sincerely,

Steven E. Rogers

SER/jc

To: Commissioners Court of Jeff Davis County , Texas
Collectively and Individually in their Elected Capacity Under Oath.

Bob Dillard, County Judge
Bill Cotton
Billy Weston
Bill Gerhart
Chris Lacy

April 5,1994

CMRRR 2-780-828-249

From: Richard L. McLaren
P.O. Box 282
Fort Davis, Texas 79734

RE: Request for information under the Texas Open Records Act

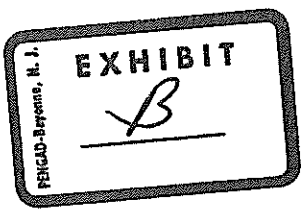
Dear Commissioner's and County Judge,

You are hereby requested to take Judicial notice of the Constitution of the United States and its Bill of Rights, and the Constitution of the State of Texas, and its Bill of Rights. Additionaly, take Judicial Notice of Texas Revised Civil Status; 6626 A, as revised as; 6702-1; as revised as; 232.001.

This is a request for information under the Texas Records Act. Which involves subdivision Plats of Record, filed in the County Clerks office allegedly involving acts or actions of this court. Which have placed these Plats into records which are being used as a basis for the Conveyance of Real Property to land allegedly being claimed to be the Davis Mountains Resort Subdivision.

These Plats are as follows:

Volume 23, Pages 57-66, Date: June 1971, File Date: 6/25/71



Volume 23, Pages 67-76, Date: Sept.1971, File Date: 9/13/71
Volume 23, Pages 77-86, Date: Nov. 1971, File Date:11/6/71.
Volume 23, Pages 87-96, Date: Nov.1971, File Date:11/8/71
Volume 23, Page 162, Date: June13,1977, File Date: 2/13/78
Volume 23, Page 165, Date: Dec. 1977, File Date: 7/13/78
Volume 24, All 33 Plats
Volume 25, All 20 Plats
Slot 5/C Date: Nov. 1985, File Date: 7/14/86
Slot 6/D Date: May,1989, File Date: 6/10/89

Pursuant to these Plats:
please indicate which, or any of these Plats are in compliance to, but not limited to the following in respects to the revised Civil Status in force at the time of their recordation and filing.

Request:

1. Which Plats accurately describe all of said Subdivision or Addition by Metes and Bounds,and locate the same with respect to an original corner of the original survey of which it is part.

2. Pursuant to question No. 1, for approval and recordation of these plots.

3. Which plats are duly acknowledged by the owners or proprietors of record at the time of Commissioners Court approval in accordance with Deed Records.

Gentlemen you are mandated under your oath of office with the preservation and protection of the life and property of county citizens as such if you find in your investigation that these plats were recorded in violation of the law you have no choice but to issue a resolution suspending their use from further use as the basis of conveyance to title to real property, to prevent further damages being incurred by the use of these plats against county citizens.
I look forward to the production of information requested or your actions to protect my rights and property.

Sincerely,

Richard L McLaren

CC: All Commissioners
CC: County Judge

AFFIDAVIT.

STATE OF TEXAS
COUNTY OF TOM GREEN

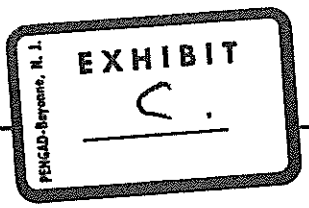
BEFORE ME, the undersigned authority, on this date, personally appeared WM. C. WILSON, JR., known by me to be the same, who, upon his oath by me sworn, stated the following:

"I am WM. C. WILSON, JR. I am a Licensed State Land Surveyor; a Registered Public Surveyor; the owner of the surveying firm of Wm. C. Wilson, Jr. and Associates, 1514 West Beauregard Avenue, San Angelo, Texas; and, by appointment of both Governor Bill Clements and Governor Mark White, a member of the Texas Board of Land Surveying. I am a charter member, as well as a former director and former President-Elect, of the Texas Surveyors Association. I have served on that association's Standards Committee since its inception in 1975. On this committee I have helped develop and publish the "Manual of Practice -- Standards and Specifications for Surveying in Texas." I have been engaged in surveying in the State of Texas since November 10, 1949, and was Licensed as a State Land Surveyor in March, 1958.

"I am legally authorized and competent to give this affidavit. The facts contained herein are true and correct, and based upon my own personal knowledge. I have received no remuneration or payment from any person for the provision of this affidavit. I give this affidavit merely to redress what I consider to be a great injustice, and to further the science of my chosen profession in the State of Texas.

"On Friday, March 13, 1987, I presented testimony to the Honorable Alex Gonzalez, District Judge of the State of Texas, 83rd Judicial District of Texas, sitting in Fort Davis, Jeff Davis County, Texas. This testimony was presented under oath, duly recorded by the District Court's certified court reporter, Bob McGlaughlin, Alpine, Texas, in open court. At such time, the following testimony was offered:

(1) The Davis Mountains Resort, Jeff Davis County, Texas, as developed, is based upon a series of surveys which are not only



professionally invalid, but also not in compliance with the surveying and subdivision laws of the State of Texas.

(2) That in 1969, while under contract to landowners immediately adjacent to the Davis Mountains Resort, I reconstructed the original survey system (E.L. & R.R. Co., Block W.J.G. 1) upon which approximately one-half of the Davis Mountains Resort is developed. In doing this reconstruction, I recovered the original survey points and corners of the original, senior surveys of the approximate 75 section survey system. In doing this reconstruction, I discovered that the original survey blocks contained within the system were erroneous based upon a three (3) degree error in the computation of the original ninety (90) degree base angle. My discovery revealed the entire survey system to be shifted from its original calculations.

(3) After completing the extensive, on-the-ground reconstruction of the survey system, and after completing my in-the-office computations of the effects of the reconstruction, I submitted my findings to the General Land Office of the State of Texas. The General Land Office accepted my reconstruction survey as being the legitimate authority for the conveyance of legal title; and, accordingly, reissued corrected patents to various parcels of real property in the system. My reconstruction survey was then filed of public record in the records of the General Land Office (File No. 100809, Abstract No. 2491; File No. 100810, Abstract No. 2492; File No. 123132, Abstract No. 2976; File No. 86587, Abstract 1826; File No. 144661, Abstract No. 3442; File No. 148617, Abstract No. 3560; File No. 148750, Abstract No. 3579), and the records of Jeff Davis County, Texas (Book J, pp. 16-24). These matters were of public record since May 1, 1970.

(4) The net effect of the General Land Office's acceptance of the reconstruction survey for the issuance of corrected patents was to invalidate, void and cancel the surveys completed by other persons in the survey system upon which approximately one-half of the Davis Mountains Resort was constructed.

(5) Several years later the Davis Mountains Resort was developed. The persons who developed the Resort, and who to this very day continue to develop the Resort, have failed to employ or even acknowledge the 1969 reconstruction survey, but instead have employed in a piece-meal fashion the cancelled and invalidated prior surveys. It appears that the developers selected not to employ or acknowledge the legal effects of the 1969 reconstruction survey in order to avoid the expense involved in properly establishing a valid perimeter survey and series of internal surveys. It appears that the developers selected to avoid the expense based upon their knowledge of the existence of unsurveyed and/or unpatented state school lands in the area upon which they had selected to develop the Resort.

(6) The net effect of the developers' failings is the establishment of an approximate then thousand (10,000) acre subdivision, containing approximately nine-hundred seventy five (975) individual parcels of land individually owned, resting upon a survey system, which, being in violation of state law, is incapable of being the basis for the conveyance of title to real property.

(7) Specifically, the following failings exist:

(a) No perimeter survey exists for the creation of the subdivision.

(b) The internal surveys, or platting of the subdivision, are additionally defective for their failure to tie to any original survey corner as required by state law.

(c) The internal surveys, or plats of the subdivision, are additionally defective based upon their failure to be signed by either a surveyor or engineer.

(d) The internal survey, or plats of the subdivision are additionally defective in that they have been unlawfully replatted by the developer. The developer has simply redrawn existing plats, changed the boundaries of previously conveyed lots, caused overlaps of previously conveyed lots, caused the taking of previously conveyed lots, caused the platting of new

roads through persons' homes or away from already constructed improvements.

(8) The end result of this myriad of incompetent development is the simple fact that the platting and surveying of the Davis Mountains Resort, Jeff Davis County, Texas, is, at best, a geometrical drawing of something, somewhere in Jeff Davis County, Texas. It is in my opinion totally incapable of being the basis for the conveyance of title to real property.

(9) My on-the-ground investigation of the land upon which the Resort has been developed, as well as my thorough review of public documents by which title has been conveyed, leads me to form the opinion that the Resort is constructed in an area of numerous gaps, discrepancies and encroachments in which it is very typical to discover lands owned by the State of Texas. These state lands shall be in the form of unpatented school lands, unsurveyed school lands, and excess in patented lands.

(10) In my 29 years of surveying lands in the State of Texas, I have participated in the surveying of millions of acres of this state's land. I have done so professionally and honestly. I have been fortunate to actively participate in the advancement of my profession for the betterment of the people of the State of Texas. However, In my wide experience as a Licensed State Land Surveyor and Registered Public Surveyor, I have never encountered a subdivision riddled with as many fatally defective survey errors. It is my opinion that is is impossible to convey title to real property in the Davis Mountain Resort, Jeff Davis County, Texas.

WITNESS my hand this the 20th day of July, 1987.

WM. C. WILSON, JR.

SWORN TO before me on this the 20th day of July, 1987.

Notary Public In and For the State of Texas. My commission expires:
2/11/91
Lori D. Warren
Printed Name of Notary

FILED FOR RECORD

This 17th Day of August 1927

at 10:10 o'clock A M.

Peggy Robertson Clerk
County Court, Jeff Davis Co., Texas

THE STATE OF TEXAS
COUNTY OF JEFF DAVIS

I, Peggy Robertson, Clerk of the County Court of said County, do hereby certify that the foregoing instrument of writing was filed for record in my office on the 20th day of July, A.D. 1987, and duly recorded this 17th day of August 87 at 10:10 o'clock a m., and duly recorded this 17th day of August 87, at 10:35 o'clock a m., in the Deed Records of said County in Volume 129 on page 28.

Witness my hand and seal of office at Fort Davis, Texas, the day and year last above written.

Peggy Robertson
Clerk County Court, Jeff Davis County, Texas

By _____ Deputy

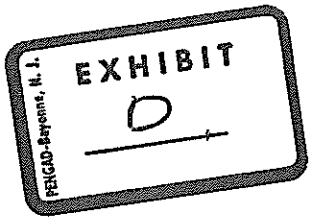
No. 1572

CONCERNED PROPERTY OWNERS ASSOCIATION, Plaintiffs	*	IN THE DISTRICT COURT OF
VS	*	JEFF DAVIS COUNTY, TEXAS
DAVIS MOUNTAINS PROPERTY OWNERS ASSOCIATION, INC. Defendant	*	83RD JUDICIAL DISTRICT

NOTICE OF CERTIFICATION OF CLASS ACTION AND HEARING

To: Any person who is the owner of a lot or lots in Davis Mountain Resorts, a subdivision in Jeff Davis County, Texas, hereinafter called the "Subdivision"

You are hereby given notice that on the 11th day of April, 1995, the presiding Judge of the 83rd Judicial District Court of Jeff Davis County, Texas certified cause No. 1572, as a class action lawsuit, naming as the Counter Plaintiff Class, all lot owners in the Subdivision, supporting the Counter Plaintiff's, Davis Mountain Property Owners Association, Inc., hereinafter called "the Association," requests for declaratory judgments, as set out in the Defendant's Second Amended Answer, Counterclaims, Motion for Suit in the Name of Members of Unincorporated Association, Request For Declaratory Judgment, Request For Dismissal Of Part Of Plaintiff's Suit, And Request For Certification As A Class Action, on file in this cause of action, to be represented by the Association, and naming as the Counter Defendant Class, all lot owners in the Subdivision opposing the requests for declaratory judgments, for judgments for maintenance



fees, interest, and attorney's fees, as set out in the Defendant's Second Amended Answer, Counterclaims, Motion for Suit in the Name of Members of Unincorporated Association, Request For Declaratory Judgment, Request For Dismissal Of Part Of Plaintiff's Suit, And Request For Certification As A Class Action, on file in this cause of action. You either received at the annual meeting of the members of the Association and signed for or attached hereto you will find a copy of the Defendant's Second Amended Answer, Counterclaims, Motion for Suit in the Name of Members of Unincorporated Association, Request For Declaratory Judgment, Request For Dismissal Of Part Of Plaintiff's Suit, And Request For Certification As A Class Action to inform you of the basis of the class action and the potential liability that you as an individual member face.

The Association has requested that Counter Defendants George Lagarde and Deborah Lagarde, George A. Fenley, Jr, and Vi Webster, be named as Counter Defendant Class Representatives, but the attorney for the Counter Defendant Class, Mr. Stephen E. Rogers, has requested that the Counter Defendant Class Representatives not be chosen until the time of the hearing set out in the next paragraph.

TAKE NOTICE THAT ON THE 14TH DAY OF AUGUST, 1995, AT 10:00 O'CLOCK A.M. IN THE 83RD JUDICIAL DISTRICT COURT OF JEFF DAVIS COUNTY, TEXAS AT FT. DAVIS COUNTY, TEXAS, THERE WILL BE A HEARING FOR ANY MEMBER OF EITHER CLASS TO APPEAR BEFORE THE COURT AND

CHALLENGE THE COURT'S DETERMINATION AS TO THE CLASS ACTION OR THE REPRESENTATIVE OF THE COUNTER PLAINTIFF CLASS AND TO PROVIDE FOR INPUT BEFORE THE APPOINTMENT OF THE COUNTER DEFENDANT CLASS REPRESENTATIVE OR REPRESENTATIVES.

This is a suit arising out of the development of the Subdivision by Global Land Corporation, hereinafter called "GLC." The Association has requested declarations that restrictions in executory contracts for the sale of lots in the Subdivision and dedicatory instruments on file are applicable to all lots in the Subdivision, give it the right to collect assessments from lot owners and a lien to secure the same. The Association has also requested damages for wrongful entry of injunctions and for wrongful appointment of a receivership in this case, interest, and attorney's fees, from the Counter Defendant Class. The Association also seeks judgments against all lot owners who have not paid their maintenance fees, interest, and attorney's fees.

The Counter Defendant Class opposes the declarations, judgments for fees or assessments, interest, and the relief the Association is requesting as well as the granting of attorney's fees.

The judgment, whether favorable or not, will include and bind all members of each class. At the hearing, you may appear before the Court and challenge the Court's determinations as to the class that you are in and its representative or representatives. Unless you file a designation with the Court otherwise, you will be

presumed to be a member of the Counter Plaintiff Class if you have paid your maintenance fees or assessments. Unless you file a designation with the Court otherwise, you will be presumed to be a member of the Counter Defendant Class if you have not paid your maintenance fees or assessments. Attached hereto is a Request For Designation Of Class Membership. You are requested to fill out the same and to return it to Ms. Sue Blackley, District and County Clerk, P. O. Box 398, Fort Davis, Texas 79734, as a means of declaring in which class you want to be included.

Respectfully submitted
BRUCE IAN SCHIMMEL, P.C.

By: Bruce Ian Schimmel
BRUCE IAN SCHIMMEL
1990 Post Oak Boulevard, #1600
Houston, Texas 77056
(713) 961-221
(713) 552-0202 (fax)
SBOT 17749350
Counsel For Counter-Plaintiff

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COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

L.J.B. ENTERPRISES and LARRY STEWART,	§	No. 08-93-00099-CV
Appellants,	§	Appeal from the
v.	§	83rd Judicial District Court
	§	of Jeff Davis County, Texas
RICHARD L. McLAREN, et al.,	§	(TC# 1395)
Appellees.	§	

JUDGMENT

This cause came on to be heard on the record of the court below, and the same being considered, and it being the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the Appellees do have and recover of and from the Appellants and their cash deposit in lieu of a cost bond, all costs in this behalf expended, both in this Court and in the court below, for which let execution issue, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 20TH DAY OF JANUARY, 1994.

/s/ Richard Barajas
RICHARD BARAJAS, Justice

Before Panel No. 4
Koehler, Barajas, and Larsen, JJ.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

L.J.B. ENTERPRISES and LARRY STEWART,	§	
	§	No. 08-93-00099-CV
Appellants,	§	Appeal from the
v.	§	83rd Judicial District Court
	§	of Jeff Davis County, Texas
RICHARD L. McLAREN, et al.,	§	(TC# 1395)
Appellees.	§	

OPINION

This is an interlocutory appeal from an order granting certification as a class action. In a single point of error, Appellants assert that the trial court abused its discretion in certifying the action as a class action under Rule 42(a) of the Texas Rules of Civil Procedure. We affirm the order of the trial court.

I. SUMMARY OF THE EVIDENCE

On October 1, 1979 and July 2, 1982, Appellee Richard L. McLaren purchased real property from Appellants in the Davis Mountains Resort, located in Jeff Davis County, Texas.

Additionally, the other named Plaintiffs/Appellees own real property within the confines of the Davis Mountains Resort, although the sources from which they purchased their property varies from individual to individual.

Appellees allege that Appellant Stewart, in the furtherance of developing the Davis Mountains Resort, systematically surveyed the lands of the resort operating pursuant to his alter ego L.J.B. Enterprises. Appellees further allege that Appellants discovered material, substantive errors in the original development of the resort. Specifically, that Appellants learned that the resort had been constructed on surveys that had been previously canceled by the General Land Office of the State of Texas.[1]

Appellee McLaren brought this action alleging breach of warranty of title and oral misrepresentations allegedly made by Appellants and relied upon by Appellees.[2]

On February 15, 1991, forty-nine individuals sought to intervene in the present action, and sought certification of a class, pursuant to the then pending Motion For Class Certification. Additionally, Appellees filed an Amended Notice of Intervention in which they again sought the granting of their Motions for Certification of Class.

On March 9, 1993, the trial court entered an order certifying this cause of action as a class action pursuant to Rule 42 of the Texas Rules of Civil Procedure. Appellants filed their Request for Findings of Fact and Conclusions of law that were ignored by the trial court.

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[1] The record shows that William C. Wilson, a licensed state land surveyor, testified that the Davis Mountains Resort is based upon a series of defective surveys which fail to be tied to any locatable point on the ground. Wilson further testified that the internal platting process of the resort is defective. Wilson opined that it is impossible to convey marketable title within the confines of the resort. His testimony showed that all property owners in the resort area are so affected. Finally, Wilson stated that in excess of 900 persons were owners of real property in the resort and that the development included over 8,000 acres.

[2] The other named Plaintiffs/Appellees brought actions alleging breach of restrictive covenants and breaches of contractual and/or fiduciary obligations of Appellants.

II. DISCUSSION

In their sole point of error, Appellants maintain that the trial court abused its discretion in certifying the action as a class action under Rule 42(a) of the Texas Rules of Civil Procedure. Specifically, Appellants assert that Appellees failed to show that: (1) they are typical of all property owners located within the Davis Mountains Resort; (2) they meet the commonality requirements of TEX.R.CIV.P. 42(a)(2) and 42(b)(4); and (3) prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudication.

A. Standard of Review

Trial courts enjoy a wide range of discretion in determining whether a lawsuit should be maintained as a class action. An order certifying a class may not be disturbed on appeal unless a trial court has clearly abused its discretion. *Chevron U.S.A. Inc. v. Kennedy*, 808 S.W.2d 159, 161 (Tex.App.--El Paso 1991, writ dism'd w.o.j.); *Amoco Prod. Co. v. Hardy*, 628 S.W.2d 813 (Tex.App.--Corpus Christi 1981, writ dism'd); *Dresser Indus., Inc. v. Snell*, 847 S.W.2d 367, 371-72 (Tex.App.--El Paso 1993, no writ). A trial court abuses its discretion only when its actions are without reference to any guiding principles, are arbitrary or unreasonable. *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439, 443 (Tex. 1984); *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939). That a trial judge decided an issue differently than would the appellate judge, does not alone demonstrate an abuse of discretion. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985). In reviewing the order certifying the plaintiffs' class, this Court is required to view the evidence in a light most favorable to the trial court's action and indulge every presumption favorable to the trial court's

judgment. *Parks v. U.S. Home Corp.*, 652 S.W.2d 479, 485 (Tex.App.--Houston [1st Dist.] 1983, writ dism'd); *Dresser*, 847 S.W.2d at 372.

As noted in *Dresser*, in order to maintain this lawsuit as a class action, plaintiffs must first satisfy four requirements:

(1) the class is so numerous that it is impracticable to join all members;

(2) there are common questions of law or fact;

(3) the representative parties have claims or defenses typical to the class; and

(4) the representatives will fairly and adequately protect the interests of the class.

Dresser, 847 S.W.2d at 372; *Chevron*, 808 S.W.2d at 161; TEX.R.CIV.P. 42(a). Once the above prerequisites have been met, the plaintiffs must also pled and prove that the action falls within one of the categories for maintenance of class action set forth in Tex.R.Civ.P. 42(b). *See George v. United Fed. Savings and Loan Ass'n*, 63 F.R.D. 631, 636 (N.D. Ga. 1974).[3]

In *Dresser*, as in the instant case, Appellants claimed that Appellees have failed to satisfy the commonality or the typicality requirements of TEX.R.CIV.P. 42. Justice Susan Larsen, writing for the *Dresser* Court addressed these two issues as follows:

COMMONALITY

> The factual or legal basis for the suit must be common to all members of the class in a class action. Tex.R.Civ.P. 42(a). The commonality requirement, however, does not mean all questions of law and fact must be identical, but rather that an issue of law or fact exists that inheres in the complaints of all the class members. *Cooper v. University of Texas at Dallas*, 482 F.Supp. 187, 191 (N.D. Tex. 1979). There are a number of common issues to be decided here, including: whether defendants participated in a tortious scheme to short materials in the 523 wells; whether the defendants' acts caused damage to the class of royalty and

[3] Tex.R.Civ.P. 42, which governs class actions in Texas, is patterned after Fed.R.Civ.P. 23. For that reason, federal case law interpreting the federal class action rule is frequently utilized by Texas courts to construe Tex.R.Civ.P. 42. *See Smith v. Lewis*, 578 S.W.2d 169, 172 (Tex.App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.).

overriding royalty interest owners; whether defendants' acts were such that punitive damages should be assessed. The common questions here are sufficient to justify the certification of a class.

TYPICALITY

The claims of the class representatives must be typical of the claims of the class as a whole. Tex.R.Civ.P. 42(a); *Gilchrist v. Bolger*, 89 F.R.D. 402, 406 (S.D. Ga. 1981); *Pellman v. Cinerama, Inc.*, 89 F.R.D. 386, 389 (S.D.N.Y. 1981). The United States Supreme Court has defined the typicality requirement as mandating that the representative "possess the same interests and suffer the same injury." *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403, 52 L.Ed.2d 453, 462, 97 S.Ct. 1891, 1896 (1977). Although it is not necessary that the named representative suffer precisely the same injury as the other class members, there must be a nexus between the injury suffered by the representative and the injuries suffered by other members of the class. *See Gilchrist*, 89 F.R.D. at 404-05. The claims or defenses need not be identical or perfectly coextensive, only substantially similar. *Chevron*, 808 S.W.2d at 162. In the *Chevron* case, this Court reviewed a class certification order that also involved royalty interest owners with differing individual damage claims. Because the class claims were based upon the same event or the same legal theories, however, this Court ruled that the varying damage claims would not defeat class certification.[4] This case is similar to *Chevron*, and we will follow our reasoning in that case here.

Dresser, 847 S.W.2d at 372

We find the contentions advanced by the Appellants in *Dresser* to be strikingly similar to those of Appellants in the case sub judice. In the instant case, Appellants complain that the class of Appellees do not share common questions of law and fact and are not typical of one another because not all members of the class acquired title directly from Appellants.[5] We disagree.

---

[4] *But see Amoco Production Co. v. Hardy*, 628 S.W.2d 813, 817 (Tex.App.--Corpus Christi 1981, writ dism'd)(class of royalty interest owners decertified because each claim was under a differing lease, requiring individual findings as to each, thus common questions did not predominate).

[5] Appellants assert that "[t]he obvious distinction between the named Plaintiffs and the property owners as a whole centers around from whom each individual property owner obtained transfer of title." Further, Appellants contend that the key facts are different for each property owner in that some property owners obtained title directly from defendants L.J.B. Enterprises and Larry Stewart, that the property owners have asserted or will assert breaches of warranty of title, and that some property owners spoke directly with L.J.B. Enterprises and/or Larry Stewart in the obtaining of their property while others did not.

The record before this Court shows that the alleged tortious acts of Appellants affect all Appellees in the same manner. All property owners in the Davis Mountains Resort area potentially have the same problem, i.e., lack of marketable title to their respective properties due to the alleged fraud of the Appellants. Thus, the named plaintiffs in the case below are typical of the much broader potential class. The common thread that binds this class of Appellees is not from whom they acquired property but the diminution in value of their property due to non-marketable title caused by Appellants' alleged fraud in developing the subdivision. Consequently, we find that the trial court did not abuse its discretion in determining that the Appellees met both the commonality and typicality requirements of TEX.R.CIV.P. 42.

Next, Appellants, relying on *McBirney v. Autrey*, 106 F.R.D. 240 (N.D. Tex. 1985), claim that Appellees have failed to show that a class action is superior to other available methods for the fair and efficient adjudication of this controversy or that separate actions might create the risk of inconsistent or varying adjudication.[6] We find Appellants' reliance on *McBirney* to be misplaced because: (1) Appellants are potentially liable to all Appellees whose property value has diminished due to his alleged fraud and (2) the real issue is whether the trial court abused his discretion in granting Appellees class certification.

The test for establishing predominance of common issues is whether they will be the object of most of the efforts of the parties and court, not whether common issues outnumber individual issues. A judgment in favor of the class members should decisively settle the entire controversy, and all that should remain is for class members to file proof of their claims. *Dresser*, 847 S.W.2d at 374, 375, *citing Life Ins. Co. of the Southwest v. Brister*, 722 S.W.2d

[6] Appellants maintain no risk of inconsistency exists where a defendant may be liable for damages to one plaintiff but not to another, since paying one claimant is not inconsistent with not paying another claimant. *McBirney v. Autrey*, 106 F.R.D. 240, 245 (N.D. Tex. 1985).

764, 772 (Tex.App.--Fort Worth 1986, no writ). In deciding whether common issues predominate, the trial court need only identify substantive law issues that will control the litigation; the court does not weigh the substantive merits of each class member's claim, nor need the class representatives make any extensive evidentiary showing of their right to prevail. *Id.* at 772-73. Further, even in cases where it is not conclusively established that common issues predominate, the most efficient approach is for the trial court to certify the class, and if necessary after the case is developed, to dissolve the class or certify subclasses if common questions will not predominate at trial. *Dresser*, 847 S.W.2d at 374, 375, *citing Life Ins. Co. of the Southwest*, 722 S.W.2d at 775.

Just as in *Dresser*, the instant case contains numerous potential plaintiffs (possibly as many as 900) who have twice requested that they be certified as a class in order that their common issues be resolved. We find the reasons advanced by Appellants fail to establish an abuse of discretion on the part of the trial court. Accordingly, Appellants' sole point of error is overruled in its entirety.

Having overruled Appellants' sole point of error, we affirm the order of the trial court.

January 20, 1994.

/s/ Richard Barajas
RICHARD BARAJAS, Justice

Before Panel No. 4
Koehler, Barajas, and Larsen, JJ.

(Do Not Publish)

CAUSE NO. 1395

RICHARD L. MCLAREN, ET. AL., Plaintiffs,	§	IN THE DISTRICT COURT OF
VS.	§	JEFF DAVIS COUNTY, TEXAS
L.J.B. ENTERPRISES, ET. AL., Defendants.	§	83RD JUDICIAL DISTRICT

ORDER GRANTING CLASS CERTIFICATION

On this date came on to be considered the pending Motion to Certify Class Action both of Intervenors and Plaintiffs, and this Honorable Court, having reviewed the pleadings on file, the evidence presented in support thereof, and the arguments and authorities of counsel, finds such motions meritorious.

IT IS, THEREFORE, ORDERED, that this action is certified as a class action pursuant to Tex. R. Civ. P. 42.

SIGNED this the 9th of March, 1993.

JUDGE PRESIDING

5:20P

MAR 9, 1993

Peggy Robertson
District Clerk

FILED

This 24 Day of July 1995 AM 11:15

Sue Blackley Clerk

District Court, Jeff Davis Co., Texas

Deputy

No. 1692

RICHARD L. McLaren,

RELATOR

VS.

COMMISSIONERS COURT OF
JEFF DAVIS COUNTY, TEXAS,

RESPONDENT

IN THE 83RD JUDICIAL

DISTRICT COURT OF

JEFF DAVIS COUNTY. TEXAS

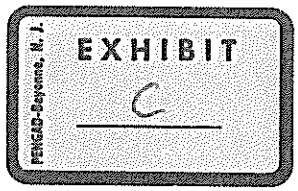
BRIEF IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

TO THE HONORABLE DISTRICT JUDGE:

Comes now Richard L. McLaren, the **Relator**, in the above numbered Cause and files this his Brief in support of his petition for a Writ of Mandamus and would respectfully show this Court in support of his petition the following:

That Mandamus may lie to both compel action by public officials who have a legal duty to preform a ministerial act or who have abused their discretion.

Womack v. Berry. 291 S.W. 2d 677, (Texas Sup. Ct. 1956)
A.L. Crouch v. Ollie Stanley. 390 S.W. 2d 795, (Eastland 1965)
Alice National Bank v. Edwards. 383 S.W. 2d 482, (Corpus Christi 1964)



That on or about April 7, 1986, the **Respondent's** presiding agent (County Judge Ann Scudday) was served with legal notice and a further direct presentation was made by **Relator** before the **Respondent** on Monday, July 13, 1986, involving the unlawful maintenance of a statutory subdivision which was approved by the **Respondent** or its predecessor members for which the plats of this alleged subdivision were being used as the basis of the conveyances of real property and the placement of liens and encumbrances.

As such the **Respondent** was now on both legal and constructive notice that their former and current acts were never in compliance with statutory law and could no longer be regarded as mere ministerial duties or acts but those depriving a citizen of unquestioned legal rights.

Commissioners Courts v. Frank Jester Development Co., 199 S.W. 2d 10044, 1007 (Tex. Civ. App.- Dallas 1947, writ ref'd n.r.e.;) City of Corpus Christi v. Unitarian Church, 436 S.W.2d 923, 927 (Tex. Civ. App-Corpus Christi 1968, writ ref'd n.r.e.). Also see Attorney General Opinion JM-317 (1985)

Due now to the **Respondent's** intentional abuse of its discretion and its unwillingness to seek a remedy and issue and order to vacate their previous actions to comply with the statutory requirements (See Brown v. Meeks, 96 S.W. 2d 839, 842 (Tex. Civ. App-San Antonio 1936, writ dism'd), the **Respondent** continues to exercise their abuse of statutory requirement and continues to approve and support the maintenance of an unlawful system of plats in furthering an unlawful statutory subdivision including title and encumberment to real property

thereto, flowing from their past and their continued acts and actions and the predication of unmarketable titles.

Thus the **Respondent** has now positioned itself by its past and continued acts in supporting deeds and records flowing from these plats in the assumed position of **Grantor to Title**; and as such, actions must be resolved against the grantor. **Kunlies et al. v. Reinert et. al. 256 S.W., 2d 435**

It is well established in Texas Cases of Judicial Review that in order to have plats both filed and recorded, they must meet the requirements of law pertaining to the establishment of subdivision.

Cowboy Country Estates v. Ellis County 692 S.W. 2d 882 (Tex. App 10 Dist 1985). Lacy v. Hoff. Tex. App. 633 S.W. 2d 605. Myers v. Zoning & Plan. Com'n of City of W. Univ. Pl 521 S.W. 2d 322.

In further support that the existing plats or alleged subdivision plats are defective and unlawful in nature, the General Land Office, in a letter signed by Staff Attorney Spencer L. Reid dated November 10, 1986, to Francis Glaze of the Jeff Davis County Abstract Company, stated in respect to the title and deed problems of the Davis Mountains Resort: **"The fact that the descriptions in the deeds to the resort do not tie to the patented surveys does not mean the state has any claim to the land. It simply means the description is incomplete so that the property cannot be located with any degree of certainty."** See attached **Exhibit "A."**

Additionally, this local abstract company and/or its agents has refused to confirm in writing, when challenged by a title attorney representing a lawful purchaser of land in the alleged subdivision, that the **Respondent** had lawfully created the Davis Mountains Resort subdivision as the basis for marketable title. See **Exhibit "B."**

Thus these further acts support the defects of these plats as basis to convey marketable title and fail to meet the Statute of Fraud. See:

Kansas University Endowment Association et. al. v. R.V. King et. al. 350 S.W. 2d 11, Davis et. al. v. Kirby Lumber Corporation et. al. 158 S.W. 2d 888 Dunlap-Swain Tire Co. v. A. Pollard Simons et. al. 450 S.W. 2d 378, Manning v. Barnard 277 S.W. 2d. 160. Jones v. Kelly Tex. 614 S.W. 2d 95.

Summary

In conclusion, based upon the extensive pervious uncontested testimony in this court by Licensed State Land Surveyor Wm C. Wilson and the Court of Appeals Eighth District of Texas, El Paso, Texas, to uphold this court's previous decision to certify a **Class Action**, based upon the defective and unlawful plats and subdivision and in view of the support of Texas case law, the **Relator** feels that the evidence fully supports his petition for this court to issue a Writ of Mandamus.

Prayer

WHEREFORE, RICHARD L. MCLAREN, **Relator**, respectfully requests and prays that:

1. This court grant a hearing to the **Relator** on this petition for a Writ of Mandamus;

2. Notice of the filing of this petition and the hearing date be given to all parties;

3. Following the hearing, this court grant **Relator** a Writ of Mandamus directed to the **Respondent** Commissioners Court of Jeff Davis County, Texas, commanding that they enter this order; then issue an order duly and properly vacating the unlawful plats for the basis of a Statutory Subdivision of the county known as the Davis Mountains Resort as follows:

Volume 13, Pages 57-66, Date June 1971, File Date 6/25/71
Volume 23, Pages, 67-76, Date: Sept 1971, File Date 9/13/71
Volume 23, Pages 77-86, Date: Nov. 1971, File Date 11/6/71
Volume 23, Page 87-96, Date: Nov. 1971, File Date 11/8/71
Volume 23, Page 162, Date: June 13, 1977, File Date 2/13/78
Volume 23, Page 165, Date: Dec. 1977, File Date 7/13/78
Volume 24, All 33 Plats
Volume 25, All 20 Plats
Slot 5/C Date Nov. 1985, All Plats, File Date 7/14/86
Slot 6/D Date May, 1989, File Date 6/10/89

4. The Court would Grant such other and further relief to which **Relator** may be entitled.

By: _____

Richard L. McLaren
C/O HCR-74 Box 101A
Fort Davis Texas PZ 79734
Relator

Verification before the Court

I hereby certify under oath before the Clerk of Court that the following Brief in Support for a Writ of Mandamus is based upon my personal knowledge and is to the best of my knowledge true and correct.

Richard L McLaren

Subscribed an sworn to before me, this 24 day of July 1995

Witness my hand and seal of office, at Fort Davis Texas

this 24 day of July 1995

Sue Blackley
Clerk of the District Court
Jeff Davis County Texas

Certificate of Service

I hereby certify that a true and correct copy of the forgoing Brief with exhibits was forwarded to C/O The Honorable Peggy Robertson, County Judge for **Respondent** Commissioners Court Jeff Davis County, Texas, P.O. Box 836, Fort Davis, Texas, Certified Mail Returned Receipt Request this the 24 day of July 1995.

Richard L. McLaren

Texas General Land Office
Asset Management Division

Spencer L. Reid
Director

Garry Mauro
Commissioner

November 10, 1986

Jeff Davis County Abstract Company
P.O. Box 813
Fort Davis, Texas 79734

Attn: Francis C. Glaze

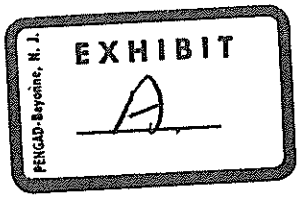
Dear Mrs. Glaze:

Based on the information that you have provided, I have verified that property in the Davis Mountain Resort has been the subject of a vacancy filing by Mr. Steven E. Rogers. The commissioner has made no determination that a vacancy does indeed exist. Furthermore the application is substantially incomplete and will require a lot more information before it can even be considered by the commissioner.

There is apparently a lot of confusion over the problem. The fact that the descriptions in the deeds to the resort do not tie to the patented surveys does not mean the state has any claim to the land. It simply means the description is incomplete so that the property cannot be located with any degree of certainty. The state will only have claim to land which is unsurveyed and located between patented surveys. It is possible that a vacancy could exist but it is unlikely that it will affect more than a few acres of the subdivision. The law clearly gives current occupants of a vacancy a preference right to purchase the land before it can be sold. Such occupants are considered "Good-faith Claimants" under the law. Any landowners so affected will receive personal notice from the state before the property can be sold to any other applicant.

I think it is premature for any landowners in the area to be distressed over the possibility that the state has a claim to their land. I have added your name to the notice sheet for this application which will insure that you receive notice of any proceeding affecting this application.

Stephen F. Austin Building
1700 North Congress Avenue
Austin, Texas 78701
(512) 463-5236

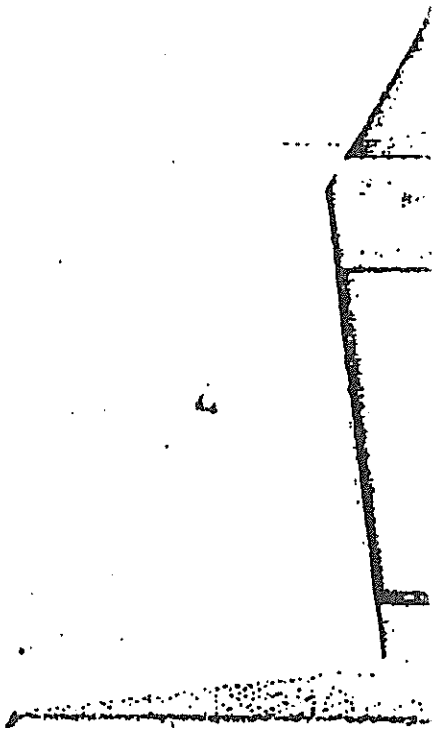


Please call me at 512-463-5236 if you need any further information on this matter.

Sincerely,

Spencer Reid
Staff Attorney

SR/nde



William A. Faulk
A Professional Corporation
2039 E. Price Road, Suite B
Brownsville, Texas 78521

William A. Faulk
Attorney at Law

Fax (512) 544-5762

William A. Faulk, Jr.
Attorney at Law

Telephone (512) 546-5304

October 1, 1992

Jeff Davis County Abstract Company
P. O. Box 813
Fort Davis, Texas 79734

RE: DAVIS MOUNTAIN RESORTS

Gentlemen:

Please be advised that I have a client who is interested in purchasing some property in the above subdivision. He has indicated that there may be some problems in regard to this particular subdivision and has asked me to inquire of you as to these problems.

1. Does this Subdivision have access to state highway 166 and if so, is the access a private easement or a public easement.

2. Is any portion of this subdivision a state land which has not been patented.

3. Will the streets, roads, and rights-of-way in this subdivision be maintained by the county or is there an Association or authority which has assessment powers for the maintenance for these rights-of-way.

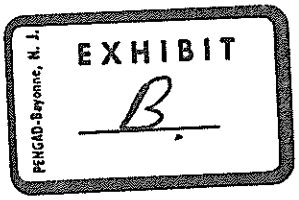
4. Has a subdivision plat been properly filed of record and is the title to lots in this subdivision insurable.

Your response to these questions and your furnishing any other significant information concerning this subdivision would be greatly appreciated.

Yours very truly,
WILLIAM A. FAULK, P.C.

William A. Faulk

WAF/ma



FRED S. PFEIFER
Post Office Box 97
Los Fresnos, Texas, 78566-0097

Phone-FAX: 210-233-5678
Mobile Phone: 210-605-1261

February 9th, 1993

Mr. L. D. Whitehead
General Partner, Vineyard at the Ridge
Davis Mountains Resort
Via FAX: 214-393-0072

Mr. Whitehead:

As you know I have for more than a year been trying to find a way to put together an investment group, including myself, to purchase your **Vineyard at the Ridge** and the adjoining winery at Davis Mountains Resort near Fort Davis Texas.

I had brought to the area for an on-site visit an attorney from Brownsville, Texas, Richard Hoffman, who was interested investing in the project. In additon, one of my associates, Robert Diaz DeLeon, the city manager of the City of Donna, Txas, and a international bridge consultant, had visited the site with the idea of investing. He had contacted one of his associates in Monterrey, and architect-engineer who already has invested in vineyards, and who had shown an interest in the unique product which you had planned to produce in the Davis Mountains.

As part of putting together the investment package, I had my attorney in Brownsville, Texas, Mr. William A Faulk, send the attached letter to Jeff Davis County Abstract Company, which I understand is owned by Lynn Baldwin. This was sent October 1st of 1992, and to date I am informed by Mr. Faulk that we have received no response.

Mr. Faulk also happens to be the President of Cameron County Title Company in Brownsville, Texas. He finds it strange that there has been no response.

The bottom line is that because of this gray area concerning the titles on the property in Davis Mountains Resort, I must assume that all lands in the Davis Mountain Resort, including the Vineyard, do not have marketable title. This includes the acreage I have discussed buying from you, that property known as "High Meadows".

Therefore, at this time, I have informed my partner that it is my recommendation that The Vineyard at the Ridge and the Winery not be considered as an investment.

Please keep me informed should the situation change.

Respectfully:

FRED S. PFEIFER

Copies: Mr. Steven E Rogers, Attorney FAX 214-828-4286
Jeff Davis County Abstract Company 915-426-3844
Concerned Property Owners Association 915-336-8934

Enclosure: William A Faulk letter of October 1st, 1992

William A. Faulk
A Professional Corporation

William A. Faulk
Attorney at Law
Fax (210) 544-5762

855 W. Price Road, Suite 5
Brownsville, Texas 78520

William A. Faulk, Jr.
Attorney at Law
Telephone (210) 546-5304

March 31, 1993

Mr. Fred S. Pfeifer
P. O. Box 97
Los Fresnos, Texas 78566-0097

Re: DAVIS MOUNTAIN RESORTS

Dear Fred:

I recently received a telephone call from Jeff Davis County Abstract Company in response to my letter of October 1, 1992.

They made some general statements indicating there was access to SH 166 and there was a pending lawsuit. They did not wish to respond in writing to the specific questions in my letter.

Yours very truly,

William A. Faulk

WAF:ddm