

Complaint

97 F.T.C.

IN THE MATTER OF
HORIZON CORPORATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9017. Complaint, March 11, 1975—Final Order, May 15, 1981

This order requires, among other things, a Tucson, Arizona land sales company, one of the largest sellers of undeveloped land in the Southwest, to establish as specified in order, a \$14.5 million trust fund to be distributed to eligible past purchasers. The order also requires the firm to make prescribed disclosures regarding the risks involved in undeveloped land investment; provide purchasers with a cooling-off period in which to cancel their dealings; and furnish a "NOTICE TO BUYERS" that provides prospective purchasers with pertinent information regarding the property, roads, utilities and recreational facilities. Respondent is further prohibited from discouraging purchasers from consulting with a real estate specialist prior to purchase; using high pressure sales tactics; using state and federal property reports as endorsements and utilizing certain contractual provisions, including one whereby defaulting purchasers forfeit all payments made. Additionally, the firm is required to ensure that \$45 million is spent to improve certain properties over a 20-year period and establish and maintain a surveillance program designed to detect violations of the order.

Appearances

For the Commission: *Alan N. Schlaifer, S. Ricardo Narvaiz, Eugene Kaplan and Lemuel Dowdy.*

For the respondent: *Glenn A. Mitchell and David Fierst, Stein, Mitchell & Mezines, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Horizon Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent Horizon Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 4400 East Broadway, Tucson, Arizona.

2. Respondent Horizon Corporation, from its aforementioned principal place of business, operates through, dominates and controls the acts and practices of its subsidiaries, and derives pecuniary and other benefits from the acts and practices of said subsidiaries.

3. Respondent is now, and for some time last past has been engaged, directly or through its subsidiaries, in the business of acquiring undeveloped land, subdividing said land into lots, and advertising, offering for sale, and selling said lots to the public.

4. Among the properties in which lots have been and/or are being offered for sale by respondent are the properties known as Paradise Hills and Rio Communities located in the State of New Mexico; Horizon City and Waterwood located in the State of Texas; and Arizona Sunsites, Whispering Ranch, and New Tucson located in the State of Arizona. The acreage of these properties is substantial. Most of these properties are divided into numerous and variously named subdivisions.

5. Respondent usually sells the lots in its properties to purchasers who have not seen their land by means of standard form contracts, titled "Agreement for Deed" and "Receipt of Deposit", hereinafter referred to in this Complaint as a "contract", whereby the purchaser generally pays monthly installments over a term of approximately eight years. According to the provisions of the contract, title to the lot remains in the respondent until final payment is made, at which time title to the lot passes to the purchaser. As to most of its properties, respondent agrees in the contract only to cause a road fronting on the property to be completed within thirty days after the purchaser has completed his payments or approximately eight years from the date of signing the contract, whichever is later. The contract provides that the purchaser pays interest to respondent during the contract term on the unpaid balance owing under the contract.

6. In the course and conduct of the aforesaid business, respondent now causes, and for some time last past has caused, its promotional materials, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from its place of business in Arizona to its agents, representatives, employees, customers and prospective customers in various other States and territories of the United States, the District of Columbia, and foreign nations. Respondent now maintains and operates, and for some time last past has maintained and operated, places of business and has made substantial sales to purchasers in the various other States of the United States, the District of Columbia and foreign nations. Respondent maintains, and at all times mentioned herein has

maintained, a substantial course of trade in said land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

7. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of land.

8. In the course and conduct of the aforesaid business, respondent disseminates advertisements through television and radio broadcasts and in various publications of general circulation, distributes promotional material through the mail and in person to members of the public, and makes sales presentations by means of oral and written statements, slides and movies. By and through such means, respondent has made and is making various statements and representations, directly or by implication, concerning the size, good reputation, financial security, and integrity of Horizon Corporation.

9. By and through the use of such statements and representations, respondent Horizon Corporation has permitted and participated in the use of its name for the purpose of selling land and deriving pecuniary benefits therefrom.

I

10. In the further course and conduct of the aforesaid business, respondent disseminates advertisements through television and radio broadcasts and in various publications of general circulation, distributes promotional materials through the mail and in person to members of the public, and makes sales presentations by means of oral and written statements, movies and slides. By and through such means, respondent has made and is making various statements and representations concerning the supply of and demand for land; the liquidity or marketability of land; land prices and values; land as an investment; principles of buying land; personal financial security; inflation; the stock market, banks and annuities; population growth and movement; the location of industrial, commercial and recreational facilities; the past, present and future suitability of lots in respondent's properties for investments or homesites; the financial terms for real estate investment; the size of respondent's assets and net worth; the tax advantages of owning real estate; the various options or financial protections afforded purchasers of respondent's land; and the repurchase or resale by respondent of lots acquired by purchasers from respondent.

11. By and through the statements and representations alleged

in Paragraph 10 herein, respondent has represented and is representing, directly or by implication, that the lots which respondent is offering for sale are, at the prices at which respondent is offering them for sale, excellent investments, and that there is little or no financial risk involved in the purchase of said lots at said prices.

12. In truth and in fact, in a significant number of instances the lots which respondent is offering for sale, at the prices at which respondent is offering them for sale, are not excellent investments involving little or no financial risk to purchasers. Therefore, the acts and practices alleged in Paragraph 10 herein are deceptive.

II

13. In the further course and conduct of the aforesaid business, respondent has offered and is offering for sale lots in its properties without disclosing to prospective purchasers that the lots being offered are, at the prices at which respondent is offering them, risky investments in that, *inter alia*, the future value of the lots being offered is uncertain and the purchaser probably will be unable to sell his lot, or his interest in it under the contract, at or above the purchase price. Therefore, respondent has failed to disclose material characteristics of its lots which, if known to certain consumers, would be likely to affect their consideration whether to purchase a lot from respondent. Such failure to disclose is a deceptive or unfair act or practice.

III

14. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, concerning the past, present, and future development of respondent's properties, and inclusiveness of the purchase price of a lot. The aforesaid statements and representations use words and terms such as "communities", "community developer", "master plan", "land use plan", "new cities" and other words or terms of similar import.

15. By and through the statements and representations alleged in Paragraph 14 herein, respondent has represented and is representing, directly or by implication, that substantially all lots are now, or by approximately the end of the purchaser's scheduled

payments will be, located within a self-contained and fully developed community, and that the price of the aforesaid lots is all-inclusive.

16. In truth and in fact:

(a) Lots in respondent's properties are not now and will not be, by approximately the end of the purchaser's scheduled payments, located within a self-contained and fully developed community.

(b) It is not part of respondent's express contractual obligation, nor is it part of respondent's land development program, to develop its properties beyond the placement of an unpaved road fronting the purchaser's property. Respondent has no obligation to maintain these roads.

(c) Respondent's properties consist primarily of vacant acreage with limited industrial, commercial, shopping and recreational facilities; limited amenities; and limited public services. In substantially all instances the only building which has occurred or, in most instances, is likely to occur in each property is in areas reserved by respondent. The amount of such building is insignificant in relation to the total acreage of each property and the length of time respondent has been offering for sale and selling lots located within each property.

(d) The purchase price of substantially all lots in respondent's properties is not all-inclusive.

(i) For substantially all lots in respondent's properties other than Waterwood, paved roads and central sewer systems are not available. Telephone service and electricity are available only at unreasonable prices. Central water systems are either not available or available only at unreasonable prices. In addition, most purchasers are required to join and make payments to an improvement association.

(ii) For most lots in Waterwood, central water and sewer systems, paved roads, electricity and telephone service are available only through substantial payments which all purchasers are required to make to an improvement association and to a municipal utility district. Such payments include both annual charges and a one-time charge at the time the purchaser desires that such services and utilities be made available. In addition, the purchaser must also fulfill other significant conditions in order to obtain such utilities and services for his lot.

Therefore, the acts and practices alleged in Paragraph 14 herein are deceptive.

IV

17. In making the statements and representations alleged in Paragraph 14 herein containing express or implied references to the past, present and future development of respondent's properties, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, the following information:

(a) Lots in respondent's properties are not now and will not be, by approximately the end of the purchaser's scheduled payments, located within a self-contained and fully developed community.

(b) It is not part of respondent's express contractual obligation, nor is it part of respondent's land development program, to develop its properties beyond the placement of an unpaved road fronting the purchaser's property. Respondent has no obligation to maintain these roads.

(c) Respondent's properties consist primarily of vacant acreage with limited industrial, commercial, shopping and recreational facilities; limited amenities, and limited public services. In substantially all instances the only building which has occurred or, in most instances, is likely to occur in each property is in areas reserved by respondent. The amount of such building is insignificant in relation to the total acreage of each property and the length of time respondent has been offering for sale and selling lots located within each property.

(d) The purchase price of substantially all lots in respondent's properties is not all-inclusive.

(i) For substantially all lots in respondent's properties other than Waterwood, paved roads and central sewer systems are not available. Telephone service and electricity are available only at unreasonable prices. Central water systems are either not available or available only at unreasonable prices. In addition, most purchasers are required to join and make payments to an improvement association.

(ii) For most lots in Waterwood, central water and sewer systems, paved roads, electricity and telephone service are available only through substantial payments which all purchasers are required to make to an improvement association and to a municipal utility district. Such payments include both annual charges and a one-time charge at a time the purchaser desires that such services and utilities be made available. In addition, the purchaser must also

fulfill other significant conditions in order to obtain such utilities and services for his lot.

Each element of information set forth above is a material fact, knowledge of which would be likely to affect the decision of certain consumers whether to sign a contract for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is an unfair or deceptive act or practice.

V

18. In the further course and conduct of the aforesaid business, respondent has offered and is offering for sale property divided into numerous and variously named subdivisions. The names of such subdivisions are often similar to each other; and, in addition, such subdivisions or the properties in which they are located are often referred to collectively.

19. The practices alleged in Paragraph 18 herein have the capacity and tendency to lead significant numbers of consumers to believe that the past, present or planned development for one subdivision is the same as the past, present or planned development for another subdivision.

20. In truth and in fact, respondent offers for sale and does sell lots in subdivisions which have not received and are not intended by respondent to receive the same degree of development. Therefore, the acts or practices alleged in Paragraph 18 are deceptive.

VI

21. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public and to persons who have purchased respondent's lots, by means of various publications of general circulation, promotional materials, and sales presentations involving oral statements, written statements, movies and slides, concerning the locations; the designation as "single-family residential", "multi-family residential" or "commercial"; and the value of respondent's lots; and, in the case of persons who have already purchased lots, the exchange of their lots for other, more expensive lots.

22. By and through the statements and representations alleged in Paragraph 21 herein, respondent has represented and is representing, directly or by implication, that more expensive lots having certain locations or certain designations have a greater value than

other lots, and, accordingly, in the case of persons who have already purchased lots, that it is generally to their advantage to exchange their lots for more expensive lots in other locations or with other designations.

23. In truth and in fact, in substantially all instances there is no significant difference in the value, if any, of lots offered for sale, regardless of their location or designation; and, accordingly, in the case of persons who have already purchased lots, it is not generally to their advantage to exchange their lots for more expensive lots in other locations or with other designations. Therefore, the acts and practices alleged in Paragraph 21 herein are deceptive.

VII

24. In making the statements and representations alleged in Paragraph 21 herein, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, that the designation of lots as "single-family residential", "multi-family residential" or "commercial" is only the designation used by respondent; that in substantially all instances there is no significant difference in the value, if any, of lots offered for sale, regardless of their location or designation; and that, accordingly, in the case of persons who have already purchased lots, it is not generally to their advantage to exchange their lots for more expensive lots in other locations or with other designations. These are material facts, knowledge of which would be likely to affect the decision of certain consumers whether to sign a contract for the purchase of land from respondent or, in the case of persons who have already purchased land from respondent, whether to exchange their lots for more expensive lots in other locations or with other designations. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

VIII

25. In the further course and conduct of the aforesaid business, respondent has made and is making various oral statements and representations to prospective purchasers concerning repurchase or resale by respondent of lots acquired by purchasers from respondent.

26. By and through the statements and representations alleged in Paragraph 25 herein, respondent has represented and is representing, directly or by implication, that it will either buy back from or resell for purchasers lots acquired from respondent.

27. In truth and in fact, respondent does not buy back from or

resell for purchasers lots acquired from respondent. Therefore, the acts and practices alleged in Paragraph 25 herein are unfair or deceptive.

IX

28. In the further course and conduct of the aforesaid business, and in some instances after a purchaser has signed a contract, respondent has made and is making various statements and representations to members of the public and to persons who have purchased respondent's lots, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, concerning the sizes of respondent's lots and the ability of owners of such lots to fully use their property for homesites now or in the future.

29. By and through the statements and representations alleged in Paragraph 28 herein, respondent has represented and is representing, directly or by implication, that all or substantially all the land within a designated lot is now or will be in the future fully usable by the owner.

30. In truth and in fact, in many instances all or substantially all the land within a designated lot is not now and will not in the future be fully usable by the owner, because various easements and other physical features affect the full use and enjoyment of said lot. Therefore, the acts and practices alleged in Paragraph 28 herein are deceptive.

X

31. In making the statements and representations alleged in Paragraph 28 herein containing express or implied references to the sizes of respondent's lots and the ability of owners of such lots to fully use their property for homesites now or in the future, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, the existence, nature, location, size and significance of all easements and other physical features which affect the full use and enjoyment of such lots. These are material facts, knowledge of which would be likely to affect the decision of certain consumers whether to sign contracts for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XI

32. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, wherein certain well-known personalities, specifically Mery Griffin and Leif Erickson, make statements and representations concerning, but not limited to, the values, marketability and liquidity of land; population growth; land as an investment; and their ownership of respondent's property.

33. By and through the statements and representations alleged in Paragraph 32 herein, respondent has represented and is representing, directly or by implication, that the aforesaid personalities have purchased respondent's land and that they did so because they believed that respondent's land was a good investment.

34. In truth and in fact, the aforesaid personalities have not purchased land from respondent but were paid substantial sums by respondent to make the statements and representations alleged in Paragraph 32 herein, and, in addition, were given land by respondent. Therefore the acts and practices alleged in Paragraph 32 herein are deceptive or unfair.

XII

35. In making the statements and representations alleged in Paragraph 32 herein, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction with such statements and representations, that the aforesaid well-known personalities were paid substantial sums of money by respondent to make the statements and representations alleged in Paragraph 32 herein, and that the land they own was given to them by respondent. Therefore, respondent has failed to disclose material facts which, if known to certain consumers, would be likely to affect their decision whether to sign contracts for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XIII

36. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and repre-

sentations to members of the public, by means of promotional materials and oral statements, concerning the improvement associations which purchasers of respondent's land are required to join.

37. By and through the statements and representations alleged in Paragraph 36 herein, respondent has represented and is representing, directly or by implication, that the presence of such an association will increase the value of property which is subject to the association.

38. In truth and in fact, the presence of most of said associations, in and of themselves, does not increase the value of properties which are subject to said associations. Therefore, the aforesaid acts and practices alleged in Paragraph 36 herein are deceptive or unfair.

XIV

39. In the further course and conduct of the aforesaid business, respondent has made and is making various statements and representations to members of the public, by means of advertisements in various publications of general circulation, promotional materials, TV and radio broadcasts, telephone calls and sales presentations involving oral statements, written statements, movies and slides, concerning the size of respondent's assets and net worth.

40. By and through the statements and representations alleged in Paragraph 39 herein, respondent has represented and is representing, directly or by implication, that its assets and net worth are at least as great as the amounts stated.

41. In truth and in fact, in many instances at the times when respondent has made the statements and representations alleged in Paragraph 39 herein, respondent's total assets and net worth have been substantially less than the amounts stated. Therefore, the aforesaid acts and practices alleged in Paragraph 39 herein are deceptive and unfair.

XV

42. In the further course and conduct of the aforesaid business, respondent has made and is making various statements orally and in promotional materials concerning travel allowances, "Property Visit Credit Certificates" or other allowances which respondent will provide to a purchaser to help defray the cost of a visit to the purchaser's lot.

43. By and through the statements alleged in Paragraph 42 herein, respondent has represented and is representing, directly or by implication, that the travel allowances, "Property Visit Credit

Certificates", or other allowances promised by respondent are either actual payments to the purchaser in the form of cash or checks or immediate deductions from the purchaser's currently scheduled payments, and that such payments or deductions are made upon completion of a visit to the purchaser's lot as reimbursement for the purchaser's expenses.

44. In truth and in fact, the "travel allowances", "Property Visit Credit Certificates", or other allowances provided by respondent upon a visit by a purchaser to his lot are not actual payments in the form of cash, checks, or immediate deductions from the currently scheduled payments, but are deductions from the remaining account balance at the time the principal balance is equal to the amount of the allowance, providing that a company-guided tour is made within one year of the date of the acceptance of the contract and that the payments due under the contract have been current throughout the term of the contract. Therefore, the acts and practices alleged in Paragraph 42 herein are deceptive.

XVI

45. In the further course and conduct of the aforesaid business, respondent has made and is making statements and representations in promotional materials which use, set forth or refer to all or part of various endorsements, testimonials and printed articles concerning, but not limited to, the size, good reputation, financial security and integrity of respondent; the past, present and future development of respondent's properties; land prices and values; land as an investment; and population and industrial growth and movement.

46. By and through the statements and representations alleged in Paragraph 45 herein, respondent has represented and is representing, directly or by implication, that the aforesaid articles, endorsements and testimonials were originally published or made in the recent past.

47. In truth and in fact, in all or substantially all instances when so represented, the aforesaid articles, endorsements and testimonials were not originally published or made in the recent past. Therefore, using or referring to the aforesaid articles, endorsements or testimonials which were not originally published or made in the recent past is an unfair or deceptive act or practice.

XVII

48. In making the statements and representations alleged in Paragraph 45 herein, respondent has failed to disclose clearly and

conspicuously, and in reasonable conjunction with such statements and representations, the date when each of the aforesaid articles, endorsements and testimonials was originally published or made. Therefore, respondent has failed to disclose material facts, which, if known to certain consumers, would be likely to affect their decision whether to sign a contract for the purchase of respondent's land. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XVIII

49. In the further course and conduct of the aforesaid business, respondent has made and is making statements orally in sales presentations concerning the prices and locations of the lots being offered for sale and to be offered for sale.

50. By and through the statements alleged in Paragraph 49 herein, respondent has represented and is representing, directly or by implication, that a prospective purchaser must purchase a lot immediately to insure that the price will not increase or that the desired location will be available.

51. In truth and in fact, most prospective purchasers do not have to purchase immediately to insure that prices will not increase or that desired locations will be available. Therefore, the acts and practices alleged in Paragraph 49 herein are deceptive or unfair.

XIX

52. In the further course and conduct of the aforesaid business, respondent is offering and disseminating promotional materials which purport to provide informed and unbiased advice on the purchase of land, and which often purport to have a specific dollar value.

53. By and through the practices alleged in Paragraph 52 herein, respondent has represented and is representing, directly or by implication, that these materials set forth comprehensive, informed, unbiased, prudent and generally accepted principles of purchasing land; and, that in many instances, these materials are distributed to the general public by widely-known publishers and are sold at the prices stated thereon.

54. In truth and in fact, these materials do not set forth comprehensive, informed, unbiased, prudent and generally accepted principles of purchasing land; have never been distributed to the general public by widely-known publishers; and have never been sold

at the prices stated thereon or at any other prices. Therefore, the acts and practices alleged in Paragraph 52 herein are deceptive.

XX

55. In the further course and conduct of the aforesaid business, and in some cases after a purchaser has signed a contract, respondent has made and is making various statements in promotional materials and orally concerning its purpose in contacting members of the public, holding "dinner parties" or other gatherings, or in offering publications, goods or services free or at low cost.

56. By and through the statements alleged in Paragraph 55 herein, respondent has represented and is representing, directly or by implication, that its purpose in contacting members of the public, inviting them to dinner parties or other gatherings, or in offering publications, goods or services free or at low cost, is, *inter alia*, to conduct a bona fide survey, or to furnish the public unbiased information on the purchase of land as an investment without any obligation or pressure whatsoever, or, in the case of persons who are already holders of respondent's land, to advise them on the status of their property.

57. In truth and in fact, respondent's purpose in contacting or making offers to members of the public or in holding dinner parties or other gatherings, or in offering publications, goods or services free or at low cost is to induce the signing of contracts for the purchase of respondent's land, or, in the case of persons who are already holders of respondent's land, to induce the signing of contracts for the purchase of additional land from respondent or to induce them to exchange their lots for other, more expensive lots. Therefore, the acts and practices alleged in Paragraph 55 herein are deceptive.

XXI

58. In making the statements and representations alleged in Paragraph 55 herein, respondent has failed to disclose clearly and conspicuously, and in reasonable conjunction therewith, that respondent's true purpose in contacting or making offers to members of the public and persons who are already holders of respondent's land, or in holding dinner parties or other gatherings, or in offering publications, goods or services free or at low cost, is to induce the signing of contracts for the purchase of respondent's land, or, in the case of persons who are already holders of respondent's land, to induce the signing of contracts for the purchase of additional land from respondent or to induce them to exchange their lots for other,

more expensive lots. Therefore, respondent has failed to disclose material facts which, if known to certain consumers, would be likely to affect their decision whether to sign contracts for the purchase of respondent's land, or, in the case of persons who are already holders of respondent's land, to purchase additional lots, or exchange lots they own for more expensive lots. Therefore, the failure to disclose the aforesaid information is a deceptive or unfair act or practice.

XXII

59. In the further course and conduct of respondent's business, in obtaining a purchaser's signature on a contract, respondent has presented and is presenting purchasers with a contract, a property report required to be provided to the purchaser by federal law, various other written and illustrated publications, and in some instances additional lengthy or detailed documents. These documents and publications contain information and provisions likely to affect the decision of certain consumers whether to sign a contract for the purchase of respondent's land.

60. Respondent frequently has made and is making available the aforesaid documents and publications at dinner parties or other gatherings sponsored by respondent or under such circumstances that it is likely that many purchasers will not read such documents and publications because they are insufficiently aware of their utility or significance, or it is likely that many purchasers will not read such documents and publications carefully, completely or with full comprehension of their meaning and import. The soliciting or obtaining under such circumstances of an agreement to purchase respondent's land, involving a substantial financial commitment by the purchaser, is an unfair or deceptive act or practice.

XXIII

61. In the further course and conduct of the aforesaid business, respondent has utilized and is utilizing contracts, the provisions of which are not understandable to many consumers or cannot be evaluated by many consumers to determine if they are fair or unfair. Respondent has made and is making the contracts available to prospective purchasers, and soliciting and obtaining signatures to the contracts from purchasers, in circumstances where the purchaser has not had the opportunity to seek assistance or counsel in understanding the provisions or making the aforesaid determination.

62. The soliciting or obtaining of an agreement to purchase

respondent's land, involving a substantial financial commitment by the purchaser, where the purchaser has not had the opportunity to seek assistance or counsel for the purposes referred to in Paragraph 61 herein, is an unfair act or practice.

XXIV

63. In the further course and conduct of the aforesaid business, respondent has utilized and is utilizing two lengthy, detailed and seemingly unrelated documents entitled "Receipt of Deposit" and "Agreement for Deed" which together make up respondent's contract.

64. The use of the two aforesaid documents has the capacity and tendency to mislead purchasers as to the significance of said documents. Therefore, the use of the aforesaid documents constitutes an unfair or deceptive act or practice.

XXV

65. Respondent, in the further course and conduct of the aforesaid business, has utilized and is utilizing standard form contracts.

66. The aforesaid contracts contain a condition of sale, embodied on the reverse side of the "Agreement for Deed", that there is no understanding or agreement between the parties except as expressly set forth in the "Agreement for Deed" or the "Receipt of Deposit."

67. The use by respondent of the aforesaid condition of sale is an unfair or deceptive act or practice because respondent makes representations, directly or by implication, through advertisements in publications of general circulation, in promotional materials, and in sales presentations, by means of oral and written statements, slides and movies, which differ in material respects from the obligations of respondent or purchasers under said contracts.

XXVI

68. The aforesaid contracts contain various conditions and provisions which are printed on the reverse side of the "Agreement for Deed" in a manner which is not clear and conspicuous.

69. The practices alleged in Paragraph 68 herein are unfair or deceptive because they have a tendency and capacity to cause purchasers of respondent's lots to ignore conditions and provisions printed on the reverse side of the agreement and to mislead such purchasers as to the significance of such conditions and provisions.

XXVII

70. Most of the aforesaid contracts subject a purchaser to an annual assessment and membership in an improvement association, which purportedly is to provide improvements, amenities and public services which respondent has represented, directly or by implication, by and through the statements and representations alleged in Paragraph 14 herein, that it will provide to purchasers. Said associations have the authority to use the funds collected for improvements, amenities and public services for a purchaser's lot. However, most of said associations have no obligation to spend said funds for the benefit of a specific purchaser's lot.

71. In most instances the requirement that a purchaser pay annual assessments to and become a member of such an association is an unfair or deceptive act or practice because (i) the purchaser is obligated to pay monies to an association with no corresponding obligation by the association to spend these funds for the benefit of the purchaser's lot, and (ii) respondent has represented that it would provide, at no additional cost, the improvements which the associations are authorized but not obligated to provide to the purchaser.

XXVIII

72. The aforesaid contracts contain, within the "Receipt of Deposit", a declaration by the purchaser that the purchaser has received and read any property reports or offering statements required to be made available to prospective purchasers by federal or state law.

73. The use by respondent of the aforesaid declaration is an unfair or deceptive act or practice because respondent frequently fails to give the purchaser the property report or offering statement prior to the signing by the purchaser of the contract, or frequently makes available the property report or offering statement in circumstances where it is likely that many purchasers will not read such documents because they are insufficiently aware of their utility or significance, or it is likely that many purchasers will not read such documents carefully, completely, or with full comprehension of their meaning and import.

XXIX

74. The aforesaid contracts also provide, within the "Agreement for Deed", that upon a failure of the purchaser to pay any

installment due under the contract, the seller shall be entitled to retain all sums previously paid thereunder by the purchaser.

75. The use by respondent of the aforesaid provision is an unfair act or practice because the sums retained by the respondent are not calculated to bear any relation to the actual damages, if any, sustained by respondent by reason of the purchaser's default.

XXX

76. In the further course and conduct of the aforesaid business, respondent has utilized and is utilizing forms entitled "Receipt of Deposit", "Agreement for Deed" and "Property Visit Credit Certificate", which in most instances contain a refund provision, which specifies that a purchaser may obtain a refund if the purchaser completes a company-guided inspection tour of the property in which the purchaser's land is located within one year of the date of purchase, and, upon completion of the aforesaid tour and while still on the property, sets forth on the respondent's refund request form the details of how the property was misrepresented at the time of sale. In addition, the aforesaid form provides that purchasers will be entitled to a deduction of the amount stated on the form from the remaining account balance at the time the principal balance of the contract is equal to the amount stated, if the aforesaid tour is taken within one year of the date of purchase and if a declaration is obtained from the purchaser that he has seen his land, that it is as represented, and that he is satisfied with his property investment.

77. The use by respondent of the provision as alleged in Paragraph 76 herein is an unfair act or practice because it requires the purchaser to incur the expense of traveling to the property and taking the company-guided inspection tour but (i) it is often not possible for the purchaser to see his land, and therefore not possible for him to make a declaration that he has seen his land; and (ii) irrespective of whether the purchaser does see his land, it may not be possible for him to ascertain whether the property is as represented or was misrepresented at the time of sale, or whether he is satisfied with his property investment, and, therefore not possible for him to make a declaration that the property is as represented or that he is satisfied with his property investment, or to set forth how the property was misrepresented at the time of sale.

XXXI

78. In the further course and conduct of the aforesaid business, and after a purchaser has signed a contract, respondent has made

and is making various statements and representations to such previous purchasers and others, through oral statements, and by written materials, concerning the current value of lots which have previously been purchased from respondent.

79. By and through the statements and representations alleged in Paragraph 78 herein, respondent has represented and is representing, directly or by implication, that the value of lots typically has increased significantly since the time of their purchase from respondent.

80. In truth and in fact, the value of lots typically does not increase significantly after their purchase from respondent. Therefore, the acts and practices alleged in Paragraph 78 herein are deceptive.

XXXII

81. In the further course and conduct of the aforesaid business, respondent as aforesaid has induced and is inducing members of the public through unfair and deceptive acts and practices to pay to it, in advance of passage of title, substantial sums of money toward the purchase of lots located within respondent's properties known as Rio Communities located in the State of New Mexico, Horizon City located in the State of Texas, and Whispering Ranch located in the State of Arizona. Said lots are of little value to purchasers as investments and little use as homesites. Respondent has received and is receiving the said sums and has failed to offer to refund or refused to refund such money to purchasers.

82. The use by respondent of the aforesaid practices and respondent's continued retention of the sums, as aforesaid, is an unfair act or practice.

XXXIII

83. In the course and conduct of the aforesaid business, respondent as aforesaid has utilized and is utilizing in its standard form contracts a provision whereby defaulting purchasers forfeit all payments previously made to respondent under the contract. Respondent has received and is receiving said payments and has failed to offer to refund or refused to refund to defaulting purchasers all payments in excess of respondent's reasonable damages caused by the purchaser's default.

84. The continued retention by respondent of payments in excess of reasonable damages, as aforesaid, is an unfair act or practice.

XXXIV

85. Respondent as aforesaid (i) has induced and is inducing members of the public through unfair and deceptive acts and practices to pay to respondent substantial sums of money toward the purchase of respondent's lots, and (ii) has continued to retain substantial sums in excess of its reasonable damages as a result, as aforesaid, of the unfair forfeiture provision in its contracts.

86. The effect of using the aforesaid acts and practices to secure and retain substantial sums of money is or may be to substantially hinder, lessen, restrain or prevent competition between respondent and the aforesaid competitors.

XXXV

87. The use by respondent of the aforementioned unfair and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are true, and into the purchase of substantial numbers of respondent's lots because of said mistaken and erroneous belief.

XXXVI

88. The aforementioned acts and practices, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES,

ADMINISTRATIVE LAW JUDGE

SEPTEMBER 21, 1979

PRELIMINARY STATEMENT

The complaint in this proceeding issued against respondent, Horizon Corporation, on March 11, 1975. The complaint contains thirty-six separate allegations of unfair or deceptive acts and practices and unfair methods of competition in or affecting commerce arising out of the sale or offering for sale of undeveloped land

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in the states of Texas, Arizona and New Mexico. These complaint allegations can be summarized as follows:

COUNT I

Respondent's lots offered for sale are represented to be excellent investments at the prices offered with little or no financial risk involved, whereas in a substantial number of instances the lots are not excellent investments involving little or no risk.

COUNT II

Respondent failed to disclose material characteristics of the lots in that the lots are risky investments because (1) their future value is uncertain, and (2) purchasers will probably be unable to sell the lots at or above the purchase price. [2]

COUNT III

Respondent made representations concerning the past, present, and future development of its properties, used words such as "communities," "community developer," "master plan," "new cities," etc., represented that by the end of the purchaser's scheduled payments, all lots would be located within a self-contained and fully developed community, and that the price of its lots would be all-inclusive. In fact:

(1) lots are not and will not be, by the end of scheduled payments, located within a self-contained and fully developed community;

(2) respondent's only express contractual obligation is to place an unpaved road fronting the purchaser's property which respondent does not have to maintain;

(3) respondent's properties consist primarily of vacant acreage with little development; the only building which has occurred and is likely to occur is in areas reserved by respondent, and development to date is insignificant in relation to the total acreage and length of time the property has been offered for sale;

(4) the purchase price of the lots is not all-inclusive since (a) paved roads, sewer, telephone, electricity and water are not available except at unreasonable prices and most purchasers are required to join and pay to an improvement association, and (b), in the Waterwood property, water and sewer are available only through substantial payments on an annual basis and a one-time connection charge.

COUNT IV

Respondent failed to disclose clearly and conspicuously in conjunction with representations about past, present and future development of properties the material facts about its property set forth above in Count III.

COUNT V

Respondent has numerous and variously named subdivisions, often of similar names and often referred to collectively, which leads the consumer to believe the past, present and planned development of one subdivision is the same as that of another, when such is not a fact. [3]

COUNT VI

Respondent has designated lots "single family," "multi-family," or "commercial," and represented that lots in certain locations and having certain designations have greater value than other lots, and has recommended purchasers exchange lots already purchased for more expensive lots, when there is no significant difference in the value of the lots and it is not advantageous to exchange one lot for a more expensive lot.

COUNT VII

Respondent failed to disclose the material facts about lot designations and values, as set forth in Count VI.

COUNT VIII

Respondent represented that it will buy back or resell for purchasers lots acquired from respondent, when such is not a fact.

COUNT IX

Respondent represented that all or substantially all land within a designated lot is fully usable, when easements and other physical features affect the full use and enjoyment of the lot.

COUNT X

Respondent failed to disclose clearly and conspicuously the material facts set forth in Count IX.

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COUNT XI

Respondent utilized Leif Erickson and Merv Griffin to make representations about land values, marketability and liquidity, and about their purchase of respondent's property because it was a good investment, when such personalities had not purchased land from respondent.

COUNT XII

Respondent failed to disclose clearly and conspicuously the material facts that the personalities in Count XI did not purchase land from respondent but the land was given to them.

COUNT XIII

Respondent represented that improvement associations which purchasers are required to join will increase the value of the land; when such is not a fact.

COUNT XIV

Respondent misrepresented its assets and net worth. [4]

COUNT XV

Respondent represented that property visit credits and other allowances are either actual cash payments to purchasers or immediate deductions from currently scheduled payments, and that such payments or deductions are made upon completion of a property visit as reimbursement for the purchaser's expenses, when such deductions actually are made at the end of a purchaser's scheduled payments, provided a company-guided tour is made within one year and payments under the contract have been current throughout the term of contract.

COUNT XVI

Respondent used endorsements, testimonials and printed articles and represented they were of recent date, when such was not a fact.

COUNT XVII

Respondent failed to disclose in reasonable conjunction with the

articles described in Count XVI, the material fact of when the articles were originally written or published.

COUNT XVIII

Respondent represented that purchasers must act immediately to insure that the price and lot location will be available, when most purchasers do not have to act immediately to get the price and lot.

COUNT XIX

Respondent represented that materials it provided set forth informed, unbiased, prudent and accepted principles of purchasing land, that these materials have been distributed to the public by well-known publishers and are sold at stated prices, when such is not a fact.

COUNT XX

Respondent holds dinner parties and offers goods and services free or at low cost stating its purpose is to conduct a bona fide survey, or to furnish unbiased information on the purchase of land as an investment without any obligation or pressure, or to advise existing purchasers of the status of their property, when respondent's actual purpose in contacting the public, or existing purchasers, is to induce the purchase of land, or to exchange property previously purchased for more expensive property.

COUNT XXI

Respondent failed to disclose the material fact of the real purpose in holding dinner parties and the offers of free or low cost goods and services. [5]

COUNT XXII

Respondent made available property reports and other lengthy and detailed documents at dinner parties and under other circumstances where it was unlikely they would be read by purchasers fully and with comprehension, and the soliciting and obtaining of substantial financial commitments to purchase land under such circumstances.

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COUNT XXIII

Respondent utilized contracts for the purchase of land which cannot be understood and evaluated by purchasers, where the purchaser has not had the opportunity to seek assistance or counsel.

COUNT XXIV

Respondent utilized two lengthy, detailed, and unrelated documents, "Receipt of Deposit" and "Agreement for Deed," which have the capacity and tendency to mislead purchasers as to their significance.

COUNT XXV

Respondent utilized a contract with a statement on the reverse side that there is no understanding or agreement not expressly set forth in the "Agreement for Deed" or "Receipt of Deposit"; at the same time respondent made representations through various advertisements, brochures, movies and other written and oral statements, which differed in material respects from the contracts.

COUNT XXVI

Conditions and provisions on the reverse side of the "Agreement for Deed" were not clear and conspicuous and had the tendency and capacity to cause purchasers to ignore such conditions and provisions, and to mislead purchasers as to their significance.

COUNT XXVII

Respondent's contracts subject a purchaser to pay annual assessments to an improvement association which purportedly is to provide improvements, amenities and services which respondent represented it would provide. The association has the authority to use its funds for such purposes but (1) the association has no obligation to spend the funds for the purchaser's lot, and (2) respondent represented that it would provide, at no additional cost, the improvements which the association is authorized but not obligated to provide.

COUNT XXVIII

A declaration in the "Receipt of Deposit" stated that the purchaser has received and read any property reports and offering statements

required to be made available by federal and state law, when respondent frequently failed to give such reports to the purchaser prior to signing the contract, and frequently made the reports available in circumstances where it is unlikely the purchaser will read such documents or not read such documents carefully, with full comprehension of their meaning and import. [6]

COUNT XXIX

Use by respondent in the "Agreement for Deed" of a clause that upon failure of the purchaser to pay any installment due, respondent shall be entitled to retain all sums previously paid, where the sums retained are not calculated to bear any relation to actual damages sustained by respondent by reason of the purchaser's default.

COUNT XXX

Respondent utilized agreements which contain a provision that a purchaser may obtain a refund if the purchaser completes a company-guided tour of the property within one year of the date of purchase and fills out a refund form with the details of how the property was misrepresented, and a further provision that the purchaser will be entitled to a deduction for the property visit at the conclusion of all payments if the aforesaid tour is taken and if the purchaser signs a form stating he has seen his property, it is as represented, and he is satisfied with his property. These provisions are alleged to be unfair because the purchaser is required to incur the expense of traveling to the property to take the tour and (1) it is often not possible for purchaser to see his land, and (2) it may not be possible for the purchaser to ascertain if the property was misrepresented at the time of sale, or whether or not he is satisfied with his property.

COUNT XXXI

Respondent represented to previous purchasers and others that the value of lots purchased from respondent had increased significantly since the time of purchase, when said lots have not increased significantly in value.

COUNT XXXII

Respondent caused purchasers to pay substantial sums of money toward the purchase of property in advance of the passage of title,

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retained the money and failed to offer refunds or refused to refund the money, when the lots were of little value as investments and of little use as homesites.

COUNT XXXIII

Respondent utilized a provision whereby defaulting purchasers forfeited all payments, and after receipt of such payments, respondent failed to offer to refund or refused to refund all payments in excess of respondent's reasonable damages caused by the purchaser's default.

COUNT XXXIV

Respondent (1) induced members of the public through unfair and deceptive acts and practices to pay substantial sums of money toward the purchase of respondent's lots, and (2) continued to retain substantial sums in excess of its reasonable damages as a result of [7] the unfair forfeiture provision in its contracts; this practice restrains competition between respondent and its competitors.

COUNTS XXXV AND XXXVI

The aforementioned unfair acts and practices have the tendency and capacity to mislead and deceive the purchasing public, are to the prejudice and injury of the public and respondent's competitors, and in violation of Section 5.

On May 23, 1975, respondent filed its answer to the complaint admitting generally certain jurisdictional allegations, but denying all allegations of unfair or deceptive acts or practices. Respondent also set forth thirty-two affirmative defenses to the complaint.

Complaint counsel requested and was permitted extensive discovery following issuance of the complaint. Such discovery was limited to the period subsequent to January 1, 1968 (Order Granting In Part Respondent's Motion To Quash Complaint Counsel's Subpoena Duces Tecum, August 18, 1975, pp. 8-9; Order Granting In Part Complaint Counsel's Motion For Reconsideration And Denying Request For Permission To File Application For Review, September 9, 1975, p. 2). By order of August 11, 1976, the undersigned denied respondent's claims of a self-evaluative privilege for certain intracompany documents subpoenaed by complaint counsel and examined by the undersigned *in camera* (Order Ruling on Respondent's Claim of Privilege For Certain Internal Corporate Records), which denial was affirmed by the Commission by order dated October 5, 1976. On

November 18, 1976, the undersigned was permanently enjoined from delivering these documents to complaint counsel, *Horizon Corp. v. FTC*, 10 Court Decisions-FTC 512, CCH Trade Reg. Rep. par. 61,155 (1976-2 Trade Cases). Thereafter, the Commission sought enforcement of the subpoena. The Court of Appeals for the District of Columbia subsequently ordered production of the documents in question, sustaining the Commission's determination that the so-called self-evaluative documents were not privileged from discovery *FTC v. Horizon Corp.*, No. 77-1385, Feb. 28, 1978. These documents were not received by complaint counsel until after the case-in-chief was completed. Complaint counsel was given permission to offer the documents when received, and they were offered and received in evidence during rebuttal hearings (Tr. 16395-415).

During the trial of this matter respondent objected to the receipt of any evidence occurring prior to March 11, 1972, or three years prior to issuance of the complaint herein based on the three-year limitation in Section 19(d) of the Federal Trade Commission Act (15 U.S.C. 57(b)). This objection was overruled; however, proof was limited to acts, practices and transactions occurring subsequent to January 1, 1968 (see Tr. 505, 652-58, 898-99, 6177).

Complaint counsel began the presentation of the case-in-chief on March 10, 1977 in Washington, D.C. (Tr. 442), and continued through August 1977 with hearings in Houston, El Paso, Albuquerque, Phoenix, Tucson, Denver, Chicago and Washington. Complaint counsel presented 91 witnesses, including 36 customers, 20 former sales personnel and several real estate brokers, company employees, utility company [8]employees, city and state planners, experts, and approximately 800 exhibits (Tr. 442-7844).

Respondent began its defense on February 13, 1978 in Houston, Texas (Tr. 7910) and continued through June 16, 1978, when it closed in San Diego, California (Tr. 16088). Respondent presented nearly 1600 exhibits and 129 witnesses, including customers, residents of its properties, sales representatives, real estate and construction experts, county officials, its employees and management personnel, and several experts on numerous subjects. Following the close of respondent's defense, complaint counsel presented nine witnesses in rebuttal in New York City on August 28 and 29, 1978 (Tr. 16094-16702); four witnesses testified for respondent in surrebuttal hearings held in Albuquerque on September 11, 1978 (Tr. 16704-807).

The record closed on October 10, 1978 (Order Closing The Record For Reception of Evidence, October 10, 1978). Pursuant to requests filed by the parties, the administrative law judge requested and the Commission ordered that the parties be given until February 12,

1979 for the submission of Proposed Findings of Fact and Conclusions of Law and until April 12, 1979 for the filing of reply memoranda. The parties have filed their proposed findings, reply findings, proposed order and supporting memoranda. Oral argument was held on May 25, 1979. The date for filing this Initial Decision was subsequently extended by the Commission to September 17, 1979 (Order by the Commission dated August 1, 1979).

This proceeding is now before the administrative law judge for decision based upon the complaint, the answer, pleadings, testimony and other documentary evidence of record, proposed findings of fact and conclusions of law and legal authority submitted by the parties. These submissions have been given careful consideration and, to the extent not adopted herein in the form proposed or in substance, are rejected as not supported by the record or as immaterial. All motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings of fact and conclusions of law submitted by the parties, the administrative law judge makes the following [9]findings of fact and conclusions and issues the Order set out at the end hereof.¹

¹ References to the record and other material are given in parentheses, and the following abbreviations are used:

- | | |
|-----|--|
| F. | - Findings of this Initial Decision followed by the finding being referenced. |
| Tr. | - The transcript of record in this proceeding followed by the page being referenced. |
| CX | - Commission Exhibit followed by number of exhibit being referenced. |
| RX | - Respondent Exhibit followed by number of exhibit being referenced. |
| CPF | - Complaint counsel's Proposed Findings followed by the finding number being referenced. |
| CRB | - Complaint counsel's Reply Brief followed by the page number being referenced. |
| RPF | - Respondent's Proposed Findings followed by the finding page being referenced. |
| RRB | - Respondent's Reply Brief followed by the page number being referenced. |

FINDINGS OF FACT

I. Description of Respondent and the Nature of its Business

A. Corporate Background

1. Respondent Horizon Corporation, "Horizon," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 4400 East Broadway, Tucson, Arizona (Ans. Par. One). Respondent was organized on May 11, 1959 as Horizon Land Corporation. The name was changed to Horizon Corporation on March 4, 1968 (CX 56L, 67B).

2. Horizon, from its aforementioned principal place of business, operates and controls the acts and practices of its subsidiaries, and derives pecuniary and other benefits from their acts and practices. These subsidiaries are engaged in the sale of undeveloped land in limited areas of the United States. Some of these subsidiaries are, for example, Horizon Corporation of Connecticut, Horizon Corporation of Indiana, Inc., Horizon Corporation of Kansas, Inc. (CX 70E, G, I). There has been no real contention during this proceeding that Horizon was not responsible [10]for the acts and practices of these subsidiaries (Ans., Par. Two; CX 68-74, 110A, D, E, 211A-Z-231, 103A-Z, 168-182, 229-341, 60A, C, N, S).

3. Horizon is now, and for sometime past has been engaged, directly and through its subsidiaries, in the business of acquiring undeveloped land, subdividing said land into lots, and advertising, offering for sale, and selling said lots to the public (Ans., Par. Three). Sales of undeveloped lots have been made throughout the United States through sales offices located in most of the states. In 1973 Horizon operated as many as 67 sales offices (CX 61V). Horizon has also offered for sale and sold undeveloped lots to the United States armed forces located abroad (CX 112D; Tr. 10527-535); sales have been made in areas such as Guam (Tr. 6033-34) and Canada (CX 949A-G). In addition, Horizon has been engaged in home building and in the sale of homes and developed lots to builders and to the public (CX 66D, E, 67J). The sale of homes and developed lots has not been directly challenged in this proceeding.

4. Among the properties in which lots have been and are being offered for sale to the public by Horizon are the properties known as Paradise Hills and Rio Communities located in the State of New Mexico; Horizon City and Waterwood located in the State of Texas, and Arizona Sunsites and Whispering Ranch, located in the State of Arizona. The acreage of these properties is substantial. Most of these

properties are divided into numerous and variously named subdivisions (Ans., Par. 4; CX 195, 197M; RX 1541A).

5. Horizon usually sells the lots in its properties to purchasers who have not seen their land at the time of the contract of sale. Horizon utilizes standard form contracts, entitled "Agreement for Deed" and "Receipt of Deposit," whereby the purchaser generally pays monthly installments over a term of approximately eight years. According to the provisions of the contract, title to the lot remains in Horizon until final payment is made, at which time title passes to the purchaser. As to most of its properties, Horizon's only contractual commitment is to stake the lot and to cause a road fronting on the property to be completed within thirty days after the purchaser has completed his payments or approximately eight years from the date of signing the contract, whichever is later. The contract provides that the purchaser pays interest to Horizon during the contract term on the unpaid balance owing under the contract. As to some of the properties, the purchaser is responsible for making a yearly payment of a specified amount to a community improvement association; the purchaser is also responsible for payment of taxes on the property. Both of these latter obligations commence at the time of execution of the purchase contract (Ans., Par. 5; CX 67F [SEC 10-K Report for fiscal year ending May 31, 1976]).

6. In the course and conduct of the aforesaid business, Horizon now causes, and for some time past has caused, its promotional materials, contracts and various business papers to be transmitted through the United States mail and other interstate instrumentalities from its place of business in Tucson, Arizona to its agents, representatives, employees, customers and prospective customers in [11]various other States and territories of the United States, and the District of Columbia. Horizon now maintains and operates, and for some time past has maintained and operated, places of business and has made substantial sales to purchasers in the various States of the United States and the District of Columbia. Horizon also places advertisements in newspapers and other communications media which circulate and/or transmit messages across state lines. Horizon maintains, and at all times mentioned herein has maintained, a substantial course of trade in said land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Ans., Par. 6).

7. In the course and conduct of the aforesaid business, and at all times mentioned herein, Horizon has been, and now is, in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of land (Ans., Par. 7; Tr. 6676-78; CX 67R).

B. Horizon's Properties

Paradise Hills

8. The first land which Horizon purchased, after its incorporation in 1959, was Paradise Hills (RX 199B). It was a barren stretch of undeveloped land northwest of the Albuquerque, New Mexico city limits (CX 196R; RX 1564). The initial purchase was of 8,500 acres (Tr. 14378-79); subsequent purchases brought it up to its present size (Tr. 14435). As of May 31, 1976, the Paradise Hills project consisted of approximately 13,000 acres of improved, semi-improved and unimproved land located in Bernalillo County, New Mexico. It lies to the west of the Sandia Mountains on the western bank of the Rio Grande River. The direct distance from the heart of Albuquerque to the southeastern corner entrance of the tract on May 31, 1976 was approximately 7 miles and the direct distance from the northwest city limits of Albuquerque was approximately 3 miles. Approximately 9,000 acres of the project had been sold as of May 31, 1976; 185 acres contained a regulation size 18-hole golf course and country club; the balance has been or will become available for sale. Development included 917 homes, 138 apartment units and 3 industrial plants employing approximately 500 people (CX 67Z-2 [SEC 10-K, May 31, 1976]). The present population of Paradise Hills is approximately 4,000 (Tr. 2843, 10041, 10291).

9. Several thousand acres of Paradise Hills were sold in large acreage parcels in the 1960's (Tr. 14392-93, 14431). At the same time, 1,300 acres were sold to an Albuquerque developer who built 600 homes in the core development area (Tr. 14431-32). Sales of acreage parcels have been insignificant since 1970 (RX 1535B; CX 312N). Since 1970 there have been few sales of Paradise Hills land to consumers (RX 1535), either on-site (Tr. 10439, 11015), or off-site (Tr. 8495, 8893, 11480, 11653, 12102). The only sales now consummated are of developed lots to builders by Horizon (Tr. 10291).

10. Approximately 200 homes were built in 1977 (Tr. 9984), and projections for 1978 and 1979 are for about three times that number in each year (Tr. 13963, 9984-85). In March 1978 local [12]builders were already committed to purchase 175 developed lots from Horizon in the next month (Tr. 10345, 13963). There is some industrial development going on at Paradise Hills industrial sites which consists of non-rail served industrial land (Tr. 10814, 19838). There is also a shopping center, an elementary school, several churches, a library, and various community buildings (CX 231B). Horizon has invested over \$20 million in the development of the core area of Paradise Hills, not including the purchase of the land, of which over

\$11 million represents expenditures on housing (RX 1524B). Horizon now owns 1,000 acres of acreage and 3,500 acres in the core development area, none of which is currently being offered to consumers (RX 1535A; Tr. 10357, 10290, 14433, 14437).

Rio Communities

11. As of May 31, 1976, the Rio Communities project consisted of approximately 249,000 acres of improved, semi-improved and unimproved land located on both sides of the Rio Grande River and the town of Belen, New Mexico, which had a population of 5,000. The property ranges from 3 to 18 miles from Belen. Approximately 78 percent of the Rio Communities property lies in Valencia County and 22 percent in Socorro County. Rio Communities, 35 miles south of Albuquerque and the largest Horizon community in terms of acreage, blankets a land area larger than the combined cities of San Diego, Las Vegas and Philadelphia (CX 155C). By May 31, 1976 approximately 159,000 acres of the project had been sold. In addition, 75 acres contained an 18-hole golf course and appurtenant facilities, approximately 25,000 acres had been conveyed to property owners associations. The balance of the land has been or will become available for sale. Development on that date included 635 homes, 31 apartment units, a 139 space mobile home park, one industrial plant employing approximately 35 people, and an office and retail shopping area (CX 67Z-4 [SEC 10-K, May 31, 1976]). Rio Communities is primarily situated between the Rio Grande River on the west and the Monzano Mountains on the east (RX 1546; CX 214A, 225C), though Rancho Rio Grande, which consists of 14,000 acres subdivided into five acre parcels (RX 1539A), and 20,600 acres of unnamed property which has been subdivided into parcels ranging in size from 160 to 640 acres (RX 1539, 1546, 1529A), is located on the western side of the Rio Grande River.

12. The initial purchase of land for Rio Communities was consummated by Horizon in the early 1960's (CX 131). This purchase constituted 106,000 acres, and consisted of Rancho Rio Grande and the unnamed acreage on the west bank of the Rio Grande River, Rio Grande Estates, Rancho Rio Grande East, and the present development area (Tr. 14491; RX 1546). In the late 1960's Horizon purchased approximately 40,000 acres, which became Rio del Oro, which was subdivided into individual lots, a future core area, and several planned town center sites (Tr. 14491; RX 1540, 1541H, 1539A), and 11,000 acres which were subdivided into lots and designated as the Canyon del Rio subdivision (Tr. 14493). The final purchase, in 1972,

was of the 83,000 acre Tierra Grande, which has been subdivided into large tracts ranging in size from five to forty acres (Tr. 14495; RX 1539A, 1546). [13]

13. The population of Rio Communities as of mid-1978 was estimated to be between 2500 and 3000 (Tr. 10303). The developed core area contains approximately 700 homes (Tr. 9978). There are eleven more homes in Tierra Grande (Tr. 10580). The rate of home building has increased somewhat in recent years, and there is construction activity currently in progress (Tr. 9979, 10494, 11035-36, 10924-25). Facilities in Rio Communities include a shopping center (Tr. 10075), a car dealership (Tr. 10056-59), a country club and golf course (Tr. 10076), a fire station (CX 211B), a gas station (CX 211B), a motel (CX 211B), several churches (RX 1529C), a car wash (RX 1529C; Tr. 10060), and a modern industrial facility which is presently vacant (Tr. 10819). In addition, there are currently firm plans to construct a supermarket, liquor store, pharmacy, and restaurant within the core development area (Tr. 10060-61). In addition to the purchase price of the land, Horizon has expended over \$14 million on housing and just under \$14 million on community facilities, improvements, and maintenance in the core areas of Rio Communities (RX 1524C).

Arizona Sunsites

14. As of May 31, 1976, the Arizona Sunsites project consisted of approximately 47,500 acres of improved, semi-improved and unimproved land located in Cochise County, Arizona. The nearest entrance to the tract is approximately 12 miles south of the town of Willcox (population approximately 3,000); the farthest portion of the tract is approximately 31 miles distant from Willcox. The town of Douglas (population approximately 12,000) is approximately 55 miles south of the project, and Tucson is approximately 100 miles northwest. Cochise County is thinly populated and consists primarily of undeveloped land, grazing land and farm land. Approximately 35,000 acres of the Arizona Sunsites project had been sold as of May 31, 1976. In addition, 75 acres contained an 18-hole, par-three golf course and appurtenant facilities, and the balance is or will become available for sale. Development includes 377 homes and 28 apartment units, a community activities building and a number of retail shops. (CX 67Z4-Z5, [SEC 10-K May 31, 1976]).

15. The present population of Sunsites is approximately 1150 (Tr. 13041), living in approximately 400 homes in the development area and 35 homes located outside the development area (RX 1235R). The

residents of Arizona Sunsites are mostly retired (Tr. 13045; RX 79). There are four churches (RX 79), two parks and a recreational center (RX 79), a pool, two tennis courts (RX 79), a 61 unit mobile home park (Tr. 13852), an arts and crafts center and a library (RX 79), a post office (RX 1235Q), a bank, a grocery store, a filling station, a garage, a beauty shop, pub, cafe, auto body shop, and other commercial facilities (Tr. 13052-53). There is also a medical clinic at Sunsites and free ambulance service to the Wilcox Hospital (Tr. 13050-52). Horizon has spent over \$7 million on housing, and over \$4 million on improving and maintaining the Arizona Sunsites core development (RX 1524B). [14]

Whispering Ranch

16. As of May 31, 1976, the Whispering Ranch property consisted of approximately 19,000 acres of totally unimproved land in Maricopa County, Arizona, approximately 10 miles south of Wickenburg, Arizona, and approximately 36 miles northwest of Phoenix, Arizona. The property has been offered in unimproved 5 and 10 acre and larger tracts. An aggregate of 16,000 acres had been sold and 2,400 acres were available for sale on that date (CX 67Z-6 [SEC 10-K, May 31, 1976]). The overall tract consists of range land and varies in elevation because of its rolling, hilly nature which slopes from west to east with the highest portion of the property being approximately 2,200 feet and the lowest portion being approximately 1,800 feet above sea level. The soil in the area is generally of a coarse granular to sandy loam character. The vegetation is primarily southwestern desert type, namely cactus, yuccas and mesquite (CX 63Z-15 [Prospectus, Horizon Corp., February 26, 1969]). Whispering Ranch has no current development, with the exception of unpaved roads constructed by Horizon (Tr. 12717).

Horizon City

17. As of May 31, 1976, Horizon City consisted of approximately 87,000 acres of improved, semi-improved and unimproved land located at its extremes from 5 to 19 miles east of the El Paso City limits, and from 16 to 30 miles from the downtown section. Most of the land lies in El Paso County, with a minor portion in Hudspeth County. Approximately 60,000 acres of the project had been sold as of May 31, 1976; 159 acres contain a regulation size 18-hole golf course and appurtenant facilities; 110 acres were reserved for a lake; approximately 2700 acres had been conveyed to a property owners

association; and the balance has been or will become available for sale (CX 67Z-3 [SEC 10-K, May 31, 1976]).

18. Horizon City is located southeast of El Paso, Texas (RX 1545, 1146, 1145), a city of approximately 400,000 (RX 1557B). The initial 63,000 acres of Horizon City was purchased by Horizon in the early 1960's (Tr. 14443); subsequent purchases in the mid-1960's raised the total acreage to its current size (Tr. 14443). Horizon City currently consists of an existing core development area, nine platted subdivisions, 15,000 acres of acreage parcels, several parcels ranging in size from 24 acres to 4,000 acres which are reserved for potential future core areas, and several large parcels which have been donated to the Horizon Community Improvement Association (RX 1536, 1528, 1545, 1537).

19. Development in Horizon City through the 1960's was limited; at the close of the decade, fewer than 100 houses had been constructed (CX 13B, 218B; Tr. 9836). Currently there are approximately 1800 residents living in Horizon City and more than 650 homes (Tr. 9081; RX 209U). In fiscal 1977, 120 residential lots were developed in Horizon City and approximately 40 to 50 homes were built. As of mid-1978, about 200 lots were in the process of development and 20 homes were under construction (Tr. 9071-73). The core area also contains an 18 hole golf course club, a swimming pool, tennis courts, and the Horizon administrative offices. In the industrial park, which adjoins the core area, there are approximately 11 commercial and industrial establishments with a total employment of about 800 people (Tr. 9081, 14190-91). Approximately 180 of these [15]employees are residents of Horizon City (Tr. 9081). In early 1978, construction began on an 18,000 square foot shopping center, of which all but 600 square feet had been leased prior to the beginning of construction. The leases are for a doctor's office, supermarket, hardware store, ice cream store, ceramic shop, gift shop, florist shop, fabric shop, a ladies' and mens' clothing store, liquor store, barber shop, beauty shop, drug store, savings & loan office, cocktail lounge, restaurant, real estate office, an office of the El Paso County Water Authority, dentist's office, a law office, and an accountant's office (Tr. 9082, 9863-65). Over \$17 million has been spent by Horizon in the construction of housing, and over \$15 million has been spent on public facilities, improvements, and maintenance in the core development area of Horizon City (RX 1524B).

Waterwood

20. As of May 31, 1976, the Waterwood project consisted of 25,000

acres of improved, unimproved and semi-improved land located approximately 19 miles from Huntsville, Texas, which has a population of approximately 15,000, and is 100 highway miles north of Houston. A portion of the property is located in San Jacinto County and a portion in Walker County. The property fronts on the northwest portion of 90,000 acre Lake Livingston and includes approximately 12% of the total lakeshore line. Portions of the property are offered fully improved with paved streets and utilities, and other portions are offered with deferred improvements. By May 31, 1976 approximately 1,200 gross acres of the project had been sold; approximately 1,500 acres had been conveyed to the Waterwood Improvement Association; and the balance has been or will become available for sale.

Initial development was primarily concentrated in a 1,000 acre area which includes central sewer and water service, electricity, telephone service, approximately 17 miles of paved roads, a 48 unit motel, a restaurant, a recreation center, a visitors' pavilion, an equestrian center, a marina, a barbecue and picnic area, a park with a swimming pool, and a country club complex. The country club complex contains an 18-hole championship golf course on 169 acres and a 38,000 square foot clubhouse containing dining, convention and banquet facilities. Adjacent to the clubhouse are 36 hotel units, four tennis courts and three swimming pools. In August 1975, the property contained 11,160 lots of which 2,639 had been sold (CX 373H). As of May 31, 1976 there were 54 homes complete or under construction (CX 67Z-6 [SEC 10-K, May 31, 1976]).

21. Lake Livingston, a fresh water lake constructed by the Trinity River Authority in 1971 (Tr.7934), has a shoreline 450 miles long (RX 1548B; Tr. 7934, 7985). The emphasis in the development of Waterwood has been on resort and second home use (Tr. 14525). There are presently approximately 120 homes in Waterwood (Tr. 8024). Seventy of these homes were constructed within the last two years (Tr. 7990). As of the spring of 1978, approximately 40 or 50 homes were under construction (Tr. 7961-63, 8024). Approximately 60 or 70 of the already constructed homes are full-sized homes, used either as second homes or primary homes (Tr. 7960; RX 1037, 1938, 1051, 1057, [16]1059, 1092, 1904, 1095). The second major classification of homes are the "weekenders," generally smaller homes on smaller lots which are intended to be used as weekend resort homes (Tr. 7960; RX 1548).

22. Of Waterwood's 25,000 acres, 7,000 or 8,000 acres have been subdivided (Tr. 14520). Of the approximately 7,000 acres which have been subdivided, 30 percent has been planned as open space (Tr.

7920, 7957, 7995). One thousand lots have been fully developed with all utilities extended to them, as of September 1976 (Tr. 7958-59). Horizon has spent over \$3 million on housing at Waterwood and over \$27 million on facilities, land improvements and general maintenance (RX 1524C).

C. How Sales Are Made

23. Horizon began sales of undeveloped land in 1960. Its first purchase of land was Paradise Hills in July 1959 (CX 131C; RX 199B); the last purchase of land was March 1972 when the Waterwood property was purchased (CX 131C). Total acres of land purchased by Horizon from 1959 through 1972 amounted to approximately 432,000 acres (CX 131C, D). By August 1975, Horizon's properties totaled 356,312 lots, of which 277,890 had been sold (CX 873J). Sales of undeveloped land for the five years, commencing June 1, 1969 to and including May 31, 1974 totaled \$369,740,000, as follows:

1970	\$ 57,103,000
1971	\$ 84,289,000
1972	\$102,267,000
1973	\$ 82,774,000
1974	\$ 43,307,000

(CX 66H, 61N, 62Q)

As of May 31, 1973, contract receivables on land sales totaled \$192,782,000, representing contracts on which 36 percent of the aggregate sales price had been received (CX 61G, R).

24. By 1973 Horizon had 67 sales offices (CX 61V, 258; see also Tr. 4047). The total number of sales representatives employed by Horizon as of May 31, 1971 was 1,443 (CX 64D); as of May 31, 1972, Horizon employed 1,651 sales representatives (CX 65E). A sales trainer in the Philadelphia office testified that she trained hundreds of sales representatives during her employment as a trainer of about two and one-half years (Tr. 16420-23, 16425). One regional manager testified he supervised 25-35 sales representatives as a district manager and up to 100 sales representatives as a regional manager (Tr. 4498; see also Tr. 6152). One zone manager (Horizon had several sales zones - Tr. 8993-95, 9007) testified that he had 500 sales representatives within his zone at any one time (Tr. 2087). In a motion to quash a subpoena *duces tecum* issued at complaint counsel's request, it was asserted by Horizon that its Payroll

Department had approximately 60,000 terminated sales representatives' records on file (Memorandum In Support Of Motion To Quash Complaint Counsel's Subpoena Duces Tecum, filed July 25, 1975, p. 53; attached Affidavit of George C. Larsen, Director of Sales Administration, Horizon Corporation, dated July 22, 1975). [17]

25. It appears clearly from the record that sales representative turnover at Horizon was substantial (Tr. 2133, 3711, 6152, 16425-26). Sales representatives who remained with Horizon for more than a few months were promoted to a sales trainer's position or a sales manager's position (Tr. 1848-49, 1901-03, 2093, 2130, 2142, 2306-07, 3503-05, 3708-09, 3751, 4351-52, 4362, 4497, 4518, 4531, 4619-20, 4653-54, 16422). The sales representatives were compensated on the basis of a commission on sales, usually 8%, and the sales managers, district managers and zone managers received salaries plus overrides on sales by those sales representatives under their supervision (CX 66C, 157, 180N, O; Tr. 9018, 1850, 1877, 1910, 2142, 3506, 4368, 4500, 4765, 16097). The resulting remuneration of some of the sales representatives and the managers was substantial (Tr. 1910, 4500; CX 950D). The 45 to 60 sales representatives in the Fort Worth office were stated to have average earnings of \$2,160 per month in 1970 or 1971 (CX 180M; Tr. 8764). One zone manager netted \$189,000 in 1971 (Tr. 10376).

26. Horizon's policy and practice was to train its sales representatives before permitting them to sell land. The content and procedures of training evolved through the years. Prior to 1974 the training in most sales offices consisted of three to five days of in-class instruction, followed by one or more days of field training (Tr. 9125, 9493, 9586, 9808, 10177, 11619, 10388, 11654, 11304, 11447, 11230, 8846, 11572, 11619; CX 159J). In other offices training was less formal and less extensive (Tr. 2306, 3500, 3536, 4470, 4501, 6139). Where additional training was necessary to obtain a state license, the training program lasted more than five days (Tr. 16348, 10246-47, 3709). The training generally consisted of the history of the company, the different properties of the company, the TBA maps and the unit maps of the properties, and how to write the contracts (Tr. 2094, 1917, 4532, 4588, 4621-22, 16097). The training included how to use the presentation manual, and the locked-in growth pattern of Horizon properties (Tr. 2095-96, 1918-23, 1929, 3709, 4355, 16299-300, 16,488).

One description of the in-class training during the early 1970's is as follows:

A. We had three days of training and then on Saturday we had a half day test. We got there at 9:00 o'clock and it let out at 12:30.

Q. What was involved in the training?

A. Well, there was a general background on Horizon Corporation, their [P]rinciples, how they wanted you to sell the property, what Horizon was made of. Then we went into contracts, proper application of them, federal property report[s]. We had our TBA maps explained to us. We had our unit maps explained and we had the general background of the areas which we would be selling in.

(Tr. 8672-73) [18]

Following the in-class training, sales representatives accompanied the trainer or one of the managers on several sales presentations for field training. The field training, as described by a sales representative in Denver, was as follows:

We were field trained by the individual salesmanager or his assistant. [The field training consisted of] mostly observation for a couple of days and then actual sales presentation[s], followed by a critique.

(Tr. 11447-48; see also Tr. 4382, 4588)

27. In addition to the training of sales representatives, Horizon instituted training programs for managers and prospective managers. Prior to the institution of formal management training programs there had been quarterly zone meetings at which company officials would enunciate company policies to the managers on the local level (Tr. 13338-41). Beginning in mid-1971 these zone meetings were supplemented by formal training programs which were held in Tucson (Tr. 8980, 12792, 13341-42, 11019, 11245-46), and included a visit to each of the Horizon property sites (Tr. 12792). There were initially two types of management training programs, one for district managers and one for sales managers (Tr. 8980, 8989). The training sessions lasted for approximately two weeks (Tr. 12759, 8987; CX 103Z278-Z279). The district manager and sales manager training programs continued for several years, during which time more than 100 potential managers passed through the programs (Tr. 8990).

A third form of management training began in late 1971, the Sales Office Manager Recruiting and Training program ("SOMRAT") (Tr. 13542-44). This program also included visits to the properties and presentations by company officials (Tr. 13542-44, 4353-54, 4504). The SOMRAT program was in operation for approximately two years, during which time 200 to 250 potential managers were trained (Tr. 11519, 13542-44).

28. Horizon utilized newspapers, magazines, radio, television, outdoor and direct mail advertising services. Expenditures for these services were as follows: For the year ending-

Initial Decision

97 F.T.C.

May 31, 1971	-	\$1,579,807
May 31, 1972	-	\$1,875,996
May 31, 1973	-	\$2,391,636

These expenditures do not include costs for promotional materials and services rendered by outside suppliers, including advertising agencies, for the production of any materials except newspaper inserts used in 1973 (CX 93).

29. The promotional materials used by Horizon were generally conceded to be factually accurate (Tr. 678-79). The Horizon legal department verified all factual statements in promotional materials before permission was given to use such materials (Tr. 12565-66, 12617). There were approximately 14 states that required all advertising and promotional materials to be approved prior to the time such materials were used in these states. (Tr. 12559). The [19] requirements varied from state to state (Tr. 12461-62). Some minimal number of states also required prior clearance of all sales representative's material (Tr. 12618). Horizon took measures to make certain that no advertisement or promotional piece was published or used without having received prior approval from the states in which advertisements or materials appeared in compliance with state requirements (Tr. 12646, 8582, 8597, 4109-13, 13091, 13096-98).

30. Many of the states in which Horizon has conducted business have required that Horizon register its lots with the state. The registration document contains general information about the organization who is selling the property, a copy of the plat of the property, documents showing any encumbrances affecting title, and information about the existence of roads, utilities, and prices of the lots. Some of the states inspect the property being offered for sale. Often, as part of the registration process, Horizon was obligated to submit to the state all advertising and promotional materials, including sales training manuals and the individual promotional materials used by the sales representatives (Tr. 12571, 12616-18).

31. The Office of Interstate Land Sales Registration ("OILSR"), which was created as an office in the Department of Housing and Urban Development pursuant to the Interstate Land Sales Full Disclosure Act of 1968, in December 1973 established requirements for advertising and promotional materials used in the interstate sale of land to assure that the materials are not false and misleading or deceptive (15 U.S.C. 1701-20 (1976)). The evidence of record indicates that Horizon complied with these regulations (Tr. 12553-57, 13272).

32. Through most of the relevant time period, Horizon utilized

three contract documents at the time of sale. These documents consisted of the Agreement for Deed (CX 142), and two related documents, the Receipt of Deposit (CX 139) and the Property Visit Credit Certificate ("PVCC") (CX 134). At the time of purchase the Receipt of Deposit is filled in by the sales representative and signed by the customer. This document recites that the sales representative has received a downpayment, that the customer has received the federal and state property reports, as appropriate, and it identifies the lot or lots being purchased by the customer (RX 4-6). Several provisions from the Agreement for Deed are reprinted verbatim on the Receipt of Deposit (e.g., RX 4-6). At the time of the sales presentation the customer also signs a blank copy of the Agreement for Deed. In Tucson, following the confirmation procedures utilized by the company (Tr. 13395-97), the Agreement for Deed is executed by an authorized Horizon official (RX 1-3), and a completed copy of the Agreement is returned to the customer in his important document package (Tr. 12890, 13405). The third related document, the PVCC, recites the Horizon guarantee and the Horizon property visit credit allowance, and is mailed to the customer in the important document package (RX 23-24; Tr. 12890). Upon visiting the property, a customer may sign the PVCC, have it validated by Horizon and receive a 5% credit against his purchase. [20]

In recent years, two changes were made in the form of the contract documents. After the Office of Interstate Land Sales Registration regulations changed in 1973 and required the receipt for the property report to be included as the front cover of the property report, the Receipt of Deposit was discontinued and the contract was revised into a single document entitled Contract for the Purchase of Land (RX 979-84). Beginning in 1974, the PVCC was replaced by the Property Visit Acknowledgement ("PVA") (RX 61).

The customers received, either from the sales representative at the time of sale or in the important document package which each customer received within a few days or weeks subsequent to the sale, the Receipt of Deposit, the Agreement for Deed, the PVCC, the TBA and unit maps, the federal and state property reports, and other documents.

33. Under the Agreement for Deed between Horizon and the purchaser, Horizon agrees to issue a warranty deed within 30 days after the purchaser has completed all payments, and within 30 days after receiving final payment, or eight years from the date of the agreement, whichever is later, cause a road fronting the property and connecting the property with a county, state or federal road system to be completed. The purchaser agrees to pay taxes on the

property and also all improvement association assessments. Upon failure of the purchaser to make payments according to the agreed-upon schedule, Horizon may take possession of the property and retain all sums paid as liquidated damages. The agreement also provides that there is no agreement or understanding between the parties except as expressly set forth in the contract (CX 142, *for example*).

34. The Receipt of Deposit provides the purchaser with an exchange privilege. Horizon agrees to accept the purchased property in trade, applying the full principal paid, for any other available land, except land within a designated building area, which is, at the time of the exchange, equal to or greater than the original price of the traded property. In addition, upon the agreement to buy or commence construction of a home within 90 days and complete construction within 120 days thereafter, the purchaser may exchange one single family residential lot for a similar size lot in any building exchange area within the same development, so long as one is available, without any increase in the price of the land, the purchaser to pay for the cost of the then current utility costs to the lot line and street improvement costs at the time construction is to commence, or such costs shall be included in the cost of the house if purchased from Horizon (CX 139, *for example*).

35. Sales representatives were allocated specific inventory to sell on each sales call (Tr. 1877-78, 2077, 2084-89, 2167, 16473). Sales representatives were trained to preselect the lots for presentation to a prospect and not to give the prospect choices or alternatives: "We made the decision for him" (Tr. 1878; see also Tr. 2085; CX 180Z-4, Z-19, 157M, 158 O, P, 160Z-1, 161Z-3, 163K, P, 178 O). Sales representatives were trained to "[A]void letting your prospect gain control by moving you to another Unit, Block, or Lot. Simply tell them that the reason you selected this Unit, Block, and Lot over others was because of these features, and repeat them" (CX 161Z-3). Property designated as commercial or multi-family was [21]scarce so most salesmen had to sell lots designated as residential (Tr. 1935). Several different sales methods were used. These sales methods included dinner party or group sales, fly-in sales, in-home sales, and on-site sales.

(1) *Dinner Parties*

36. In the late 60's and early 70's, a substantial portion of Horizon sales were obtained through the medium of group sales, primarily at dinner parties to which company sales representatives

invited prospective and past purchasers selected from lists of names developed by Horizon (CX 63E, 537A-C; Tr. 16448-49). Invitations were usually by mail and prospects replied by return card (Tr. 3499). The dinner parties were held in quality hotels or motels (Tr. 4464, 4469, 4471). A very nice dinner paid for by Horizon was served to the husband-and-wife couples attending the party (Tr. 4469-70, 4471, 3500, 4769; CX 538). Sales representatives sat with the couples at a table during dinner to "warm up to them, be friendly, casually throw out a few words about Horizon during the dinner, build-up a rapport" (Tr. 4471, 3499, 4764). After dinner, a speaker would say a few words, a film would be shown - the Merv Griffin film or the Leif Erickson film, and the speaker would come on with an intensified sales presentation (Tr. 1321-29, 1100, 4471-72, 4486, 4764, 4767-68, 5962, 6450-52, 6472, 6543, 16473-74; CX 538). Thereafter, the sales representatives would try to close a sale (Tr. 4472, 3500-01, 4786, 5962). If the sales representative could not close the sale, there was a technique whereby another sales representative, a "harder closer," would take over, a "T.O." (Tr. 4472-73, 4763, 4765-66, 5980-81). Some Horizon sales offices held dinner parties five to seven nights per week (Tr. 4474, 3499, 4765), and up to 80 couples attended these parties on any given night (Tr. 3500, 1321, 4768).

There were other group sales where a sales office would periodically hold a gathering where sales representatives would invite their customers, or prospects to whom they had made previous presentations, or other prospects referred by them (Tr. 1188-89, 1117-19, 1524, 2322; CX 636Z-4, Z-5, 528).

(2) *Fly-ins*

37. Some of the Horizon sales offices conducted extensive sales programs involving fly-ins. The persons participating in fly-ins were usually customers who had previously purchased property from Horizon and were visiting the property (Tr. 4364-65, 16221, 16534, 16542; CX 636Y, Z). The property visitation credit which Horizon offered its purchasers could theoretically offset some of the travel expenses (Tr. 16214-15). The sales program during the fly-in was to sell additional property to the customers, or to use the customer's existing equity in Horizon property to upgrade the customer's property, or to exchange the property previously purchased for additional property, effecting additional sales in the process (Tr. 16449-50, 16469-72, 4365). While customers were on the fly-in trip, efforts were made to keep the customers busy all the time and to separate from the group those persons who might cause problems in

making sales during the trip (Tr. 16471, 16543-44). Special inventory was assigned for fly-in trips, and follow-ups were made if [22] sales were not finalized during the trip (Tr. 16472-73, 16544). Contracts sometimes were made out in advance of the fly-in trip to cover the specific property that would be offered to a customer during the trip (Tr. 16450, 16479).

During the fly-in, the on-site sales representative took the customer out to see the customer's existing purchase and also to see the new property. On return to the on-site sales office the customer was escorted into a closing room and asked if the new property was satisfactory. The customer was then asked to sign a pre-written contract:

Yes, sign here, press hard. There are four copies, and you hand them the pen. It was very cut and dried and very quick. We landed a lot of people (Tr. 16470).

There were "T.O." sales representatives in the closing rooms, and commissions were split among the on-site sales representative, the fly-in sales representative and the "T.O." sales representative (Tr. 16480). Jing Jo Yu, a Korean American woman who purchased 15 lots in Rio del Oro, gave a vivid description of the sales pressures utilized in the fly-in closing rooms (Tr. 6353-60; see testimony of Elsie Colon, a customer who also participated in a fly-in property visit Tr. 16215-22, 16245).

(3) *On-Site Sales*

38. Horizon maintains sales offices at each of its land projects (CX 69X, 61V). As of May 31, 1974, Horizon stated that approximately 5% of its sales were made on site (CX 66C). Many of the sales on site were made to customers who were visiting their property pursuant to the property visit credit offered by Horizon (Tr. 1539, 1830-33, 5033-34, 6360, 16478-80). Some customers traded lots while visiting the property (Tr. 5161, 16215-22, 1201).

(4) *In-Home Sales*

39. Sales of Horizon land was effectuated primarily through sales representatives' visits to individual homes by appointment through leads obtained from various kinds of advertising and from personal contacts (CX 66C; Tr. 6250, 6258, 6335, 888-93, 1471, 4992, 16262, 4930), through telephone calls (Tr. 816, 4930, 1850-53, 2141), and cold canvassing (Tr. 4670, 4675, 4690-92, 4712-14, 4718, 4722). Horizon has stated that over 50 percent of its sales were to existing customers or to contacts referred to Horizon by existing customers

(CX 66C). Sales to existing customers were referred to as "reloading" a customer; i.e., increasing the amount for which a customer was obligated. Sales representatives were trained at reloading and were very successful at this sales technique (Tr. 2000, 2162, 2314, 3528, 3726, 3745, 3770, 3777, 3942, 4363-64, 4515, 4566).

The sales presentation in the home usually consisted of a presentation from a standard presentation manual (Tr. 1856, 1918, 3709-10, 3716, 3762-63, 4355, 4534, 16461). Additionally, TBA and unit maps of the property, federal and state property reports, and [23]contracts were utilized, and sometimes a movie was shown (Tr. 2139-40, 2312, 4382-83, 4502, 4532, 4555, 4588, 4656, 4659, 16118; CX 101). The presentation generally followed a pattern of selling the company, selling land as an investment, selling the southwest, selling the nearby city, selling the development, selling the unit within the development, and then selling the specific lot or lots, a presentation one zone manager referred to as "funnelling" (Tr. 1933, 1923-24, 1960, 4551-52, 4657, 16431-32, CX 180H, Z-28, 778Z-10). The sales presentation varied to suit the occasion and the individual sales representative (Tr. 923-24, 2161-62, 2190, 3554, 4571-72, 4576, 4581, 4593-94, 4608-09, 4432, 4735, 4644, 4793, 1106, 1243, 9019, 9021-22; CX 947H).

Representations by sales representatives follow in a general way the training manuals and presentation manuals. Salesmen, however, often deviated from the standard presentation and added embellishments or adapted the presentation to best suit their own methods and needs. Some sales representatives testified that they were trained to use the standard presentation verbatim (Tr. 3503, 3505, 3709-10, 3716, 4355, 4407, 4534). Others used the standard presentation as a guideline or outline of the sales presentation (Tr. 9019, 9021-22, 4644). As sales representatives became more experienced and comfortable with their sales presentations, they relied less upon the standard presentation (Tr. 2047, 2049, 2161-62, 2190; CX 856A).

40. One witness, Larry Cervenka, gave a rather complete account of a sales presentation in the home:

Q. Mr. Cervenka, to the best of your ability, taking your time, would you kindly tell His Honor what your first personal contact was with Horizon Corporation?

A. Well, I got this phone call from a young lady and she said, invited me to a dinner and—

Q. (Interposing.) Excuse me. Can you establish a time when this took place?

A. This is in early evening, one day during a week day one evening, and said I was invited to a dinner.

Q. What year, sir?

A. This is in '71, 1971.

Q. Go ahead.

A. And anyway, I asked what's involved with the dinner? She said "Well, it would be a sales presentation at the dinner," and, or a movie on land in general, something like this. I said, "Well, I couldn't attend that." She said, "Would you like a free book on how to make money in land," or something like this. So, I said, "Sure." [24]

So, I think, I don't remember whether she called and then a salesman came by the next night, or whether it was that same night, but shortly, within the next day or so, somebody came by and brought me the book and it was just a little bitty book. I don't know how many pages, but it wasn't a real substantial book, and then this salesman, his name was John Cashier, he started talking about different investments, and he had a complete sales presentation there.

He had really professional-looking maps and brochures and had all of this in a file folder and a loose-leaf folder, you know, that opens up.

So, as he was talking to me, he would point out the appropriate page and point out certain charts or pictures, and whatever, and during the course of his talk, he showed in the past record of investments in stocks and investments in real estate and some other items, too. I don't remember, but mainly I remember stocks and real estate, and pointed out that land investment was a secure investment, and in some cases would yield a high rate of return, and then after this he pointed out the Southwest Area of the United States as being one of the fastest-growing areas of the United States and showed me how the population was moving to that area, and then what industries came in parts of that area, and then he started talking specifically about El Paso, and he explained how, because of geography of the city, the city could only expand in only one direction because of Fort Bliss on one side, the Border on the other, and then mountains and New Mexico.

So, he went and had a presentation on just what El Paso was all about, and then he described a particular—let's see, this was Horizon City Estates, and he showed where schools were planned to be built and shopping centers and showed me their—see, they had a land plan where, showed me where everything was going to go and showed me the various sections and then he got down to one section, Section 58; I think Lot 10.

He showed me the relationship to this section to the rest of the city and told me the price of the lots and I think corner lots were one hundred dollars more than interior lots, and he said at the time he was just selling, he just had two lots available, I think, a corner lot and then one middle lot, and if I remember correctly, he said [25] that this was—when he came to talk to me was about September or October of '71.

He said in December the prices were going to go up and that salesmen were given just certain sections to sell, that he couldn't guarantee that these same lots would be available for purchase at a later date because, you know, he just sold what his supervisor gave him, and he said—so, if I didn't buy it then, there was no guarantee I could have the lots at a later date or at the same price.

Before he had started talking, he showed me a property report and I glanced through it. I didn't read it really carefully, but I did notice the one item there about Horizon having a mortgage and if they were to default in their mortgage, this would not affect the purchaser of the lot.

That is about all I remember from the property report, but he gave it to me before he started talking.

Let's see. After he talked about the lot—I could tell from his presentation that he

really wasn't experienced at this, and he told me later he had just been working there for a few weeks and he hadn't made too many sales, so I guess I felt a little sorry for him and he seemed to know his presentation pretty well. He was just as nervous as I was, I guess, but, anyway, he—

I don't remember at what point I decided to buy, but he stressed several things that had appealed to me, like the exchange that Horizon Corporation had a deal where you can exchange any of their lots for any of their other lots that was equal to or greater in price and this was before you completed paying for the lot.

This appealed to me because he had told me about this development, that Waterwood, near Lake Livingston, and I could see the potential for that and I thought that would probably be a real good investment, but at this time Waterwood was not developed.

So, I couldn't buy anything there if I wanted to.

So, what I thought of in my mind, I would buy a lot and the equity I would build up in that lot, I would later trade for one at Waterwood. [26]

So, this is the primary reason I was thinking about all the time.

I would probably go look at it and if I didn't like it, I would at a later date trade for something at Waterwood because this really appealed to me.

Q. Now did he mention any rate of return or appreciation on land investment?

A. All right. In just land in general. O.K. He—I remember a figure of 20 per cent. This is, you know, when he was showing me, flipping through the pages of his presentation, 20 per cent.

I don't remember any figures from stocks and bonds or anything like that, but those I remember didn't really interest me, so I didn't remember what rate of return.

Q. All right, sir.

You mentioned that he said that corner lots were one hundred dollars more?

A. Right.

Q. Did he give any reasons for the lots—

A. (Interposing.) I believe they are a little bit larger than the middle lots.

Q. I see, sir.

All right. Now I take it that you did purchase a piece of property that evening?

A. Right.

Q. It was Horizon City Estates, is that correct?

A. Right.

Q. What was the cost of that lot, sir?

A. Thirteen hundred dollars.

Q. And what did—Were you married at the time?

A. No, I was single.

Q. How old were you?

A. I was twenty-one, almost twenty-two, I believe.

Q. I see. (Tr. 1823-28)

II. Representations made by Horizon in its Sales of Land

A. Basic Investment Theme

41. Both expressly and subliminally, the major theme that permeated Horizon's communications and representations to the public was the investment potential of its land—the promise of profits and financial security. This constant theme, implemented in numerous ways, was expressed in Horizon's advertising, its sales literature, its sales training manuals, its sales presentation manuals, and orally by its sales representatives. An intrinsic element of this basic theme was the representation that Horizon was going to make this investment potential happen.

A former zone manager, Theodore Stone, employed by Horizon from 1968 to 1974 and a zone manager for about four years of this time, was trained by Bill Cook. Bill Cook was first employed by Horizon in 1967 as a salesman; became a sales manager, division manager, zone manager, and from October 1970 was Vice President of Sales for Horizon (Tr. 1898-1904, 13512-23). Mr. Stone testified as to the training received from Bill Cook:

Q. What, if anything, did Mr. Cook say about the nature of the product you were selling?

A. Well, he was very convincing that it was a very good and sound investment and that it was going to make the investors an awful lot of money.

Q. What, if anything, did he say with regard to financial security?

A. That was a large part of the sales presentation that we were taught, how to create the need for the investment. People's need for financial security and retirement fund (Tr. 1918).

* * * * *

Q. What, if anything, did Mr. Cook [mean] when he made the statement that you made reference to earlier that you were selling money, not land?

A. Well, I particularly, from having a housing real estate background, I wondered how they could successfully sell this property unseen. And, that's when it was brought to my attention that there was a correct way to present it if you were going to accomplish that and an incorrect way if you weren't going to accomplish that. [28]

And, as I recall, and I have heard many times since that that everybody had a little green vein in palm of their hand and it ran across their arm to the heart, and he said it was called "greed," and, "if you mash it, you are going to be successful."

The emphasis was put on the financial security, the profit, the money that one would make by purchasing this land (Tr. 1922-23).

The following are representative techniques used by Horizon to convey its basic theme that Horizon land has tremendous investment potential:

(1) *National Advertising*

42. Horizon's national advertising program emphasized making money on land, Horizon land (CX 410C, 412A-C, 413A-C, 414A-C, 415D, 425F,G,H,T,U,X,Y, 252, 253, 254, 256, 258, 259, 261, 262, 263, 265, 266, 267, 271, 272). Many of the advertisements carried coupon offers of free books or brochures; for example, "How To Successfully Invest In Real Estate," "Make Money In Land," or "The New Southwest Potential Unlimited." A 1970 advertisement stated:

Small investors are making big money in low-cost growth land directly in the path of the Southwest's fast-growing liveable cities and suburbs.

* * * * *

Buying land is one of the few investments that give you an opportunity for tremendous profits starting with a modest investment. (CX 252, 255)

Another 1970 advertisement stated:

Horizon offers you tomorrow's good futures - today.

We sell planned land investments.

For growth.

For living.

For retirement (Advertisement in *Life* Magazine CX 254).

A January 26, 1971 advertisement in *Look* Magazine stated: [29]

Who put up a \$100,000 community building before there was a community?

Horizon Corporation Community Developers that's who!

We build better communities that offer better investment opportunities.

* * * * *

When you're looking into land investment look to Horizon. (CX 256; see also CX 271, 272)

CX 258, an advertisement for the New York area, stated:

Nassau County land at 1950 prices.

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* * * * *

Horizon Corporation, one of the nation's leading developers, believes that the Nassau Counties of tomorrow are in the making today, now, this very minute.

* * * * *

We guide our new communities through their initial stages. We put in roads, make utilities available in development areas, install recreational facilities, build residential and shopping areas, and create attractive proposals for industry. In short, we nourish the new community and help it to thrive and grow.

* * * * *

All things considered, the potential return from intelligent land investment presents a rare opportunity to the small or modest investor. (See also CX 259 - "For Sale: Wilmette land at 1950 prices;" CX 262 - "For Sale: West Hartford land at 1950 prices." CX 263 - "For Sale: Bergen County land at 1950 prices.")

CX 267, an advertisement depicting children, stated in part:

You want to do the best for their future. To provide an investment they can lean on.
[30]

Something they could use for further education. Start a business. Found the family fortune..

Give them land.

The greatest investment. With the greatest profit potential. For any size pocket. And not only for the kids. You, too, can inherit the earth.

Today money loses value fast. But land's value is as progressive as its history. Traditionally, the best hedge against inflation.

CX 274 stated:

HORIZON CREATING OPPORTUNITIES

HORIZON CORPORATION, one of the nation's leading land developers, selects large parcels of land strategically located in the path of people and progress. On this choice property, we plan and create exciting new communities such as Paradise Hills and Rio Grande Estates in New Mexico; Arizona Sunsites; and Horizon City, Texas. It is almost inevitable that this land will rise in value as the population there increases, and as the population of big growth cities like Albuquerque and El Paso expand outward toward them.

We believe that we can prove to you that there is no other investment as good as land. Even a little bit can go a long way to patch up your future dollars.

CX 276, headlining "Money grows in land! Let Horizon prove it to you—show you how!", offered free books, "The New Southwest,

Potential Unlimited" and "How To Successfully Invest In Real Estate;" "They Could Make You Richer!" (See also CX 277, 278, 279.) CX 279 stated:

Ask Horizon to show you how you may grow dollars in land.

The price of land used for urban development has soared 90% over the past ten years compared to only an 18% increase for the Dow Jones stock index. [31]

This advertisement stated, in respect to the book "How To Successfully Invest In Real Estate":

Having it, reading it could well enrich your family's fortunes in the foreseeable future and for generations to come.

CX 282 offered a "New Investment Starter Kit," a free copy of "Make Money In Land." CX 283 offered this same book "Sold at Newsstands for 90¢! Yours Free! If You Mail This Coupon Now!" (See also CX 284)

CX 349A-C, an advertisement which received wide dissemination in 1972, headlined:

1962:	\$400
1972:	\$1,600
1982:	\$(What's your guess)

This advertisement further stated that these prices are not "fictitious." "That's the track record of Horizon land to date."

CX 352A-D, widely disseminated in 1972, noted that "The land you buy is only as good as the company you buy it from":

Horizon isn't just waiting for expansion to catch up with us. On each of its properties Horizon is building planned communities. These aren't just aimless tracts. They're model communities planned for schools, industrial parks, golf courses and country clubs, swimming pools and apartment complexes, tennis courts, utilities, paved streets, churches and pleasant residential areas

The advertisement also noted that Horizon had total assets of over \$150 million, net worth of over \$60 million and an inventory of land value of \$240 million. It also stated that lot prices in ten years have risen from \$395 to \$1100.

Advertisements disseminated in 1973 and 1974 feature the building accomplishments at Horizon's properties, but have no investment claims (CX 351A-B, 354A-C, 355A-B).

The free booklets, offered by Horizon in national advertisements, emphasized the basic message that land is a great investment and it "COULD MAKE YOU RICHER":

How To Successfully Invest In Real Estate (CX 256-57, 279; Tr. 1970-76)

Make Money in Land, A Guide to Successful Investment (CX 454; Tr. 1976-77) [32]

The New Southwest, Potential Unlimited (CX 279, 455; Tr. 1977-79).

These books were also offered to the public through brochures and by other means (CX 340-42, 344-46, 294A-B, 357-58), and wide distribution to the public was apparently accomplished (CX 329-39). CX 295A-B, a mailer brochure offering free a copy of "How To Successfully Invest In Real Estate," stated that Horizon is "one of America's largest land and community developers."

43. Horizon also utilized radio and television spots. One radio advertisement mentioned that "Horizon Corporation is creating beautiful new communities" and "a Horizon land investment is an opportunity you won't want to miss;" it also offered the booklet "Make Money In Land" (CX 360; see also CX 361, 362). Some radio spots emphasized that Horizon is developing new communities in the Southwest for people who want a "solid, high-profit-potential investment . . . an investment you can depend on" (CX 375; see also CX 376, 378-79). An August 1970 radio spot stated that "Money Does Grow In Land . . . Horizon's research shows that a lot of land has increased in value as much as 48 times in the last 22 years. That's an average of about 20% compounded annually." (CX 386; see also CX 387, 392-94). Other radio spots stressed Horizon's \$150 million in assets (CX 390-91).

In March 1971 TV commercials were stating "Invest In Some Land Now. It may be more than just a smart investment. It may become your *best* insurance policy," and offering booklets (CX 366). Another TV commercial stated that "The difference between just buying a little land and successfully investing in land is all a matter of who you do business with." This commercial stressed Horizon's assets and net worth (CX 367). TV commercials stating "Money grows in land" and that people are making money out of land, are also in the record (CX 369-74).

(2) Training Manuals

44. The various training manuals used in Horizon's sales offices instruct sales representatives to bring home the basic theme that Horizon is building better communities, that the corporation is financially strong, that money can be made in land, and that investment in Horizon land is a most desirable investment for the public (CX 189J-L, 157E, 258F-G, 259I-K, 160Z-1, 262V, Z-18, 163D, E, 165D, E, J, K, 615Z-11-Z15).

Representations that Horizon is a financially secure and a substantial New York Stock Exchange corporation is shown by the following statements in training manuals:

Starting in 1959, with \$300,000, today, Horizon Corporation has assets totaling \$250 million. It's a publicly owned company listed on the New York Stock Exchange (CX 157F, 1974 training manual, Northwest Zone; see also CX 178G Northwest Zone training manual 1973). [33]

Starting in 1959 with \$300,000, today Horizon Corporation is the largest land developer in the Southwest with assets totaling over \$100 million. It's publicly owned with over 4,000 shareholders (CX 956D, training manual used in early 1970's).

A telephone solicitation call used in a Horizon sales office stated:

Your name has been referred to me as a person that's interested in making money? Is that right? . . . If we can show you how to invest as little as \$15 or \$20 per month and double or triple your money over the next six to eight years, would this be something of interest to you?" (Tr. 2318-19; see also Tr. 2358).

The sales representative, at the beginning of the "Front Talk" designed for use just after entering a prospect's home, was instructed to tell the prospect that a reason for his visit was to find people, such as the prospect, "who stated that if they were reasonably assured of a profit, they would invest in land." (CX 615A,D, 956B, 180Z-1; see also CX 858A). After asking prospects whether they wanted "to make money," a positive response would elicit the comment that they were the type of people Horizon is spending millions of dollars on advertising to locate, "people who actually want to make money." (CX 160A,C). The training manual's front talk includes statements that Horizon made:

surveys and tests and studies to prove the worth of this land as investment potential for the modest investor or for homesites Real estate experts analyzed every facet as far as investment, industrial possibilities, closeness to major cities, population expansion, tax loads. . . . Millions of dollars were spent to develop golf courses, public utilities, as well as lakes and ponds. (CX 180Z-2, 157E, 158F, 163D,E, 165D,E, 905A-B,F, 956D).

One training manual stated that Horizon has "developed four thriving new and complete communities in Arizona, New Mexico and Texas" (CX 956C).

One point the sales representative was trained to establish is "Mr. Jones, are you interested in a sound investment" (C 180Z-3). "Mr. Jones, are you a man who wants to make money. How about you Mrs. Jones, do you want to make money" (CX 160C). The sales representative was trained to establish that land is one of the surest investment vehicles available today, and that Horizon land is much

more desirable than the average investment property because of Horizon's development concepts and technical knowledge (CX 180Z-4, [34]615Z11-Z15). A training manual used in Horizon's Northglenn (Denver) Colorado office advised the sales representative that "We sell our land as a VEHICLE for making money" (CX 856A).

One training manual used in the Philadelphia office during 1970 and 1971 instructed the sales representative to demonstrate to the prospect that a total investment of \$2790, starting with a down payment of \$240, would be worth \$15,000 in ten years (CX 956V-X).

A training presentation used in the Philadelphia office started out by telling prospects about Horizon's success at Paradise Hills:

Your original investors were offered an acre of land, in those days, for as little as \$600. Today, a choice acre at Paradise Hills is worth \$12,000 Well, tonight we're prepared to offer you an opportunity, in the same kind of project, the same rock bottom prices, and, in relation to future development, in the same time cycle. (CX 957B)

An answer for sales representatives to use to a possible prospect's objection of "How Do I Know This Will Ever Develop?" was "This is our business—we make things happen." (CX 959A)

A training manual used by a sales trainer in Horizon's Austin, Texas sales office stated that Horizon properties "must have inherently high investment potential by virtue of its location in a growth area near a growing city or because of a unique combination of climate, natural beauty, road and rail access, etc." (CX 778E). This same manual tells the sales representative to:

Sell *Himself* on land as the *one* investment outranking all others in security and return, *and* on Horizon Corporation as offering the most *rewarding* of all land investments. (CX 778Z-10)

At the time the prospect assents to purchase the lot selected by the Horizon sales representative, the representative is instructed to state: "Mr. and Mrs. Smith, let me be the first to congratulate you on your decision. I know it will help assure your financial security." (CX 905K)

One closing technique - the "Lost Sale Close" - has the sales representative apologizing to the prospect for the failure to make clear "that you should make a nice profit on this land." (CX 180Z-11)

(3) *Presentation Manuals*

45. The sales presentation manuals used during in-home sales presentations carry the basic theme—Horizon's corporate history, [35]its substantial financial worth, its national and local recognition,

its development of beautiful communities in the Southwest, the need for financial security in the future, the historic rise in land values in the past, and the excellent investment potential of Horizon land because of its location in the Southwest near fast-growing cities and its predeveloped stage - "that land in the predeveloped stage, in a growth area, is where the greatest potential exists for future appreciation" (CX 194-197, 196Z6, 197Z-39). One message found in the presentation manuals stated:

People buy land from us to build homes for immediate use or to hold their land for potential future appreciation. This potential appreciation is keyed to the success of the master-planned communities Horizon is creating in the growing southwest (CX 196E-F, 197E-F).

Another message in the presentation manual stated:

Horizon Corporation has spent millions developing these communities. They didn't just happen. Horizon made them happen (CX 196Z7, 197Z9).

Earlier versions of the presentation manual carried messages, such as:

Horizon Corporation Offers Better Investment Opportunities by Building Better Communities . . . offering profit potential land in the Growth Southwest.

* * * * *

We guide these communities through their initial development stages—putting in roads; making utilities available in the building areas; installing recreational attractions such as golf courses; building homes and shopping centers; bringing in industry—all the necessary things to launch a community and attract the elements to enable it to thrive and grow (CX 194B, 195C).

These earlier presentation manuals had specific comparisons between land, savings accounts, life insurance and stocks and bonds. The comparisons show that land has the "Greatest Profit Potential" (CX 194K-O, 195P-Z2).

Testimonials in the presentation manuals include newspaper articles under the heading "Horizon Corporation is nationally known and acclaimed" (CX 195D—the Gold Presentation Manual). Some of these newspaper articles are: [36]

The Washington Daily News Assets over \$67 million Horizon Corp. Enters Second Decade as Giant in the Southwest (CX 195D, 197G).

Boston Sunday Globe Horizon Success Story \$300,000 to \$51 million (CX 195D).

Dallas Times Herald New Horizons That Lure Investors (CX 195E, 197I).

Houston Chronicle Horizon City Adds Beauty to El Paso (CX 195E, 197H).

El Paso Tribune Judge Praises Horizon City (CX 195F).

El Paso Times Horizon Developer Wins Award (CX 195F).

Resolutions of praise from the States of Texas and New Mexico are included in the presentation manuals (CX 197K,L, 195F).

The manuals stressed not only the investment potential of Horizon land but also the success and worth of Horizon as a corporate entity. A TBA map used in sales presentations in the home stated the following about Horizon's corporate worth:

Horizon Corporation, founded in 1959, is a publicly owned company and is listed on the New York Stock Exchange with approximately 8,000 stockholders. The company and its subsidiaries are represented by sales offices in major metropolitan areas across the nation and abroad, which serve over 115,000 Horizon customers - January 1973 (CX 213A).

Other efforts by Horizon to assure that sales representatives were trained on Horizon's corporate success include a memorandum from Horizon's sales administration office, to all offices entitled "Horizon Corporation Management Rating" (CX 778 O). Through this [37] memorandum all offices were notified that Dines [A stock market newsletter] showed Horizon as number two on their list of America's Smartest Management on the basis of its rapidly increasing profits from land sales (CX 778P). This material was part of CX 778, a training manual used in Texas in the early 1970's. (See also CX 856A-B)

(4) *Celebrity Films*

46. The Horizon films, narrated by Merv Griffin and Leif Erickson and shown at dinner parties and sometimes during in-home presentations, emphasized the basic theme of the investment potential of Horizon's properties. The Leif Erickson film begins:

Hello, I'm Leif Erickson, I'm here to tell you about land investment, good living, and Horizon Corporation's communities. (CX 526B)

Leif Erickson gave examples of unusually high appreciation of land in various locations (CX 526D); he discussed population growth in the Southwest and in Albuquerque near two of Horizon's properties, the growth of Arizona and of El Paso with its locked-in growth and twin-plant concept. Mr. Erickson discussed Horizon's growth and its net worth. The script also included representations about Horizon's planning of its communities and the assistance Horizon gives the communities by building roads, making utilities available, installing

recreational facilities, building homes, shopping centers and bringing in industry. Leif Erickson concluded the film by stating:

I own some Horizon Land, along with more than 100,000 other people, because I am convinced that to buy land in the right place at the right time is a wise and rewarding thing to do Go ahead and get some land . . . It will probably be the best investment for your future that you ever made (CX 526T-V, [film script, "Investment Southwest"]).

The Merv Griffin film (CX 527) starts out as follows:

Hello. I'm Merv Griffin. I'm here to tell you about land investment, profits and the Horizon Corporation. (CX 527A)

The film script emphasizes the same points as the Leif Erickson film. Merv Griffin concluded his film presentation:

Investors in Horizon Land can be assured that they are investing in the very best type of profit potential land. Land which has been planned to attract tomorrow's residents, business and industries. (CX 527Z-17) [38]

* * * * *

I own Horizon Land, along with 70,000 other investors because there is no other investment as good as land and the Horizon Corporation convinced me that, to buy land in the right place at the right time is a wise and profitable thing to do . . . The Horizon Corporation's developments are in the right place and when buying land, *now* is always the right time . . . (CX 527Z-19).

(5) *Dinner Party Presentations*

47. Dinner party presentations used the congenial atmosphere of a dinner party and the media of speakers, celebrity films and sales representatives to put across the theme that Horizon land had tremendous investment potential. The front talk (after being served dinner but prior to the film) used at dinner parties held in Denver included the following:

THE STORY OF HORIZON IS AN INTERESTING ONE. IT STARTED BACK IN 1957 WHEN A MR. JOSEPH TIMAN, WHO WAS CONSIDERED ONE OF THE MOST SUCCESSFUL REAL ESTATE ATTORNEYS IN THE UNITED STATES RETIRED TO TUCSON, ARIZONA.

INSTEAD OF LYING BACK AND TAKING IT EASY, HE WAS SO EXCITED BY THE GROWTH AND DEVELOPMENT TAKING PLACE IN OUR SOUTHWEST HE JUST HAD TO BECOME A PART OF IT.

THEREFORE IN 1959 HE FOUNDED THE HORIZON CORPORATION.

SINCE THAT TIME THIS PUBLICLY OWNED COMPANY HAS ACQUIRED OVER SEVEN THOUSAND SHAREHOLDERS, OVER 100 THOUSAND CLIENTS, AND HAS CONTROL OVER 460 SQUARE MILES OF LAND NEAR AMERICA'S

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TOP GROWTH CITIES. STARTING WITH A NET WORTH OF JUST THREE HUNDRED THOUSAND DOLLARS, THE COMPANY NOW HAS ASSETS IN EXCESS OF 140 MILLION DOLLARS. I MIGHT ADD MR. TIMAN WAS THE CHAIRMAN OF THE COMMITTEE FOR SETTING UP A NATIONAL LAND DEVELOPMENT POLICY . . . A COMMITTEE WORKING VERY CLOSELY WITH THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

WE ARE DEVELOPING COMMUNITIES NEAR ALBUQUERQUE . . . THE BRAIN CENTER OF THE ATOMIC AGE. EL PASO . . . THE FASTEST GROWING CITY IN TEXAS . . . TUCSON . . . THE FABULOUS GROWTH CITY IN ARIZONA. WE HAD RAW LAND FOR INVESTMENT JUST NORTH OF PHOENIX, ARIZONA, BUT IT IS NO LONGER AVAILABLE. [39]

AS YOU WATCH OUR FILM, I WANT YOU TO REMEMBER ONE IMPORTANT THING . . . AS LITTLE AS EIGHT YEARS AGO THERE WERE NO HOMES, ROADS, NO GOLF COURSE, OR INDUSTRIES IN ANY OF THESE PROJECTS . . . JUST RAW RANCH LAND. TODAY YOU WILL SEE HOW HORIZON HAS INVESTED MILLIONS IN THESE PROJECTS, ENGINEERING A MASTER PLAN . . . ROADS, SCHOOLS, COUNTRY CLUBS, ETC.

THE EXCITING PART IS THAT YOU RIGHT HERE CAN INVEST IN LAND THERE.

TO ILLUSTRATE THIS POINT . . . AT PRESENT THERE ARE MORE THAN 100 THOUSAND FAMILIES JUST LIKE YOURSELVES THROUGHOUT THE UNITED STATES, WHO OWN PROPERTY WITH HORIZON IN OUR SOUTH-WEST COMMUNITIES. I MIGHT ADD THAT APPROXIMATELY 2200 OF THESE FAMILIES LIVE RIGHT HERE IN THE DENVER AREA.

SO . . . TONIGHT LADIES AND GENTLEMEN . . . WE WILL TALK TO YOU ABOUT YOUR OPPORTUNITY TO MAKE IMPORTANT MONEY AS A MODEST INVESTOR.

LADIES AND GENTLEMEN WE ARE VERY PLEASED THAT ONE OF OUR INVESTORS THAT YOU KNOW FROM STAGE, RADIO AND TELEVISION HAS CONSENTED TO NARRATE OUR FILM AND IS ALSO A LARGE LAND OWNER OF HORIZON PROPERTIES . . . MERV GRIFFIN.

NOW . . . IF YOU WILL JOIN ME WE WILL SEE HOW FAMILIES ARE MAKING MONEY WITH HORIZON CORPORATION. (CX 857B-C)

After showing the Merv Griffin or Leif Erickson film, a sales presentation is made by a master of ceremonies. A transcript of a speech given at a dinner party in Denver carried the basic theme that land is the best investment that can be made, better than savings in banks, insurance or stocks. Examples of fantastic profits that have been made on real estate in the Denver area were pointed out to the dinner guests. Thereafter, the speaker described the Horizon plan for making money:

. . . Basically this, it's a plan that has been extremely successful for Horizon Corporation and for the families that have invested with us. It's [known] as this, it's a

three-step formula. Location plus population and I think you'll have [to] agree with me, number three is location plus population equals money in land investment today. . . . We don't go out and we don't just select any land and say we're going to build a [40]city here. No sir. We do not do that. We go to the growth communities of the Southwest (CX 601, p. 8).

The speaker then described Horizon's selection of land in the Southwest in locked-in growth corridors where growth can go in one direction only. The sales presentation was directed to Rio Communities near Albuquerque. Albuquerque was described as a growing city with a fence around it with only one gate through which industry and population can move towards Horizon's Rio Communities. The speaker described the Paradise Hills project where land was purchased from Horizon in 1962 for \$99 to \$199 and is now valued at \$3500 to \$5000:

Now this evening, ladies and gentlemen, we're going to talk to you about a savings investment program an opportunity like was offered in Paradise Hills in 1962 where families did make money. . . . This is an opportunity to take part with a multi-million dollar corporation and you too joining many thousands of families and making money (CX 601, p. 14).

The dinner party invitees were advised that an IBM 360 computer in Tucson, Arizona allocates to the 63 sales offices across the nation the investment properties which are available. Each sales representative has "an envelope with this evening's allocation":

Due to the mere fact that Rio Del Oro is just about invested . . . our allocations are limited for this evening. Therefore, representatives, in the event that the two families are interested in regards to the same option of property which is available it will be on a first come first served basis (CX 601, pp. 16-17).

CX 858A-I is a copy of another Denver dinner party sales presentation that was used on numerous occasions. This presentation represents that across this country "there is a twenty per cent return on real estate investments" (CX 858C). Examples of tremendous profits on Denver real estate are mentioned. Horizon's corporate worth is stated along with the fact Horizon selects land in the growth communities of the Southwest where there is locked-in growth corridors and then master-plans the communities. "Money was made and is being made today in our land investments" (CX 858F). The dinner party presentation mentioned El Paso, Texas with a locked-in growth corridor and the Horizon City project. The speaker stated that land in Horizon City sold for \$200 to \$800 in 1964 and at the time of the dinner party speech was selling for \$3500 - \$5000. It was represented that this same profit potential would be available to prospects purchasing at the dinner party (CX 858G, H).

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It was further represented that \$1,000 invested with Horizon in 1962 would be worth \$16,525 in 1970 "and this is fact it is not conjecture" (CX 858I): [41]

Ladies and gentlemen isn't this the type of investment that you would like to have for your family. Now we have every reason to believe that the same type of profit opportunities are available to you and your family . . . and we believe there is an even greater opportunity for you and your family today with Horizon Corp. with its tremendous assets and technical knowledge we now have.

* * * * *

Now ladies and gentlemen if you have a desire to make things happen for your families listen to your representative he'll make you money with Horizon Corp. (CX 858I)

The instructions to the sales representatives at the conclusion of the dinner talk was as follows:

PARTY CLOSE

Immediately upon completion of principal presentation, take envelope and open it. Look at allocation sheet and select option, WITHOUT DISCUSSION which you feel best suited. When speaker asks your option—Mr. Speaker, I want the primary on option no. _____.

Now Mr. and Mrs. Jones what I've selected for you is an investment program of only \$23.00 per month—let me show you what secures your investment—(Take out T.B.A. Map) (At this time go into "Path of Development" story showing locked in growth pattern & tracing route out of city—highlighting developments and industry on the way to the project, then through the project highlighting development of the area and mentioning appraisal value of lots in developed areas, then to particular areas where their investment is located.)— Note: 5 Basic Qualities of that Presentation.

Mr. & Mrs. Jones, your investment is secured by two residential homesites here in unit 30—as I mentioned earlier, a lot in the developed area right now is selling from 3.5 to 5 thousand dollars, and Horizon Corporation has every reason to believe that the parcels I've selected for you will be worth at least that in full development. In other words, we are discussing a return of 7 to 10 thousand dollars over the next 8 to 12 years! Does that sound [42]like a pretty good investment to you, (NAME) (GET COMMITMENT, NO NODS OR GRUNTS-VERBAL COMMITMENT) (CX 859A).

(6) *New Horizons Magazine*

48. Horizon publishes a magazine quarterly, *New Horizons*, that is distributed to Horizon's customers and used in sales offices as sales brochures. These magazines or brochures portray the Southwest as growing and Horizon as rapidly developing its properties. These publications continue the basic theme that Horizon's properties are an excellent investment (CX 505-15). Other brochures distributed by

Horizon reinforce the basic representation that the Southwest is growing and this will impact favorably on Horizon (CX 516-24, 706; Tr. 934-35, 3530). One customer testified about receiving *New Horizons*:

Q. Mr. Carter, did you also receive in that packet of materials any other items?

A. Well, yes. It is a paper printed by Horizon [CX 504] and it made my investment look real good (Tr. 917).

B. Land as an Investment

49. Land is represented by Horizon's sales representatives to be the best investment that can be made by the modest investor. Land is represented to be the best hedge against the persistent inflation which exists. Land as an investment is specifically represented as being superior to savings accounts, insurance and stocks and bonds. Bill Cook, the Vice President for Sales of Horizon, when he was a sales manager and a sales trainer, represented to trainees—"He made it quite evident that the land was the thing to buy and not the other investments" (Tr. 1928). One regional manager testified he trained sales representatives: "Well, of course, we told them land was the basis of all the wealth in the United States, that it was the best investment that you could make" (Tr. 4509). A district office sales bulletin, included as part of a training manual, instructed trainees to sell "*LAND* as an Investment, proven to be superior to all others" (CX 778Z-10).

Sales representatives testified they used comparisons of land with savings accounts, insurance and stocks, and represented land as the best investment (Tr. 2308-10, 3719, 3721, 4567, 1643). One sales representative testified:

Q. Did you ever in any of the sales presentations you made while you were at Horizon compare land to other investments?

A. Yes.

Q. How did you do that? [43]

A. Just listed off four major types of investments, stocks and bonds, savings accounts, insurance accounts and the growth in land nationally, and the land was far superior to any of the others (Tr. 4567).

Another sales representative testified:

Well, we compared the different investments. We compared stocks and bonds, savings accounts, life insurance and annuities, and land and different ways that people could

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invest their money and what was the greatest growth potential, which was land. The whole presentation was geared around that (Tr. 16431).

Customers testified about the representations that were made to them:

Basically, the program that he presented, or the investment he presented to me was that this was indeed a good investment of your money compared to other investments in a Savings and Loan, in the Stock Market, things of this nature. The fact that land does not lose its value, that it will only appreciate. There's not going to be any more of it (Tr. 819; see also Tr. 1239, 1159-60, 1472, 6544).

* * * * *

Well, one of his favorite phrases was, "They are not making any more land," and now is the time to get in on the profit making (Tr. 893).

* * * * *

Well, he said the way land, the cost of land was rising that there was no better investment than land itself. That it was better than bonds or stocks (Tr. 910).

Testimony of other customers about land as an investment, and land being superior to other forms of investment are at Tr. 910, 1189-90, 1238-39, 1159, 1325, 1613-14, 1563, 1688, 1824, 5921, 6257-58, 6326, 6337, 6451, 6472-73, 6544, 16153, 16208.

C. Use of Examples of Appreciation In Land Values

50. Sales representatives were trained to use well-known examples of substantial profits that have been made on land in the [44] past. A training manual used in the Southwestern Zone instructed sales representatives that a well-chosen story about local people who made fortunes in buying cheap land and reselling it ". . . can be a powerful incentive to buy for a prospect. But be careful—these stories infer" (CX 180Z-11). The training manuals include examples of land value increases in Horizon property, in cities bordering Horizon property, and in the locality of the sale for use by sales representatives (CX 160S, 180Z20, 615 O,Y, 856C, 956P, 957, 961D).

A training manual used subsequent to January 1971 gives as an example Horizon's Paradise Hills land that sold for \$600 an acre in 1962 and in 1966 was selling for \$2500 an acre (CX 6150, 6150 Z24). A training manual used in the Philadelphia office cites an example of four acres of land in that city that increased in value from \$12,000 an acre to \$200,000 an acre in only eight years, and another example where land increased from "practically nothing" to \$24,000 per acre in 13 years (CX 956P). Other examples in training manuals, films and presentation manuals include a 10-year increase from \$100,000

to \$600,000 of a half-acre lot in the business district in Washington, D.C.; a 20-year increase from \$150 to \$5000-\$6000 per acre for subdivision land in Springfield, Illinois, and a sharp rise from \$250 to \$5,000 for building lots in Squaw Valley, California (CX 527D,L, 195Z, 615Y).

Presentation manuals, films and training manuals also pointed out increases in the value of land located near the areas of Horizon's properties. The Merv Griffin film and the Gold Presentation Manual note that land in Albuquerque which sold for \$100 an acre in 1947 was selling for \$15,000 only 22 years later (CX 615Y, 195Z, 527E). Other examples, such as a 20-year rise in a lot from \$75 to \$50,000 and a 6-year jump from \$1,000 to \$4,000 per acre, are mentioned (CX 195Z, 615Y). The Gold Presentation Manual and training manuals used with it point to a 10-year rise in 10 acres of apartment land in El Paso from \$35,000 to \$250,000 (CX 195Z; see also 615Y). Horizon City TBA maps used in sales presentations also refer to that specific price increase and cite other examples of land valued at amounts as high as \$125,000 per acre (CX 220A, 221A).

In a "Similar Situation or Story Close," which sales representatives were trained to use, the sales representatives sought to capitalize on a prospect's indecision by pointing out how costly such indecision had been for someone else. The sales representatives did this by discussing another prospect who could not make up his mind whether to buy a parcel for \$695 with only \$10 down and \$10 per month, which in just 3 years "had appreciated to \$2795." In describing a recent meeting with the earlier prospect who did not buy, the sales representative points out "the really sad part of the story" to his current prospect: "By not making a decision that night [three years ago, that prospect] did not have \$2100.00 profit the land would have brought him" (CX 961D-E).

Sales representatives testified that they used examples in their sales presentations of property that had increased in value (Tr. 1866-67, 2125, 2184, 2163, 2341-42, 3740, 4356-59, 4390, 4525, 4549, 4643, 4668, 4689, 16131-32, 16499). Horizon's internal surveys of its sales offices revealed instances where price increases of [45] other properties were used in sales presentations (CX 930F, 941C). One sales representative used as an example Northglenn, Colorado, where land purchased for \$35 per acre in 1959 was worth in excess of \$36,000 per acre in the 1970's (Tr. 4549). Customers confirmed that these land value examples were used (Tr. 6484, 4936). One customer was told of a purchaser who paid \$9-10,000 for Horizon property and sold it three years later for \$90,000, over ten times what had been paid for the property (Tr. 6484).

The dinner party speakers referred to examples of land values which had increased substantially in the past (CX 858D, 601, p. 7, 12, 15-16). One example in a dinner party speech referred to land in Denver that went from \$800 an acre to \$90,000 an acre in a few years (CX 601, p. 13). Paradise Hills lots were described as appreciating to \$3500 to \$5000 from \$99 to \$199 a few years earlier (CX 601, p. 12).

Sales representatives also used recent price increases by Horizon on its lots to show how land was increasing in value (Tr. 1865-67, 2002, 3526-27, 3771-72, 4657). One sales representative told prospects that people had previously bought land from Horizon for \$199 and that the land was "worth" at the time of his presentation various amounts from \$1500 to as much as \$3000: "It was always—it was up to the discretion of the representative at that time. He used his own figures. There were no figures" (Tr. 5970). Sales representatives also were trained to tell prospects that Paradise Hills land, which supposedly cost \$80 for a "home site" when Horizon started, was selling at the time of the sales presentation in 1970 and 1971 for over \$5,000 and up to \$10,000 to \$14,000 along the golf course. Sales representatives stated that those "original investors" had "reaped the profits" because they "had the faith in Horizon to invest right on the spot" (CX 856C; Tr. 4541-43; see also Tr. 4474-80, 16421-26, 16455-56; CX 957B).

The use of the examples of tremendous increases in land value was to raise the inference that this could logically happen to the Horizon land now being offered for sale (Tr. 16500, 4643).

D. Use of Federal Housing Administration Statistics

51. Training manuals and presentation manuals used FHA charts to depict the increase in value of residential lots over the last three decades (CX 194 O, 195T, U,V, 196Z21, 197Z23, 160, 161Z17, 163V, 615Z12-Z14, 856A-F, 956M, 957F, 856D, 962A-H). One training manual refers to the FHA charts as "the most powerful selling tool ever devised" (CX 962A). A training manual used during the period 1970-1972 trained sales representatives to point out the FHA charts and the price increase of 552% on improved lots from 1946 to 1968 and the 800 percent increase on the land without improvements, or 20 percent per annum compounded which the charts depict.

Horizon's internal survey of its sales offices revealed instances of sales representatives utilizing the 20% price increase as representative of the price appreciation Horizon's property would realize (CX 928B, 941C, 942A-C, 160Q). A training manual used in the North-

west Zone suggests that sales representatives answer any [46] question about the resale value of Horizon land by referring to the FHA charts in the presentation manual (CX 159X).

Sales representatives testified that they used the FHA charts in sales presentations (Tr. 1861-62, 2309, 3510, 3719, 3721, 3766-67, 4355, 4553-55, 4595, 4629, 4632-33, 4646-48, 4657-60, 16465, 16500). One sales representative testified that ". . . the twenty percent FHA averages were something that I used all the time" (Tr. 4657). "FHA, Federal Housing Administration was strong. If the government says it's good, it's good" (Tr. 16465). Customers also testified to the use of the FHA charts by the sales representatives (Tr. 1828, 4895, 4909-10, 6255-56, 6493).

The use of the FHA charts, which show substantial increases in building lot values since 1946, was in the context that the increase could logically happen to Horizon's land being offered for sale (Tr. 1862, 1865-67, 4648, 4595, 16500). Complaint counsel's expert witness, Dr. Howard Stevenson, stated that the use of FHA statistics lacked general relevance to Horizon's properties. Horizon's use of the FHA statistics compares all Horizon land to a center city building lot, which is not appropriate. Secondly, a strict projection of 20 percent compounded annually over a twenty-five year period would make an Albuquerque building lot be valued at \$906,000 (Tr. 6783-84).

E. Representations of Lack of Risks in Purchasing Land

52. Since Horizon's entire sales presentations were geared to showing land, especially Horizon land, as the superior investment, it is not surprising that sales presentations represented Horizon land to be risk free, or were devoid of any mention of risks (Tr. 2061; CX 157-161, 163, 178, 615, 778, 856, 956, 957, 959, 194-197). In fact, the training manuals instructed sales representatives to impart the message that land can only increase in value, that there are no risks in buying land (Tr. 2071-72, 4525, 6350). "No risks in land. All the risks were in the other investments" (Tr. 1928). "The least amount of risk in any investment" (Tr. 16326). Sales representatives were instructed to seek referrals from customers for this "relatively risk-proof opportunity" a "risk-free investment" which Horizon offered (CX 778Z17-Z18).

Sales representatives testified that during sales presentations they did not mention possible risks in purchasing land (Tr. 4525, 6167, 16451). Theodore Stone, an Horizon employee from 1968 until 1974, who was employed as a salesman, district manager, regional

manager, and for four years as a zone manager (Tr. 1898-1904), gave the following testimony on cross-examination:

Q. What about this question of risk? Isn't it true that there was some discussion at one or more of these levels of authority concerning the existence and non-existence of risk as part of the investment. Isn't that true? [47]

A. Never heard of it.

* * * * *

A. I can never recall any instance anyone within the company above my position ever attacking our land, being critical of it, or suggesting that it was not a good investment, or that there were risk factors involved, or that it might go down in value, or that it was speculative, in fact, quite the opposite (Tr. 2072).

Sales representatives testified they were not trained to affirmatively point out sales risks to prospective customers (Tr. 16496). Customers testified that there was no mention of risks being involved in purchasing Horizon land:

Q. Did he mention anything with regard to the risk of buying land?

A. No, he said there was no risk involved at all; that the land would only grow in value (Tr. 910).

* * * * *

Q. What, if anything, did the salesman say about the possibility that the land could fall in value?

A. No possibility, that land has no way to go but up. It's not like the stock market and it's not like an automobile. Land don't depreciate (Tr. 1618).

Other customer testimony concerning the lack of mention of risks during sales presentations can be found at Tr. 16152-53, 16208-09, 1745-46, 5038-39, 1185, 4899, 4911, 4937, 5927, 6268, 6286, 6455.

The specific representations about lack of risks in the purchase of Horizon's land, made in the context of the general sales presentation about Horizon's corporate stability, the growing Southwest, Horizon's property located in the path of growing cities, the pre-planned communities, the development activity generated by Horizon, and the constant reference to land value appreciation and price increases on Horizon's own property, greatly exaggerated the safety and grossly understated the risk of buying Horizon land.

F. Representations of Profit Potential

53. The record contains substantial evidence that representations were made to customers concerning the length of time before a

purchaser could expect to realize a profit on the land investment, the percentage of profit which would be realized within [48]that time frame, and the ease with which resale could be accomplished. These representations were both general and specific. The general representations included the growth of the United States population, the growth of the Southwest, the growth of Arizona, the shortage of private land in Arizona, the locked-in growth of Albuquerque and El Paso, the excellent location of Horizon's properties directly in the growth pattern of these cities, Horizon's investment in the planning and development of the properties, and the past record of growth of Horizon's properties. Population growth and the other attributes of Horizon's properties would assure its rapid development and profitability. The percentage of profit to be expected was referred to generally by reference to the FHA charts, to examples of property price increases in the locality of the sales presentation and in other areas of the country, to references of land as the best hedge against inflation, and to the price increases on Horizon's property and profits that had been made on Horizon properties in the past.

In addition to these general representations as to profitability, specific representations were made by sales representatives as to the time the property would be developed or could be sold at a profit, and the expected percentage of profit. Bruce Lehmann, who participated in most of Horizon's internal surveys of its sales offices during 1973, 1974 and 1975, (see Findings 89-97) wrote on September 4, 1975, about the sales representations being made by Horizon's sales representatives:

The future development of Horizon's properties is not presented to the customer in speculative terms stressing its dependence upon many complex and variable factors. But rather, it is dealt with as a predictable assured trend whose pattern and design is known by the representative (CX 929E).

An analysis of the training manuals, presentation manuals, dinner party speeches, other documents of record, and testimony of sales representatives and customers reveal beyond any doubt that representations were made concerning the profit potential of Horizon's property and the time frame within which such potential would be realized.

(1). *Training Manuals*

54. Training manuals in use in the period 1968-1971 reveal generally that although there were detailed instructions in ways to promote sales, there were no instructions or directions to sales representatives concerning any restrictions, limitations or prohibi-

tions regarding representations that could be made respecting the percentage or amount of appreciation to be expected, the time frame within which a profit could be realized, or difficulties in reselling the property after purchase.

In this regard, the following manuals and presentations serve as examples: CX 778, a General Reference Guide for Sales [49] Representatives dated March 1, 1970, has no instructions, limitations or prohibitions concerning representations of time, value or resale difficulties. Yet, the Guide does concern itself with other possible questions or objections which may be raised by prospective purchasers.

CX 856A-F, a standard sales presentation used in the Northglenn (Denver), Colorado office during 1970-71 (Tr. 4541-42), makes no mention of instructions, limitations or prohibitions on representations concerning the percentage of profit to be expected, the time frame for profitability or difficulties of resale. This presentation does provide training on the use of the FHA charts in the presentation manual to show a 552% increase in the value of a developed lot in 22 years.

CX 956, a training manual used in the Philadelphia office during 1970-1971 gives several examples of substantial increases in land values: Philadelphia land increased from \$12,000 an acre to \$200,000 eight years later; land in a Philadelphia suburb went from "practically nothing" in 1957 to \$25,000 an acre in 1970; a Washington, D.C. lot increased in value from \$86,000 an acre in 1960 to \$800,000 in 1970; Albuquerque land selling for \$100 an acre in 1947 was selling for \$15,000 an acre in 1970. The sales representatives were also trained to represent that a \$2400 investment in Horizon land would be worth \$15,000 in ten years. This training manual has no instructions, limitations or prohibitions on representations concerning percentage of profit to be realized, the time frame within which a profit could be realized or resale difficulties.

CX 957, a sales presentation used in the Ardmore, Pennsylvania Office in 1970 and thereafter (Tr. 16302, 16455), cited an example of Horizon's Paradise Hill lots which increased in value from \$600 per lot in 1959 to \$12,000 in 1970. This sales presentation is silent on instructions, limitations or prohibitions on representations concerning percentage of profit, time frame to profitability, or resale problems.

CX 959, a listing of suggested answers to possible questions by prospective purchasers, used in the Philadelphia office during 1970 (Tr. 16319), has no questions or answers on the time of development

of the property offered for sale, the possible resale value of the property, or any resale difficulties that might be encountered.

CX 615, a training manual used in 1971 and thereafter, contains, as does CX 956, several examples of land that has increased substantially in value, and FHA statistics which show increases that amounted to 20% compounded annually. This training manual also instructed sales representatives to represent that the Horizon property being offered for sale at \$900 per lot would be worth \$3,500–\$5,000 “at the time of development” (CX 615Z27). The training manual is silent as to instructions, limitations or prohibitions concerning percentage of profit, a time frame for profitability, and resale difficulties. [50]

CX 160, a training manual used from the Spring of 1970 to at least the Fall of 1972 used the FHA property increases—approximately 20% compounded annually, but is silent on instructions, limitations or prohibitions on percentage of profit, time frame to profitability, and resale problems.

CX 962, used until 1972, is a sales presentation based on the use of the FHA statistics “. . . the most powerful selling tool ever devised.” (CX 962A). The sales representatives were instructed to explain the FHA land appreciation data and then let the prospect select what *he* considered a conservative growth rate. This document also pointed out that land sells many times before development and that it can be held for long periods to realize all the growth or sold along the way at an appreciated value. It is further stated that resale of the land will be no problem—the real estate investment market is enormous. This presentation is silent as to any instructions, limitations or prohibitions on representations concerning profitability, time frame to profitability, and resale problems.

CX 180, a training manual used in the Southeastern Zone subsequent to June 1971 and in 1972 (CX 180K; Tr. 8764), states that Horizon property must be sold as a long-term investment, and that no estimates of when a buyer will make a profit should be made. However, “. . . if we are absolutely unable to avoid it, it must be 12 to 15 to 20 years or more” (CX 180S). Sales representatives were instructed not to guarantee a profit, but to present the facts of the past and anyone can draw a logical conclusion from these facts. It is also pointed out that Horizon does not offer to resell a customer’s property or buy it back. Since Horizon does not have a “crystal ball,” it cannot foretell the performance of a specific piece of property (CX 180S).

CX 180, however, has instructions to the sales representative demonstrating how the prospect can be shown that two single family

lots selling for \$900 each can be controlled for 10 percent down, and sold for \$6,400 at development (CX 180Z-13). This is termed "The Automatic Close" and for best results was to be memorized word for word. CX 180 also instructed the sales representatives to point out that Horizon's Paradise Hills project had lots selling for \$600 an acre in 1962 which were worth (1971-72) \$3,000 an acre and more. Further, sales representatives were instructed to project that Rio del Oro lots selling for \$900 would be worth the same as the developed lots in Enchanted Mesa, [Horizon's developed core area in Rio Communities]—\$3,500 to \$5,000 "at the time of development" (CX180Z-20).

CX 161, a training manual used Spring 1971 to February 1972, has a list of "don'ts": "Don't project or refer to profits or timetables" (CX 161Z5); "Don't forget you are selling a long term investment, and long term means ten years or longer" (CX 161Z5); and "Don't forget that Horizon does not guarantee or predict when or how much money a purchaser will experience—nor does Horizon allow a sales representative to make such predictions" (CX 161Z5). This training manual also posed a series of possible questions with corresponding answers. One answer stated that Horizon cannot [51]guarantee a particular profit on a particular timetable; however, an evaluation of history and facts from the best available sources "can lead to logical and profitable conclusions" (CX 161Z15). It is also stated that property can be resold within ten or fifteen years (CX 161Z16). FHA statistics are used to answer any question concerning possible resale price of the property (CX 161Z17).

CX 163, a training manual used in Horizon's Northwest Zone, has special training on selected questions: "When Can I Sell This Land For A Profit" and "What Will I Be Able To Sell These Lots For" is answered by ". . . that is a very difficult question to answer, specifically" (CX 163V). FHA statistics are used to show how land values have gone up in the past. This training manual also has the following statement: "No one can precisely forecast property values in the future. In fact, Horizon prohibits its people from doing so" (CX 163G). This language follows closely the statements in the "Principles of Land Ownership" (RX 67), issued sometime after May 1, 1973 (see Finding 57), which indicates CX 163 probably antedates that document.

CX 905B,D, a training tape apparently dated September 1, 1973, stated that land lacks liquidity, no one can precisely forecast property values in the future, and Horizon prohibits its people from doing so. The training tape also pointed out that anyone desiring certainty may lose an opportunity to profit.

CX 157, a training manual used in 1974, contains language apparently adopted from the "Principles of Land Ownership," as follows:

No one can precisely forecast property values in the future. In fact, Horizon prohibits its people from doing so. Those individuals not sufficiently informed who insist on guarantees of specific value increases, development time, resale, repurchase or profitability, should not buy our land, or in fact, any land. You see, the world is filled with people who want everything guaranteed, who will not act in the face of uncertainty. Unfortunately, by the time they are certain, everyone else is too and the opportunities are often gone (CX G-H).

CX 157 lists some specific "don'ts":

Don't project or refer to profits or time tables (CX 157T).

Don't forget that Horizon does not guarantee or predict when or how much money a purchaser will experience—nor does Horizon allow a sales representative to make such predictions (CX 157T). [52]

Additionally, CX 157 has questions and answers about when the land can be sold for a profit and when the lots will be developed. Answers include statements such as "that is a very difficult question," and lots will be developed "when the population warrants it" (CX 157U,W). The FHA statistics are also used to answer these questions.

CX 158, used in 1973, and CX 159 are training manuals that raise questions and answers. The answers state that Horizon does not "guarantee" a profit and cannot predict when to sell lots, that these are difficult questions but that land values should continue to rise and the longer the lots are held the greater the increase in value will be.

(2) *Dinner Party Speeches*

55. Dinner party speeches in the record do not have any instructions, limitations or prohibitions concerning percentage of profits, the time within which the property will be developed or can be resold at a profit, or any problems that may be encountered in resale. In fact, CX 858, a copy of a dinner party speech used in Denver, gives examples of profits made on land:

- (1) Northglenn, Colorado land selling at \$2-3-4-800 per acre a few years ago currently worth \$90,000 an acre;
- (2) Cherry Hill Shopping Center which was merely a dump a few years ago;
- (3) Horizon City lots selling for \$2-800 in 1964 currently worth \$3,500-5,000; and

(4) an investment in Horizon of \$1,000 in 1962 worth \$16,525 in 1970.²

CX 601, a transcript of an actual dinner party presentation, made no mention of limitations concerning percentage of profits, the time frame to development or profitability, or difficulties of resale. This dinner party presentation lists examples of land value increases similar to those listed in CX 858.

(3) *Presentation Manuals*

56. The earlier presentation manuals, CX 194, 195 and 196, did not have any statements concerning limitations or prohibitions on percentage of profit, time to profitability, or resale problems. However, beginning in early 1974 (CX 307; Tr. 1986) the presentation manual had substitute pages added which carried the following [53]statements (in type much smaller than other representations on the pages):

The figures used in this chart are the latest available Federal Housing Administration figures showing by year the average selling price of improved sites on which new FHA-insured single family houses were built. Source for this information: Division of Research and Statistics. Market price of sites for new one-family homes, Sec. 203.

Naturally all land does not increase in value at a particular rate. The value of land is based on what a user will pay for it. Land which has no immediate use has a value which can only be estimated by judging when a user market will exist. Many complex factors affect the time which it will take vacant land to be ready for development and the user market. The general, regional and local economies, the area's rate of growth, interest rates and availability of capital are all examples of these factors. (CX 197Z-23).

No one can precisely forecast property values in the future. Horizon prohibits its people from doing so. Those who insist on guarantees of specific value increases, development time, resale, re-purchase or profitability—should not buy our land—or any other land. The world is filled with people who cannot act in the face of uncertainty. Unfortunately, by the time they are certain, everyone else is too, and the opportunities that existed earlier are gone. (CX 197Z-24).

Land owned for the long-term not the short-term. Now, what do we mean by long-term and short-term? Horizon's use of short-term is less than ten years and long-term more than 20 years. This does not mean the land that we offer for sale today will not be used for 20 or more years—portions of it in or near present development areas may be used within the short-term and other portions over longer periods. The main consideration is not to commit funds needed for foreseeable necessities or which are being held in reserve for unknown contingencies. (CX 197Z24).

² This representation of \$1,000 invested in Horizon in 1962 and worth \$16,525 in 1970 is not altogether clear. It could be interpreted to mean investment in land or investment in Horizon corporate stock. However, it most likely would be understood by dinner party guests to mean land, since land was the subject matter of the presentation.

The above statements reflect language contained in the "Principles of Land Ownership"(RX 67); which was first distributed in mid-1973 (Finding 57). [54]

(4) *Other Documents*

57. By memorandum dated May 1, 1973, Sidney Nelson, President, Horizon Corporation, stated to all employees certain principles of land ownership which related to the profit potential of Horizon land (RX 1551). In August 1973, these principles were printed in a brochure entitled "Principles of Land Ownership - A Policy Statement by Sidney Nelson, President, Horizon Corp." ("Principles") (RX 67), and distributed to sales representatives (Tr. 13563). Thereafter, Horizon included a copy of the "Principles" in the "important document package" which was sent to customers after the sales transaction had been completed at Horizon's Tucson headquarters (Tr. 12889-95, 13565). The eleven principles are as follows:

1. Every individual, with discretionary financial resources, should be encouraged to own land. No sounder investment exists, when entered into with informed awareness. Horizon believes its properties to be an ideal subject of purchase for all such people. Sound judgment must be employed, however, to insure that purchases are not made by those for whom land is an unsuitable purchase.

2. Since real estate generally, and vacant land particularly, lacks liquidity (convertibility into cash at a fair price at will), caution should be exercised to commit only funds which are comfortably available from "discretionary" income or from liquid assets which are not necessary to meet foreseeable necessities, to include a reasonable allowance for unknown contingencies. This axiom applies to any initial or subsequent purchase of land.

3. The notion that all land increases in value at some particular rate or another is fallacious. Placing other factors such as area growth aside, real estate may increase in value to offset inflation.

4. The value of land is based on what a user will pay for it, now or in the future. Land which has no immediate user market has a value which can only be estimated by judging when in the future a user market will exist, and what the value of such property will be then. The future value as determined should then be discounted to its present estimated value dependent on the time differential.

5. Many complex factors affect the time it will take a given piece of vacant land to be [55]"ready" for development and the user market. The general, regional and local economies; the area rate of growth; interest rates and availability of capital are all examples. Horizon selects land for its developments in areas which it believes are influenced by factors favorable to long-term growth. We cannot control nor precisely predict (nor can anyone else) when these factors will mature, but Horizon is convinced that dynamic growth is predictable in its developments in the long term.

6. What do we mean by "short-term" and "long-term"? A buyer of land must be conservative in his application of these terms. Horizon's use thereof shall read "short-term" as less than 10 years and "long-term" as more than 20 years. In between is the gray area which cannot be defined more closely.

7. This does not mean that the land we offer for sale today *will not* be used for 20

or more years in that portions in or near present development areas may be used with the near term and other portions may only be used over longer periods. Each individual should carefully consider and then buy only that land he can afford to put aside as a long-term asset.

8. The world is filled with people who will not act in the face of uncertainty; unfortunately, by the time they are certain, everyone else is too, and the opportunities existing earlier are often gone. While this is a truism which each prospective landowner should recognize, it should never be allowed to influence him to buy any land without careful consideration.

9. Horizon cannot make forecasts of property values in the long-term future, and prohibits its personnel from doing so. Those who do not wish to buy land based on the fundamental factors recited in this statement of policy, but insist on an assurance of specific value increases, time to development, guarantee of resale, repurchase or profitability, should be advised plainly that we do not recommend their purchase of our land or any other land.

10. Particular care should be exercised by older people, near or in retirement, to assure that no purchase is made upon which realization of an economic return is essential to the buyer to provide for his retirement needs. Personal or family use of the property, or estate purposes, is the only [56]reasonable basis for purchase by such persons in view of the long-term nature of the investment.

11. When presenting property to prospective owners, Horizon personnel shall clearly explain and be guided by the spirit and intent of this statement of policy.

Horizon's internal surveys of its sales offices during 1974 and 1975 revealed clearly that sales representatives did not use the "Principles" in their sales presentations. Further, it was found that the "Principles," which were sent to customers several days after the sales transaction had been completed, were not read by the customers (CX 938D, G, H, 951E, F, G; CX 945A).

(5) *Representations by Sales Representatives*

58. Training documents recognized the questions which are paramount to a potential customer. "Any investor may want to know three things. How much can he make? When can he make it? How does it come about?" (CX 962E). The training manuals and presentation manuals previously discussed indicate that sales representatives beginning sometime after 1971 were instructed how to answer questions by prospects concerning when and how much profit they could expect from purchasing Horizon land. The suggested answers to these questions were "that is a very difficult question to answer" (CX 163V, 157U, W), or "no one can precisely forecast property values in the future" (CX 163G). These answers are followed by explanations as to what property has done in the past. Testimony by sales representatives demonstrate how these instructions were effectuated.

One very experienced sales representative and sales trainer,

Barbara Kelly, who was employed in Horizon's Philadelphia office from September 1969 to September 1972, testified that she did not affirmatively tell prospective customers about the period for profitability or specific problems in reselling the land; it was only if they asked—"it was not part of the presentation" (Tr. 16494-95):

JUDGE BARNES: As part of your presentation, did you make an effort to tell people all of these things?

THE WITNESS: No.

JUDGE BARNES: If they asked questions, then you did?

THE WITNESS: Yes. (Tr. 16,496)

She testified that sales representatives used a structured approach, that price increases that other properties had experienced in the past were cited to the prospect to indicate what the property being sold could potentially be worth in the future—"using FHA figures and everything else" (Tr. 16,498-500). This presentation answered the questions for the prospects: "That's the way the presentation was geared and that's the way we understood it" (Tr. 16,498). [57]

Another sales representative, employed from August 1970 to December 1971 and who served as a sales manager for over one year, testified that he approached the subject of time period and profitability by using the FHA statistics, and by leading the prospect to answer his own questions:

We are leading to the point that that is a dramatic increase and off of this statement we then asked the client, "what do you think the value of land would be?"

Of course, we have pre-empted that with directional growth, and they would come and indicate, "Yes, yes, that looks like the value ought to go up dramatically!"

They drew the conclusion from what was shown (Tr. 1862-63; see also Tr. 1873-74).

* * * * *

Yes, we would attempt to get them to answer their own question by the appreciation of land value in Austin, Texas [where the sales representative was employed] and the appreciation of land value as shown in the [FHA] charts in the presentation book and just lead them to the conclusion (Tr. 1866-67).

* * * * *

As I explained, we went back to the presentation booklet and pointed out to them the growth pattern and "they" drew conclusions, sir (Tr. 1874; see also Tr. 1866).

Another sales representative testified that he too would let the customer speculate about the time period by using a city the prospect

was familiar with: "He would normally say five or ten years" (Tr. 2185; see also Tr. 2125, 2184). Other sales representatives also testified that they would rely upon the FHA statistics and then place the burden of future price or value back on the shoulders of the prospect and let the prospect answer his own question and do the speculating (Tr. 3510, 3553, 4792).

Another method used by sales representatives was to respond to customer inquiries by stating that no one has a "crystal ball", and then refer to examples of property value increases in the past (Tr. 4704, 4706-08, 4772-73, 4791-92, 16,494; see also Tr. 13,547, 10,241, 13,343, 11,384, and 16,137). Besides the "crystal ball" answer, and the shift of the burden to the prospective customer, the record clearly demonstrates that sales representatives made specific representations concerning profitability and the time period in which such profitability would be realized. [58]

Theodore Stone, employed by Horizon from 1968 to 1974 and who served as a zone manager from 1970 to 1974, testified that he was trained in 1968 by Bill Cook, who later became Horizon's Vice President of Sales, to tell prospective customers they would have to hold their land 6 to 8 years to realize a profit (Tr. 2030). He further testified that in late 1972, as a result of many, many meetings in Tucson among zone managers as to what investment claims should be made: "The decision was to identify it as long-term, long term meaning ten years or longer" (Tr. 2032). Thereafter, in 1973 "there was a great deal of confusion in my last eight or nine or ten months with Horizon as to what investment claims could be made and what couldn't be made. The Principles of Land Ownership came out about that time and there were statements in the Principles about time periods that confused the issue even further.

"The Gray Area was made use of and the salesman, everything he had all of a sudden was in the Gray Area" (Tr. 2034-35).

* * * * *

Well, item 6 [of the "Principles"] says What do we mean by "short-term" and "long-term"? "A buyer of land must be conservative in his application of these terms. Horizon's use thereof shall read short-term as less than ten years, and long-term as more than twenty years. In between is the Gray Area which cannot be defined more closely."

That added a great deal of confusion in the salesman's mind in that there was some properties still that were short-term, some that were long-term, and some were in the Gray Area.

There was a lot of abuse given the short-term and the Gray Area that we as developers who knew where those areas were (Tr. 2037-38).

Mr. Stone considered a misrepresentation about the investment potential time period as a most severe misrepresentation of the property and he terminated sales representatives for such misrepresentations (Tr. 2065). He testified that whatever time period was agreed upon at the meetings in Tucson he passed on to the salesmen— . . . "The consensus was ten years or longer" (Tr. 2066):

JUDGE BARNES: Mr. Stone, can you sell that property if you told people it would be ten years or more before they realized any appreciation?

THE WITNESS: Yes, sir. [59]

JUDGE BARNES: You could?

THE WITNESS: Yes, sir. The argument was with the twenty years. That was the argument, whether you could say twenty years or longer, and there was not a zone manager within the company who felt like that he could go back to the field and put into the presentations and manuals to enforce the 20-year period, that no one would buy, and I agree with that (Tr. 2067).

* * * * *

Then, along about 1972 there was a real serious effort in meetings to see if we could not sell our properties with twenty years or longer, and that met with such resistance by all people who were supervising sales efforts that it was never adopted.

Then, in 1973 this Principles of Land Ownership came out and added a little bit more confusion as to that particular investment claim. When I left, they were still debating it, and I assume they still are (Tr. 2069-70).

Daniel B. Nickeson, employed by Horizon from August 1968 to November 1972 as a sales representative, sales manager, district manager and regional manager (Tr. 4497, 4518), testified that when he first started with Horizon ". . . we would use three to five years, they could expect some appreciation on it" (Tr. 4507; see also Tr. 4513).

Q. Did you tell them how much it would appreciate in that three to five year period?

A. We used different charts that showed what land values had done over the years and that we use 20 percent a year, 15 percent a year, 25 percent a year, and in some cases, you could point out to them what it has done in Denver here, some land has gone up 30 percent a year (Tr. 4507-08).

* * * * *

JUDGE BARNES: Did you say initially during that period of time that this was changed? [60]

THE WITNESS: Yes, it was changed two or three different times as far as the

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number of years before we really felt that there would be a resale market for that property locally through a realtor. It was changed to where the company didn't want to even project any time or give them a time. At the same time they took the word investment out of it. We used to use it, and the Federal Government said you couldn't really say this was really an investment. So, they were very particular about not using that.

JUDGE BARNES: What time was it when this last change occurred?

THE WITNESS: This basically all came about in 1970, '71, this is when it started changing (Tr. 4513).

According to Mr. Nickeson, the word "appreciation" was used to replace the word "investment" (Tr. 4514). One sales representative, who also served as a sales manager and trainer, used words like "rainy-day fund type of thing or down the road or retirement fund" in lieu of using the word "investment" (Tr. 4666). Another sales representative testified:

We were later on instructed absolutely not to use it for investment anymore, and we were debating how we go around the investment. That is a fact (Tr. 16144; see also Tr. 16143, 5983, 6007).

Marc Knasel, an Horizon employee from September 1969 to November 1976, served as a sales representative, sales manager, district manager, a staff member of the Gulf Coast Zone, and from July 1971 until July 1974, the Director of Training at Horizon's headquarters (Tr. 3751-56). Mr. Knasel, at the time he served as a sales representative and district manager until July 1971, would respond to a prospect's question concerning when the prospect could resell his property, as follows:

I believe I used terms at that time in the nature of three to five years. If I was asked that question I would probably answer to the prospect three to five years, six years (Tr. 3769; see also Tr. 3929, 3934).

As for percentage profits to be made, Mr. Knasel testified: [61]

I recall in some of the earlier, in 1969, it sticks in my mind that there were some multiples mentioned, three to five times the investment (Tr. 3933).

Mr. Knasel testified that when he was first in the Tucson headquarters, subsequent to July 1971 he recalled that in management training sessions Richard Lovinger, Horizon's Vice President of Customer Service, spoke in terms of 10 to 15 years in addressing the field management people. This continued through June 1972. The first written instructions concerning time periods which Mr. Knasel

recalled, was Sidney Nelson's "Principles" distributed in the Summer of 1973 (Tr. 3946-3950).

One sales representative, employed from June 1971 to June 1972, was trained that property would develop in two or three years (Tr. 4385, 4389, 4425-26, 4435-37, 4443, 4446-47), and would appreciate at a rate of 25-30 percent per year (Tr. 4387, 4392). He also testified that sales representatives were given some property to sell especially to doctors (Tr. 4437, 4448), and some "hot" property that would develop within six months (Tr. 4416).

A sales representative and trainer, employed by Horizon in Las Vegas from July 1973 to August 1974, would answer prospects' questions about when the prospect could expect to sell the property by referring the prospect to the FHA statistics (Tr. 4632-33, 4646-48). This sales representative was not permitted to "come out and say" that a prospect could make a specific amount of money within a specific time period (Tr. 4646). "We wouldn't come right out and say your property is going to be developed, guaranteed to be developed. We didn't specifically come out and say that, but we kind of tended to lean toward that impression that it would be" (Tr. 4641). On cross-examination he further testified:

Q. When you gave examples of values of commercial and multi-family land in Las Vegas, you did not tell them that this would necessarily hold true in Rio Communities or in Horizon City, did you?

* * * * *

A. We wouldn't come out and specifically say your property is going to do that, but we tended to give them the impression that if they held on to their property and time warranted and it was developed, if they had commercial property and multi-family property, this would be what they would stand to get versus having single-family lots (Tr. 4643).

A dinner party sales representative employed in the Denver office from July 1970 until July 1971, testified that he was trained that single family property would grow anywhere from three to five [62] times, multi-family would grow from five to seven times, and commercial would grow up to ten times the original investment (Tr. 4771-72). This sales representative also used three different methods to show the time period involved; two, three, four, and five years; eight to twelve years; and the "crystal ball" method (Tr. 4772). The "crystal ball" method was used most often (Tr. 4773).

A sales representative who was a party salesman in the Chicago office from 1968 until 1975, testified that:

* We generally use a figure that if the individual bought \$2,700 worth of property and

from five to seven years that property should be worth somewhere between \$9 to \$12,000 (Tr. 5970; see also Tr. 6003-04, 6008-10, 6023, 6026-27).

This sales representative testified that he used this type of a presentation "all the time" (Tr. 5972), and that he used the rate of development as being "one square mile per year" "anytime I needed it" (Tr. 5972).

Another sales representative and sales manager, employed in Horizon's Chicago office from December 1970 to April 1972 (Tr. 6137-38, 6157), testified to representing that Horizon would establish satellite or pilot communities in the Rio Communities property, that the property would develop in four to seven years, and lots costing \$1,400 would be worth \$4,000 to \$7,000 at that time (Tr. 6144, 6146, 6152-53). Horizon City property was represented to increase in value from \$900, \$1100 and \$1400 to \$4500 to \$7000 in four to seven years (Tr. 6144). While this sales representative testified that the existence of pilot communities within a given time period was not a sure thing (Tr. 6166), any doubts or uncertainty was a very, very minor part of the sales presentation and very much downplayed (Tr. 6167-68).

A sales representative and sales manager, employed in Horizon's New York City and Brooklyn offices from February 1970 until July 1975, testified that she was trained that the development period for Horizon's property was seven to ten years "without guarantee" (Tr. 16110, 16142). After visiting Rio Communities in 1974, this sales representative stopped using seven to ten years because "I would be a liar" (Tr. 16111, 16136). This sales representative heard much talk about satellite areas which "infiltrated in the salesman[s] head and you infiltrated it into your client's head," but nothing was ever done about starting satellite areas (Tr. 16113).

Barbara Kelly, a sales representative and sales manager in Horizon's Philadelphia office from September 1969 to September 1972 (Tr. 16420-22), testified that when she started with the company ". . . they were telling us you are selling an eight to ten year investment" (Tr. 16432, 16491). Residential was the quickest-type investment, but you did not make as much money. Multi-family property was worth five times as much as single family property but it took a little longer, and commercial property was worth ten times what a single family lot was worth (Tr. 16432). This sales [63] representative was trained that Horizon would open up additional core areas to facilitate development, and she sold property based on the satellite core area concept (Tr. 16442-44).

Another sales representative employed in Horizon's Philadelphia office from October 1969 until August 1971, was trained to tell

prospective customers that Rio Communities property would develop in five to seven years. This time period was later changed to ten years (Tr. 16325, 16352, 16356, 16377, 16379). She was instructed that single family property would multiply three times, multi-family six times and commercial property ten times (Tr. 16325, 16378; see also Tr. 1935, 1940-41).

One sales representative who worked for Horizon from July 1969 until July 1974 (Tr. 2305, 2332-33), stated that a telephone solicitation used in the Washington, D.C. office to solicit in-home appointments would ask the prospect if he would be interested in an investment where you could "double or triple your money over the next six to eight years" (Tr. 2318-19). Sales representatives in the Washington, D.C. office used this six-to-eight year period until the District Manager visited Tucson in 1969 and came back and said to stop using six years so the period then became eight to ten years (Tr. 2352-53, 2355): "—if the company will allow you eight years to pay for this, somewhere at the end of this eight years, your property should be into the development stage. That's normally how most of us would answer it. It seemed to be a logical explanation which the customer would accept" (Tr. 2358). Sometime thereafter, this sales representative used a range of figures from 8 to 10 up to 18 to 20 years. "When I say 20, the people sort of lost interest, so I back off. I tell them anywhere from 16 to 18 years, something like that" (Tr. 2356):

Q. So the figure at which you began to perceive resistance from a customer would be twenty years; is that correct?

A. No, 18 (Tr. 2356).

A sales representative and later a sales manager, employed by Horizon from September 1973 to April 1975, testified that inferences arose from the Horizon promise to have roads in by the property in eight years that the property would be developed in eight years (Tr. 3732-33).

59. Horizon's "self-evaluative" documents, which report on surveys of sales offices which Horizon undertook beginning in 1973, revealed that representations were routinely made that Horizon's property was a short term investment, and specific time periods and profitability increments were mentioned. These representations are set out in detail in Findings 91-100, see especially CX 927L-M, O, 930C, G, 932E, F, 933, 936C, 942A, B, D, 943B, 944B, 947F, I, M, N, 948E, 949D, E, 950 E, I, K, 951E, G, I, 954. These internal survey reports reveal that older persons in particular were sold property on the representation that they would realize a profit during retire-

ment, or during their lifetime (Findings 91-100; see especially CX 927G, I, 935B, 936C, 944T, 947I, 949E, 950I, J). [64]

The survey documents reveal that it was routine practice to "trade" customers into multi-family property, or to trade customers into "better" locations which, it was represented, would result in a much shorter holding period and thereby enhance their profitability (Findings 91-100; especially CX 927E, F, H, 929D, F, I, J, K, 938D, 944E, T, 946H).

Testimony showing that Horizon officials had knowledge that Horizon's purported policy was not being followed in sales presentations can be found in the record. Mr. Nickeson, a regional manager in the Denver, Colorado area, testified that he realized practices existed in some of the offices under his supervision that were not in accord with his directives (Tr. 4529).

One sales representative who worked in the Chicago office from July 1972 until July 1973, and then transferred to the Phoenix office as a sales manager, testified:

Again, a salesman was trained but once he left the office and went to a customer's house there were many things that happened that were not training. A salesman would say, if he became panicky and he couldn't make a sale, he would use whatever method of means necessary to try and make the sale. It was kind of in stages, he would kind of go into his regular presentation and if that didn't succeed he might get what in the trade we call "hot" and add little phrases of his own. (Tr. 3553-54).

According to this sales representative, the District Manager, Stan Drizen, knew of such activities (Tr. 3554). Another sales representative testified that Mr. Drizen departed from Horizon policy in almost everything he did (Tr. 3744). Another sales representative testified that on occasion Mr. Drizen stated that he did not care how the business was obtained, he wanted X amount of business on the books within a given time frame (Tr. 4674-75). Horizon's internal surveys of its sales offices revealed that the Phoenix Office, under Mr. Drizen's supervision, made numerous serious misrepresentations (Finding 93; see especially CX 939, 940-942).

One sales manager testified that the general practice for zone office's supervision consisted of why aren't you selling more (Tr. 1892).

Horizon received complaints from customers about sales representative's misrepresentations. On April 12, 1972, a customer wrote Horizon requesting a refund of the \$460 which the customer had invested in Horizon property some six months previously. The customer stated:

After careful investigation through numerous qualified sources we find that Horizon

Corporation has misrepresented the appreciation [65]time of eight to twelve years for land we purchased in the Rio Del Oro development. Our sources project a more realistic time of twenty to thirty years for noticeable appreciation to occur. (CX 907B).

Horizon's Operations Manager of Customer Service replied on April 25, 1972 and denied the request for a refund, stating in part:

We do not know what will happen to your property and I'm sure you do not know. The demand for development in your area could occur in many years less than an eight to twelve year projection. Then, it can take many years longer. . . . If I were you I certainly would not take the word of any other person in relation to what will happen to the property you personally own. You have purchased very fine property and I'm sure you will be most enthused about your purchase if you will visit your property. (CX 907A).

(6) *Customer Testimony*

60. Customer testimony confirms that sales representatives made specific representations concerning the profit that would be realized in the purchase of Horizon's land and the time period within which such profit would be realized.

Col. John Yuill, who invested several thousand dollars in Horizon land for his children's college expenses (Tr. 840), was told in November 1971, that he could invest a small amount of money to control the property (leverage), resell the property at a substantial profit in 2-3 years and use the profits to buy additional property (pyramiding) (Tr. 819, 822). Col. Yuill was told Horizon would "assist" him in reselling the property and there would be no problem in reselling (Tr. 822-23). He purchased seven residential lots in Rio del Oro at that time for about \$5800 (Tr. 823). He later purchased a commercial lot in Horizon City because he was told there was a greater potential for appreciation with commercial property (Tr. 831, 845). He also purchased an additional Rio del Oro lot closer in to the developed area, which he was informed would appreciate in a shorter period of time (Tr. 839).

Burnice Carter, an individual who owned a dry cleaning business, purchased four residential lots and one commercial lot in Horizon City during February 1970, for \$6,300 (Tr. 914; CX 691). The sales representative, a customer and a friend of Mr. Carter (Tr. 892, 907, 915, 940, 942), at the time of the initial contact was wearing a big lapel button emblazoned "MONEY" (Tr. 892). Mr. Carter, who was attracted by the lapel button (Tr. 892), was told that he could double his money on his purchase in five years, and could show an immediate profit of \$150 per lot because the price on the lots was going up the next day (Tr. 893-94, 913). The commercial lot was represented to be more profitable than a residential lot (Tr. [66]912).

The sales representative stated that he would help sell the lots in about five years (Tr. 913). The sales representative called about one month later and informed Mr. Carter that he had a 24-hour exclusive on a commercial lot that would be a real good investment. The alleged exclusive was given to the sales representative as a bonus for leading the area in sales. The commercial lot was in a good location and there would be some money made on it, but if it were not purchased that night it would be grabbed up (Tr. 923). The sales representative stated that a thoroughfare would be cut through the property and the commercial lot would be on a corner which would make it tremendously valuable. The time period for profit was stated to be five or six years. Mr. Carter paid \$9600 for this Horizon City commercial lot (Tr. 923-24; CX 699). This same sales representative came up with another 24-hour exclusive on another commercial lot, which he represented to Mr. Carter as a real good investment and there would be no problem at all in doubling the investment in five or six years (Tr. 931-32, 962-65; CX 704). After his sons-in-law visited the property and reported back to him, Mr. Carter wrote to Horizon to get his money back, but he was unable to get a reply. He stopped payments in 1971 after paying to Horizon approximately \$5100 (Tr. 943-44).

J. D. and A. D. Oliver, twin brothers, were told in early 1975 that the lots they purchased in Horizon's Waterwood property would double in value in two years (Tr. 975-76, 977-78, 1052, 1055).

Allen Nesbit purchased three single family lots in Horizon City in July 1970 for \$1,000 each (Tr. 1191). He was told that raw land appreciates at the rate of 20% per year and that the land would have to be held for seven to ten years (Tr. 1191-92). Horizon would notify Mr. Nesbit when there was a buyer available for the land (Tr. 1192). About two years later Mr. Nesbit was contacted by a sales representative who wanted to talk about the progress that had been made on the earlier purchase. The sales representative stated that the land had doubled in value (Tr. 1194-95, 1219-20), and that Mr. Nesbit needed to add to his portfolio and pick up some multi-family property. Multi-family property was represented to be more choice than residential property and that land was appreciating at approximately 20% per year (Tr. 1195-96). He was told that Horizon was opening up various parts of the land and development would occur in seven to ten years (1196). Mr. Nesbit purchased a multi-family lot for \$4,600 (Tr. 1198). He later became concerned about his property and was short of money so with Horizon's consent he traded in his four lots for one paid-up lot (Tr. 1202).

Billy Cook purchased a lot in Horizon City in January 1972 for

\$1300 and was told by the Horizon sales representative that the lot could be sold for \$5,000 in five to seven years, although there was no guarantee that this would happen (Tr. 1159, 1182).

Michael Collum was told in July 1970 he would double his money by the time his purchase contract was paid out - eight years, ". . . or even as early as five years" (Tr. 1527-28). The sales representative also stated that there was to be a price increase right away so now was the time to buy (Tr. 1528-29). Mr. Collum purchased two lots in Horizon City for \$2,000 (CX 751). In 1975, [67]after the Commission's complaint herein issued, Mr. Collum requested release from his contract. The matter was resolved by giving Mr. Collum a paid-up deed to one lot and a refund of \$575 (Tr. 1539-40).

Jose Medina purchased two lots in Horizon City in November 1971 for \$2,000 (RX 113; Tr. 4994), a price represented to be below the normal price of the lots (Tr. 4994, 5006). The sales representative stated that he could double his money in four years and that there would be no problem in reselling the lots at that time (Tr. 4995-96, 5009).

Helen Anderson, jointly with her sister Margaret Hayner, purchased 10 acres in Whispering Ranch in 1968 for \$8,990 (Tr. 6176-77; RX 145-46). At the first meeting the sales representative stated that there was not much private land available in Arizona since the government owned so much of the land. The sales representative said the Whispering Ranch property was raw land but it had been engineered and utilities would be provided; Ms. Anderson assured by Horizon, that there was good water there and, with the demand for the property, it should double in value in 20 years (Tr. 6178, 6185, 6202). Ms. Anderson did not purchase the property on the evening of the sales representative's first visit, but asked for more information about Horizon's financial condition. The sales representative returned two days later with Horizon's financial statement and a contract of purchase was signed (Tr. 6180). According to the sales representative, Whispering Ranch would be comparable to the Sun City development outside Phoenix (Tr. 6179, 6182). The lots which were purchased were represented to be on a section line and would be of greater value because they would have some commercial value (Tr. 6184, 6191). Ms. Anderson would at least double her money in 20 years, but by dividing the 10 acres into one acre lots, she could increase the value much more (Tr. 6216-17).

In 1969 Ms. Anderson visited Whispering Ranch by airplane, courtesy of Horizon (Tr. 6209; RX 149-50). The Horizon representative flew her over Sun City, a good retirement community, enroute to Whispering Ranch, and she only saw the property from the air (Tr.

6186, 6206). The Horizon representative stated that he hoped Whispering Ranch would be like Sun City eventually (Tr. 6186). In 1971 or 1972 Ms. Anderson made an attempt to sell the property through assistance from Horizon and through contact with a real estate agent, but was not successful (Tr. 6183). The Horizon representative advised her to keep the property since it was worth more than she had paid for it (Tr. 6190). In 1975 Ms. Anderson tried to get her money back from Horizon without success (Tr. 6187). After her refund request, a Horizon sales representative visited Ms. Anderson and attempted to trade the Whispering Ranch property for Rio del Oro property. The sales representative denigrated the Whispering Ranch property and stated that the Rio del Oro property would be a better investment (Tr. 6188-89).

Margaret Hayner, Ms. Anderson's sister, testified that in 1969, after the purchase of the Whispering Ranch property, another Horizon sales representative telephoned and asked for an appointment to talk about a "hot" property, a very good property (Tr. 6219-20, 6227). Ms. Hayner expressed a desire to purchase Horizon property [68]only through Mr. Fisher, the sales representative who had sold the Whispering Ranch property (Tr. 6220). The sales representative, Mr. Leibman, stated that Mr. Fisher could not sell this property and that it would not be available very long (Tr. 6220, 6227). The sales representative indicated that the investment could double in three to five years (Tr. 6220-21, 6228). Ms. Hayner and Ms. Anderson purchased two multi-family lots in Horizon City during June 1969 from Mr. Liebman for \$2870 (RX 153). Mr. Fisher later advised Ms. Hayner that he could sell any property that Horizon had, and, since Ms. Hayner was unhappy about the purchase from Mr. Liebman, Mr. Fisher suggested that the property could be traded at a later date when other property became available (Tr. 6222).

Thereafter, in May 1970 Ms. Hayner went with Mr. Fisher on a fly-in trip to Rio del Oro (Tr. 6228), and upon returning to her home in Chicago area she and her sister traded the two Horizon City multi-family lots for six lots in Rio del Oro (Tr. 6222-23). The new contract was in the amount of \$5,000 (Tr. 6224). Mr. Fisher stated that the Rio del Oro property would be a much better investment than the Horizon City property. It would be lived in within 10 years and would triple in value (Tr. 6225-26, 6231). The Whispering Ranch property and the Rio del Oro properties have been paid up and are owned by Ms. Hayner and her sister, Ms. Anderson (Tr. 6224).

In September 1968, Frank Simon requested a booklet from Horizon through a newspaper ad (CX 457 - "How To Successfully Invest In Real Estate"), and thereafter a sales representative called

on him (Tr. 6250-51). Mr. Simon purchased six lots in Horizon City for a total price of \$2,034 (Tr. 6255). The sales representative stated that the property would be worth \$5,000 to \$10,000 in seven to eight years—at the time Mr. Simon's oldest child would be ready for college (Tr. 6256-57). He was further advised that Horizon would assist in the sale of the land (Tr. 6259). In 1972 Mr. Simon called on Horizon for assistance in the resale of his land. He received a kit containing sample advertisements. A second request to Horizon produced the name of an El Paso realtor (Tr. 6261). The realtor listed the six lots for one year (RX 160-62), but no sale was ever consummated (Tr. 6262). In 1975 Mr. Simon contacted another realtor who advised that there was no market for the lots (Tr. 6263).

In December 1971, Robert Pernini visited Horizon's offices in Chicago and purchased a commercial lot in Horizon City for \$8,400 (Tr. 6292; RX 163). He was told that property increased at a rate of ten, eleven, twelve percent per year and it would probably continue in the future (Tr. 6289-90). He was told that the El Paso area would be a good place to start a business because of the cheap labor available from Mexico (Tr. 6291). Mr. Pernini was informed that his lot would be available for development in eight and one-half years; at that time, utilities would be available and he could open a commercial business (Tr. 6293-96):

He just made it sound like it was a very excellent investment, the area was growing, that type of thing (Tr. 6297). [69]

Mr. Pernini was promised assistance in reselling the land (Tr. 6299-6300). Two or three years later when he asked Horizon for such assistance, he was advised that they would send him a sales kit containing sample newspaper advertisements (Tr. 6299). He also requested Horizon to repurchase his property but was advised Horizon could not do this (Tr. 6300). At the time of his testimony he was still making payments on his purchase contract (Tr. 6302).

Jing Jo Yu, a Korean American woman, testified that in January 1973 she saw newspaper advertisements in a Korean language newspaper in Chicago, Illinois. After being visited by a Horizon salesman, who was also Korean American, she purchased 15 lots in Horizon City for \$13,800 (RX168; Tr. 6334-37, 6351). Mrs. Yu had been in the United States about two years at the time she purchased this property (Tr. 6336). She was informed by the Horizon sales representative that land was a better investment than savings accounts in banks or insurance (Tr. 6339-40, 6369), and that the land would increase at a rate of 20 to 30 per cent each year and it could be resold in two to three years (Tr. 6340, 6345, 6370-71, 6375). At the

time of the purchase, Mrs. Yu and her husband could read and understand very little of the English language (Tr. 6350). The sales representative inquired as to how much money Mrs. Yu had, and on being informed the amount was about \$7,000, he selected the lots and the payment arrangements (Tr. 6352, 6353, 6373, 6386-87). Mrs. Yu made a down payment of \$5,800 on the 15 lots (Tr. 6352). She visited her property about two months later on a fly-in trip and was very disappointed and depressed at what she saw—only sand and desert plants (Tr. 6353-56). The on-site sales representative said not to worry—"this place is going to be a shopping center. This place is going to be a school" (Tr. 6356; see also Tr. 6358-59). The sales representatives attempted to sell Mrs. Yu additional land at the completion of the property visitation, but without success (Tr. 6359-60). At the time of her testimony, Mrs. Yu was making payments on her property (Tr. 6363).

Irmtraut Vuletic purchased two single family lots in Horizon City during August 1971 after attending a Horizon dinner party where at least one hundred persons were gathered (Tr. 6448-50). The price of the two lots was \$3,000 (Tr. 6449). She was told that the property could very well double in value in seven to ten years, although this was not guaranteed (Tr. 6451-52). Mrs. Vuletic was visited by Horizon representatives in 1974 or 1975 who wanted to update her on her property. The sales representatives suggested that Mrs. Vuletic trade her two lots for some commercial property which would be more valuable than the residential property she had purchased. Mrs. Vuletic did not purchase any additional property (Tr. 6456-58). At the time she testified she was still paying on the property, but was considering stopping the payments after having paid in more than \$2,000 (Tr. 6455).

James Devlin purchased four single family lots in Rio del Oro during January 1972 (RX 158C). The sales representative stated that the property would yield a guaranteed 10 percent per year return (Tr. 16624, 16654-56, 16659). The property would be developed within six to seven years and Mr. Devlin would have to either build on the property at that time or sell it (Tr. 15624, 166542-53, 16659).
[70]

G. Representations Concerning Resale of Horizon Land

61. Training manuals used during the period 1968-1971 were silent as to specific representations that sales representatives could, or could not make with respect to how the property being purchased from Horizon could be resold, and whether Horizon would be

involved in the resale of the property (CX 160, 856, 956, 778, 957). After 1971, training manuals contained information to the effect that Horizon's policy was that it would not resell or buy back a customer's property, and that sales representatives should not make representations contrary to this policy. Sales representatives were instructed to state that the property was to be resold as any other property would be sold (CX 161, 180, 959B, 178, 158, 157-59, 163). As of 1973 Horizon had each sales representative pledge in a signed document not to represent that Horizon would resell, repurchase or lease any property from a customer (RX 81). Information about Horizon's resale policy was not part of the sales presentation, but was treated as a possible question that a prospect might ask.

CX 157, a training manual used in 1974 and subsequently, handled the resale problem as a possible question from a prospect, as follows:

Q. Will you sell my lots for me? Horizon Corporation's policy at this time is such that we cannot do that. You would sell these lots just like you do any others. You'd place them in the hands of a Real Estate Broker either in that area or here, in your own local area. Or you can run an ad in your local paper. (CX 157V; see also CX 158U, 159Y, 163).

CX 158, a training manual used subsequent to the Spring of 1973, stated that "Mr. Prospect, Horizon will not sell your lots for you, or buy them back from you," as the suggested answer to the question "Will you sell my lots for me" (CX 158V).

CX 180, contained training on selected questions. In respect to resale of a customer's property, it stated:

We may not offer to resell a client's property at any time. We cannot guarantee that he can resell it later. Our company *will* send him a resale package. This contains an approximate valuation of his property and some local real estate companies who may handle his property for him (CX 180S).

CX 161 instructed sales representatives not to promise personal or company participation in resale (CX 161Z5). This training manual answered a question about resale as follows: [71]

Realtors, who just like right now in your own neighborhood, will be competing to list property (CX 161Z16).

CX 178, a training manual for use subsequent to May 1973, stated in answer to possible questions from prospects, that Horizon would not resell the lots or buy them back (CX 178W). The manual further stated that when the property was ready for development there should be no difficulty selling the property through the purchaser's own efforts (CX 178X).

CX 962, used until 1972, is a sales presentation based on the use of

FHA statistics. This presentation stated that resale of the Horizon property will be no problem—"the real estate market is enormous" (CX 962).

CX 783, a document containing rebuttals for certain objections that prospects might have to purchasing Horizon property, was used in several Texas offices during 1970-1971 to train sales representatives (Tr. 2155-58). It has the following statement:

We are real estate brokers, specialists in land investment. I know that if we can be instrumental in getting you started in land investment, we will get the opportunity to resell your property. We live on commissions (CX 783C, D).

Sales representatives were trained to tell prospects that resale was not dependent upon actual development or use of the land bought from Horizon. Sales representatives were trained to make "the point (which is self-evident to [the prospect] once stated) that land usually sells many times in the years *before* its use" and repeated buyers and sellers can all realize a profit (CX 962; see also CX 622A).

Theodore Stone, a former Horizon Zone Manager, testified that sales representatives were initially instructed to inform customers that they should contact local brokers in the Albuquerque-El Paso areas to resell their property. At a later period sales representatives were instructed to tell customers they should write to Horizon headquarters and ask for a kit to give them various instructions on how to proceed with their efforts to resell their property (Tr. 2029-30).

Paul Boman, a sales representative and sales manager employed by Horizon from October 1972 until December 1974 (Tr. 4351-52, 4362), attended Horizon's National Sales Manager Training Program. At the training program the question of a resale program came up; the participants were advised by a high level Horizon official that a resale program was in the mill and would be in operation sometime during the next year - 1974 (Tr. 4361-62). Mr. Boman communicated this information to prospects in his sales presentations (Tr. 4362). Such a resale program did not commence as indicated (Tr. 4362, 4377-78). Another sales representative, Olin Hillman, who also served as a sales manager and district trainer and who attended the training program at Horizon's headquarters, testified that he also was informed by the same Horizon official that Horizon would have a [72]resale program in the future. Four other Horizon representatives from other sections of the country were present at the training session and heard the same statements about the resale program. Mr. Hillman attended a different session of the training program than did Mr. Boman. Mr. Hillman testified that he

used representations about the resale program in his sales presentations and communicated this information to other Horizon sales representatives and to his trainees (Tr. 4679-81, 4722-27).

Anthony Zimmer, an Horizon sales representative in the Chicago office from December 1970 until April 1972, testified that he was trained that Horizon's Customer Service Department would assist the customer in reselling the property:

Q. Mr. Zimmer, I didn't quite understand what you said about resale. Did you state that as part of your presentation you would tell people that Horizon Corporation would try to find a buyer if they wanted to resell?

A. They will assist in finding a buyer, yes.

Q. Did you also state that Mr. Steer made that statement in his presentation?

A. Certainly. Everyone did.

Q. Everyone that you heard give a presentation?

A. In fact, even in that training initially, that came out that we would assist someone in selling that property. (Tr. 6163-64).

Henry Fisher, a sales representative in the Chicago office from 1963 to 1973, testified that he represented to customers that Horizon would have a resale department by the time the customer was ready to sell the property (Tr. 6042, 6065-67).

Conversely, Daniel Nickeson, a former Horizon regional manager, testified that "We indicated that we didn't sell it when the question arose" (Tr. 4527; see also Tr. 16494-99). Other sales representatives testified that they made no statements about whether Horizon would or would not resell a customer's land (Tr. 1879, 4643). Although Chicago Zone Manager Tony Frederico testified that sales representatives in his zone were told not to represent that Horizon would assist in resale (Tr. 11761), one sales representative in the Chicago office testified that Mr. Frederico had a statement he termed "a good side-step" which was that if a customer wanted to sell, he wanted first crack at the resale (Tr. 6042, 6067; see also Tr. 11782-84).

62. Customers testified that Horizon sales representatives stated that Horizon would resell the land, or buy back the land, or would assist in the resale of the land, or that there would be no problem in resale of the land. [73]

Col. John Yuill asked a specific question of the sales representative about resale and was told that he would have no problem reselling the land—"People will be seeking that property. They will be coming to you to purchase it" (Tr. 822). He was also informed that while

Horizon was not in the business of buying back land, Horizon would assist in selling the land if the need arose (Tr. 822-23).

The Horizon sales representative stated that he personally would assist a customer, Bruce Carter, in reselling his Horizon land (Tr. 913, 959, 961). J. D. Oliver and A. R. Oliver were informed by the Horizon sales representative that the Waterwood lots they purchased would be resold by either the sales representative or by Horizon (Tr. 976-78, 1037-38, 1090-91). Allen Nesbit was told that development would be up to his four lots in Horizon City in seven to ten years and that Horizon would contact him when Horizon had a buyer for the property and then he could negotiate with the buyer to sell his land (Tr. 1192, 1219).

Michael Collum was assured by the sales representative that there would be no problem at all in reselling the property—"Just call me. I'm your personal representative. I'm in contact with El Paso daily, and if you decide to liquidate your property, we can handle it for you" (Tr. 1529). It was also indicated that Horizon possibly would be interested in the lots for building purposes (Tr. 1530).

James Madget traded in his three Horizon City lots for a Waterwood lot after Horizon representatives told him he could not resell his Horizon City lots, but that there were several real estate agents who would list the Waterwood lot which could be sold right away (Tr. 1403-04, 1408). Mr. Madget was told that if the real estate agents could not resell the lot, the sales representatives would get his money back for him (Tr. 1408). After several attempts Mr. Madget received names of real estate agents from the sales representatives. When Mr. Madget called, two of the agents just "laughed;" he could not locate the other agents. Thereafter, Mr. Madget contacted the sales representatives again and was advised that Horizon would send him a sales package that would assist him in the resale of his property. Mr. Madget thereafter received a package from Horizon containing sample newspaper advertisements. He tried newspaper advertisements without any success (Tr. 1409-10). The sales representatives finally agreed to get Mr. Madget a refund, but the sales representatives then left Horizon. Mr. Madget ultimately forfeited his property after paying out approximately \$1,352 (Tr. 1411-13).

Carl Troyer testified that the sales representative during a reloading presentation, stated that there would be no problems in reselling the lots, that they were going up in price all the time, and that Horizon at certain periods was buying back some of the lots (Tr. 1339, 1371). Patsy Zecco was told Horizon would help in the resale of the lot Mr. Zecco purchased for his son (Tr. 1620, 1679-80). Mr. Zecco later purchased a Waterwood lot and was told by the sales

representatives that they would do all they could to sell the lot in the event Mr. Zecco wanted to sell it (Tr. 1633). Willard [74]Morgan was told by the Horizon sales representative, in response to Mr. Morgan's question about resale of the property in view of its remoteness from Mr. Morgan's location, that Horizon would provide help in selling his two single family Rio del Oro lots. "They will be developing this community. Perhaps they will even buy them back, but in any event they will assist you with a sale" (Tr. 1565).

David Krausse was told the method of resale of his Horizon property would be for builders to approach Horizon, who would indicate to the builders who the property owners were (Tr. 1721). Larry Cervenka was told that generally what had been done in the past was that when the property was ready for development a developer would contact the individual owner and purchase the lots (Tr. 1834-35). Ronald Nokes was advised that he would be approached by a builder desiring his commercial lot for combining with other lots to build a store of one type or another, or more likely to rent the property for such purposes (Tr. 4902).

The sales representative indicated to John Mossman that there would be no problem whatsoever reselling his Whispering Ranch lot either to Horizon or to future property owners once development began (Tr. 4863). Two or three years later he contacted Horizon about reselling the lot and was advised Horizon did not have a resale program at that time but were hoping to do so in the future. Horizon suggested newspaper advertising might be the best route to follow (Tr. 4865). Ivan Westcoatt was told that Horizon would not resell his property but that there would be no problem in reselling it (Tr. 4659). Jose Medina was told that his lots would be developed and if Horizon started developing that area he would be paid a legal or fair price for his lots (Tr. 4996).

Joan Wild was told that Horizon was going to start a shopping center immediately in the area where her commercial lot was located, and that she would be able to lease her property to a company that wanted to come into the shopping center (Tr. 5027-28). She also purchased two lots together to be located near a "highway loop" which the sales representative said would be ideal commercial property, and undoubtedly within a year or two an oil company would want the property for a service station (Tr. 5029-30). The sales representative also said that Horizon would have a resale office by the time the property was paid for and would handle any resale (Tr. 5030).

Melvin Bradley was told by the Horizon sales representative that he should retain the multi-family lot he had purchased and lease the

land for building purposes (Tr. 5165). Helen Anderson was told there would be no problem reselling her Whispering Ranch lot and that Horizon would help in the resale if she wanted to sell—"It was very vague" (Tr. 6182-83, 6212, 6207-08).

John Gothard attended a Horizon dinner party in November 1972 and purchased a single family lot in Rio del Oro for \$3,000 (Tr. 6077-79). Shortly after purchasing the property he became dissatisfied with the purchase and contacted Horizon (Tr. 6079-80). In March 1973, a Horizon sales representative who identified himself as a "troubleshooter" visited with Mr. Gothard (Tr. 6080-81). [75] During this visit Mr. Gothard upgraded his property into two multi-family lots in Rio del Oro which cost \$10,800 (Tr. 6081-82, 6186, 6101). The sales representative stated that the purchase of land was the way to make money, that land was a very, very fine investment, that Horizon was a land developer interested in promoting growth areas, and that Horizon wanted and welcomed the opportunity to resell the land, or Horizon would buy the land back and at the very least pay him what he had invested in the property (Tr. 6082-85, 6115-18). The sales representative did not mention a specific percentage of profit or specific time period:

But he most emphatically emphasized that the community was a bustling, growing community. The place was just ripe. It was bursting for an influx of people. And this land that I was having—he would be very surprised if it didn't at least double its value in three years. (Tr. 6087).

The sales representative also stated that the price of the property was going to be increased and that alone would insure a certain profit (Tr. 6088). When questioned as to why Horizon was anxious to sell property that was rapidly increasing in value, the sales representative repeated that Horizon was a community developer and there was need for a "cash flow" to finance the communities (Tr. 6089-90). The sales representative also emphasized that the land was scarce and would be gone if Mr. Gothard did not sign that night (Tr. 6117).

Mr. Gothard became disenchanted with his property as time passed and in 1974 he contacted the Horizon sales representatives to sell his property for him, or buy back the property as represented (Tr. 6092-94). He was advised that he had a valuable piece of property and he should keep it and he would make a lot of money on it (Tr. 6094). He was also told that Horizon was no longer a land developer but now was engaged merely in the sale of land (Tr. 6095). Mr. Gothard ultimately discontinued making payments and forfeited his investment of \$4,156 (Tr. 6096-97). Mr. Gothard later was visited

by Bruce Lehmann, a special assistant to a Horizon Vice President, who interviewed Mr. Gothard as to his reasons for forfeiting and promised to help Mr. Gothard get back some money (Tr. 6097-99). Mr. Lehmann later advised Mr. Gothard that Horizon had suffered a loss on the transaction and no refund would be made (Tr. 6100).

Frank Simon, who purchased six lots in Horizon City in 1968, testified:

As far as selling the property, I asked that question specifically and was told that one, Horizon normally would be the contact point for anyone who wanted to buy property in that area and they maintain lists or knowledge anyhow of all the people who own the land or bought the land from them. And they would direct anybody who was interested in buying [76]land—they would let me know so we could make contact with that person. Also they indicated that they could help sell the land if I wanted at the time I wanted to sell it. They also helped their customers to sell the land. And I didn't get into a whole lot of detail (Tr. 6259).

Mr. Simon later wrote Horizon for assistance in resale and received a sales kit and thereafter the name of an El Paso realtor (Tr. 6261). He was unable to sell his property (Tr. 6262).

Robert Pernini was promised assistance in reselling his property. When he later requested assistance he was sent a sales kit on how to write a newspaper advertisement (Tr. 6299). Jing Jo Yu, a Korean American, purchased 15 lots in Horizon City from a Horizon sales representative who was also a Korean American. Mrs. Yu was told she could resell her property in two or three years and she should call the Horizon sales representative when she was ready to sell (Tr. 6345). Carmie Ottaviano was told that within six or seven years a developer would get in touch with him about his multi-family lot for which he paid \$4800 and pay him \$17,000 for it, or Mr. Ottaviano could have a six-flat apartment put on the lot where Mr. Ottaviano could live free. The developer would have a 99-year lease on the property after which Mr. Ottaviano's grandchildren or great grandchildren would own the property (Tr. 6410-12, 6424, 6440; RX 169).

Douglas Thornly was informed by the Horizon sales representative that he had never encountered a situation where anybody had any problems selling Horizon land, and that Mr. Thornly would have no difficulty selling his Whispering Ranch property because land values are always increasing and people are always looking for good investments such as Horizon land (Tr. 6480).

Elsie Colon was informed at the time she purchased two single family lots in Rio del Oro that Horizon might want to buy the land back because Horizon was a land developer and so many people were migrating into the area that Horizon would need land to develop for industry and homes (Tr. 16210-11). Anderson Austin was told that

Horizon would buy back the four single family lots he purchased in Rio del Oro. Mr. Austin readily accepted the premise that Horizon would be willing to buy the land back because it was also represented that the land was increasing in value (Tr. 16265-66, 16274-82).

Howard Gottesman testified that the sales representative made a definite statement to him that Horizon would buy back the Rio del Oro lot he purchased (Tr. 16673, 16691-696). Mr. Gottesman was later contacted by another sales representative in a reloading effort, and this sales representative also emphasized a buy-back by Horizon of the multi-family lot located in Canyon del Rio for which Mr. Gottesman traded (Tr. 16676). When Mr. Gottesman contacted Horizon in 1975 to effectuate a buy-back, the local Horizon office stated that under no circumstances would that be done and a newspaper advertisement in the Albuquerque area was suggested as a means of [77]selling the land (Tr. 16679).

James Devlin was assured that there would be no problem in reselling the four lots he purchased in Rio del Oro, that Horizon had an office in New Mexico that handled resales, and that Horizon would handle the resale in the event Mr. Devlin decided at a later date he did not want the property (Tr. 16625, 16655). Evelyn Tracy was told by the Horizon sales representative that she could resell her \$800 Rio del Oro single family lot within a few months and realize \$2-300 profit (Tr. 5923).

Horizon's internal surveys of its sales offices found several instances where representations were made to customers that there would be no problems in reselling the Horizon land (CX 929K), or Horizon's resale policy was vague (CX 927N), or outright representations were made that Horizon or the sales representative would assist in the resale of the property being purchased (CX 932E, 936C, 947L, 950E, G).

H. The Horizon Property Visit Credit and the Horizon Guarantee

(1) *Property Visit Credit*

63. Count XV of the complaint alleges that Horizon has represented, directly or by implication, that the travel allowances, "Property Visit Credit Certificates," or other allowances promised to purchasers by Horizon are either actual payments to the purchaser in the form of cash or checks or immediate deductions from the purchaser's currently scheduled payments, and that such payments or deductions are made upon completion of a visit to the purchaser's lot as reimbursement for the purchaser's expenses. In truth and in

fact, the complaint alleges, the travel allowances, "Property Visit Credit Certificates," or other allowances are deductions from the remaining account balance at the time the principal balance is equal to the amount of the allowance, provided that a company-guided tour is made within one year of the date of the acceptance of the contract, and that the payments due under the contract have been current throughout the term of the contract.

The contractual provision concerning the 5% property visit credit is found in the Receipt of Deposit and the Agreement for Deed:

Upon confirmation and acceptance by Horizon Corporation or applicable subsidiary, Purchaser will be issued a Property Visit Credit Allowance Certificate in the amount of 5% of the cash price (net additional sales price in superceding sales). *** The Allowance granted herein is deductible from the remaining account balance at the time the principal balance is equal to the amount of the Certificate, providing that the personal inspection and company guided tour is made within one (1) year of the date of this Agreement and providing that the payments [78]due hereunder have been current throughout the term of this Agreement. (CX 139A, 140A, 148A, 149A, 150A, 151A, 152A, 153A).

The Agreement for Deed and Receipt of Deposit are signed by the purchaser as the time of the sale and copies of the documents are delivered to the purchaser.

Testimony by customers and sales representatives has demonstrated that the property visit credit is typically explained accurately to the customers and that there is no misunderstanding by the customers as to the requirements for earning the 5% credit allowance, or the time at which the credit is applied to the contractual payments (Tr. 4371-72, 4642, 6549, 6490, 6393, 4249-50). Likewise, there is insufficient evidence that Horizon failed to allow such credits when customers complied with the terms of the contractual agreement (Tr. 13352-54). Complaint counsel has proposed no findings to the contrary (see CPF 6.1-6.13).

(2) *The Guarantee*

64. As part of the property visit allowance, Horizon included in its Agreement for Deed and Receipt of Deposit a guarantee which provided that the customer was entitled to a refund of all monies paid in if, at the time of the property visit, the customer believed that the property had been misrepresented to him at the time of the initial sale and the customer requested a refund. To obtain a refund, the customer was required to fill out a refund request form at the time of the property visit and state on the form the circumstances of the misrepresentation. The on-site sales representative also filled out a separate report on the customer's visit (CX 908, 920B; Tr. 6211).

The request for refund was thereafter transmitted to Horizon's headquarters where a determination was made as to whether the customer was entitled to a refund pursuant to the guarantee. Richard Lovinger, Horizon's Vice President of Customer Services, testified:

Q. What was the policy of the company with respect to instructing field personnel in assisting customers in filling out that form or otherwise participating?

A. The instructions were that if the person wants a refund and can't satisfy an on-site exchange or anything else and he really wants it and says I want to make a claim, they were to furnish the claim and have the customer fill it out in his own handwriting, not the salesman and let the customer do it and send it into the office. (Tr. 13357).

Pursuant to this guarantee, Horizon officials sometimes granted full refunds, sometimes negotiated partial refunds, sometimes arranged an exchange of property, and sometimes denied a refund (Tr. 13367-63, 2360, 2370): "This is a discretionary thing" (Tr. 12983). [79]

The following are some responses to refund requests. CX 907A-B is correspondence in which Horizon denied a request for a refund based on a claim of misrepresentation made within one year of the sale where the customer had not visited the property. Horizon stated to the customer that he should personally visit his property within the one year period, and that he had purchased "very fine property." CX 908 and CX 920 represent correspondence whereby Horizon denied refunds based in part on the fact the purchasers had visited their property and signed the PVCC stating they were satisfied with their property. CX 921 is correspondence whereby Horizon denied a refund to a purchaser who visited his property within one year and filed a report claiming the property had been misrepresented to him. Horizon did not agree the circumstances stated by the purchaser constituted "misrepresentation."

Patsy Zecco, a customer who testified in this matter, was denied a refund because more than one year had passed before he made a request for a refund (Tr. 1654).

The Horizon guarantee is set out in the Agreement for Deed executed at the time of sale:

HORIZON CORPORATION GUARANTEE

Horizon Corporation or applicable subsidiary guarantees to refund all the money paid on your property if it was MISREPRESENTED to you at the time of sale. Requests for such refunds may be made only at the property upon completion of buyer's initial

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company-guided personal inspection tour within one year of the date of purchase by stating the details on the company's refund request form. (CX 142-51).

This identical guarantee also appears on the Receipt of Deposit, which is executed at the time of the initial sale (CX 139-40).

The Property Visit Credit Certificate ("PVCC"), which is mailed to the customer in the important document package several days after the property sale, has a bold heading "HORIZON CORPORATION GUARANTEE," and the following statement:

Horizon Corporation guarantees to refund all the money paid on your property if it was MISREPRESENTED to you at the time of sale. Requests for such refunds may be made only at the property upon completion of buyer's initial company-guided personal inspection tour within one year of the date of purchase by stating the details on the company's refund request form.

TO BE COMPLETED AT TIME OF PROPERTY VISITATION TOUR.

I have seen my land. It is as represented [80] and I am satisfied with my property investment. Please credit my account in accordance with this certificate.

Landowner(s) signature(s) _____

Authorized Horizon Representative

Date

(CX 134, 136, 137).

In 1973 the PVCC form was changed to provide the following statement:

TO BE COMPLETED AT TIME OF PROPERTY VISITATION TOUR

I have visited the above described subdivision(s) and completed the Company guided tour. It is as represented in the Agreement for Deed, property report and state offering statement, public report or prospectus, if applicable. I acknowledge that I have relied solely upon the representations contained in such materials, that no guarantee of appreciation, resale or repurchase has been given and that the Company provides no resale services.

Landowner(s) signature(s) _____

Authorized Horizon Representative

Date

(CX 133, 135, 138).

Professor Stevenson is a trustee of a successful real estate investment trust, a director of a company which invests long-term pension accounts in the United States realty market, a Director of a company whose activities include building and development, and a trustee of a non-profit charitable organization whose primary purpose is acquisition and development of raw land which is deemed to be of a critical conservation interest (Tr. 6576-77). Professor Stevenson has been involved in a variety of studies for government and others (Tr. 6577). He has had experience of various types in dealing with real estate and other investments, including work with major corporations regarding their involvement in real estate as investors and users (Tr. 6574, 6577-78).

Professor Stevenson has examined large properties in the Southwestern United States, including Texas. He did a study of Woodlands, a 17,000 acre property north of Houston, Texas, and a study of a 7,000 acre recreational land development in East Texas (Tr. 6578-80). He is a member of various professional organizations (Tr. 6581), and has written numerous articles and a book on real estate investments and other aspects of real estate. He has worked on feasibility studies and the economics of high-rise buildings (Tr. 6582). Professor Stevenson is also a limited partner in a 160-acre development project near Castle Ridge, Colorado, which is selling 10-acre tracts of land with utilities (Tr. 6661-66, 6886-6896).

Professor Stevenson stated that there are three fundamental factors to be considered in a real estate investment; the property itself, the financial return or investment structure, and the people who are involved as investors, managers and active partners. In terms of investment philosophy, one must seek an investment where all three factors work together; an investment lacking in any one dimension should be rejected (Tr. 6585, 6814-15). He observed that there are more investment opportunities than money; therefore, an investor should be very selective in committing capital to any particular investment. An investor must seek a means of evaluating investments whereby he can quickly reject a large number, make intensive study of a few more, and do an extremely intensive study of those investments where he intends [198]to place funds (Tr. 6585-86). An investor must know the risks and the potential rewards of an investment (Tr. 6587).

Professor Stevenson stated:

I fundamentally believe that your sound investment value must ultimately be related to use, which is basically a retail end user use. I think this is true in the stock market where you see many of the promotions that had no fundamental end market for their

product, got burned. This has been true in real estate. You can ride bubbles, you can ride dreams, but fundamentally it is end use that creates value (Tr. 6587).

According to Professor Stevenson, an absorption analysis is basically an assessment of the rate at which properties will be placed into an end use (Tr. 6589). The sophistication of absorption analysis varies greatly; the further away the use, the more complex the problem becomes and the more end data must be developed (Tr. 6590). Professor Stevenson emphasized that an investment can be rejected without the necessity of a sophisticated study.

There are a variety of reasons for rejecting an investment. One can be simply the relationship between market demand and the available supply. One must also reject it because of physical conditions, either known physical deficiencies or uncertainty with respect to physical conditions. One might reject it for a variety of legal uncertainties relating to title or zoning or various property interests which may be involved, such as water rights, mineral rights, etc. Also uncertainty as to precisely what legal rights you obtained relating to contract for deed versus deeded property—all of these things and they may be risks that overwhelm any of the other factors:

Organizational problems, when you examine an investment and ask yourself, does the organization which has the capability or has the responsibility for carrying out the investment have the capability. And all of these are reasons where any one of them is sufficient to reject, because ultimately for a successful investment you have to have the right market, the right balance between supply and demand, right physical condition, the right organization and proper legal protection.

So if I have determined that any one of the others has sufficient risk in it to eliminate the investment possibilities of the investment, then I don't need to do a sophisticated absorption study (Tr. 6591-92).

Professor Stevenson stated that representations that land is risk free, or "the nearest to a sure thing," are, without qualification, false. Factors such as price, eventual utilization, changes in legal constraints, the volatility of the real estate market, must be used to qualify such a broad representation (Tr. 6778). [D. A. Lomax, an expert witness who testified for Horizon, stated that "all property does not go up uniformly" (Tr. 15128)]. Professor Stevenson also testified that unimproved land probably should be purchased only when change in use is imminent and when [199]the conditions surrounding that change can be examined and verified (Tr. 6592, 6883). [Alan Nevin, an expert witness who testified for Horizon, recognized that the increase in raw land price comes when a change in use is imminent and can be predicted, usually a five to seven year

basis (Tr. 16066, 15883-84)]. Professor Stevenson noted that there is increasing recognition of the difficulties of putting together an organization capable of carrying out large scale projects and of bringing them to a successful conclusion (Tr. 6594).

Putting aside risk factors, Professor Stevenson testified that the investment quality of Horizon's lots depends upon (1) the absorption rate, (2) the price paid originally, (3) the future costs of any development expenses to be incurred by the owner, and (4) the cost of carrying the property in the meantime (Tr. 6880-81). Another factor to keep in mind is liquidity. Liquidity, with respect to investment in general, is the ability to turn your asset from a noncash form to a cash form. Undeveloped land, except where there is an immediate use for it, is not very liquid (Tr. 6595).

102. Professor Stevenson's assignment with the Commission was to analyze the investment value and risks, not in an appraisal sense, to determine whether the land in Horizon's properties of Paradise Hills, Rio Communities, Arizona Sunsites, Whispering Ranch and Waterwood was a prudent investment given the information available, and to look at the relative value of different lots or parcels within those projects (Tr. 6606-07). He reviewed much of the material in this record. He studied documents from Horizon, property reports, and planning documents. He interviewed brokers and others and personally visited Paradise Hills, Rio Communities and Waterwood. He also visited other properties in the Albuquerque area and in the area near Waterwood (Tr. 6608-29, 6710-13).

In Professor Stevenson's opinion, the lots in Paradise Hills have proved to be at best a marginal/poor investment. He testified that the lots outside of the development area, even within areas close to the development area, have proved to be a bad investment. The areas currently served by water and sewer have a potential for sale. The remaining lots have little, if any, trading activity. The costs of development and difficulties of development offer little hope for long-term investment potential (Tr. 6629-30, 6735-40).

In Professor Stevenson's opinion the vast, vast majority of Rio Communities lots are bad investments. He based this conclusion on an analysis of the market, the uncertainty regarding physical conditions, the capability both financially and organizationally to develop the lots, and what may be prospective legal uncertainties given the time horizon to development (Tr. 6675-76). Professor Stevenson testified:

The problem of going from a population of 600 or 800 houses, . . . to the size of a population that would be required to fill the Rio Communities, has proved to be

difficult at best. It is an exercise which has been carried out over exceedingly long time periods. That requires major financing. (Tr. 6690):[200]

According to Professor Stevenson, the most critical investment factor is the supply and demand relationship (Tr. 6849). He relied on several studies of the supply and demand for undeveloped property in the Albuquerque area, and on his personal investigation (Tr. 6676-79, 6683-88). He named several undeveloped projects in the Albuquerque area and noted in addition that there were large chunks of land not yet subdivided (Tr. 6676). Professor Stevenson testified:

The total of lots available in those sites exceeds the full needs of the community of Albuquerque under the most optimistic projections through—and I have to think back, given what I just included—well beyond the end of the century and depending on which projections you read, perhaps well into the 22nd century (Tr. 6676).

In Rio Communities Professor Stevenson considered the lack of an infrastructure being in place an investment risk (Tr. 6688-93). While there are indications that adequate water is available, Professor Stevenson stated that he is not satisfied without further investigation. He noted the difficulties which Paradise Hills has had with a water supply (Tr. 6690-93). Water and sewerage problems twenty-five years in the future may pose severe problems not now readily apparent (Tr. 6699-6700, 6846-48, 6869-72). Professor Stevenson also foresees risks in the fractionalization of the land. Land divided into small lots with many owners, most of whom are non-resident, raises a question of whether the land can be used effectively at some future date (Tr. 6688-89, 6853). Professor Stevenson noted that if the 1,000 dwellings which had been built in Rio Communities over the past eighteen years, were duplicated each year in the future, it would take 131 years to fill the 131,578 single family lots in Rio Communities (Tr. 6695).

For all the above reasons, the supply and demand situation in the market, the physical condition of the property, the organizational question as to the ability to deliver, and legal uncertainties would make Rio Communities lots bad investments (Tr. 6719, 6748-49). Multi-family property would represent a "very bad" investment because of the higher initial cost of the land and the longer holding period which would be required (Tr. 6719-20, 6749). For these same reasons commercial lots would be even worse investments (Tr. 6720-23, 6749):

The basic objection to all of these lots is founded upon the absorption data, the supply available as recorded in plats and the potential supply which I believe could be brought into existence during the period before the potential absorption. The other

factors . . . are simply additional risks which compound the problem of investment value (Tr. 6750). [201]

Professor Stevenson recommended defaulting and taking a tax loss where there were substantial payments remaining to be made on Rio Communities lots (Tr. 6752-54). He is of the opinion that there are so many fatal flaws with respect to investment in Rio Communities lots that elimination of one-half the risks would not change his opinion of the investment value of the lots (Tr. 6878).

Professor Stevenson rejected Whispering Ranch as an investment property (Tr. 6741). The prospect of a change in use of the land is slight, in Dr. Stevenson's opinion. There is substantial land available in Arizona, and the fractionalized parcels of Whispering Ranch would make development difficult (Tr. 6742). He classed Whispering Ranch as a very bad investment (Tr. 6743, 6756-57).

Professor Stevenson recommended against an investment in a lot in Arizona Sunsites:

. . . primarily on the basis again of the tremendous oversupply of lots and the potential additional supply of lots that has been alluded to very frequently with respect to Rio Communities, but is perhaps even more severe in the case of the remote subdivisions in Arizona. Cochise County in particular has a major oversupply condition according to the studies which I have read (Tr. 6757).

Fractionalization of the property interests and the oversupply of lots are the basic reasons Professor Stevenson rated Arizona Sunsites as a bad investment (Tr. 6758).

Professor Stevenson also recommended against the purchase of lots in Waterwood as investments:

I would have recommended against the purchase of this property for several reasons. One is in terms of the information I was able to gather there were properties available, fully developed, at prices which on a present value basis, were not totally incomparable. These properties, in many cases, had more proximate location to Houston, they had their facilities in place and were in subdivisions or land developments where the potential total number of lots was known and limited. The information which I have on Waterwood showed the platting [of] roughly 7,000 [acres]; however, the presence of the 25,000 acres, most of which was unplatted, provided a great amount of potential competition within the site itself and I believe would [202] effectively serve to limit any up side potential.

Therefore, to recapitulate, I saw a problem of supply and demand, again the same problem but looking at the study of the absorption in the Houston market, one would have to place the potential absorption and use of that lot many decades in the future, obviously depending on specific location and secondly, the unknown of the supply as created by my major competitor, Horizon, and third, in examining other opportunities within the Houston market there seemed to be lots that offered roughly the same up side potential in terms of their price on eventual sale where I would not have to

assume the risk of anybody's ability to perform in the future with respect to construction and development (Tr. 6761-62).

JUDGE BARNES: How does he evaluate the lots as an investment?

THE WITNESS: The finished lots within the development core seemed to me to be roughly comparable to the product which I saw in other subdivisions. Those lots which were dependent for future development would be rated by me as bad because of the comparability of their net present value of pricing to the purchase value which one could have in existing subdivisions. Because of the distance of this project from Houston and my judgment as to whether it would really compete well against other major projects such as Woodlands that themselves were projecting 30 and 40 year build outs with less land (Tr. 6763).

Professor Stevenson attributed little value to the Horizon exchange privilege. He observed that an individual desiring to build in Rio Communities could purchase a lot in the open market or at an auction at a price well below Horizon's price, and exchange that lot into the development area (Tr. 6703-04). Professor Stevenson also stated that there was uncertainty as to whether Horizon would honor the exchange privilege for second, third or on down the line purchasers (Tr. 6704). Professor Stevenson testified that it was his understanding that there were no exchange lots available in Paradise Hills (Tr. 6704-05). This understanding was confirmed by William Kelly, a former Horizon employee and presently a realtor in Paradise Hills, who testified that the exchange privilege had not been honored in Paradise Hills for the past few years. Horizon redesignated lots in the Knolls area, where the exchange privilege could be exercised, to Country Club Estates. Thus, no exchange lots were available and Horizon would not have to honor the exchange privilege. [203]

(2) *Testimony of Joseph Lusteck*

103. Joseph Lusteck, a real estate planning consultant, testified for complaint counsel as an expert witness. At the time of his testimony, Mr. Lusteck was President of the Real Estate Division of Wortman and Mann, Inc., a real estate and financial services company located in Jackson, Miss. (Tr. 6928). He has been an employee of Wortman and Mann for the past five years. Prior to that time he had been employed, since 1965, first with the Pima County [Tucson, Arizona] Planning Department and later the Jackson [Mississippi] Planning Board (Tr. 6931-32).

As a real estate planning consultant, Mr. Lusteck provides services relative to land development and project planning. He is concerned

with property project evaluation, impact analyses, environmental, traffic and transportation studies (Tr. 6928). Mr. Lusteck focuses his activities on real estate, whether from a land use or a development point of view (Tr. 6929). He renders these services to a variety of clients in the business community and in the public sector, including cities, towns, counties, and agencies of the federal government (Tr. 6928-29). He has been responsible for working on three of the New Towns for the Department of Housing and Urban Development.

Mr. Lusteck graduated from the University of Arizona with a Bachelor's Degree in Business Administration, majoring in area development. He has a Masters of Science Degree in Urban Planning from the same school and has done some additional graduate work in Public Administration (Tr. 6929). He is a member of the American Institute of Planners (Tr. 6944).

Mr. Lusteck has made studies or evaluations of several large tracts of land. He did two studies for the Federal Trade Commission, one the 91,000 acre Rio Rancho project near Albuquerque, and the 26,000 acre Rotunda project in Florida. In 1973 he did a study of an 8,000 acre project in New Mexico across the state line from El Paso. He did a study of a 1,575 acre project outside Jackson, Mississippi. He has responsibility for planning about 5,000 acres of shoreline development for the Pearl River Valley Water Supply District near Jackson (Tr. 6941-42). He has worked on over 100 feasibility studies since he has been employed by Wortman and Mann (Tr. 6943).

104. Mr. Lusteck's assignment for the Federal Trade Commission was to prepare an evaluation of the Horizon City project, to include an economic and market analysis, a physical evaluation, a review of the master plan, a look at the investment potential of individual lots, and a survey of the resale market (Tr. 6968). A report of this evaluation was rendered in May 1977 (CX 874; Tr. 6969). Mr. Lusteck wrote the majority of the report and reviewed it in its entirety. He designed the study, visited Horizon City three times, talked with people, and visited other development areas in and around El Paso (Tr. 6969). Mr. Lusteck used a thirty-year period for his study—1975-2005. He concluded that the economic and market conditions and outlook for El Paso would not support the absorption of the large number of lots in the Horizon City project within a thirty-year period (Tr. 6982).

Mr. Lusteck made a specific absorption study of the Horizon City project for the thirty-year period to the year 2005. He studied [204] indicators of population, households, employment, income, retail trade and service, industrial development and recreation and tourism. He also studied the supply and demand for property and the

price of property in the El Paso area (Tr. 6983-85). He concluded that El Paso will require approximately 195,000 housing units by 2005 [1.5 times the increase in the number of households] (Tr. 7020). This growth will call for a total of about 125,000 acres of land for urban use (Tr. 7020-23, 7042). The City of El Paso and its extra-territorial jurisdiction of five miles beyond the city limits contains approximately 125,000 acres of vacant land (Tr. 7026-27). The Northeast sector surrounding El Paso contains 28 percent of that total, the Northwest sector contains 23 percent and the Southeast sector contains 36 percent of the vacant land (Tr. 7027). The Southeast sector is expected to capture 30 percent of the growth over the next 30 years (Tr. 7032-33, 7154-57, 7167-68).

There is within the City of El Paso and its extraterritorial jurisdiction enough vacant land to accommodate all the projected growth of the area through the year 2005 (Tr. 7043). Mr. Lusteck determined that 2,859 acres of Horizon City will be absorbed by 2005, which he believes will be the maximum possible absorption. This would amount to 3.3 percent of Horizon City's total acreage (Tr. 7039). This acreage is projected to be within El Paso's extraterritorial jurisdiction and would include the present core area and adjoining lands primarily owned by Horizon itself (Tr. 7039-40).

Mr. Lusteck projected a total population capacity for Horizon City of 315,640. He testified that if Horizon City captured all of El Paso's growth until 2005, 98.6 percent of Horizon City would be absorbed. "Obviously no one project is going to do that" (Tr. 7041).

Mr. Lusteck concluded that Horizon City was "grossly excessive," given the market in which it is situated (Tr. 7041):

Well, I told you that there are certain opportunities for land absorption in this particular geographic area. The problems, the reason that there is a differential there, is that the Horizon project is located outside of the area, or largely located at least outside of the area in which growth could reasonably be expected to occur during this period of time (1975k-2005). The problem is one of scale. The Horizon project is just so large, relative to the size and potential for growth of El Paso, that there is really very little chance within the given time constraint of that land being put into urban use (Tr. 7043).

Mr. Lusteck foresees problems for some lots in Horizon City because of arroyos and a flood plain. Some of the lots might not be buildable (Tr. 7176); there could be construction problems which would detract from the desirability of other lots (Tr. 7047). The lack of an infrastructure and the ultimate expense of acquiring water and utilities could create a substantial financial problem (Tr. 7048-51). Fractionalization of ownership is also viewed as a problem in the future development of the area (Tr. 7051-52, 7213-14). [205]

Mr. Lusteck testified that Horizon owns 1,745 acres of land surrounding the present core area of Horizon City, and this land would be the most likely to be developed (Tr. 7057-59).

In a study of the resale market, Mr. Lusteck found 36 possible arms-length sales transactions of deeded Horizon City lots (Tr. 7062). He determined that of about 2,000 listings taken by a real estate broker, Dewitt & Rearick, approximately 45 sales had taken place (Tr. 7062-63). The only lots Dewitt & Rearick would list, at the time of Mr. Lusteck's investigation, were lots near or on a hard surface road, adjacent to the core area, along Horizon Boulevard, or by the lake (Tr. 7063). The records of the El Paso multiple listing service showed 269 listings of Horizon City lots and 16 sales (Tr. 7064). Mr. Lusteck also noted that the Rocky Mountain Land Auction Company offered 450 lots for sale at auction but received no bids (Tr. 7065). The conclusion reached by Mr. Lusteck was that there was a very weak resale market for Horizon City lots (Tr. 7066, 7219).

Mr. Lusteck was very critical of the master plans for the Horizon City project. He observed that the overall development concept appeared to be optimization of the number of lots that could be platted on the available acreage (Tr. 7094, 7135). He stated that there was a physical problem with the generally small size of individual lots, which was inconsistent with the total acreage available. Single family lots are platted three to the acre (Tr. 7169). This small size is particularly a problem in the multi-family and commercial lots, which usually develop in larger tracts (Tr. 7095). A further problem which Mr. Lusteck noted was the unplatted acreage scattered throughout the project. The ultimate use of the unplatted acreage could alter the entire development concept since there is no commitment as to the use of whole sections of land (Tr. 7095).

Mr. Lusteck was of the opinion that Horizon City lots were very poor investments:

The opportunity for producing a return on an investment in a lot of the outlying portions of Horizon City would be very slim because there is a very small chance of that lot ever being placed in use (Tr. 7078).

* * * * *

... Making just an investment in one of those lots, it would be a poor choice, because it is not a liquid investment and the chances of taking any appreciation within a reasonable period of time would be very slim. [206]

PRESIDING OFFICIAL BARNES: What is a reasonable period of time?

THE WITNESS: I have used 30 years for this analysis. I think you could make a distinction of core area lots. Now, there could be a possibility to do well on a core area lot.

. . . The vast majority, the 97 percent that I don't think are going to have a chance at being absorbed, I would advise them otherwise. Consequently, if I was asked to advise someone, should I invest a hundred dollars in this, I would say no because your chances of selling it are very slim. (Tr. 7079).

(3) *Testimony of Jack Mann*

105. Jack Mann, Vice President of the Board, Wortman and Mann, Inc., Jackson, Mississippi, testified for complaint counsel. He has been with the company since 1949. He was elected Vice President of the company in 1955 and President in 1967. Until 1976, he was Chief Operating Officer of the firm (Tr. 7553-54). He has been engaged in the real estate business for 28 years. More specifically, he has been responsible for appraising real property for clients and counseling with clients regarding their real estate problems. In the general real estate field he has been involved in buying, selling, leasing, financing developing and promoting real estate. For the past 10-15 years the company has been the managing broker of a 10,000 acre tract of land, with the responsibility to plan and supervise the developing and marketing of the land (Tr. 7554-55).

Mr. Mann has a Bachelor of Science Degree in Business Administration from the University of Missouri. He has also taken special courses from the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers. He has been an appraiser since 1947. In the last 27 years he has appraised property of virtually all types in areas including Southeastern and Southwestern United States, New York, Illinois, New Jersey, Nevada and Missouri. He appraised the United States Naval Auxiliary Air Station site in Lauderdale County, Mississippi containing some 10,000 acres. He has also appraised five tracts of land in the Barnett Reservoir site in Mississippi containing between 10,000 and 60,000 acres, a portion of the Okefenokee Swamp in Georgia containing 42,000 acres. He has appraised two of the New Towns developments, and numerous other large developments (Tr. 7557).

Mr. Mann's assignment for the Federal Trade Commission was to determine the prices the Horizon City lots would sell for in the open market at the time of the appraisal (Tr. 7578). His instructions were to ignore the Horizon selling price of the lots (Tr. 7576, 7570-71, 7601). Mr. Mann stated that the conditions implicit in market value are: [207]

- (1) the buyer and seller must be typically motivated;
- (2) both parties must be fully informed or well advised;
- (3) a reasonable time must be allowed for the transaction to take place;
- (4) payment is made in cash or its equivalent;

(5) financing, if utilized, would be the typical terms being utilized in that particular area; and

(6) the price paid is unaffected by the financing or any other external force (Tr. 7578).

Mr. Mann testified that the beginning point of any appraisal is an estimate of the highest and best use of the land (Tr. 7584):

Highest and best use is one of the basic principles. It is defined as that legal reasonable approximate utilization that results in the greatest net return to the land, legal in the sense that it must not be illegal, reasonable in the sense it must be susceptible of achievement and approximate is simply another word for "near," which simply means it is a use which must occur within the reasonably near future (Tr. 7583).

Mr. Mann identified some of the carrying costs involved in the purchase of vacant land, including the taxes and the loss of interest on the dollar amount used in the purchase of the land (Tr. 7584). A major risk in the purchase of vacant land is that the value will not enhance to a point that there would be a profit made in the event of resale. He testified that a purchaser of undeveloped land:

... must, first of all, consider what the utilization of it would be, regardless of whether he plans to utilize it or not, for land to have value it must have some utility or some logical use within a reasonable period of time. Secondly, he must keep in mind that it is typically a nonliquid asset. It normally produces no income. The risks of whether or not it will go up in value which will produce him a profit - whether the present worth of this future dollar that he might receive is sufficient in light of other possible investments that he might make—say in stock, bonds, savings accounts, etc. (Tr. 7590). [208]

The federal property report would not provide an individual with sufficient information to make a prudent decision about investing in vacant land. Mr. Mann testified:

The HUD report does a very good job in describing the physical portion of development. It talks about the land itself, and it very candidly described the limitations and it talks about the presence or absence of utilities and the obligation on the part of the developer to provide or not to provide. But the one thing it does not provide is any economic data. It does not, of course, go into absorption, probable absorption, these types of things, and the latter in my opinion is necessary for a good decision for investment purposes (Tr. 7589).

Mr. Mann's individual assignment was to appraise 10 "typical" lots in Horizon City (Tr. 7592). For this assignment he used the direct market comparison approach, in which sale of properties similar to the ones being appraised are identified, accumulated, analyzed, adjustments made for any possible dissimilarities between the properties that sold and the property being appraised, and by comparing these actual transactions with the property being ap-

praised an opinion as to the value of the property is determined (Tr. 7595).

Mr. Mann prepared an appraisal of 10 lots in Horizon City (CX 892). He found no evidence the exchange privilege had an effect on the resale value of the lots (Tr. 7599, 7708-09). He found five classifications of lots in Horizon City: (1) developed lots in the central core area; (2) lots adjoining the core area where utilities are to be installed in a short time; (3) lots fronting on a paved road which might or might not have water and electricity (Tr. 7600); (4) lots on a rough graded road with no utilities; and (5) lots not located on any road with no utilities. He estimated 90 percent of the lots would be in category 4 or 5 (Tr. 7600-01). Mr. Mann would recommend against investment in category 4 and 5 lots on the basis of the lack of utilization within any foreseeable future and the large number available with a limited demand (Tr. 7625-26, 7629-30).

Mr. Mann located 20 separate sales transactions which he used as comparables for appraisal purposes (Tr. 7603; CX 892D-E). His appraisals are as follows (CX 892):

Typical No. 1 - zoned Multi-family Lot 19, Block 389, Unit 54 - Mountain Shadow Estates - \$250.

Typical No. 2 - Zoned Multi-family [209] Lot 27, Block 15, Unit 19 - Horizon City Estates - \$250.

Typical No. 3 Lot 10, Block 38, Unit 44 - Horizon City - \$750. (One quarter mile north off Horizon Boulevard)

Typical No. 4 - Zoned single family Lot 152, Block 232, Unit 30, Mountain Shadow Estates - \$250

Typical No. 5 - No Zoning Lot 16, Block 69, Unit 19, Sunland Estates - \$350. (6/10 mile south of Horizon Boulevard)

Typical No. 6 - Zoned single family Lot 10, Block 687, Unit 82, Horizon City - \$500

Typical No. 7 - Zoned single family Lot 47, Block 17, Unit 53, Horizon City Estates - \$250

Typical No. 8 - Zoned commercial, Lot 9, Block 1, Unit 32, El Paso East - \$1500 (Backs up to lot which fronts on Horizon Boulevard)

Typical No. 9 - Zoned commercial Lot 13, Block 2, Unit 15, Horizon City Estates - \$250

Typical No. 10 Lot 19, Block 51, Unit 10, Horizon Heights - \$4,500 (Located in development area, has fronting on street with curb and gutter but not paved).

Lots located in close proximity to Horizon Boulevard, which has electric lines and a water main, could be utilized within a reasonable

time, according to Mr. Mann (Tr. 7658-59, 7663-64). In Mr. Mann's opinion, once outside the core area and away from Horizon Boulevard, there was no correlation of increased price with decreased distance (Tr. 7677). Mr. Mann stated that his valuations, placed on these lots were estimates (Tr. 7699), and that the margin of error could be as high as 30 percent (Tr. 7700, 7738). In Mr. Mann's opinion, the "highest and best use" for Typical 1, 2, 4, 5, 6, 7 and 9 would be to discontinue payment of taxes, thereby defaulting and claim the appropriate investment loss as an income tax deduction (CX 892). Typical No. 8 is zoned commercial. Mr. Mann's opinion is that the highest and best use of this lot would be residential (CX 892). The market value which Mr. Mann assigned to the typical lots took into consideration the exchange privilege which Horizon's contracts provide (Tr. 7713, 7738).

(4) *Testimony of Frank Mangin*

106. Frank Mangin, Program Director for Economic Development for the Arizona Governor's Office, Planning Department, since December 1975, testified for complaint counsel (Tr. 3372). His [210] duties consist of directing the program of attracting employment-based industries to Arizona (Tr. 3372). Prior to his employment with the Governor's office, Mr. Mangin was Executive Director of the Douglas (Cochise County), Arizona Chamber of Commerce and consultant to the City of Douglas Industrial Development Authority and the Cochise County Industrial Authority, and prior thereto Mr. Mangin was employed by the Valley National Bank as Vice President of Industrial Development. Valley National Bank had 160 offices statewide (Tr. 3433). Mr. Mangin was a real estate broker from 1959 until 1965 (Tr. 3374-75).

Mr. Mangin testified that there are almost 73 million acres of land in Arizona, of which approximately 18 percent is privately deeded (Tr. 3379). Twenty years ago only 13 percent of the land was publicly held; the State of Arizona has been selling state-owned land to the public in recent years (Tr. 3380-83). The Indian reservations in Arizona have leased some lands for commercial and industrial purposes (Tr. 3385).

Mr. Mangin testified that housing availability is part of the structure necessary to support any other kind of economic activity, and he is familiar with housing availabilities and potentials in various areas of the state (Tr. 3387-88).

In Mr. Mangin's opinion Whispering Ranch is suitable only for cattle grazing (Tr. 3424). He testified that Whispering Ranch is so far

removed from economic activity and utilities that no one to his knowledge has thought about Whispering Ranch as a potential residential area (Tr. 3389). It does not have any value for any commercial or industrial purpose (Tr. 3390). The location has no labor force, transportation access or utilities (Tr. 3390-93). Mr. Mangin cannot conceive of Whispering Ranch having any value within the next 30 years for residential, commercial or industrial purposes (Tr. 3396). He testified that Whispering Ranch was "removed from people, roads, utilities and, consequently, demand for the use of it" (Tr. 3424). He testified that Phoenix was growing in a number of directions and its growth has stopped far short of Whispering Ranch (Tr. 3427-28).

Mr. Mangin has been associated closely with Cochise County (Tr. 3374-75, 3396, 34365-37), and he is familiar with Arizona Sunsites. Most residents of Sunsites are retired (Tr. 3404). There is no industrial employment in Sunsites, no inquiries have been received about locating industry in Sunsites, and there is no demonstrable labor supply available in the Sunsites area (Tr. 3400-04). Sunsites has no public schools (Tr. 3404), limited medical services (Tr. 3397-99), and no potential as a retail trade center (Tr. 3406). Growth of Willcox, Douglas and Tucson, towns and cities nearest Sunsites, will have no impact on Sunsites, in the opinion of Mr. Mangin (Tr. 3408-13).

Mr. Mangin noted that Sunsites had started in 1961, and in 1977 had a population of about 850-875 persons (Tr. 3400, 3414), an annual growth rate of about 60 individuals per year. Mr. Mangin projected the growth rate would continue at about the same pace as in the past (Tr. 3415). He does not foresee substantial growth because (i) the newness of the community has worn off, (ii) medical facilities are inadequate for a geriatric population, (iii) there are no significant shopping facilities, and (iv) there is no industry (Tr. 3415-16, 3485). [211]

Mr. Mangin stated that any deeded land in Arizona had an economic value in excess of \$150 per acre (Tr. 3418, 3479). The Sunsites land would have some value for cattle grazing and farming, except for the fractionalization of ownership and water problems (Tr. 3417-20). Mr. Mangin stated that there might be some minimum value for the land in 5-acre parcels for ranch houses, if water and electricity were available (Tr. 3419). He projected sales to possibly 10-12 persons each year for such low density usage (Tr. 3421).

(5) *Testimony of Roy Humble*

107. Roy Humble, supervisor of the land section of the Maricopa County assessor's office, testified as a witness for complaint counsel (Tr. 3596). His duties consist of appraising, classifying and evaluating all deeded land in Maricopa County for tax purposes (Tr. 3597).

Mr. Humble visited the area which he believed to be Whispering Ranch (Tr. 3603). He drove to the top of a hill, stood on top of his truck and surveyed the property with field glasses. He could observe 5 or 6 miles with the field glasses. He did not see any buildings. He saw native, desert growth, hilly land with washes and ravines (Tr. 3604-08). In the courtroom, he indicated on the aerial photographs several washes on the property, including a "big giant wash" (Tr. 3626-28).

After inspecting the land, Mr. Humble researched the most recent property sales that had taken place in the area. He also examined aerial photographs of the area. He then made a judgment of the market value of the land (Tr. 3613-14). In Arizona property is assessed at 18 percent of its market value (Tr. 3614). Mr. Humble considers the use of the land and other comparable properties in the area (Tr. 3615). In making the appraisal of Whispering Ranch property, Mr. Humble did not give any consideration to the transactions in which Horizon was the seller. He testified:

I gave no consideration to the selling price of these two and a half or five-acre lots, primarily because the adjoining property didn't conform with what they were paying there. In other words, the trend in this particular area, the desert area, was not what these people were paying for this property in here.

* * * * *

Q. Could you give us the reason why you didn't give any consideration to those prices?

A. Market value is defined as a property that's placed on the market for a reasonable length of time with a knowledgeable buyer and [212]knowledgeable seller, when both parties agree to the price and so on. In this case, the information that I had found prior to appraising this property was that these people weren't knowledgeable because of the fact that I found other sales of local people in this area that nowhere near come to the values that appeared on here, so I disregarded the entire market (Tr. 3615-16).

Mr. Humble placed a \$50 per acre full cash value on the Whispering Ranch property in 1972 (Tr. 3620, 3631). In 1975 he changed the appraisal to a minimum of \$500 per five-acre parcel. He placed this minimum valuation on the property because the economics of mailing out tax bills made the minimum charge appropriate (Tr.

3620-21). Mr. Humble found no sales of Whispering Ranch property by the individual lot owners:

Yes, I found no resales. That would give the appraiser and the assessor an indication that there was something happening in there if there were some resales (Tr. 3623).

In making the appraisal Mr. Humble considered the current use of the land, not its possible highest and best use (Tr. 3650).

(6) *Testimony of David Hamernick*

108. David Hamernick, a planner with the Arizona Office of Economic Planning and Development, testified for complaint counsel. Mr. Hamernick prepares and gathers statistics in relation to natural resources, water resources, minerals and land use, and analyzes various problems on behalf of the Director of the Office of Economic Planning and Development and the Governor (Tr. 3666).

As of December 1, 1973, Mr. Hamernick conducted an inventory of subdivided land in Arizona outside of the incorporated municipalities. This inventory showed 943,000 acres of land subdivided into approximately 742,000 lots (Tr. 3669; CX 843). Examining the number of dwelling units in the state in 1970 in context with the subdivision inventory report, Mr. Hamernick expressed the opinion that there is an over-supply of subdivided lots available in Arizona for residential purposes (Tr. 3668). Approximately 8.2 percent of the private land in Arizona is in such remote subdivisions. Cochise County had 83,652 acres subdivided into 80,064 lots, and Maricopa County had 127,168 acres subdivided into 110,130 lots (CX 843, p. 8).

According to Mr. Hamernick, there are certain subdivisions in Arizona that do not have to be recorded with the state real estate department (Tr. 3668-69). Mr. Hamernick made an inquiry in April 1975 as to the number of acres in subdivisions that were not, in fact, recorded. He found an additional 537,000 acres in such subdivisions (Tr. 3672-73). In Cochise County there were 97,190 acres in such subdivisions, and 28,160 acres in Maricopa County (Tr. 3674). Mr. Hamernick projected that there was an over-supply of [213]vacant lots for the year 2000 based on a population of 4,985,400 for Arizona (Tr. 3793). Since 1974, the population projection for Arizona for the year 2000 has been lowered to 4,057,000 (Tr. 3703-04).

(7) *Testimony of David Altenstadter*

109. David Altenstadter, Cochise County Planning Director since 1970, testified as a witness for complaint counsel (Tr. 4797). Prior to becoming Planning Director for Cochise County, Mr. Altenstadter

was employed by the Delaware Valley Regional Planning Commission in the Philadelphia metropolitan area as a transportation planner. He received a Master's Degree in City Planning from the University of Pennsylvania in 1969 (Tr. 4789).

Mr. Altenstadter prepared a report entitled Cochise County Projective Allocation Model, dated December 1975 (CX 860). This report makes a projection of Cochise County's population at future points in time, 1980, 1990, and 2000, and allocates the population to smaller areas within the county (Tr. 4799, 4800). The report was widely distributed throughout the county (Tr. 4802). Arizona Sunsites is located in Cochise County (Tr. 4805).

The population projection for Cochise County for the year 2000 is 152,778 (Tr. 4806). Arizona Sunsites was shown as having 684 persons in 1970 (Tr. 4812), and was projected to have approximately 5 to 6,000 persons living there in the year 2000 (Tr. 4811-15, 4837). Mr. Altenstadter expects the greatest growth in Cochise County to occur in the Sierra Vista and Fort Huachuca areas (Tr. 4819).

Mr. Altenstadter stated that Cochise County has just over 4 million acres of land within its borders and approximately 40 percent is privately owned (Tr. 4816-17). There is no shortage of private land in Cochise County for development purposes (Tr. 4816). There are approximately 120,000 parcels of subdivided land in Cochise County and 60,000 are estimated to be within subdivisions outside incorporated city limits (Tr. 4817). There are some subdivisions that are not recorded and do not have to be recorded under Arizona law (Tr. 4817).

Mr. Altenstadter does not anticipate the growth of Sierra Vista, Fort Huachuca, Tucson or the twin-plant concept at Douglas to have any impact on Arizona Sunsites (Tr. 4820-22, 4848).

B. Respondent's Expert Witnesses

(1) *Testimony of Dr. Benjamin Stevens*

110. Dr. Benjamin Stevens is the President, Director and senior research associate of the Regional Science Institute, a non-profit research corporation doing work in regional analysis, regional economics, industrial location, land development, urban planning, and related field (Tr. 14642; RX 1554). The field of regional science includes research into the forces that cause regional economic and urban growth, and encompasses the fields of economics, demographics, and planning (Tr. 14644). [214]

Dr. Stevens received a Master's Degree in city planning from the Massachusetts Institute of Technology; his Ph.D. in regional plan-

ning and economics was also awarded by MIT. He has taught as a full professor of regional science at the University of Pennsylvania (Tr. 14642-43), where he was also on the doctoral committee for regional science (Tr. 14644-45). He is currently a part-time visiting professor at the University of Massachusetts, teaching the forecasting of economic development and projecting of population growth (Tr. 14663). He has authored or co-authored 60 articles, reports, and discussion papers on various aspects of regional science (RX 1554). These have included studies for the National Institutes of Health, the National Science Foundation, the Council of Environmental Quality of the Environmental Protection Agency, the Corps of Engineers, and various state and city agencies (Tr. 14649-60).

For the last twenty years, Dr. Stevens has been the co-editor of the *Journal of Regional Science*, which is the most highly regarded professional journal in the field of regional science (Tr. 14657; RX 1554). He is a member of several professional societies (RX 1554; Tr. 14663-64).

111. Dr. Steven's assignment for Horizon was to project the population growth of four developments, Paradise Hills, Rio Communities, Horizon City, and Waterwood (Tr. 14659). He reviewed a number of publications and certain parts of the record of this proceeding (Tr. 14665-70; RX 1556); he also visited the four projects (Tr. 14669). He made population projections from the 1970's to the year 2005 (Tr. 14694). Dr. Stevens did not express an opinion as to the investment quality of lots in Horizon's projects (Tr. 14890-91).

Dr. Stevens stated that overall regional projections are likely to be more accurate than for a smaller area, the plusses and minuses in given locations tend to cancel out. As you get smaller, you are more likely to be wrong because many local factors have to be taken into account (Tr. 14700). He also stated that he had not had a previous assignment similar to the studies he did in this proceeding (Tr. 14708-09).

For Horizon City, Dr. Stevens projected for the year 2005 a population of 90,000 as a high, 75,000 as a medium, and 60,000 as a low (Tr. 14713; RX 1557B). For the medium population, approximately 19,000 acres would be utilized (Tr. 14713, 14779). For the El Paso SMSA for the year 2005, Dr. Stevens projected a population of 863,700 as a high, 809,800 as a medium and 745,000 as a low (Tr. 14717; RX 1557B), figures somewhat higher than the El Paso City Planning Commission's projections of 742,450, which Mr. Lusteck used (CX 876; Tr. 14740-43). Dr. Stevens thus projected 67,350 more population in the El Paso SMSA than Mr. Lusteck and the Planning Commission. Mr. Lusteck placed 111,000 persons in the Southeast

sector. Dr. Stevens placed 161,000 persons in this sector (Tr. 14768-70; RX 1557B), a difference of 50,000 persons. Mr. Lusteck concentrated his population in the area of the Southeast within the city limits and the extra-territorial area; Dr. Stevens placed more persons within the Horizon City project (Tr. 14770-72). [215]

Dr. Stevens was of the opinion that Horizon's future geographical distributional plan for Horizon City population was reasonable, calling for a concentration of people in the present core area, a smaller core area at the opposite end of Horizon Boulevard near the lake, and a concentration of businesses between the two core areas along Horizon Boulevard (Tr. 14763-65). The distance between the present core area and the core area at the lake would be 10 miles (Tr. 14952).

The Bernalillo County population estimate for 2005 projected by Dr. Stevens was 605,000 for the medium range (RX 1557D; Tr. 14791). For Paradise Hills, a medium population of 29,000 was projected (RX 1557D; Tr. 14806).

Dr. Stevens viewed Rio Communities as a satellite, "semi-independent" of Albuquerque. This refers to the fact that the higher level services—medical, legal, financial, collateral—would be provided by Albuquerque. Also, some portion of the population of Rio Communities would commute to Albuquerque for work (Tr. 14807). The problem of how a satellite community grows was a novel problem for Dr. Stevens (Tr. 114992, 14808-12). In projecting future population for Rio Communities, Dr. Stevens used an equation based on the growth of the nearby metropolitan center - Albuquerque, the distance from the satellite to the metropolitan center, and the distance from the satellite to the interstate highway interchange (Tr. 14985). He projected 10,000 manufacturing jobs for Rio Communities by 2005, roughly 20 percent of the projected industrial growth of Bernalillo County (Tr. 14815). He also projected 2,000 workers commuting to Albuquerque (Tr. 14816).

Dr. Stevens used a questionnaire survey which Horizon conducted of persons who purchased Rio Communities property in 1976 (Tr. 14829). These purchases occurred after issuance of the complaint in this matter [March 11, 1975], and were made on site (Tr. 14830). There were 799 responses to the questionnaire. Of these responses Dr. Stevens concluded that 439 intended to eventually retire or relocate to Rio Communities, and another 39 said that they would consider relocation if there was a business opportunity (Tr. 14817-3). The questionnaire gave the ages of the respondents (Tr. 14818, 14831). Dr. Stevens used the responses to the questionnaire to project retirement migration, which he stated was more difficult than

predicting economic growth (Tr. 14825). He did not make an effort to determine the extent of the reliability of the questionnaire (Tr. 14825). Dr. Stevens assumed the questionnaire responses were a random sample since he did not know the total number of questionnaires that were given to purchasers and could not determine the percentage of purchasers who responded (Tr. 14826-30, 14836). The relevant question was: "Are you considering eventual retirement or relocation to one of our communities" (Tr. 15010). Dr. Stevens stated that he would not have designed the questionnaire in that manner (Tr. 15012-13).

Of purchasers under age 25, there were 36 who responded that they intended to retire or relocate in Rio Communities, and 83 responded "maybe" to the question (Tr. 14832). The age group 25 to 34 responded 73 "yes" and 135 "maybe"; age group 35 to 44 responded 69 "yes" and 98 "maybe"; age group 44 to 64 responded 60 "yes" and 85 "maybe"; age 65 and over responded 10 "yes" and 7 "maybe" [216](Tr. 14832-33). Dr. Stevens considered one-half of the "maybe" responses as being "yes," indicating an intention to retire or relocate in Rio Communities (Tr. 14834-35). While Dr. Stevens' arithmetic was not entirely accurate, he assumed a total of 441 "yes" responses (Tr. 14835-37).

Dr. Stevens used the percentage of yes responses, 441, over the total returned questionnaires 799, multiplied this percentage times 68,807 individual customers in Rio Communities (Tr. 14837), and arrived at a figure of 38,778 families arriving at Rio Communities. He assumed there would be two persons in the average retiree family which would give you approximately 76,000 persons. Dr. Stevens then projected an actual total of 30,000 retirees arriving at Rio Communities by the year 2005 (Tr. 148235-39). Dr. Stevens was of the opinion that the questionnaire sample, together with other information on the migration rate of retirees into New Mexico, suggested that 500 families of retirees, or 1,000 persons per year, would settle in Rio Communities over the next 30 years (Tr. 14841). Dr. Stevens apparently included other information in his projection of retirees (Tr. 14856-63).

Dr. Stevens' ultimate projection for Rio Communities included 3,300 heads of households in industrial employment, 2,000 heads of households in commutation, and 15,000 heads of households among the retired. Dr. Stevens used an economic multiplier of two trade or service jobs for each of the 20,300 heads of households. These heads of households generate Dr. Stevens' medium population projection for Rio Communities of 60,000 by 2005 (Tr. 14865-67; RX 1557D). Dr. Stevens' high projection is 90,000 population and the low projection

is 30,000 a greater range than for the El Paso projection. Dr. Stevens explained this range on the basis that there were clearly more unknowns in Rio Communities than in the case of El Paso (Tr. 14867). Dr. Stevens stated: "I think, honestly, 60,000 is my best guess" (Tr. 14997). Dr. Stevens, in effect, projected that Rio Communities will receive 28 percent of the growth of Bernalillo County through 2005 (Tr. 15004-06).

Dr. Stevens considered Waterwood a recreational community. In projecting an average utilization of the Waterwood property Dr. Stevens arrived at an estimate of \$10 million dollars per year being spent on second homes in Waterwood by residents of Houston, Dallas and East Texas. He assumed \$3,000 per year to keep and maintain such a second home. This would provide for roughly 3,300 houses. Records indicate that one-third of the purchasers of Waterwood property are from outside East Texas. Therefore, Dr. Stevens assumed one-third of the purchasers in the Waterwood project in the future would be from outside East Texas. He thus assumed an additional 1,700 houses, or a total of 5,000 dwelling units to be built in Waterwood by the year 2005. These houses would absorb between 2,500 and 3,000 acres (Tr. 14879-83, 15045). He attributed 40 percent of the development contiguous to the Lake Livingston area to the Waterwood project (Tr. 15029-31): "Our best estimate is 40 percent over the long haul" (Tr. 15032). [217]

(2) *Testimony of D. A. Lomax*

112. D.A. Lomax is a professional real estate appraiser and consultant, who specializes in land in Texas, New Mexico, and Arizona. He has been an appraiser for 25 years, and is a member of the American Institute of Real Estate Appraisers (M.A.I.), a Senior Real Estate Appraiser (S.R.E.A.), and an Accredited Rural Appraiser member of the American Society of Farming Managers and Rural Appraisers (A.R.A.). Mr. Lomax is currently the National Vice President of the Society of Real Estate Appraisers, and has served for six years on the Society's Board of Governors. He is the author of the *Rural Appraisal Handbook* for the New Mexico State Tax Commission, a book on condominium appraising. He has also written several articles for professional magazines in the field of appraising. Mr. Lomax has taught real estate appraisal courses at several colleges and universities, and he has been an instructor for the American Institute of Real Estate Appraisers (Tr. 15053-63).

Mr. Lomax has conducted studies for federal agencies, the states of New Mexico, Texas, and Indiana, thirty-one of the thirty-two

counties in New Mexico, and several municipalities, districts and state agencies. He has given expert testimony in federal, state, and local courts, in hearings before the Federal Home Loan Bank Board, the Indian Claims Commission, the Federal Aviation Administration, and before numerous state, municipal, county and city agencies (Tr. 15067).

Mr. Lomax specialized in appraising investment properties, vacant land, and residential properties (Tr. 15065-66). His appraisals often project future value and investment value (Tr. 15068-69). His largest appraisal concerned a six to ten million acre tract in New Mexico. He has also appraised a tract of 550,000 acres and two tracts of 270,000 acres each. In 1966, he appraised approximately one-third of the state of New Mexico (Tr. 15067-68).

113. Mr. Lomax's assignment for Horizon was to evaluate the land at Rio Communities, Horizon City and Paradise Hills and express opinions, both as to value at the time of purchase and future values, and to relate those values to the question of investment value (Tr. 15069). He was to appraise the properties to estimate market value at the time the lots were purchased from Horizon and project future values to the year 2005 (Tr. 15090-91). Mr. Lomax did not concern himself with the current market value of the properties (Tr. 15124).

Mr. Lomax defined market value as the highest price in terms of money that a property will bring in a competitive market, under all requisites of a fair sale, when both the buyer and the seller act prudently, knowledgeably, and assuming the price is not affected by any undue stimulus. Both parties must be well informed and well advised, and a reasonable time must be allowed for exposure to the open market. Payment must be made in cash or by financing which does not affect the price (Tr. 15092).

Mr. Lomax was initially concerned with whether sales by Horizon were in fact representative of market value. To make this determination, he needed to ascertain whether the buyers of Horizon's lots had acted with knowledge when the lots were purchased from Horizon (Tr. 15095-96). To determine knowledgeability [218] Mr. Lomax prepared a survey of the purchasers of Horizon's lots (Tr. 15103-04). He was assisted in this task by Steven Van Dresser, and he also consulted with Drs. William Kinnard and Beryl Boyce, both of the University of Connecticut (Tr. 15105-10).

Steven Van Dresser is employed by Mr. Lomax and is involved with computer programming and selling computer programs (Tr. 15429). He was assigned the task of designing and conducting the survey of Horizon customers to determine their knowledgeability

with respect to their purchases of Horizon property (Tr. 15424). Mr. Van Dresser has a degree in Economics from the University of New Mexico and he has had some experience with surveys (Tr. 15423-24).

A random sample of just over 1,000 customers' names was selected (Tr. 15430). Using the questionnaire which appears in the record as RX 1508A-B, telephone interviews were conducted (Tr. 15432). The original sample included only 244 names; and only 14% were contacted. There were such few responses which had sufficient reliability that a larger sample of 1,010 names were used and 480 interviews were ultimately completed (Tr. 15433-34). Mr. Lomax believed this to be a random sample (Tr. 15108, 15810-11). Mr. Lomax concluded that the customers who purchased land from Horizon were knowledgeable, and that the price paid at the time of purchase represented market value (Tr. 15112).

To determine knowledgeability Mr. Lomax set up an eight point system. The broad categories utilized had to do with educational capabilities, whether the customer had seen the property or other similar properties, whether the customer had prior experience in the acquisition of real estate, and whether undue pressure was utilized in making the sale (Tr. 15112-13). Points were awarded as follows:

- One point credit for a high school diploma;
- One point credit for a college degree;
- One point credit if the customers had seen the property prior to purchase;
- One point credit if they waited more than one week to make the purchase;
- One point credit for looking at other vacant land properties prior to making the purchase;
- One point credit if the customer had considered the purchase of other potential investments;
- One point credit if the customer owned other real estate prior to making the purchase, and
- One point credit if the purchaser believed it would be several years before the property could be utilized (Tr. 15113-14, 15446). [219]

Mr. Lomax rated the responses from customers on the basis of a low, medium and high knowledgeability capacity; zero to two was low, three to five was medium, and six to eight was in the high range. Thirteen percent of those contacted scored low, seventy-two percent scored medium, and fifteen percent scored high (Tr. 15116). Sixty-three percent scored four or higher.

Mr. Lomax admitted that his survey was a test of capacity for knowledge, that he did not test for actual knowledge, and that he

had no way of determining whether or not the purchasers were "truly knowledgeable" (Tr. 15241). He read some of the customer testimony in this proceeding, but chose not to rely upon the testimony as an indicator of purchaser knowledge (Tr. 15266-67). On cross-examination, Mr. Lomax stated that if a material misrepresentation were made to a buyer it would have to be taken into consideration in a determination of buyer knowledgeability (Tr. 15273), and the nondisclosure of material facts could also prevent a buyer from being well-informed or knowledgeable (Tr. 15284). Mr. Lomax testified that a failure to disclose the presence of Rio Rancho Estates, a development of 91,000 acres just north of Albuquerque, could be a material nondisclosure to a buyer of a Rio Communities lot (Tr. 15285).

To determine if Horizon's lots had more than a little value as investments, Mr. Lomax considered three broad categories; the future supply and demand, historic growth patterns, and specific market reactions in the current market (Tr. 15130-31). He did not consider the current resale market for Horizon lots because "there was no marketplace to go to to take a look at resales" (Tr. 15289).

Mr. Lomax estimated 900,000 acres of land was available for development in the Rio Grande Valley around Albuquerque (Tr. 15142). He also concluded that for every person living within the Albuquerque city limits, an urban influence was exercised over approximately two acres of land outside the city limits (Tr. 15150). Using a population for the year 2005 of 700,000 to 750,000 for the Albuquerque area and an urban influence of two acres per person, Mr. Lomax arrived at a figure of 1,400,000 to 1,500,000 acres of land under the urban influence of Albuquerque, which would influence the price structure of the land (Tr. 15159). Since Mr. Lomax found a supply of only 900,000 acres of land available for development, he found significantly more demand than supply (Tr. 15151-62). The supply area considered by Mr. Lomax included Rio Communities (Tr. 15163).

In his historical growth study, Mr. Lomax studied several subdivisions that were started in the 1950's in the Albuquerque area, some of which have not been built out (Tr. 15171-73). He made a study of the price structure of these subdivisions since their inception to the year 1978 (Tr. 15173-78). Mr. Lomax found that improved in-town lots in Albuquerque appreciated at a rate of 18 percent per year; peripheral undeveloped lots appreciated at a rate of 8 percent per year (Tr. 15180). After adjusting for development costs of the in-town lots, he found that lots inside the city and lots influenced by the city

both increased at an 8 percent per year compounded rate (Tr. 15181-827). [220]

Mr. Lomax also studied subdivisions that were distant from Albuquerque, as much as 60 miles within the Albuquerque-Rio Grande Valley area through and including Valencia County (Tr. 15188-197). He arrived at a conclusion that there is a basic underlying value of land in eastern Valencia County of \$1600 per acre (Tr. 15197), and it can vary as high as \$4500 an acre (Tr. 15197-98). He thus concluded that land in Rio Communities has a value today of from \$1600 an acre to \$4500 an acre (Tr. 15199). Using an 8 percent annual compound rate Mr. Lomax projected land values in Rio Communities from \$13,000 an acre to \$36,000 an acre by 2005. This would give a return of 7.2 percent on the low value land and a return of 10.2 percent return on the higher value land to the year 2005 for a lot that Horizon sold for \$500 in 1968 (Tr. 15201-02). For a lot which Horizon sold for \$8900 in 1973, the low side return would be 1.2 percent and 4.5 percent on the high side compounded (Tr. 15202). He projected investment returns from 5.2 percent to 14.6 percent compounded on other Rio Communities lots. He therefore concluded that Rio Communities lots were of more than little value (Tr. 15203).

Using Mr. Lomax's \$1600 value of a Rio Communities lot today and projecting a 20% annual compounded return, the lot would sell for \$219,792 in 2005. Conversely, using the low projected selling price of \$13,000 for a Rio Communities lot in 2005, the discounted price of the lot in 1978 would be \$94 (Tr. 15310-11).

According to Mr. Lomax, Paradise Hills' lots have a basic underlying value of \$4,000 per acre (Tr. 15205). This value was based on current sales of lots in Paradise Hills (Tr. 15206). Paradise Hills lots will have a basic underlying value of \$32,000 per acre in 2005 on the 8 percent per year compounded growth (Tr. 15206). Mr. Lomax concluded that Paradise Hills' lots would be a good investment purchased at any time from 1968 through 1975 (Tr. 15207).

Mr. Lomax repeated the procedures he employed in the Albuquerque area in his study of the El Paso area (Tr. 15210). He found that land in the Southeast sector of El Paso that was ready for absorption into the development process was selling for \$7,500 to \$8,000 per acre (Tr. 15213). Land one step removed from being ready for development was selling for \$5,000 per acre, land two steps removed from development was selling for \$2-3,000 per acre, and land three steps removed from development was selling for \$200 to \$2,000 per acre (Tr. 15215). Mr. Lomax explained his "bands" of land as being due to El Paso's structured, controlled growth pattern (Tr. 15216).

Mr. Lomax used the El Paso Planning Department population projections to the years 2005 (Tr. 15216). Based upon these projections for the Southeast Planning sector and assuming orderly growth section by section, Mr. Lomax projected a population of 75,000 for Horizon City by the year 2005. Using the 6.5 percent per annum compounded appreciation rate which he had calculated for the El Paso area (Tr. 15210, 15217), Mr. Lomax predicted land values in 2005 of \$37,500 per acre for the first band of land, \$27,000 per acre for the second band, \$14,000 per acre for the third and \$2,000 per acre [221] to \$12,000 per acre for land in the fourth band (Tr. 15218). Mr. Lomax concluded that the minimum property value in Horizon City will be \$14,000 per acre in 2005 (Tr. 15221), and certain land within Horizon will fall within bands one and two. The population projection would absorb 19,000 acres of and in Horizon City, or about 23 percent of the total project (Tr. 15224).

Horizon City lots in band one at a 20% annual compounded rate would be valued at \$298 in 1978 discounted, band two lots would be discounted at \$196, and band three lots would be discounted at \$102 (Tr. 15318). A Horizon City lot valued at \$2000 in 1978 would sell for \$275,000 in 2005 at an annual rate of return of 20 percent compounded (Tr. 15321). Based on his study and projections, Mr. Lomax concluded that Horizon City lots definitely have more than a little value (Tr. 15227).

Mr. Lomax attributed value to Horizon's exchange privilege (Tr. 15231), to the HCIA's (Tr. 15234), and to specific locations within the properties (Tr. 15236). He did not consider holding costs on the land over the time period, such as taxes, interest paid and interest on investment lost, HCIA payments, and eventual selling costs (Tr. 15281-82, 15313). Nor did he consider liquidation costs; vacant land sales commission rates start at 10 percent (Tr. 15312).

114. During September 1976, Mr. Lomax was interviewed by two complaint counsel in this proceeding. At the time, such counsel were interested in engaging Mr. Lomax as a possible witness for complaint counsel. The following testimony about that interview was elicited on cross-examination:

Q. Do you recall making a statement that "A speculator or an investor does not buy an individual lot, especially in the sticks. He knows he is competing against 100,000 lots and chances of selling that lot are not very good."

A. It is possible that I might have made that statement, yes, sir.

Q. Do you recall making a statement that "A well-informed purchaser would never have bought most of this land unless a user, immediate or otherwise, in buying in a close-in area."

A. Again, it's possible that I might have made that statement, yes, sir.

Q. Do you recall making a statement that you rejected the prices of national sales area lots in valuing property because you didn't think they were good comparables? [222]

A. I probably did make that statement, yes, sir.

Q. Do you also recall answering questions in regard to the local purchasers, in the areas of Rio Communities, and I am referring now specifically to the people who you indicated yesterday, I believe, you had contacted after receiving names from the company.

Do you recall having told Mr. Dowdy and myself that most of those people were poorly informed and that they were not truly well informed?

A. It is possible I—that is not a true representation of what I felt about that survey, but it is possible that I could have made that statement, yes, sir.

Q. Do you recall making a statement that it was impossible to see all lots within the Horizon properties developed in any given period.

A. I think the gist of that statement in such that I probably made the statement. I tend not to ever use such words as "impossible," if I can keep from it.

Q. Do you recall also stating that if the Horizon subdivisions grew just as fast as Albuquerque, it would be the 22nd Century before lots would be developed, all lots would be developed?

A. Yes, I probably made that statement (Tr. 15392-94).

* * * * *

Q. Now, do you recall also telling Mr. Dowdy and me that there was no locked-in growth in any direction in the Albuquerque area, and that the main potential for land development is in the west?

A. No, but that is properly a constructive statement insofar as the City of Albuquerque will grow. It will grow to the west. It has problems on the east in that the forest lands have stopped it from effectively growing any further in that direction (Tr. 15396). [223]

* * * * *

Q. And do you recall saying that the individual should be able to get compensation for the lack of liquidity in a land investment?

A. That is one of the features of additiveness that should be taken into consideration, yes, sir.

Q. And another feature, you need a higher rate of return than the so-called safe investment because of the greater risk of a land investment?

A. Yes. You are going down the sequence now of classical economic theory as to how a rate of return should classically be built up.

And I think it sounds like I pulled a little professorial stunt on you and we talked about it for a while as to what the classical items of return were.

Q. What are the other items of return?

A. There should be, in line with that, there should also be a loading factor for the possibilities of managing the investment.

Q. Do you recall stating, adding all of this up, you need significant return in land over and above the safe rate of return?

A. I probably said that, yes, sir.

Q. Do you recall also stating that you had recommended against the purchase of Horizon land several times?

A. No, I don't recall saying that.

Q. Did you, in fact, recommend against the purchase of land at any of the Horizon properties at any point in time?

A. I just said I don't recollect having said that and I have already stated here this afternoon that I don't recall ever having consulted with anyone on the purchasing of any of Horizon's land. [224]

Q. Do you recall stating that you would not recommend that anyone under any circumstances buy Rio Communities lots unless for use, with one possible exception being Tierra Grande land?

A. It's probable that I said that at that time, yes, sir (Tr. 15398-99).

(3) *Testimony of Sanders Solot*

115. Sanders Solot, a real estate appraiser located in Tucson, Arizona, testified as an expert witness for Horizon. Mr. Solot has been an appraiser for about twenty-five years working primarily in Arizona (Tr. 15590). He is a member of the American Institute of Real Estate Appraisers (M.A.I.) and is a Senior Real Estate Appraiser (S.R.E.A.) (Tr. 15595-91). Mr. Solot is a graduate of the University of Arizona and has taught real estate appraisal courses at the University (Tr. 15591-92).

Mr. Solot's assignment was to estimate the market value of Horizon's Arizona Sunsites and Whispering Ranch properties, and to give a thirty-year projection of those values (Tr. 15597). Mr. Solot visited the properties, read property reports and studied the lands surrounding each property. He testified that he was familiar with the Sunsites project from other work he had performed in Cochise County (Tr. 15601).

Mr. Solot testified that the highest and best use of the Whispering Ranch property is long term land investment, a period he defined as

20 to 30 years (Tr. 15607). Mr. Solot gathered data on other properties which he determined were comparable to Whispering Ranch, and he used those "comparables" as a measure of value for Whispering Ranch (Tr. 15608). He testified that there are four major elements of comparison; physical characteristics, date of the transaction, terms of the transaction, and location. Adjustments can be made in location between the comparables and the subject property (Tr. 15627).

Mr. Solot conducted a survey of Whispering Ranch property owners to confirm selling prices and to learn of the motivation of the purchasers (Tr. 15630). He surveyed 300 Horizon customers and received 183 responses (Tr. 15631). The questionnaire used in the survey, RX 1574, had twelve questions, such as, where did you live when you purchased the Whispering Ranch property; were you as well informed about the purchase and the potential of the property as you have been about other real estate you have purchased; have you inspected the property from the air - on the ground; are you satisfied with the property; what is your opinion as to the value of the property; how long did you anticipate holding the property before utilizing it or selling it; and have you ever utilized the property in the preparation of a financial statement? Based on the survey, Mr. Solot determined that the prices paid Horizon for Whispering Ranch property represented market value (Tr. 15642). [225]

Mr. Solot reached an opinion that Whispering Ranch property had a market value of \$700 per acre as of May 15, 1978 (Tr. 15642).

Mr. Solot testified that the highest and best use of Arizona Sunsites property is long term land investment, the same as for Whispering Ranch (Tr. 15646). Mr. Solot also used the "comparable" approach in appraising Sunsites (Tr. 15647). No customer survey was undertaken (Tr. 15656-57). He estimated the market value of the Sunsites lots which contain slightly more than one acre at \$1,000; other lots containing .85 acres were appraised at \$850 per lot; half-acre lots were appraised at \$600 per lot; five-acre parcels were appraised at \$1,750; and forty-acre parcels were appraised at \$16,000 (Tr. 15658).

To estimate future values of the Whispering Ranch and Sunsites properties, Mr. Solot studied historic sales records of comparable developments in Pima County, approximately 20 miles from Tucson (Tr. 15663-65, 15737). Mr. Solot determined future values to the year "2000 I suppose" (Tr. 15666); he later testified that he computed future values to the year 2005 (Tr. 145671). Mr. Solot determined that the subdivision lot prices in the comparable developments from

1958 to 1978 equalled or exceeded the increase in the consumer index for the same period (Tr. 15670-71).

Mr. Solot determined that the Arizona Sunsites lots would increase at an annual compounded rate of 7 percent. Thus, lots presently valued at \$1,000 would have a market value of \$6,649 in 2005; \$850 lots would have a value of \$5,651; \$600 lots would have a value of \$3,989; lots having a \$3,000 market value would be \$19,946; and 40-acre lots presently valued at \$16,000 would have a market value of \$106,381 in 2005 (Tr. 15673-74).

The above projections include three basic assumptions; the population of Arizona increases as expected, there are no radical changes in governmental regulations regarding water, population control, zoning, and utilities, and the inflation rate of seven percent continues (Tr. 15674). He made no projection as to the date Sunsites lots reasonably could be expected to be used as home sites (Tr. 15706).

Whispering Ranch property presently valued at \$700 per acre and \$3500 for a five-acre tract would be valued at \$4,654 per acre or \$23,271 for the five acres in 2005 (Tr. 15675). Mr. Solot characterized the Whispering Ranch lots as having more than a little value and as being a sound, prudent investment of discretionary funds over a long term (Tr. 15676). He reached the same conclusion about the Arizona Sunsites lots (Tr. 15677).

Mr. Solot acknowledged that there might not be a resale market today for the Sunsites and Whispering Ranch properties due to an inordinate supply of land. He maintained that there is an opportunity to sell the property under long term conditions, and his appraisals represent the present worth of the future value of the lots (Tr. 15687-88).

Mr. Solot was questioned as to why he did not use sales of Whispering Ranch properties as comparables. He stated that he did [226]locate some transactions, but they represented tax loss transactions or property exchanges which he did not use (Tr. 156688-89). One "tax loss" transaction represented a purchase from Horizon for \$4500 and a sale at \$500 (Tr. 15690). He also made no projection as to the date the Whispering Ranch property could be expected to be used as home sites (Tr. 15706). He testified a reasonable time for sale of a lot in Whispering Ranch would be 20 years (Tr. 15709), and that this is a fact a purchaser should be aware of prior to purchasing the property (Tr. 15709).

Mr. Solot was unable to specify whether the 20-year period started at the time of the purchase of the lot, or at the time of his appraisal in 1978; he thought perhaps both dates might be appropriate (Tr. 15709). He stated that the comparables he used in appraising

Whispering Ranch property were sold "reasonably quickly," a year or two. He was unable to explain why a reasonable period for sale of a comparable was two years and for Whispering Ranch was 20 years—"We're dealing in a nonexact science when we talk about real estate evaluation" (Tr. 15710-11). Mr. Solot did not think Whispering Ranch lots were more comparable to each other than land located 50 miles distant from Whispering Ranch (Tr. 15718).

(4) *Testimony of Charles Osenbaugh*

116. Charles Osenbaugh is a real estate appraiser and consultant with Osenbaugh & Associates, a firm he has run since 1958 (Tr. 15752-53). He is an M.A.I., an S.R.E.A. (Tr. 15754-55), and a Senior Real Estate Property Sales (S.R.P.S.), which is the next highest designation after S.R.E.A. (Tr. 15755). He is a member of the National, Texas, and Houston Real Estate Associations (Tr. 15755). He has taught for the Society of Real Estate Appraisers, and at the University of Oklahoma, University of Santa Clara, Louisiana State University, and University of Houston (Tr. 15756).

Osenbaugh & Associates have performed appraisals for HUD, General Services Administration, Internal Revenue Service, the State Department, the Department of Justice, Texas, several school districts, oil companies, IBM, Rockwell International, and numerous other companies and individuals (Tr. 15757-58). Mr. Osenbaugh performed the initial appraisal for the Trinity River Authority and the City of Houston of the land now covered by Lake Livingston (Tr. 15758), and of the land acquired for Lake Conroe for the San Jacinto River Authority (Tr. 15758). Mr. Osenbaugh also appraised the original acquisition of 50,000 acres for the Woodlands, (a New Towns development) and he performed a second appraisal of 20,000 acres in Woodlands (Tr. 15759). He has testified as an expert appraiser in the United States Tax Court, federal district courts, bankruptcy courts, and state and county courts in Texas.

Mr. Osenbaugh's assignment for Horizon was to look at the viability of Waterwood and to determine if the prices at which Horizon was selling the lots were synonymous with the market value of the lots (Tr. 15759-60). In carrying out this assignment, Mr. Osenbaugh looked at the selling prices of Waterwood lots from 1973 to the time of his testimony in 1978 (Tr. 15760). He did not utilize the standard definition of market value because it is his opinion that there will not be a resale market for the lots until 1984 [227] (Tr. 15761). Utilities will not be placed to the lots until ten years plus one year from the date the Waterwood project sales began, and "whoever

bought was locked in until that period of time when the utilities got in" (Tr. 15761). Mr. Osenbaugh took into account this "absence of resale value" (Tr. 15761).

Mr. Osenbaugh testified that to determine market value you had to have a knowledgeable buyer and seller, someone who is apprised of a reasonable number of factors in the market (Tr. 15762). Knowledgeability means the purchasers have the facts about the property (Tr. 15782). To determine knowledgeability, Mr. Osenbaugh looked at addresses of purchasers of Waterwood property and from his own familiarity with the area he determined the income levels of the purchasers. He did not interview the purchasers (Tr. 15780, 15785). He examined the sales brochures and examined the layout at Waterwood as compared to other recreational areas. He considered that 43 percent of the purchasers whose addresses he examined had either purchased on site, or were from Houston. From a sales presentation which he received on Waterwood property and from reading selected transcripts of this proceeding, Mr. Osenbaugh concluded that the purchasers of Waterwood property were knowledgeable (Tr. 15772).

In determining the value of the lots, Mr. Osenbaugh took into consideration the location's proximity to major populations centers, the ease of access, the facilities, the water location, the timber and the terrain (Tr. 15772). He concluded that the prices paid to Horizon by the purchasers were synonymous with market value (Tr. 15773).

Mr. Osenbaugh stated on cross-examination that one factor pertinent to buyer knowledgeability would be knowledge on the buyer's part that Horizon owns a total of 25,000 acres in the Waterwood project (Tr. 15783-84). He also testified that as long as Horizon is in the market and has an inventory of lots, Horizon will "get the first crack at anybody that comes in," and Horizon's prices will set the upper limit of any resale market (Tr. 15794-95).

(5) *Testimony of Alan Nevin*

117. Alan Nevin testified as an expert witness for Horizon. Mr. Nevin is a consulting economist with Sanford Goodkin Research Corporation, Del Mar, California, and serves as Senior Vice President of that firm (Tr. 15806). Sanford Goodkin provides investment advice in consultation to the real estate and lending community (Tr. 15806). Mr. Nevin's areas of expertise deal with land, new construction, and the technicalities of feasibility (Tr. 15807). Mr. Nevin is also associated with a partnership which gives estate planning advice (Tr.

15809-10). Previous employment included stints with Ernst & Ernst, Gladstone Associates and American Housing Guild (Tr. 15811).

Mr. Nevin received a B.A. from American University in Media Management (advertising), a Master of Arts Degree in statistical research from Stanford University, and a Masters Degree in Business Administration from American University. He has taken some advance courses leading to a Ph.D. degree in real estate economics (Tr. 15807). Mr. Nevin testified that he is "pretty well considered an expert in the field of demographics and community growth" (Tr. 15813). [228]

Mr. Nevin has participated in a number of studies of undeveloped land (Tr. 15812-17). A key element of the studies is "they want to know, when it's all said and done, are they going to make money" (Tr. 15815). The time element usually involved in the studies is 10 to 25 years (Tr. 15815).

Mr. Nevin's assignment was to analyze Rio Communities, Paradise Hills, Horizon City and Waterwood to judge whether investments in land in those communities would be reasonable investments (Tr. 15818-19). Mr. Nevin began this assignment by looking at the Sunbelt, an area extending south from a line across the United States from Washington, D.C. to all of California. Thereafter he looked at the states where the properties are located, then at the nearby metropolitan areas, and ending up at the specific properties (Tr. 15820-21). Mr. Nevin had to determine the growth pattern of the metropolitan areas and the potential for utilizing the land within a reasonable period of time (Tr. 15822).

Mr. Nevin stated that Horizon's communities are very similar to the federal government's New Town projects, which have been "a massive failure, very massive" (Tr. 15900). He stated that 21 of the 23 "New Towns" had declared bankruptcy (Tr. 15901). He further stated that a New Town would have to generate 1,000 housing units per year to stay solvent (Tr. 15901). He stated that even the best studies showed the "New Towns" would not break even for 14 or 15 years—"that's pretty horrendous, going out on a limb for 14-15 years" (Tr. 15901). He testified that Columbia, Maryland, a project of 18,000 acres located between Washington, D.C. and Baltimore, Maryland had managed to develop in excess of 1,000 units per year. That town, acknowledged to be the most successful new town in this country, had financial difficulties and had to be restructured (Tr. 15902). Mr. Nevin attributed the New Town failures to an attempt to change the natural growth directions of an area (Tr. 15905).

Mr. Nevin is of the opinion that Rio Communities is going to be a suburb of Albuquerque (Tr. 15907), and it is in the Albuquerque

growth directional stream (Tr. 15908). Paradise Hills is already part of the Albuquerque community (Tr. 15906). He considers Horizon City to be definitely in El Paso's path of development (Tr. 15908). Mr. Nevin foresees a need to "market" both Rio Communities and Horizon City (Tr. 15908).

Mr. Nevin predicted a population for Albuquerque of 1,250,000 by 2005, or a growth of 30,000 per year (Tr. 15909). He is of the opinion that Rio Communities will attract 60,000 persons by 2005. The population could reach 90,000—"God only knows I can't put my crystal ball 30 years ahead" (Tr. 15910). Mr. Nevin stated that it was "exceedingly difficult for any one development to attract more than 10 percent of the growth of any metropolitan area" (Tr. 15909). Rio Communities will utilize 30,000 to 35,000 acres by the year 2005 (Tr. 15911).

Mr. Nevin is of the opinion El Paso will grow at a rate of 15,000 persons per year, and that will give El Paso a population [229]of 850,000 by 2005. Horizon City will receive approximately 75,000 persons, or about 9 percent of the population gain. This is about 2,700 persons per year, or about 900 households per year. By 2005 this population growth will absorb about 20 - 22,000 acres of Horizon City land (Tr. 15912-13).

In evaluating the lots for investment, Mr. Nevin considered an investment by an individual to have a completely different set of criteria than a major firm investment (Tr. 15915). The individual utilized discretionary funds, a corporation invests on its philosophy governing corporate funds (Tr. 15916). Mr. Nevin compiled a customer profile from Horizon's corporate record of purchasers of Horizon City and Rio Communities lots during the period 1970-1973 (Tr. 15916). He developed information as to the total amount invested by each customer; customers who were deeded, who were still paying, and who cancelled out; and customers who visited the property. These categories were then analyzed as to age, whether they rented or owned a home, their income and their profession (Tr. 15918). In the customer profile, 40.5 percent of the deeded or active customers had incomes under \$10,000; 43 percent had incomes between \$10 and \$15,000; and 16 percent had incomes of over \$15,000 (Tr. 15990-91). Of the contracts that were cancelled or superseded, 43 percent had incomes under \$10,000 (Tr. 15992). From this buyer profile, Mr. Nevin determined that buyers had used discretionary income in purchasing Horizon property (Tr. 15920). From the same profile he determined that the customers were knowledgeable (Tr. 15922). Mr. Nevin used existing records for the customer profile; he did not develop an independent questionnaire.

One factor Mr. Nevin did not have, in determining discretionary income, was the number of children or dependents in a purchaser's family (Tr. 15986).

Mr. Nevin testified that the risks of purchasing land are (1) when can you sell the land - liquidity, (2) and the appreciation history (Tr. 15933-34). Mr. Nevin projected an 8 percent compounded annual rate of appreciation on a "substantial" number of Rio Communities lots, depending on location within the development. Others would appreciate at a 3 or 4 percent annual compounded rate, and still others would appreciate at a 12 to 15 percent range, depending upon how fast they are utilized for development (Tr. 15945-47). The lots in Rio Communities were of more than a little value according to Mr. Nevin (Tr. 15950-51): "I have to say some of them are not very good values, but I would say most of them are acceptable, reasonable values" (Tr. 15950), good or reasonable investments (Tr. 15955).

Mr. Nevin also used an 8 percent compounded annual appreciation rate for Horizon City lots, with some lots appreciating at a higher rate and some lots appreciating at a lower rate, probably 4 or 5 percent compounded (Tr. 15952). In Mr. Nevin's opinion, these lots have more than little value (Tr. 15953), and are reasonable to good investments (Tr. 15954).

On cross-examination Mr. Nevin stated that he had determined in his own mind that inflation would continue at a 6 percent per year rate and real estate would carry an increased inflation in value of 8 percent per year (Tr. 16023, 16065-66). [230]

Paradise Hills lots were characterized by Mr. Nevin as "very good investments" (Tr. 15953). Mr. Nevin stated that he hesitates to call anything an "excellent investment" (Tr. 15956):

Q. In analyzing a purchase from the point of view of the purchaser, in your opinion, can an investment of Horizon lots, where there is uncertainty as to the time of resale, be considered an excellent investment with little or no financial risk?

A. Absolutely not.

Q. In analyzing a purchase from the point of view from the purchaser, can an investment of Horizon lots, where there is uncertainty with respect to the amount of the resale price, be considered an excellent investment with little or no financial risk?

A. No. (Tr. 15956).

Mr. Nevin analyzed Waterwood lots as an investment opportunity in a second home or recreational community (Tr. 15957). In Mr. Nevin's opinion, the future value of Waterwood lots is going to depend very much on the marketing ability of the developing company (Tr. 15957). Mr. Nevin believes the lots will appreciate at a

rate of 8 to 10 percent per year compounded "as long as the momentum of the marketing is continued" (Tr. 15958). He testified that the lots at Waterwood purchased during the period 1973-1975 represent a good value as an investment (Tr. 15962).

Mr. Nevin described the Horizon communities as "bastard" cases because Horizon has shifted the financial burden of its developments to the lot purchasers (Tr. 16032-34). He testified:

The Horizon Communities are a bastard case, as it were, in that it is a form of master plan development, where the future buyers or home owners have bought the land, in essence, for cash, so the parent corporation has limited carrying costs on the land. Since I took on this assignment, I have been wrestling with this direct issue, because it almost seems that Horizon may have the best of all worlds, in that they have the land—the land is already pre-purchased by the land owners, by the lot owners, and, therefore, Horizon doesn't have the heavy carryingcosts on the land that normally cripple new towns. (Tr. 16032). [231]

C. Horizon's Core Areas

(1) *Paradise Hills*

118. Horizon retains about 4,500 acres in Paradise Hills adjacent to the present development area, which have not been developed (RX 1535A; Tr. 14025). The developed area consisted of approximately 1,100 dwelling units as of June 1978, with about 100 units under construction. The developed acreage consisted of 1500 acres, which includes a 185 acre golf course (Tr. 14025; CX 67Z-2, 122). Thus, Horizon owns three times as much acreage in Paradise Hills as has been developed in the past several years.

(2) *Rio Communities*

119. There are several core areas retained by Horizon in Rio Communities, only one of which has existing development. Core Area I, where development has occurred and is occurring, consists of 5,400 acres, platted as follows; 3200 acres consisting of 5600 single family lots, 500 acres multi-family, 300 acres commercial, 600 industrial, and 800 acres recreational schools and parks (RX 1539B). There were approximately 800 dwelling units as of June 1978; about 1000 acres have been utilized, including a golf course (Tr. 14013-14; CX 67Z-4).

Horizon has retained Core Area II in Rio del Oro adjacent to where the Monzano Expressway may enter the project, and it will have the nearest location to Albuquerque. This core area consists of 2000 acres platted as follows: 1,000 acres consisting of 2500 single family lots, 350 acres multi-family, 150 acres commercial, 500 acres

recreational, schools and parks (RX 1539B; Tr. 13983-86, 14015). There possibly will be a connecting highway between these two core areas (Tr. 13986). There is no development in this core area.

An additional core area of 5,300 acres has been retained by Horizon in Canyon del Rio platted as follows: 4,000 acres consisting of 2,000 single family lots, 1,200 acres multi-family, 100 acres recreational, schools and parks (RX 1539B; Tr. 14015). There is no development in this core area.

Horizon has a core area in Tierra Grande consisting of 3,300 acres platted as follows: 2,000 acres industrial, 1,300 acres commercial (RX 1539B; Tr. 13986, 14015). This property parallels the railroad on both sides for several miles (Tr. 14016, 14014, 14495; RX 1539B, 1540, 1546). There are 8 homes constructed in the 83,000 acre Tierra Grande property. In addition, Horizon retains six "town centers" throughout Rio Communities consisting of approximately 500 acres (RX 1539B).

(3) *Horizon City*

120. The existing core area at Horizon City has 6,400 acres platted as follows: 4,000 acres consisting of 10,000 single family lots; 800 acres multi-family; 500 acres commercial; 600 acres industrial and 600 acres recreational, schools and parks (RX 1536B; Tr. 13979, 14019). As of [232]June 1978, about 600 acres of this core area had been developed and there were approximately 800 homes completed (Tr. 14020-22).

Horizon has retained a 4,000 acre core area near what is termed Lake Horizon, which is about 10 miles from the existing core. The two areas are connected by Horizon Boulevard. There is no construction at this second core area. The 4,000 acres are platted as follows: 2,000 acres consisting of 5000 single family lots; 700 acres multi-family; 250 acres commercial; and 1,050 acres recreational, schools and parks (RX 1536B; Tr. 13977, 14022).

Horizon also retained approximately 1,500 acres in core areas located throughout the Horizon City project (RX 1536B).

(4) *Waterwood*

121. The Waterwood project consists of 25,000 acres of land, with only 7 - 8000 acres presently subdivided (Tr. 14520). Whispering Pines Units 1 and 2 and Country Club Estates are fully improved, consisting of about 1,000 acres which includes the golf course and the other facilities (CX Z 67-Z6). Within other Whispering Pines Units

there are 2,823 single family lots, 230 multi-family lots and 12 commercial lots, none of which have been sold (RX 1543A).

Deer Creek Village has 4,976 single family lots and 159 multi-family lots, of which 1411 had been sold and 178 deeded as of May 4, 1978 (RX 1543A).

Green Tree Village has 2,356 single family lots and 133 multi-family lots, of which 895 had been sold and 98 deeded as of May 4, 1978 (RX1543A).

(5) *Arizona Sunsites*

122. The core area at Arizona Sunsites consists of approximately 760 acres, about one-half of which is now developed. There are approximately 400 dwelling units in the core area, along with a golf course and other buildings (RX 1235R; Tr. 13041, 14023). There are approximately 38 homes outside the core area (Tr. 14024). Horizon owns 12,000 acres in Arizona Sunsites in a parcel named Iozona (Tr. 14023). A real estate broker testified that there were between 800 and 1,000 lots in the Sunsites building area that are vacant and owned by Horizon (Tr. 4040-41).

None of the future core areas in Horizon's properties, are, or have been, for sale to builders (Tr. 14028). In 1975 Horizon ceased its own building operations, and it now sells developed lots in existing core areas to builders (Tr. 14026).

D. The Resale Market For Horizon Lots

(1) *Paradise Hills*

123. As of August 2, 1975, Paradise Hills had a total of 6,583 lots of which 1,131 had been deeded and 928 sold but not deeded, leaving 4,524 lots [233]owned by Horizon. These lots were platted as follows: 5,381 single family, 142 multi-family, 80 commercial, 5 commercial/multi-family, and 975 bulk lots (CX 873A). Horizon owned all the multi-family lots, 4,162 of the single family lots, but only 106 of the bulk lots. The record does not establish whether the deeded lots had homes or other buildings erected on them as of August 1975. Individual investment in Paradise Hills consisted primarily of bulk acreage where no development has occurred.

Record evidence of resale activity in Paradise Hills is limited (Tr. 6629-30). Professor Stevenson found only limited resale activity in Paradise Hills, and all this activity was concentrated in the development area (Tr. 6737-38, 6832-36). William A. Kelly, a realtor in Paradise Hills who formerly was a Horizon sales representative

(16540-41), testified that owners of the bulk acreage in Paradise Hills contacted him regularly to have their property listed. From 50 to 100 persons sought to list bulk acreage with his firm between 1975 and 1978 (Tr. 16456-47). His firm has not accepted listings for any of these lots (Tr. 16548). He has informed persons seeking to have their property listed that there is no market locally for the lots; that no one is interested in buying them (Tr. 16548-49). Owners of lots in the Knolls area of Paradise Hills have sought to have his firm list their lots. His firm has accepted listings of lots closest to the building area, and rejected those nowhere near the building area (Tr. 16562-63). Mr. Kelly stated that he had sold about sixty developed lots in Paradise Hills in 1977, but "very few," "three or four," undeveloped lots (Tr. 16608).

When Mr. Kelly worked for Horizon he received information that the lots in the Knolls had a Horizon "book value" of \$3300 (Tr. 16563). He testified that Horizon recently had attempted to repurchase those lots for \$2200, which was much less than the price at which Horizon had sold the lots (Tr. 16563-66; see RX 1535A for selling prices of Paradise Hills property).

Mel Kupetz, President of Rocky Mountain Land Auction Company, testified that in November 1975, land in Paradise Hills was put up for auction in Albuquerque by his company. There were 63 listings of Paradise Hills property covering one or more lots each (CX 870, 871A-B). Offers were sought on all lots. Only two lots were sold as a result of this auction (Tr. 5128-29).

CX 817A-N represents all Albuquerque Board of Realtors Multiple Listing Service listings of property in Paradise Hills for the period 1970-1974. CX 817A reports a sale of an undeveloped 2 1/2 acre lot in April 1974 for \$2500. This information is insufficient to establish whether the seller made a profit on the transactions over and above costs. The remainder of the sales were developed lots. It is noted that Horizon Realty, an Horizon subsidiary (Tr. 2805), was the sales agent on most of these transactions. Horizon did not come forward with any reliable information of sales of undeveloped property in Paradise Hills.

The information available in the record establishes that there was no resale market for undeveloped lots in Paradise Hills as of 1978.

(2) *Rio Communities*

124. As of August 2, 1975, Rio Communities had a total of 172,020 lots of which 68,029 had been deeded, and 73,688 sold but not deeded, [234]leaving 30,303 owned by Horizon. These lots were

platted as follows: 131,578 single family, 17,327 multi-family, 11,486 commercial and industrial, and 11,629 bulk lots (CX 873B-C).

John Maguire, a former Horizon sales representative, had been a real estate broker in Belen, New Mexico, for four and one-half years at the time he testified in this proceeding in June, 1977, and he had operated his own real estate business for about three of those years (Tr. 2780-81). Mr. Maguire testified that he takes listings for all kinds of real estate in New Mexico. Most of his listings for undeveloped land are in Rio Communities (Tr. 2782). Mr. Maguire has received more than 1,000 requests for Rio Communities lots to be listed for sale during the period from May 1974 to June 20, 1977. The firm accepted about 600 listings, which were about equally divided between Rio del Oro and Rio Grande Estates, ranging from one mile up to 17 or 18 miles from the core area (Tr. 2782-85, 2800). Of these approximately 600 listings for Rio Communities lots, only two ½ acre lots in Rio Grande Estates had been sold. The firm sold one lot in Unit D, for \$250 in 1975, and another lot, in Unit S, for \$100 in 1976 (Tr. 2782-87).

Some of the owners of Rio Communities' lots who requested listings were advised of the slim possibilities of selling the lot and of the considerable length of time Mr. Maguire would require for a listing. Mr. Maguire testified that "then we wouldn't hear from them any more" (Tr. 2786). He would inform other owners of Rio Communities lots that there was "absolutely no way" the firm could sell their property "regardless of what happens . . . except for a few dollars" (Tr. 2785-86). If someone really wanted to have him accept a listing, however, he would do so. (Tr. 2793).

Mr. Maguire made substantial efforts to sell Rio Communities' lots for which he had taken listings. He has advertised weekly in the local, Belen newspaper. He also ran advertisements in newspapers in 14 northeastern and midwestern cities, such as Chicago, New York, Philadelphia and Boston. Few people responded to these advertisements (Tr. 2787-92). In addition, brokers in the Albuquerque area are aware that Mr. Maguire has listed Rio Communities lots, but these firms have not sold any lots from him (Tr. 2792).

The Albuquerque Board of Realtors has a Multiple Listing Service ("MLS"), which circulates listings of properties for sale among its members. The number of subscribers to the MLS went from 235 to 1160 over the period from 1962 to 1977 (Tr. 2929, 2932, 2846-47). Listings are for all types of real property, including vacant land, and cover a geographic area 35 miles from the Bernalillo County Court House in all directions (Tr. 2846-47). By regulation, the Board requires all members to report all sales to the MLS (Tr. 2856).

The MLS has taken listings of vacant lots in Rio Communities (Tr. 2858). Of listings taken in 1972 and 1973, 27 in Rio Grande Estates and 10 in Rio del Oro, all expired in 1973 and 1974 without a sale recorded (CX 818A-Z2, 819A-J). The MLS has also kept records of 63 other listings during the period from 1973 to 1977 in Rio Communities with a sale recorded in only two instances. (CX 820A-P, 821, 822A-D, 823A-U, 824A-Z7). One of the sales, a Rio Grande Estates lot in Unit 5, sold for \$850; it was listed for \$1,500 (CX 821). Horizon's selling price for similar lots in 1973 was \$1,200 (RX 1541B). The second sale, [235]a 10-acre parcel in Tierra Grande, was sold for \$4,500 in 1976 (CX 824Z5); Horizon's selling price for similar lots in 1976 was \$7,300 (RX 1541G). Some listings which expired without a sale being recorded indicated that: the offering price was below the price for which Horizon was selling comparable lots (CX 819 B,D,E,H; RX 1541H), the buyer could exercise the exchange privilege for other land in more developed sections of Rio Communities (CX 818M, Y), financing would be provided (CX 818W, 819G), the price was less than the seller's original cost (CX 819D; RX 1541H) the lots were "multi-family" (CX 819G), and the owner would accept any reasonable offer (CX 818J, W).

Ronald Williams, administrative assistant to the executive vice president of the Albuquerque Board of Realtors from 1967-1976 (Tr. 2929-30), testified that from 1967 to early 1974 the MLS circulated information to its subscribers about inquiries from lot owners desiring to sell their Rio Communities lots (Tr. 2930-34). At that point the MLS stopped circulating this information because of complaints from MSL subscribers that no action was being taken upon the inquiries and the information "cluttered up" the circulations (Tr. 2934-36). From about the spring of 1974 until June or July 1976, the Board sent a form letter to those who inquired about the sale of lots in Rio Communities (Tr. 2936) that the Board felt there was little local market for such Rio lots (Tr. 2942-43).

Efforts to sell Rio Communities lots through two auctions produced minimal results. The Rocky Mountain Land Auction Company held two auctions, one on August 2-3, and another on November 20-22, 1975 at the Albuquerque Convention Center (CX 865a, 868a). Owners of deeded lots in Rio Communities were contacted to determine if they wanted to offer their lots for sale at the auctions (Tr. 5083). Mel Kupetz, the owner of the Auction Company, testified that he spent about 9 months of working time on efforts connected with these auctions (Tr. 5081, 5114, 5129-30). Expenses of \$10,726 were incurred in connection with the first auction, and of \$11,421 with the second auction (CX 869, 872). These expenses included

"saturation" advertising campaigns which used the newspapers with the greatest circulation and radio stations with the largest audience in Albuquerque (CX 866, 869, 872, 867; Tr. 5100-02, 5225-19). Additional publicity for these auctions included newspaper articles, a television feature and invitations to 30 builders in the Albuquerque area (Tr. 5102-03, 5119).

Prior to the auctions, Mr. Kupetz contacted brokers in the Albuquerque area to assist him. Of the 10 he contacted, 9 expressed no interest in participating. They told him that they had not had any luck selling Rio Communities property and they did not want to have further involvement with it (Tr. 5103-04). Mr. Kupetz, however, was able to locate a broker to assist at the auctions. Peter Olguin, an Albuquerque real estate broker assisted with the first auction (Tr. 5104-05, 2662-64), and Gertrude Kaveny assisted at the second auction (Tr. 2804-06; CX 813). The auctioneers at the auctions had previously conducted auctions of land (Tr. 5156-57). Large blowups of subdivision maps were used to explain the locations of lots. Members of the audience received smaller maps of the property (Tr. 5109, 5122-23). Listings of lots were also available before the auction (Tr. 5094, 5107-08, 5121). The audience was informed before the auction began that offers seeking financing from the seller would be submitted to the sellers (Tr. 5109). [236]Once the auctions began, the auctioneer sought bids at any amount if he failed to receive a bid for a given lot at or above the minimum price listed (Tr. 5109-5111, 5123). Bids as low as \$5 or \$10 for a lot would be accepted, "start it anywhere you want" (Tr. 5110).

The Auction Company accepted about 1,000 listings for the first auction of Rio Communities lots, and rejected an additional 200 to 300 because they were received too late to be included in the printing (Tr. 5099-5100; CX 865a-f). At the auction in August 1975, all of the lots accepted were offered for sale (Tr. 5111-12). All offers made at the auction were submitted to the owners whose lots were the subject of bid offers (Tr. 5131). The result of this auction was that offers were submitted to sellers on only 10 lots. Eight of the lots, all in Rio Grande Estates, were sold, at prices ranging from \$200 to \$500 (Tr. 2674-79; CX 802a-g).

For its November 1975 auction of Rio Communities lots, the Auction Company accepted listings for about 1,200 lots and rejected listings for about 200-300 lots which were received too late to list (Tr. 5114-15). Listings covered between one and six lots, and lots were located in Rio Grande Estates, Rio del Oro, and Rancho Rio Grande (CX 868A-O). All lots were offered; bids were made on only about 25 or 30 lots (Tr. 5123-24, 5125). All of these bids were submitted to lot

owners, and about 20 were sold at prices approximating \$200 per lot (Tr. 5125-26).

Professor Howard Stevenson concluded that the resale market for Rio Communities lots was negligible (Tr. 6713). He based his conclusion on contact with brokers and a review of the testimony of persons from the Albuquerque Board of Realtors (Tr. 6710-13). John Maguire told him that the most of the outlying lots were unsaleable (Tr. 6711). Gladys DeLettera of Cullins Realty in Belen told Professor Stevenson that her firm actively discouraged listings of lots in the various subdivisions in Rio Communities with a few minor exceptions. These exceptions were lots in Units 1 and 2 of Rio Grande Estates; a narrow band along State Highway 6; and lots near the 4 or 5 houses in Rancho Rio Grande or near the few houses in Tierra Grande (Tr. 6710-13). Professor Stevenson testified:

Again, my purpose in interviewing these people was not to ascertain the truth, fiction, or whatever, but it was to establish for the benefit of somebody who had not yet purchased what the outlook, attitudes, and potential resale—which creates the investment value—of their property could be.

Q. What was your conclusion as to resale after talking to these people and reviewing the testimony you have mentioned?

A. Negligible. In fact, Mrs. DeLettera was a lot owner, was continuing to make her payments, but when asked why, she said 'Well, I have paid so much down now and maybe some day I can trade it in for closer.'

But even her own lot she felt there was no possibility [237] of sale, which was the ultimate party of interest. (Tr. 6713).

A number of customers who testified in this proceeding attempted to sell their Rio Communities property without success (Tr. 837-39, 1565, 1581, 6092-95, 6114, 16164-65, 16265, 16678-79).

(3) *Horizon City*

125. The Horizon City project had 139,507 lots as of August 21, 1975, of which 49,483 had been deeded and 64,711 sold but not deeded, leaving Horizon as the owner of 25,313 lots. These lots were platted as follows: single family 113,328, multi-family 12,816, multi-family/commercial 5,113, commercial 4,284, industrial 37, bulk (2 ½ acres) 3,929 (CX 873C; Tr. 6981).

Lois Zans, an administrative assistant with the El Paso Board of Realtors, testified that the Board's membership had increased from 166 members in 1970 to 354 as of 1977 (Tr. 2378). The Board operates a Realtors Listing Service ("RLS"), and members who participate in the RLS receive copies of summaries of all listings on all types of properties, including vacant land, which are sent to the RLS (Tr.

2376-81). In 1970 the RLS distributed about 400 copies of these listings to realtors who participated in the RLS. By April 1977, the RLS was distributing about 875 to 900 copies of its weekly book containing listings and the same number of its quarterly digest, which compiles all sales and expirations of listings during the preceding quarter (Tr. 2382). RLS listings also reflect the changes which have occurred in vacant land listings, such as the legal status of the property and the terms a buyer will accept (Tr. 2383-85). Where a sale occurred in a listed property, the realtor who had obtained that listing was required to report that sale to the RLS. Information reported included the sales price, terms and date of the sale (Tr. 2387-88). The listing is then pulled from the active listings, with information on the sale included in the weekly listing book and quarterly digest sent to RLS participants (Tr. 2382). Property listed by one RLS member can be and sometimes is sold by another RLS subscriber, or even a non-member of the RLS (Tr. 2382-83, 2443-44).

From at least 1968 to April 1977, the El Paso Board of Realtors has received inquiries from purchasers of lots in Horizon City who were interested in having their lots listed for resale (Tr. 2376, 2388-89). Mrs. Zans testified that the Board had an average of about four inquiries per week (Tr. 2388-89). The RLS notified all of its subscribers on a weekly basis of the inquiries which they received for the resale of lots in Horizon City. Where no realtor indicated an interest in a given lot, the Board of Realtors during the period from at least 1967 to 1977 sent a letter containing the following to the person who inquired about a listing:

During recent weeks we have polled our REALTORS in hopes of finding someone who will accept listings on property in [Horizon City, or subdivision of that property.] From each we have received basically the same answer. There is no local market for this property and they will not accept any listings on it. (CX 785, 786; Tr. 2388-95). [238]

The following summary reflects the approximate number of RLS listings and the listings and sales of land within Horizon City (Tr. 2396-2412):

Initial Decision

--97-F.T.C.

<u>Year</u>	<u>Horizon City Listings</u>	<u>Number of Listings Sold</u>
1970	8	0 (CX 787A-C)
1971	31	1 (CX 788A-I)
1972	35	3 (CX 789A-I)
1973	35	3 (CX 790A-H)
1974	80	2 (CX 791A-R)
1975	51	3 (CX 792A-X)
1976	26	2 (CX 793A-Z-2) ^a

Thus, from about 1400 inquiries to the RLS there were approximately 266 listings and 14 sales of Horizon City property during the period from 1970 to 1976 (Tr. 2376, 2388-89).

Listings sometimes indicated that they were below Horizon's selling prices for comparable property. For example, the third listing on CX 792W contains the following information: The offering price of \$2500 is marked through, \$1250 written over it. This listing indicated that the owner will finance the purchase, "carry paper". It also stated that it is a "commercial" lot offered at the price that the "owner paid for property in 1966" and that comparable property was "being sold by Horizon for \$3400" at the time of the notation. This listing existed for more than 2 years, from January 1973 to February 1975. Other listings also indicated they were below Horizon's price at the time; e.g., CX 791F, item 2 ("Seller hopes for a fast sale at this reduced price"; 791J, item 2; 791O, item 4 Horizon "reverified" its prices for similar lots at the time). Most resale listings handled by Horizon Realty had asking prices below Horizon's then current sales prices for similar property (Tr. 9637). Listings on lots with the following locations expired without being sold: near lake [Horizon] (CX 792U, item 2, 791G, item 2, 791I, item 3,4); near the golf course (CX 791B, item 1, 791F, item 3); one block from utilities and one-half mile from present subdivision (CX 791E, item 2, "submit all offers"); across the street from where homes are being built (CX 791F, item 3); and one-half mile north of Horizon Boulevard and three-quarter mile from water tank (CX 791J, item 3). Listings expired without being sold where the exchange privilege was mentioned (e.g., CX 792P); financing was offered by the seller (e.g., CX 792P, item 2; 791D, item 4; 791W, item 2 ("submit all offers", 791F, item 1, item 3 [15% down, balance over 10 years]); or through assumption of the balance due Horizon (CX 791K, item 4 "submit all offers").

Oswald Glaze had been a real estate salesman with the El Paso realty firm of DeWitt & Rearick for 5 years as of the time of his testimony in April 1977. He worked out of the office in Horizon City all but the first 18 months of that period (Tr. 2224, 2226). He

^a Some of the listings shown on CX 787-793 were apparently not Horizon City property (see CX 787, 793V).

accepted about 2,000 listings on vacant lots in Horizon City during that period (Tr. 2237-38). [239]Mr. Glaze testified that he accepted about 200 listings in 1973, about 600 in 1974, about 800 in 1975, about 200 listings in 1976, and about 100 during the first three months of 1977 (Tr. 2239-40). Listings were usually for a 6-month period until 1976, and for one year after that (Tr. 2250). When Mr. Glaze first began listing lots in Horizon City he listed all lots where someone requested a listing. In 1975 to 1976, he began restricting listings in general to those within a mile of Horizon Boulevard or Rodman Street, adjacent to the developed area in Horizon Manor, or within one to two miles from Lake Horizon (Tr. 2232-36). He testified that his experience had shown that certain lots were not as marketable as others. Also, company policy was to sell only property that you could take people out to see, "put them on the ground and explained to them the general area" (Tr. 2232), how far the property was from utilities, roads, etc. (Tr. 2232). Of the approximately 2,000 listings which Mr. Glaze accepted during the period from 1973 to 1977, only 45 resulted in sales (Tr. 2237, 2244, 2246), 34 of which were outside the developed area (Tr. 2249).

Mr. Glaze was recalled as a defense witness. His testimony at this time was very general and vague as it previously was. He testified that he had refused about 100 requests for listings (Tr. 9877) and had taken about 80 listings on land in Horizon City since his previous testimony one year earlier (Tr. 9836, 9839). About 60 of these parcels did not have utilities (Tr. 9846); he sold 5 of these parcels (Tr. 9840), which were all acreage parcels (Tr. 9841) located adjacent to Horizon Heights.

Mr. Glaze has lived in Horizon City for several years and has had a real estate office there for several years (Tr. 2225-31, 9834-35; RX 1170). The real estate firm with which he is employed, DeWitt & Rearick, is a very large firm, employing approximately 72 sales representatives in 1977 (Tr. 2231). His testimony was from memory; no actual listings showing lot locations, descriptions of property, or selling prices were offered in evidence. However, from Mr. Glaze's testimony, it is apparent that he received many requests for listing Horizon City property, that he refused requests to list undeveloped lots that were not adjacent to the core area or along Horizon Boulevard, and that a resale market for undeveloped lots in the vast Horizon City project was non-existent.

On October 15 and 16, 1975, in El Paso, Texas, the Rocky Mountain Land Auction Company held an auction of lots located in Horizon City (Tr. 5082). Before the auction began, an El Paso real estate broker described the property, using maps to show the

locations of different areas within Horizon City and their proximity to areas already improved. Individuals attending the auction were given brochures on the property to be offered at the auction (Tr. 5090, 5094-95). It was stated that all offers, including those contingent upon financing from the seller and those at prices below the minimum, would be submitted to the seller (Tr. 5092-93, 5095). Between 800 and 900 deeded lots were offered at the auction. No lots were sold, and no bids of any amount were made for these lots (Tr. 5092-97, 5099). Rocky Mountain's expenses for this auction were \$10,700 (CX 863). Of this amount, \$786 was spent for an advertising campaign two days before the auction, which included advertisements in El Paso's morning and evening newspapers and on the two El Paso radio stations with the largest audiences (CX 862; Tr. 5087-89, 5117-18). [240]

Joseph Lusteck, an expert witness who testified for complaint counsel, reviewed the results described above of the listings and sales of the RLS and of Mr. Glaze, as well as the experience at the auction. He also had a search made of 49,483 lots which Horizon had deeded to purchasers, and found only 36 of those subsequently transferred to involve arms' length transactions (Tr. 7060-65). On the basis of his analysis, Mr. Lusteck concluded that there was only a "very shallow" and very weak resale market for unimproved lots in Horizon City (Tr. 7064-67).

Jack Mann, who also testified for complaint counsel as an expert appraiser, studied the resale market for Horizon City property, and was able to locate 20 sales which he used as "comparables" for appraisal purposes (CX 8920,E; Tr. 7602-03). These "comparables" which were undeveloped lots, sold at prices less than the original Horizon sales price (CX 892D, E).

Several customers who testified in this proceeding, related their experiences in attempting, unsuccessfully, to sell their Horizon City property (Tr. 944, 954, 1127-28, 1185, 1654-55, 1838, 1843, 6261-63, 6299-6300, 6496-98).

(4) *Waterwood*

126. As of August 2, 1975, Waterwood had a total of 11,160 lots of which 2,560 had been sold but not deeded, and 79 which had been deeded, leaving Horizon owning 8,521 lots (CX 873H). Only 7,000 of Waterwood's 25,000 acres had been platted as of that date (Finding 121).

The Waterwood property was not placed on the market until 1973. There is little evidence concerning the resale market for Waterwood

lots. The evidence which does exist indicates that there is no resale market for these lots. Horizon set up a resale organization for Waterwood property in 1976, Waterwood Realty (Tr. 8133, 8153-54). Janis Hearn of Waterwood Realty testified that in the two years the realty company had been in business, no vacant (or deferred use) lots were sold even where the owners were willing to sell below Horizon's current price (Tr. 8157). She claimed that there has been resale of developed properties, but none of the undeveloped lots (Tr. 8153). Waterwood Realty has taken listings on approximately 100 vacant lots for individual owners without making a sale (Tr. 8153). Individual buyers are able to get a better deal from Horizon, especially in terms of financing (Tr. 8153).

A more individualized experience was related by Raymond Dickson, who stated during his testimony in February, 1978, that he had been trying since April 1977 to sell his developed lot (Tr. 8933). Significantly, his lot is located on the golf course and overlooks the lake in Waterwood (Tr. 8937, 8923). The lot was listed with Waterwood Realty [Horizon] which charges a 12% commission, but the listing had expired (Tr. 8936). If he received his asking price, he would lose money compared to what he could have earned in a savings account (Tr. 8937). He testified he would be willing to sell at a loss so he could save the Waterwood improvement fees and tax costs (Tr. 8939).

James Madget, who owned an Horizon City lot which he could not sell, traded for a \$6,000 Waterwood lot in August 1974. He was told he would be able to sell that lot right away, and that the sales representative would [241]give him names of real estate brokers who would list the lot. Mr. Madget was also told that if he was unable to sell the lot, he could get his money back. He was later able to get the names of real estate brokers from the sales representative - "he did finally after about a month give me the names of several real estate brokers who he said could list the property" (Tr. 1409). Mr. Madget telephoned two brokers who just "laughed" (Tr. 1409-10); he was unable to locate two other brokers (Tr. 1410). Upon recontacting the sales representative, Mr. Madget was sent a "sales package" containing sample newspaper advertisements. He advertised in the *Houston Chronicle*, but he received no response (Tr., 1410). He asked Horizon to trade his Waterwood property for a cheaper parcel, and was told this was against company policy (Tr. 1411). Mr. Madget forfeited \$1,352 (Tr. 1413).

Charles Osenbaugh, an expert witness who testified for Horizon and was given an assignment to determine if Horizon's prices for the Waterwood lots were synonymous with the market value of the lots

(Tr. 15759-60), testified that there would be no resale market for the undeveloped lots in Waterwood until 1984 (Tr. 15761).

(5) *Whispering Ranch*

127. As of August 2, 1975, Whispering Ranch had a total of 3,827 lots of which 1,849 had been deeded and 1,672 sold but not deeded, leaving Horizon owning 306 lots (CX 873F).

Frank Mangin, Program Director for Economic Development for the Arizona Governor's Office, Planning Department, testified that he was not aware of any developmental inquiries about the Whispering Ranch property. He stated that it is so far removed from any economic activity, because it has no existing utilities, no one has seriously thought about it for residential purposes or for any other purpose (Tr. 3388-89). Whispering Ranch is not prime real estate; "it is removed from people, roads, utilities and consequently, demand for the use of it." The land is "typical of high desert, rolling country, not unattractive but with no particular reason for any higher use" than the grazing which originally went on when the land was part of a ranch (Tr. 3424).

Claude Wolverton, owner of Red Carpet Realtor in Youngtown, Arizona, testified that he has had numerous inquiries from Whispering Ranch property owners desiring to list their property for sale, but that he advised them that he could not resell the property (Tr. 3225), much less sell it at the prices the owners wanted—\$700 to \$1500 per acre (Tr. 3226). He has refused to list Whispering Ranch property (Tr. 3225, 3241).

Mr. Wolverton also testified that he has properties listed that are near Whispering Ranch (Tr. 3234), some with electricity (Tr. 3235). These properties have better locations than Whispering Ranch and are being offered for sale below the prices which customers purchasing from Horizon had paid (Tr. 3233-35). To his knowledge, no parcels of land have been resold in Whispering Ranch (Tr. 3240).

Ruth McCaughey of Wickenburg, Arizona, has been in the real estate business near Whispering Ranch since 1971 (Tr. 3253). She testified that during her employment with American Realty, the company would not take [242] listings on Whispering Ranch property (Tr. 3257). Since she started her own firm, five people have asked her about listing Whispering Ranch property and she has informed them that there was no market for the property (Tr. 3258).

She, however, has taken three listings on Whispering Ranch property at 20 acres for \$11,000, 40 acres for \$450 an acre, and 40 acres for \$450 an acre. She has not received any offers for these

properties, although they have been listed for one and one-half years (Tr. 3259). She has sold one parcel of land adjoining Whispering Ranch, a parcel of 133 acres at \$75 per acre (Tr. 3260). The land around Whispering Ranch is being used for cattle grazing by the Federal Bureau of Land Management, four cattle per section. A section of land is 640 acres (Tr. 3261).

Another Wickenburg realtor, Bruce Summer, testified that he believes he has been on Whispering Ranch, both on horseback and four-wheel drive vehicle, but he cannot be certain because there are no stakes to identify the property (Tr. 3304). Mr. Summer's company, American Realty, has received numerous requests to list Whispering Ranch property and has taken two listings, only because he could not dissuade the people otherwise. The reasons for trying to dissuade the people from listing the property was, first of all, "no one could show it where it was. And I can't sell land I can't show" (Tr. 3306). Secondly, American Realty has no way of establishing a market value for the property (Tr. 3306). Mr. Summer has been in the real estate business since 1971, and no one has asked to buy Whispering Ranch property through him (Tr. 3303-07).

Sanders Solot, a real estate appraiser who testified for Horizon and appraised Whispering Ranch property and projected the future value of the property (Finding 115), was unable to locate any sales of Whispering Ranch properties which he could use in making his appraisal of that land. The few sales of Whispering Ranch properties he did locate involved "tax loss" transactions or exchanges of property, which did not represent market value transactions (Tr. 15688-89).

The land appraiser for Maricopa County found no resales of Whispering Ranch land in 1972 and 1975 at the time he appraised that property (Tr. 3623).

(6) *Arizona Sunsites*

128. As of August 2, 1975, Arizona Sunsites had a total of 22,116 lots of which 14,897 had been deeded, and 4,536 sold but not deeded, leaving Horizon owning 2,683 lots. These lots were platted as follows: 19,203 single family, 717 multi-family, 732 multi-family/commercial, 220 commercial and 1,244 bulk lots (CX 873G).

Frank Mangin, from the Economic Development Office of the Governor, testified that he had received no inquiry concerning industrial development in Arizona Sunsites. In his judgment the area lacks the first element for attracting industry, "a demonstrable labor supply" (Tr. 3401). He further testified that Arizona Sunsites

does not have sufficient population to support a significant retail sales infrastructure (Tr. 3406), and it lacks the medical facilities to support a substantial population of retired persons (Tr. 3472, 3397-99). [243]

Peter Fusco, a former Horizon employee, has been in the real estate business in Willcox, Arizona for ten years (Tr. 4023). His firm takes listings of all types of property in Cochise County, which includes Arizona Sunsites (Tr. 4023-24). He has received 6-700 inquiries about listing lots for sale in Arizona Sunsites. He has referred all such inquiries to brokers located in Sunsites, because the 10 percent commission he would receive would not make the effort worthwhile to him (Tr. 4026, 4032). He owns two lots in Sunsites, which he has been unable to sell (Tr. 4027-4039).

Albert Karnok, formerly employed by Horizon, has been a real estate broker since 1971 (Tr. 3958). He has lived in Sunsites 14 years (Tr. 3979). Mr. Karnok has accepted some listing in Sunsites; he has refused to list other property depending upon the locations (Tr. 3956). He does not list lots that are too distant from the "core" area (Tr. 3956-58). From 1971 to July 14, 1977, Mr. Karnok had listed approximately 195 lots (Tr. 3958).

From 1971 he has records of refusing to list 110 lots, not including telephone and walk-in inquiries that he refused to list (Tr. 3959). From 1971 to the date of his testimony, July 18, 1977, Mr. Karnok had made 56 sales embracing a total of 96 lots (Tr. 3959).

From at least 1972 to 1976, Mr. Karnok sent letters to persons who inquired about the resale of their lots in Sunsites. These letters indicated that there was little demand or resale market for lots in this property (CX 845A-F; Tr. 3960). In one 1976 letter, he indicated that even if a lot listed for \$700 sold for that amount, the net amount to the seller would be no more than \$510 after deducting the costs of sale; i.e., a 10 percent sales commission and title costs.

E. Customer Forfeitures

129. Horizon's contracts with its land customers provide that failure of the buyer to make payments according to the payment plan selected shall entitle Horizon to "retain all sums paid under this Agreement as liquidated damages" (CX 142, 143, *for example*; Ans., Par. 74). Horizon's policy generally is to cancel a land sales contract as follows:

<u>Purchaser's Equity In Contract</u>	<u>Contract Cancelled When Delinquent</u>
0% to 10%	3 payments
1% to 30%	4 payments
Over 30%	6 payments
	(CX 61R, 62U).

Horizon has never taken any action against delinquent customers other than forfeiture of the property (CX 66B; Tr. 13455-57). However, Horizon did send delinquent customers "dunning" letters threatening legal action: "Should you fail to bring your contract current, we shall be compelled to place this matter in the hands of our attorney . . . Please save us—and yourself—from this embarrassment" (CX 921D). [244]

130. Commissions were payable to the sales representatives who made a given sale. Commissions ranged from 7% to 11%, depending upon the percentage down payment, the length of the payout period, and whether the sales representative was a junior or senior sales representative (CX 159f). With the high average downpayment of 12% on sales (CX 67d), the weighted commission would be 8.2%. Tony Zimmer, a Horizon sales representative for over a year, testified that his commission was generally 8% of the gross amount of the sale (Tr. 6139). Commission overrides were also payable. Mr. Zimmer testified that his sales manager, Jerry Steer, received an override of 2% on sales which Mr. Zimmer made (Tr. 6152). Theodore Stone and Bernard Gelfand received $\frac{1}{2}\%$ of the net sales in their respective zones (CX 775; Tr. 10376). Daniel Nickeson received overrides as a regional manager (Tr. 4500). Thus, total commissions and overrides from sales could range between 9.5 and 13.5%. Based on the average downpayment and the commission figures above, the total commissions and overrides were generally in the range of 10.5 to 11%.

Horizon's direct selling expenses included costs in addition to sales commission and override costs (*see, e.g.*, CX 921). Selling expense as a percent of sales was between 27.8% and 29.6% in fiscal 1968, with the percentage varying by property (CX 87A-B). The selling expense also varied in later years by property (CX 87A-B). In all cases, the selling expense was a greater percentage of the original sales price of the contract than the commission and override totals discussed above (CX 87A-B). Multiplying the direct sales expense percentage by the sales amounts for lots purchased in a property produces a total for direct selling expenses (Tr. 4293-96).

131. Accounts which were forfeited during the period January 1, 1968 through June 30, 1975 where the principal and interest collected exceeded the direct selling expense are shown below (Tr. 4297-98). The information set forth in this table shows separately

the principal and interest paid by customers, the total of such payments by customers, Horizon's direct selling expenses, and the net retention by Horizon—i.e., the difference between the total payments by the customer and Horizon's direct selling expenses. These figures were taken from CX 852A-Z124, and establish that Horizon retained \$2,251,721 over its direct selling expense.

<u>Fiscal Year</u> <u>Cancelled</u>	<u>Principal</u> <u>Paid</u>	<u>Interest</u> <u>Paid</u>	<u>Total</u>	<u>Direct Selling</u> <u>Expense</u>	<u>Net</u> <u>Retention</u>
1968	74,330	30,850	\$105,180	70,314	34,866
1969	201,708	77,708	279,076	168,380	110,696
1970	219,335	82,998	302,333	191,781	110,552
1971	353,980	128,662	482,642	314,063	168,579
1972	390,296	154,910	545,206	365,613	179,593
1973	717,577	311,573	1,029,150	668,011	363,139
1974	1,088,420	498,417	1,586,837	1,095,089	491,748
1975	1,503,212	665,341	2,168,553	1,374,005	794,548
Total:	\$4,548,858	\$1,950,119	\$6,498,977	\$4,247,256	\$2,251,721

The above figures for fiscal 1968 do not include information for June 1, 1967 through December 31, 1967. This table has been taken from CPF 3.143 and 6.33. The information has not been audited by the administrative law judge, but is assumed to be approximately correct. [245]

Horizon's out-of-pocket costs for commissions and overrides for the cancellations reflected above were considerably lower than the direct selling expenses. For example, direct selling expenses for account 369-04045 shown on its printout of cancellations were \$700.92. This amount represented 26.4% of the sales price of \$2,655 for project 3 in fiscal 1969 when the sale was made (CX 852Z2, 87B). Deducting that amount from the principal and interest payments leaves a net retention of \$113 (CX 852Z2). If, instead, a commission and override total of 11% is applied to the sales price, the amount is \$292. Deducting this amount from the \$814 paid by the customer leaves a balance of \$522 retained by Horizon.

5,541 customer contracts were cancelled during fiscal 1974 (June 1, 1973 - May 31, 1974) with no refunds being made. This tabulation establishes that these customers paid in a total of \$2,466,802. The defaults, or cancellations, by property are:

<u>Property (CX 109Z24-25)</u>	<u>Payments on Principal</u>
Combined land in more than one property	\$ 272,440 CX 854A-D

Paradise Hills	45,811	CX 854D-3
Horizon City	896,720	CX 854E-Z28
Rio	1,116,328	CX 854Z28-81
Whispering Ranch	40,776	CX 854Z81-82
Arizona Sunsites	60,995	CX 854Z82-85
Waterwood	33,732	CX 854Z85-86
Total	\$2,466,802	

Many of the customers who defaulted also paid interest to Horizon which is not included above. For example, interest of \$461 was paid on account number 205-0435 (CX 854D, 852Z50); \$868 on account 394-72365 (CX 854X, 852Z52); and \$1,723 on account 476-15931 (CX 854Z74, 852Z58).

Customers who defaulted were also responsible for the payment of taxes and HCIA fees, if any, on their lots prior to the time of their default (e.g., CX 35j-k). Payment of these amounts and the loss of any income on the funds paid out increased the losses of the customers.

Horizon claims that it lost \$7 million in each of 1973 and 1974 from cancelled sales (RPF 581, p. 356-57). Horizon cites CX 92E in support of this claim of a loss on cancelled contracts. This "loss" is merely an accounting entry made at the time of a contract cancellation to adjust entries which were made to sales and deferred profit at the time the original sale was made. An accurate statement of this accounting entry is found in Horizon's annual report:

Upon cancellation of a contract receivable, the excess of the unpaid balance over recovered costs (land and improvement costs and recovered commissions) and deferred profit is charged to 'Loss on cancellations'. (CX 62U) [246]

Several customers who testified in this proceeding forfeited on their contracts. Burnice Carter forfeited on his lots after paying Horizon approximately \$5100 (Tr. 944). J. D. Oliver forfeited on a Waterwood lot after making a downpayment and three monthly payments (Tr. 1044). Other customers who forfeited were Billy Miley (Tr. 1507-08), James Madget (Tr. 1412-13), David Krausse (Tr. 1777-78), John Mossman (Tr. 4868-69), Jose Medina (Tr. 5001-03), John Gothard (Tr. 6096-97), Grace Swanson (Tr. 16169), Elsie Colon (Tr. 16224-25), and James Devlin (Tr. 16627).

F. Tax Sales

132. In New Mexico, property on which a delinquency in taxes has occurred and remains delinquent for three years, will be deeded by the County to the State. The State holds the tax deed for one year to give the assessed owner an opportunity to redeem or repurchase the

property. After the one year period passes, the State may set the property for auction (Tr. 2697). The State seeks to recover delinquent taxes, interest and costs out of the proceeds if land is sold at auction. The excess, if any, over these amounts, may be obtained by the former owner (Tr. 2699-2700).

Tony Armjo, Manager of the Enforcement and Collections Division for the Property Tax Department, State of New Mexico, testified that the state had a backlog of some 26,000 tax deeds at one time. Mr. Armjo made a special effort to get rid of these tax deeds (Tr. 2712-13). CX 804A-Z68 is a listing of property in Valencia County which was placed at auction on April 16, 1974. This listing included over 300 lots located in Rio Grande Estates, a subdivision of Rio Communities (CX 804Z23-Z45, Z51-Z63). Horizon bought many of these lots at the auction (CX 804Z28-Z33, Z35-Z45, Z51-Z63; Tr. 2712).

CX 807 A-C is a buyer registration for a tax auction which was held in Valencia County on October 2, 1975. This exhibit (CX 807A) indicates that Horizon was assigned buyer's number 3. CX 808A-Z9 is a listing of the property placed at auction in Valencia County on October 2, 1975. The listing consists of 414 parcels of land and all but three are lots in Horizon's Rio Grande Estates in Rio Communities. Further, Horizon purchased many of these lots, apparently paying the minimum bid price set by the State. Mr. Armjo testified that he was informed by Horizon representatives on several occasions that Horizon would give a standing offer to bid the minimum bid on all Horizon properties if no one else bid on the property (Tr. 2756-57). These minimum prices at the auctions were substantially less than the price which the lot owners paid to Horizon. Single family lots in Rio Grande Estates were sold by Horizon for \$200 in 1962, and in 1974 the lots were selling for \$1400 (RX 1541B). Horizon was buying substantial numbers of these lots in 1975 at tax auctions for \$100 or less (CX 804, 808).

G. Feasibility and Absorption Studies

133. It is a usual and desired procedure for developers or investors in real property to have economic feasibility studies and [247]population absorption studies made on property before they make investments, or before they commence development of the property. An economic feasibility study focuses on the economic return that can be expected if certain action that can be taken with property is taken. A population absorption study seeks to determine the number of persons that will settle in a property in each year and

the length of time it will take for property to be totally absorbed, totally placed in an end use (Tr. 4003-04, 6589). Professor Stevenson testified that banks and lenders require absorption analysis on property before they make loans (Tr. 6728-29). Feasibility studies and absorption studies were required on all New Town projects sponsored by the Department of Housing and Urban Development (Tr. 6908). Joseph Lusteck testified that feasibility studies and absorption studies are an essential tool for banks, investors and land developers (Tr. 7081-83), and that such studies are necessary to render an opinion on the investment quality of property (Tr. 7136). Jack Mann testified that an absorption study is necessary for an informed decision to be made respecting an investment (Tr. 7589).

Available evidence indicates that Horizon had no economic feasibility or absorption studies made prior to selling land to the public. Ben Southland of Gruen Associates, which planned various subdivisions of Horizon's properties, testified that he presumed Horizon had such studies, but that he never was shown any such study and his firm did no such study for Horizon (Tr. 4003-04, 4012). John Hegstrom, formerly a Vice-President and Chairman of Horizon's Pricing Committee (Tr. 4123-25), could not recall any study or analysis being used in connection with pricing recommendations covering any of Horizon's six properties (Tr. 4141-42). George Larsen, formerly a member of the Pricing Committee, confirmed that Horizon did not consider the timing of the end use of its land even though Horizon's president, Sidney Nelson, recognized the utility of this information in valuing land (Tr. 4255-59).

Marshall McIntyre, Horizon's Development Services Manager, testified that there were no Horizon studies; no study of sewage costs in any property (Tr. 4327-28), no study of availability of water for any property (Tr. 4330), no study of demand for housing in any property (Tr. 4331), no study of supply of housing in any property (Tr. 4332), no study of demand for industrial land in any property (Tr. 4333), no study of any kind specifically for Horizon property (Tr. 4334), no feasibility study (Tr. 4337), no investment potential study (Tr. 4338), no scientific tests (Tr. 4340), and no reassembly programs or studies (Tr. 4334).

H. Horizon's Officials Did Not Invest in Horizon Land

134. Horizon's officials, who were responsible for purveying to the public what was represented to be an excellent, risk-free investment, better than savings accounts, stocks or bonds, or life insurance, purchased no Horizon undeveloped land (Tr. 14057,

13769-70, 14629, 13452). Bill Cook, who started as a sales representative with Horizon in 1967 (Tr. 13512) and became Vice President of Sales [248]in 1970 (Tr. 13523), who earned \$40,000 per year plus \$100,000 per year in commissions as a Zone Manager and \$150,000 per year as Vice President of Sales (Tr. 13664), owns one lot in Horizon City for which he paid "around \$300, \$400" (Tr. 13663). This lot was purchased during the time Mr. Cook was a sales representative (RX 1538D), as it was Horizon's policy to encourage sales representatives to purchase Horizon property (CX 103K; Tr. 8401, 4420).

I. Other Development Problems

(1) *Water Rights*

135. There was expert testimony in this proceeding that there is ample water available to develop Horizon's properties and that water resources can be obtained at reasonable costs (see RPF 268, pp. 179-80). However, there is other record evidence that water rights are difficult to obtain and are expensive (Tr. 16578). Professor Stevenson alluded to water problems at Horizon's Paradise Hills project. Paradise Hills Unit 1 was sold with a development commitment (Tr. 16724-25). Water lines are in, streets and roads are in, but there has been an extended and continuing controversy over water rights. The private utility serving Paradise Hills is unwilling to assume additional expense to open up the lots because of a lack of a "ready to service" charge being available (Tr. 6690-93, 6705). William Kelly, a former Horizon employee and presently a realtor in Paradise Hills, confirmed Professor Stevenson's testimony about Unit 1 (Tr. 16618).

William Kelly also testified that he owns six acres of undeveloped land in Paradise Hills. He has been informed by the utility that supplies water to Paradise Hills, that he will have to furnish water rights to the utility in order to get water service to this property (Tr. 16572-74). According to Mr. Kelly, Horizon was contractually obligated to furnish the water rights sufficient to supply water to the original 8500 acres in Paradise Hills, but Horizon has failed to honor its agreement (Tr. 16574-76, 16597-600). A water line goes by the front of Mr. Kelly's property, but he cannot be placed on water service until the utility receives the necessary water rights (Tr. 16576-77). Mr. Kelly has been informed that water rights for his property will cost \$60-70,000 (Tr. 16578). According to Mr. Kelly, several other persons in Paradise Hills have been denied water service for the same reasons (Tr. 16600).

Additional evidence received during surrebuttal hearings confirmed Mr. Kelly's testimony. On August 23, 1978, Mr. Kelly received a letter from H. Frank Metzler, Vice President, Paradise Community Services, Inc., the private utility authorized to provide water services to Paradise Hills (CX 1000A). The letter stated that the utility, with the permission of the New Mexico State Engineer, is actually diverting more water than its consumptive rights permit. This is a temporary situation, and in the near future the utility will be called upon to curtail pumping or acquire additional water rights. The utility is therefore requiring each developer to provide [249] water rights equal to the estimated usage of the proposed development. The letter stated that Horizon has refused to supply additional water rights to the utility and presumably has rescinded the agreement between Horizon and the utility. Since Horizon will not supply additional water rights, the utility looks to each developer to provide water rights necessary to service the proposed development. The letter noted that although there may be an agreement or obligation between the original seller [Horizon] and a buyer, someone will have to provide water rights before the utility will provide water service to Mr. Kelly's Paradise Hills property.

In New Mexico, water rights are severable from the land and can be sold or purchased. It is a property right. The place of use of and point of diversion of the water can be transferred. Water rights are usually referred to in terms of acre feet of water. Water rights can be acquired in perpetuity (Tr. 15540-41). The cost of water rights is in dispute and cannot be resolved on this record (see Tr. 16578, 15540; RPF 268, p. 180). Mr. Kelly contends water rights are expensive; Horizon contends such costs are "reasonable".

The Water System Agreement between Horizon and Paradise Services, dated January 14, 1961, is in the record (RX 1593). The agreement provided that Horizon will provide water rights to Paradise Services at the time they are needed, provided, however, that if such request is made after 3,000 houses have been connected to the water system, or 6,000 acre feet of water has been purchased by Horizon and transferred to Paradise Services, or twenty years shall have elapsed from the date of the agreement, Horizon shall have no duty to purchase and transfer additional water rights to Paradise Services (RX 1593H, I).

The area of land covered by the agreement between Horizon and Paradise Services covers 8500 acres of the Paradise Hills project (RX 1593T; Tr. 16712). Mr. Kelly's property is part of the 8500 acre tract (Tr. 16729, 16574); 3,000 homes have not been built in Paradise Hills

(Tr. 16729); and 6,000 acre feet of water is not being used (Tr. 16599, 16711).

At surrebuttal hearings Horizon offered testimony and letters concerning water rights at Paradise Hills. RX 1594 is a letter dated September 8, 1978, from the President of Paradise Services stating that Horizon has fulfilled its obligation as to water rights under the 1961 agreement. RX 1595 is a letter from Sidney Nelson, President of Horizon, to Mr. Kelly dated September 8, 1978, stating that Horizon has fulfilled all its obligations to furnish water rights to Paradise Services. Horizon offered testimony by Leonard Steele, Horizon's Vice President for Development, that Horizon has provided the utility with "sufficient" water rights to service Paradise Hills, and Horizon owes the utility no additional water rights (Tr. 16713-17). Mr. Steele admitted, however, that the determination as to the amount of water rights necessary to supply Paradise Hills is made by the State Engineer, and if the State Engineer determined additional rights are necessary, Horizon would have to supply them (Tr. 16730-32). [250]

Thus, Horizon contends "sufficient" water rights have been furnished Paradise Services, and Paradise Services contends additional water rights must be furnished to it. The position of the State Engineer is not known by direct, reliable evidence. A determination as to the ultimate responsibility for furnishing water service to Mr. Kelly's property need not be made in this proceeding. The relevance of Mr. Kelly's water rights problem is a dramatic demonstration of risks involved in the development of lots in Horizon's properties now and 30 years or more in the future.

(2) *Utility Costs*

136. Horizon's lots were all sold on the representation they would be contained within a fully developed community, with paved streets and city utilities. They were not sold or purchased with the understanding that individual lots would be developed separately, with rural or semi-rural facilities (Tr. 8751-54). The record establishes that it is not economically feasible or practical to develop a single lot in the Horizon projects. Bernard Gelfand, a regional sales manager for Horizon for Paradise Hills and Rio Communities (Tr. 10235-36, 10290), at present sells developed lots to builders (Tr. 10291). He testified that a builder needs a "cluster" of lots before development can be feasible—"You cannot develop one lot at a time" (Tr. 10298, 10303). Leonard Steele, Horizon's Vice President for

Development, testified that it does not make economic sense to attempt to develop one lot in a large subdivision:

Q. Is there a reason for just why it does not happen that way?

A. Well, two reasons. The cost would break the developer and the utility company would fight it tooth and nail, because they don't want that kind of a capital asset out there taxed to provide the revenue from one meter. Just won't happen (Tr. 13976).

Horizon City lot owners are not permitted to use individual wells for a water supply (CX 35P-Q, 36 O-P). Leonard Steele testified that water underneath Horizon City lots is deeper than in other Horizon properties and in some areas of Horizon City the water is brackish and unsuitable for drinking purposes (Tr. 14021). This will require the physical transportation of water to the Horizon City premises from a distant location and this will be expensive (Tr. 14021, 15536-39).

Rio del Oro lot owners are not permitted to use individual wells for a water supply (CX 10M). Horizon has acquired water rights to service only the existing development area and five years anticipated growth, a population estimated to be 10,000 people (CX 10M). This water supply would not be adequate to serve the core areas retained by Horizon if fully developed (see Finding 85-86). Septic tank use [251]in Rio del Oro is subject to the granting of a variance because most lots are below the minimum size required. An increase in that minimum by local authorities, apparently after the lots were planned by Gruen Associates and subdivided by Horizon made the lots too small (*e.g.*, CX 10N-O, 11N-O).

Charles Campbell, a well driller located in Wickenburg, Arizona, near Whispering Ranch, testified that he had not drilled a well on Whispering Ranch. In his opinion, however, water wells on that property would range from 200 feet to 1000 feet and would cost an average of \$4000, plus cost of a pump which would range from \$500 to \$1200 [1977 prices] (Tr. 3293-96, 32810).

Peter Fusco, a realtor in Willcox, Arizona near Arizona Sunsites, testified that the cost of drilling is \$10 per foot for a domestic well, and he had determined that the average well in Arizona Sunsites was 350 to 500 feet, depending upon the water table and where you are drilling. When he sells property as a realtor he must tell prospective buyers about the electricity 2 miles away (Tr. 4030), and the need for a well and septic tank. These items add \$15,000 to the cost of the land. "It is up to the individual. He may say yes, I'll go along and he may not. The majority of them will not because it is just an exorbitant amount of money in comparison to the cost of the land. The land is the cheapest of the deal" (Tr. 4030-31, 4032).

Charges for electricity, sewer and telephone would likewise make development of an individual lot economically unfeasible. As of May, 1975, costs for utilities to the most remote lots within the various subdivisions of Rio Communities then being offered for sale could be as great as the following amounts:

Electricity		\$142,500 (CX 11n)
Water	- extension of line	\$340,000 (CX 11n)
	- drilling well	\$ 12,500 (CX 10m, 11m)
Gas	- lines not available, use bottled gas instead;	
	\$500 for storage facilities (CX 12n)	
Telephone	- line	\$165,000 (CX 12n-o)
	- radio telephone	\$ 2,500 (CX 12n-o)
Sewage	- septic tank	\$350-600 (CX 10-o)

Similar substantial expenses would be applicable to Horizon City lots (CX 35P-S, 36 O-R; Tr. 2449-96). Lawrence Mattison, engineering supervisor for the Western division of the Arizona Public Service Co., testified that to get electricity out of Wickenburg toward Whispering Ranch, an over-head, single-phase electric line would cost about \$10,000 a mile; also, since the area involves difficult terrain, they would probably have to add 25-30 percent to that figure (Tr. 3567). Electric lines are now within three miles of the Whispering Ranch boundary (Tr. 3565). [252]

Horizon's federal property reports make it clear that there is no utility service of any kind outside the development areas of Horizon's projects and no provisions have been made to provide such services. CX 35P, a federal property report for Horizon City, states that there is no assurance the El Paso County Water Authority will be able to finance extensions of the water system and therefore water may never be available to the lots. Likewise, there is no assurance that line extensions will occur at any particular time (CX 35P). The owner of a lot must make arrangements for sewage, electricity, gas, and telephone (CX 35R-S). Drainage ditches will be constructed as part of the bladed road system but will not be maintained (CX 35 O). Horizon has agreed to construct bladed and graded twenty-four foot roads with drainage ditches, but no money has been escrowed to assure completion of the roads and there is no commitment to maintain the roads (CX 35 O).

The Rio del Oro federal property reports state that Horizon has made no arrangements for the extension of water, sewage disposal, electric, telephone or gas service (CX 10L). The road commitment in Rio del Oro is similar to the Horizon City commitment (CX 10K).

J. Initial Cost Of Land To Horizon

137. Horizon purchased land for its Rio Communities project at the following cost per acre (CX 131C):

<u>Date</u>	<u>Acreage</u>	<u>Per Acre Price</u>
1-9-60	106,000	\$ 9.91
11-1-68	47,092	99.81
7-23-69	11,810	64.08
7-20-72	84,000	81.08

Average price per acre \$53.78

By contrast, all of Rio del Oro except for the core areas, was subdivided into quarter acre lots (10,000 square feet), some 82,918 lots (RX 1539a, 1540). These lots were sold at per lot prices commencing in 1970 of \$800 to \$8800. In 1972 lots in Rio del Oro were sold at the following prices (RX 1541H, I):

<i>Number Of Lots</i>	<i>Price Per Lot</i>	<i>Total Sales Price</i>
4359	\$ 800	\$ 3,487,200
402	2500	1,005,000
83	4300	356,900
3611	900	3,249,900
397	2800	1,111,600
100	5200	520,000
1574	1100	1,731,400
255	3400	867,000 [253]
96	5800	556,800
1454	1300	1,890,200
91	4300	391,300
<u>70</u>	<u>6100</u>	<u>427,000</u>
12,492		\$15,594,300

Average Price Per Lot: \$1248.34

Average Price Per Acre: \$4993.36

Horizon purchased land for its Horizon City project at the following cost per acre (CX 131C):

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<i>Date</i>	<i>Size (Acres)</i>	<i>Per Acre Price</i>
12-31-59	62,443	\$ 80.07
6-16-69	19,428	346.81
5-20-69	5,702	-0-
		(Exchange with the state)
5-27-68	1,241	125.00
11-10-69	<u>1,230</u>	<u>100.00</u>
Totals	90,044	\$133.45

Horizon City Estates contains 44,200 lots; 10,000 square feet per lot, or approximately one-quarter acre in size (CX 118; RX 1536A). Sales of these lots commenced in 1970 at \$1000 per lot (RX 1538F). In 1972 these lots were sold at the following prices (CX 1538F):

<i>Number Of Lots</i>	<i>Price Per Lot</i>	<i>Total Sales Price</i>
4593	\$1300	\$ 5,970,900
419	3800	1,592,200
107	8000	856,000
2990	1100	3,289,000
425	3200	1,360,000
85	6600	561,000
<u>8619</u>		<u>\$13,629,100</u>

Average Price Per Lot: \$1581.29
Average Price Per Acre: \$6325.08

Whispering Ranch property was purchased at the following price per acre (CX 131G): [254]

<i>Date</i>	<i>Acreage</i>	<i>Per Acre Price</i>
1-5-62	16,624	\$150.00
7-1-67	<u>2,560</u>	<u>135.00</u>

Average price per acre \$148.00

Whispering Ranch 5-acre parcels sold for \$1900 in 1964 to \$5300 in 1975. The most substantial number of lots in Whispering Ranch sold for prices of \$3100 to \$4000 (RX 1544B). The average selling price per acre would approximate \$700.

V. Conclusions

A. Summary

O, What a tangled web we weave, When first we practice to deceive!⁷ Sir Walter Scott.

Shakespeare said "Brevity is the soul of wit."⁸ If this is true, this decision is lacking in wit. The complaint consists of eighty-eight paragraphs which comprise thirty-six separate allegations of unfair or deceptive conduct in the sale of land in six properties; the general denial answer sets forth thirty-two defenses. The record has nearly 17,000 pages of transcript, approximately 2,500 exhibits, most all of which are multi-paged, and the proposed findings and briefs exceed 1,000 pages. To analyze such a massive record has been not only time-consuming, but has required lengthy and detailed findings of fact to chart a clear path through a complex sales scheme accompanied with an aggregation of deception and misrepresentation. Nor was the course marked by the briefings of the parties, which were often too general, too biased, and too immaterial to be helpful. Complaint counsel failed to offer proof as to some allegations of the complaint and presented insubstantial support for other allegations, yet did not specifically abandon any complaint allegations. Some allegations which are not supported as charged in the complaint, constitute evidence material to and supportive of other allegations. In sum, substantial effort has been made to deliver an opinion that, although lengthy, will be useful to the Commission in its consideration of this matter.

Horizon's advertising and sales practices were part of a total scheme to sell land in which the pervasive theme was Horizon land as an excellent, risk-free investment. Although Horizon did reveal certain information about the undeveloped nature of its land, one must unravel a tangled web of deception to find these revelations, which can hardly be termed disclosures. Certainly these statements did not apprise the public of the true nature of the investment. The public was lulled into believing the excellent investment theme by artful and repeated representations that land is the best investment, that Horizon is a successful community builder with thousands of happy customers, and that their lots were in areas soon to be developed. [255] Horizon's representations, where not in the form of bold assertions, were fashioned out of exaggeration, innuendo, ambiguity, half-truths, and the omission of material facts. Although many of the statements Horizon made were in and of themselves

⁷ Marmion IV, Stanza 17.

⁸ Hamlet, Act II, Scene 2, Line 90.

true, the total impression rendered by their combined use was one of misrepresentation and deception.

It is a long-established principle that "[W]ords and sentences may be literally and technically true and yet framed in such a setting as to mislead or deceive." *Bockenstette v. F.T.C.* 134 F.2d 369, 371 (10th Cir. 1943). This principle has been followed in numerous cases. Thus, in *P. Lorillard Co. v. F.T.C.*, 186 F.2d 52, 58 (4th Cir. 1950), the court declared:

To tell less than the whole is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.

In determining whether or not advertising is false or misleading within the meaning of the statute, regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might be reasonably be expected to have upon the general public.

See also, *Sebrone Co. v. F.T.C.*, 135 F.2d 676, 679 (7th Cir. 1943); *Rothschild v. F.T.C.*, 200 F.2d 39, 42 (7th Cir. 1952); *Bennett v. F.T.C.*, 200 F.2d 362, 363 (D.C. Cir. 1952); *Koch v. F.T.C.*, 206 F.2d 311, 317 (6th Cir. 1953); *Rhodes Pharmacal Co. v. F.T.C.*, 208 F.2d 382, 387 (7th Cir. 1953), modified in part on other grounds *per curiam*, 348 U.S. 940 (1955); *Feil v. F.T.C.*, 285 F.2d 879, 896 (9th Cir. 1960).

Another formulation of this basic principle, first advanced in *Bakers Franchise Corp. v. F.T.C.*, 302 F.2d 258, 261 (3d Cir. 1962) (citing *Rhodes Pharmacal* and *Koch*), is "that deception may be accomplished by innuendo rather than by outright false statements." And see *Regina Corp. v. F.T.C.*, 322 F.2d 765, 768 (3d Cir. 1963) (citing *Bakers Franchise*). This formulation was also followed in *National Bakers Services, Inc. v. F.T.C.*, 329 F.2d 365, 367 (7th Cir. 1964).

The failure to disclose material information has been condemned for many years as an unfair and deceptive practice. *The Raymond Lee Organization, Inc.*, Docket 9045, Opinion of the Commission, p. 48 [92 F.T.C. 489] (November 1, 1978), citing *Portwood v. F.T.C.*, 418 F.2d 419, 424 (10th Cir. 1969); *J. B. Williams Co. v. F.T.C.*, 381 F.2d 884, 891 (6th Cir. 1967); *Waltham Watch Co. v. F.T.C.*, 318 F.2d 28, 32 (7th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963); *Keele Hair and Scalp Specialist, Inc. v. F.T.C.*, 275 F.2d 18, 23 (5th Cir. 1960). [256]

It is concluded that Horizon's undeveloped lots were not excellent investments with little or no risk involved; Horizon's lots were, in fact, bad investments with little or no potential for profit (Finding 101-136). Therefore, all statements and representations that Horizon's undeveloped lots were excellent investments, and all statements and representations that created implications that the lots

were excellent investments were false, deceptive, and misleading. In making this determination, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. See *Beneficial Corp. v. F.T.C.*, 542 F.2d 611, 617-18 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Continental Wax Corp. v. F.T.C.*, 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc. v. F.T.C.*, 329 F.2d at 367; *Charles of the Ritz Distrib. Corp. v. F.T.C.*, 143 F.2d 676, 679 (2nd Cir. 1944).

B. Horizon's Undeveloped Properties Were Represented To Be Excellent Investments With Little Or No Risks

Counts I and II of the complaint allege that Horizon's lots offered for sale were represented to be excellent investments at the prices offered with little or no financial risk involved, whereas in a substantial number of instances the lots were not excellent investments involving little or no risk. It is further alleged that Horizon failed to disclose material characteristics of the lots in that the lots were risky investments because (1) their future value was uncertain, and (2) purchasers probably would be unable to sell the lots at or above the purchase price. These are the key allegations of the complaint and they have been established by overwhelming evidence.

Horizon's sales program was bottomed on representations that money could be made, that financial security could be assured through the purchase of Horizon land. Horizon's basic theme of the substantial profits to be made in risk-free purchases of its land permeated its entire sales effort, its national advertising, its brochures and presentation manuals, its celebrity films, and the oral sales presentations by hundreds of sales representatives at "dinner parties" and in the home. Sales presentations were designed around a concept referred to by one Horizon zone manager as "funnelling"; land was presented as the best investment; the Southwest as the fastest growing area in the United States; Horizon as a New York Stock Exchange company and a community builder with technical skills, millions of dollars in assets, and thousands of happy customers; the location of Horizon's projects near fast-growing metropolitan centers in the Southwest—El Paso, Houston, Dallas, Albuquerque, Phoenix and Tucson; the specific Horizon projects located directly in the locked-in growth pattern of these metropolitan areas; the individual units within the predeveloped projects with predesignated

locations for schools, parks, commercial and recreational areas; and finally, the specific preselected lots within the unit, which were the ultimate focus of the sales presentation (Finding 39). [257]

This sales technique was highly successful. As of August 1975, Horizon had sold 277,890 lots (CX 873J). For the five year period June 1, 1969 to May 31, 1974, Horizon's sales of undeveloped land totaled \$369,740,000 (Finding 23).

The outstanding success of Horizon's sales efforts is even more astonishing when one appreciates that the land was sold sight unseen—to thousands of persons. One Horizon zone manager, who came to Horizon from a real estate background in housing sales, testified that he had doubts as to how land could be successfully marketed sight unseen. When he began his employment with the company, it was explained to him that there was a correct way to present the land to accomplish a successful sales program—it was to activate the "greed" in everyone:

The emphasis was put on the financial security, the profit, the money that one would make by purchasing this land (Tr. 1922-23).

General representations about land as an excellent investment, and Horizon land in particular, were made in national advertising, which also portrayed Horizon as a financially sound community developer (Findings 42-43). One national advertisement stated:

Horizon Creating Opportunities

Horizon Corporation, one of the nation's leading land developers, selects large parcels of land strategically located in the path of people and progress. On this choice property, we plan and create exciting new communities such as Paradise Hills and Rio Grande Estates in New Mexico; Arizona Sunsites; and Horizon City, Texas. It is almost inevitable that this land will rise in value as the population there increases, and as the population of big growth cities like Albuquerque and El Paso expand outward toward them.

We believe that we can prove to you that there is no other investment as good as land. Even a little bit can go a long way to patch up your future dollars. (CX 274).

These national advertisements offered free booklets, such as "Make Money in Land, A Guide to Successful Investment" (CX 454). Another advertisement, emphasizing that land is only as good as the company you buy it from, stated that Horizon had \$150 million in assets, a net worth of \$60 million and an inventory of land value of \$240 million (CX 352).

These themes about the opportunity to make money with Horizon land were carried out in sales training manuals (Finding 44), in the presentation manuals which were used for in-home sales presenta-

tions (Finding 45), and in the celebrity films used at dinner parties and in the home (Finding 46).

In addition to the written and oral representations about land in general, Horizon land in particular, the general financial [258] trustworthiness of Horizon, and its reputation as an experienced developer of new communities, visual scenes of the beauty of the Southwest and of Horizon's communities were very much a standard part of every sales presentation. The presentation manuals used in the home, and the celebrity films shown at all dinner parties and at some in-home sales presentations, have many beautiful scenes of the Southwest and of Horizon's communities (CX 194-97, 526-27). On property visits and fly-in tours, customers were shown through the developed core areas where there were homes, golf courses and other attractive amenities (Finding 67). Purchasers were led to believe that the property they were purchasing would soon be part of such a beautiful community in the Southwest. These general representations attracted the attention of the prospects and gave assurances of the reliability of the company; specific representations about profitability provided the final enticement resulting in sales of the property.

Sales representatives were trained to represent to the prospects that land was the best of all investments; specifically, land was represented to be the best hedge against inflation, superior to savings accounts, stocks and bonds and life insurance (Finding 49). Since land was represented to be the investment superior to all others (CX 778Z10), it is not surprising that sales presentations stated affirmatively that the purchase of land was risk-free, or the sales presentations were devoid of any mention of risks (Finding 52).

There was wide use of Federal Housing Administration statistics by sales representatives, pursuant to their training, to demonstrate to prospects that land had appreciated at a 20 percent per annum compounded rate between 1946 and 1968 (Finding 51). Sales representatives used these statistics to represent generally that Horizon's land would increase in value at this 20 percent rate in the future. Horizon also trained its sales representatives to cite specific examples of extraordinary profits that had been made in the past on land in the United States, especially examples of tremendous profits that had been made on land in the locality where the sales presentation was being made. Some of the examples cited by sales representatives were about substantial profits that had been made on land purchased from Horizon (Findings 50, 54-55).

A most effective sales technique, widely used by sales representatives, was the price increases which Horizon periodically initiated on

its undeveloped lots. Sales representatives used these price increases constantly and systematically to demonstrate to prospects that the lots had appreciated in value over the past years and could be expected to continue to increase in value in the future (Findings 71, 68). Sales representatives exerted immediate purchase pressure by leading prospects to believe that a price increase on Horizon land was imminent, or that the lots might not be available at a later date, or might not be available at the price being offered, to spur the prospect to make an immediate purchase (Finding 72).

The most significant representations made by sales representatives concerned the amount of appreciation a prospective purchaser could expect on the property, the time frame within which this appreciation could be [259]realized, and the ease with which the property could be resold.⁹ Individual sales representatives used different time frames and different rates of appreciation over the years. Detailed findings about these extremely significant representations have been made (Findings 53–60), and the evidence manifestly establishes that there was a continuing sales practice to represent, directly or by implication, that substantial appreciation would be realized on purchases of Horizon land within a relatively short time span, and that resale of the property would be accomplished without difficulty.

The time in which an appreciation in the price of Horizon's land could be realized was generally stated by sales representatives to be three to five years during the period 1968 to 1970. The time period later was changed to seven to 10 years, and there is some indication that more than 10 years was used by sales representatives. As the time period approached 20 years, customer resistance was evident, as was sales representatives' reluctance to use such a lengthy time frame.

In 1973, Sidney Nelson, President of Horizon, distributed the "Principles of Land Ownership," which indicated that undeveloped land lacks liquidity, that there is some uncertainty as to appreciation rates and time frames for profitability of undeveloped land, and that Horizon sales representatives should be guided accordingly (Finding 57). These principles, purported to govern sales of Horizon's property, were not used by sales representatives, and had virtually no effect on sales presentations to purchasers.

Realizing that representations concerning rates of appreciation and time frames were material to purchasers, Horizon trained sales

⁹ In 1973 and 1974, Horizon changed its Agreement for Deed, Receipt of Deposit, and Property Visit Credit Certificate to have the buyer acknowledge that no guarantee of appreciation, resale or repurchase had been given and that Horizon provided no resale services (Finding 64), an indication of Horizon's recognition of the materiality of these questions to a decision to purchase its land.

representatives in various sales techniques which were utilized to avoid having to make an outright representation in this area. Sales presentations were designed to use the FHA statistics, examples of increases in other land in the past, and price increases on Horizon land to show appreciation on land. From these examples, the prospect was led to draw his own conclusion that the property would increase in value in the future (see Tr. 11498-500, 1862-63, 1866-67, 1873-74, 2184-85, 3510, 3553, 4792).

Another approach to the question of how much appreciation could be expected and in what time frame, was for the sales representatives to answer any questions by stating that they did not have a "crystal ball," and then refer the prospect to examples of property value increases in the past. This answer was widely used by sales representatives and was suggested in the training manuals (CX 180S).

The record demonstrates that Horizon knew that specific representations about substantial price appreciation within a short-term were being made by sales representatives, and that implications of [260]substantial short-term profitability were being intentionally created by sales representatives. This is conclusively demonstrated by Horizon's internal surveys of its sales offices (Findings 89-100). For example, the conclusion of the March 1974 survey of the Dallas office found an "alarmingly high percentage of misrepresentations to customers" (CX 950B).¹⁰

A survey of the Denver office in 1974 revealed serious misrepresentations concerning the number of years property must be held to be sold at a profit. The survey found misrepresentations as follows: 1968-1970 - four years maximum; 1971 - three to five years and five to seven years; 1972 - eight years maximum with shorter projections close to development area; 1973 - ten years maximum with shorter projections close to development area (CX 927L, M).¹¹

The 1974 survey of the Seattle office found misrepresentations which required cancellations or adjustments to contracts of 80 customers resulting in reductions of approximately \$500,000 (CX 944C).

Misrepresentation was not limited to a special group of a few salesmen nor to a particular time span. It appears as though new hired sales representatives were

¹⁰ Joe Mills (February 1972 - September 1973 employment in the Dallas office) sold \$613,000 in sales contracts using representations that he would personally negotiate resale of the property for the purchasers and that high profits could be realized within two years from the date of purchase. Another sales representative accompanied Joe Mills on these sales transactions and shared in the commissions from the sales (CX 950E, G).

¹¹ Sales representative Bill Van Sickle (1971 employment in the Northglenn, Colorado office) was found by Horizon's internal surveys to have sold 65 contracts (approximately \$140,000) of Rio del Oro property using 3-5 years profitability projections. Further, this was "standard training" for sales representatives in that office (CX 927M).

intentionally trained from the start of their careers to misrepresent Horizon properties. The standard dinner party presentation itself was extremely over-optimistic in its projections if not directly in violation of Horizon policy (CX 944Y).

The 1974 survey of the Chicago office found that:

The Chicago office is not selling a long term asset . What is being sold is a short term investment opportunity ranging from 4 to 12 years to maturity depending on property type and location (CX 951E).

Horizon's internal surveys revealed that where no "gross misrepresentations" were made, definite implications were very much a part of the sales presentation. The May 1975 survey of the Washington, D.C. office reported:

In conversation with the individual customers, I discovered no instances of direct "gross [261]misrepresentation." The customers were given no written or oral, personal or corporate, promises or guarantees, per se, on any topic of presentation. Indeed, in my experience nationally, I find sales presentations seldom involve such direct statements. However, when one's consideration moves beyond direct statements to the realm of "implications," the analysis and evaluation of the sales presentation becomes far more complicated. Washington, D.C. sales presentations do involve questionable implications or assurances on such topics as risk, appreciation, marketability or liquidity, time to development or term of investment and quality of investment (CX 938C).

Information about the manner or method by which the Horizon property could be resold by the customer to liquidate his asset was not part of the affirmative sales presentation. Training manuals prior to 1971 were silent as to representations that were to be made regarding methods of resale. Commencing in 1971 or thereabouts, sales representatives were instructed that Horizon's policy was that it would not resell or buy back a customer's property, and sales representatives should not make representations contrary to this policy (Finding 61, pp. 70-71). However, sales representatives were also trained that Horizon would "assist" a customer in the resale of the Horizon property (Tr. 6163-64),¹² and that Horizon was going to establish a resale office in the future, which would be in operation by the time the customer wished to resell his property.

In disregard of what was purported to be Horizon's official policy, sales representatives made specific representations that Horizon would resell the customers' property or buy it back, or would assist the customer in the resale of the property. In some instances the assistance to be offered to customers was intentionally left vague by

¹² The "assistance" furnished customers consisted of supplying the customer with sample newspaper advertisements which the customer could use, or giving the customer names of real estate brokers. This "limited" assistance was not explained to customers at the time of the sale, leaving customers to assume the assistance would involve Horizon's direct participation in resale of the property.

the sales representatives. Some sale representatives promised to personally assist in the resale of the property.¹³ Where specific representations regarding the assistance that would be given by Horizon were not stated, customers were assured that there would be no difficulty whatsoever in the resale of the property; it could be resold by real estate brokers the same as any other property. Testimony by former sales representatives and by customers attests to the fact that these resale representations were made by sales representatives in their sales presentations and that they were material to the customers' decision to purchase Horizon land (Finding 61, pp. 70-77). [262]

Horizon's internal surveys confirm that misrepresentations were made concerning Horizon's role in the resale of Horizon property.¹⁴ The conclusion reached after the completion of a survey of the Denver office was that:

Our resale policy was vague among the majority of the customers. Most customers believe that they will be contacted directly by a purchaser at time of demand. They do not foresee taking positive steps themselves. Horizon's obligation in this function plays a variety of roles but we seldom heard that Horizon Corporation accepted full responsibility for resale of owners' property (CX 927N).

Other representations were made, directly or by implication, which depicted Horizon's lots as excellent investments. The federal property reports were used as a sales aid to imply federal approval of Horizon and its property (Finding 77). The property was presented as preplanned or predeveloped, where opportunity for appreciation in land values is greatest (CX 172Z38). The unit maps, used in all sales presentations, showed the lots to be in self-contained developments with streets, recreational areas and school sites planned and ready for development (Finding 78). The community improvement associations - HCIA's - were represented to insure or contribute to the attractive development of the property. The availability of utilities was never mentioned as constituting any problem. The implication created was that utilities would be available, whether furnished by Horizon, or the HCIA, or the "developer" was never made clear (Findings 81-83). The locked-in growth of Albuquerque and El Paso was stressed in every presentation of Rio Communities and Horizon City properties as assuring short-term development of those properties (Findings 73-76). The growth direction of Phoenix to the Northwest towards Whispering Ranch, and the scarcity of private land in Arizona available for development, was part of the sales

¹³ See fn. 10 *supra*.

¹⁴ See, for example, footnote 10 *supra*.

presentations of Whispering Ranch property and assured its future development (Finding 88).

Horizon's sales representatives used property locations and designations to represent that lots would be profitably developed in the future. Locations near proposed highways and highway loops, schools or university site, shopping centers, recreational areas and cul-de-sacs were stressed (Findings 69-70). Multi-family, commercial, and bulk acreage properties were represented as offering greater profitability for purchasers, and these more expensive properties were used in reloading sales where the purchaser's property investment was "upgraded" by the sales representatives (Finding 68). Locations close-in to the development areas, or to satellite areas, were used to assure customers that the property would develop quickly and profitably, and also as "trades" in reloading sales and for customers expressing dissatisfaction with their initial property location.

The property visit credit, the exchange privilege, and the Horizon guarantee were further benefits which assured the purchaser that the property was an excellent investment. The customer could get a 5 percent credit toward the purchase price of the lot at the time of the [263]property visit, and if dissatisfied with the lot, it could be exchanged for other property. The Horizon guarantee assured the purchaser that the property had not been misrepresented, and if found to be misrepresented at the time of the property visit, all monies would be refunded. This guarantee was sometimes misrepresented and sometimes left intentionally vague, implying the return of all monies paid in if the purchaser were in any way dissatisfied with the property (Findings 63-67). For that rare customer who wished to build a home in the Horizon properties, there was the opportunity to exchange the undeveloped lot for a building lot in the core area. Thus, the customer was assured the property was an excellent investment with no risks involved.

Finally, the celebrity films narrated by Merv Griffin and Leif Erickson had both celebrities endorsing Horizon land as being an excellent investment. To forcefully demonstrate their endorsement of the Horizon property, each celebrity stressed his personal ownership of Horizon land (Finding 87).

Horizon contends, however, that it did not represent its land to be an "excellent" investment, that no sales representative who testified for complaint counsel testified that he was trained or did represent the land as an "excellent" investment. Horizon further argues that complaint counsel offered no expert opinion as to the definition of an "excellent" investment, but that Horizon did offer such an opinion

through its expert, Alan Nevin, who testified that an excellent investment must have "a high guaranteed tax shelter, cash flow, substantial equity built up, tremendous tax shelter, guaranteed high level of appreciation probably 15 to 20 percent or more and be risk free" (Tr. 15955). Horizon contends that where there is uncertainty as to time of resale or as to a minimum level of appreciation, the purchase cannot be considered an excellent investment with little or no risk (RPF 134-36, pp. 78-80; RRB, pp. 62-63). Horizon contends its land was represented as being a desirable investment with discretionary assets over a long-term, or a desirable expenditure of discretionary funds for future use or for long-term potential appreciation (RPF 137, pp. 80-81).

It is the message conveyed or the implication created in the mind of the ordinary purchaser that is of concern in this proceeding, not whether the representations fit precisely into the mold of an excellent investment created by a sophisticated realty investment expert. The word "excellent" has a dictionary meaning of "superior, very good of its kind; imminently [sic] good; first-class." *Webster's Seventh New Collegiate Dictionary*, 1969. Horizon, in almost every conceivable way short of an absolute guarantee, represented its land to be an excellent investment, better than savings accounts, stocks and bonds, and insurance, and risk free. Representations were also made that the property would appreciate at a 20 percent compounded rate and be easily resold in a short term. Thus, it is concluded that Horizon represented its land to be a superior investment, imminently [sic] good, first class, indeed, an excellent investment. As the Commission recently stated in *The Raymond Lee Organization, Inc.*, Docket 9045, the law is not made for the protection of experts but for the public who may be governed by appearances and general impressions. (Opinion of the Commission, p. 25) [92 F.T.C. 489]. Beyond any doubt, Horizon created the impression that its properties were excellent investments.

C. Misrepresentations, Deceptions, And Failure To Disclose
Material Information About Horizon's Land [264]

Many of the representations which Horizon made about its land were outright falsehoods; other representations consisted of partial truths, or literal or technical truths, framed in a setting to mislead or deceive. Horizon also failed to disclose material information about its land to purchasers. In several respects, Horizon's sales techniques left material issues vague. The record herein reveals widespread confusion and a lack of understanding about critical elements of

Horizon's property and Horizon's obligations, all conducive to Horizon's objectives.

All the representations about time frames to profitability and percentages or amount of appreciation or profit which could be expected to be realized on Horizon lands were false and deceptive. Horizon had no basis for making any projections concerning time frames or profitability since no feasibility or absorption studies had been prepared on any of its property (Finding 133). Other representations which sales representatives were trained to give, and which were given to many purchasers, to the effect that sales representatives were unable to make a projection into the future, or that the sales representatives did not have a "crystal ball," were false and deceptive for they were made in the context that all land appreciates in value, that land appreciates at a 20 percent annual compounded rate, that Horizon's land has appreciated in value in the past, that Horizon's land is located in the locked-in growth pattern of growing cities, thus creating the implication that Horizon's land will rapidly increase in value. While not in possession of a "crystal ball" as to precise future projections, Horizon was in possession of much unfavorable material information concerning the possibility of appreciation of its properties which could have been conveyed to purchasers.

Horizon's President, Sidney Nelson, stated in his "Principles of Land Ownership," that the value of land in the future can only be estimated, based upon many complex factors, examples of which include general, regional and local economies, the area rate of growth, interest rates and the availability of capital (RX 1551; see also Finding 57). Horizon's representations and implications were all grossly over-optimistic, without disclosing the many complex factors which affect the future value of its land and which make it highly unlikely that any of its undeveloped land will be an excellent or even a desirable investment. A Horizon official, who conducted numerous surveys of Horizon's sales offices, wrote in respect to the Denver office:

The future development of Horizon's properties is not presented to the customer in speculative terms stressing its dependence upon many complex and variable factors. But rather, it is dealt with as a predictable assured trend whose pattern and design is known by the representative (CX 929E-F).

Purchasers of Horizon's property were told that Horizon would resell the property for the purchaser, or buy it back, or the sales representative personally promised to resell the land for the purchaser, or that Horizon would assist the purchaser in the resale

of the land, or that there would be no difficulty in reselling the land, or the matter of resale of the property and Horizon's role in resale were intentionally left vague (Finding 61-62). [265]

These representations were all false, deceptive and misleading. During the entire period covered by this record - 1968 until 1978, there was no resale market for Horizon lots. The record is clear on this issue beyond any dispute (Findings 123-128). Horizon's officials were aware that the resale market for its lots was nonexistent and likely to remain in this posture for many years; yet, there is no evidence whatsoever of this information being made available to prospective customers or to existing customers, or communicated to them in any manner. In fact, just the opposite representations and implications were made and created.

Horizon's officials, aware that the critical elements of any investment purchase of its undeveloped land concerned the risks involved, the term the property would have to be held before it could be liquidated, the appreciation rate which could be expected during the holding period, and the ease of resale of the property, made no absorption or feasibility studies of any of Horizon's properties, left sales presentations intentionally silent or vague on these critical elements, and knowingly permitted sales representatives to make gross misrepresentations and create implications and innuendos that Horizon's properties would appreciate at a substantial rate and be easily marketable in a short period of time. No efforts were made to disclose to purchasers the highly speculative nature of the properties, the substantial risks involved, and the uncertainty of when, if ever, a demand market for the property would exist. All of these acts and practices were false, misleading, deceptive and unfair.

Horizon's price increases on its property were used to represent directly or by implication that Horizon's land was increasing in value. The record is clear that Horizon's selling prices for its land bear no relationship whatsoever to the market value of the land (Findings 123-132).

Horizon's sales representatives were trained to use the FHA statistics to represent that Horizon land would appreciate at a 20 percent compounded annual rate, and they used these government figures in almost all sales presentations. The use of such a broad representation, without qualification, in respect to a specific property is false and misleading. All property does not go up in value uniformly (Tr. 6778, 15128). Sidney Nelson, Horizon's President, in his "Principles of Land Ownership," recognized the falsity of such a broad, general representation:

The notion that all land increases in value at some particular rate or another is fallacious (RX 1551; see also Finding 57).

Horizon also trained its sales representatives to cite examples of other land, locally and nationally, that had experienced tremendous price appreciation in the past (Finding 50). These representations were deceptive and misleading since they create false expectations and the appreciation cited bears no relationship whatsoever to Horizon's land, or to the price appreciation which could be expected for Horizon's land.

The use of atypical claims of profit made on land, even if true, can be misleading and deceptive. Common sense dictates that many of the claims of profit made on land sales used by Horizon sales representatives [266] in their presentations were untrue, or made without knowledge of the truth or falsity of the claim. In any event, no disclosure was made that the profits were atypical, in which event they would be deceptive. *National Dynamics Corp.*, 82 F.T.C. 488, 564-65 (1973), *remanded in part*, 492 F.2d 1333, 1335 (2d Cir. 1974), *modified*, 85 F.T.C. 391, 393-94 (1975), *reconsideration*, 85 F.T.C. 1052, 1053-54 (1975), *cert. denied*, 419 U.S. 993 (1974).

A gross misrepresentation used extensively in the sale of Horizon City and Rio Communities properties concerned the locked-in growth of El Paso and Albuquerque. These representations were intended to convey the implication that these cities could grow only in the direction of Horizon's properties, or that "almost all," or that "most" of the growth of these cities was toward Horizon's properties, and thus these properties were certain to develop quickly and profitably for the lot owners. These representations were false and deceptive. El Paso and Albuquerque had been, and were expected to continue to grow in several directions (Findings 73-76).

Representations that Phoenix was growing to the Northwest toward Whispering Ranch and that only 15 percent of the land in Arizona was available for private development, were intended to create the implication that there was a scarcity of land and that Whispering Ranch property was therefore valuable and would be developed in the near future. These representations were false and deceptive. The growth of Phoenix has had, and is expected to have little impact on Whispering Ranch property, and there has been and is an oversupply of private land in Arizona suitable for development purposes (Findings 88, 108).

Horizon sales representatives represented that the higher-priced multi-family and commercial lots were better investments than other lots when there was no basis for such representations. There is no assurance the lots will ever be developed as multi-family or

commercial property, or that they will be developed in any fashion. Representations were made about corner lots, about cul-de-sacs, about military highways and highway loops, shopping centers, university sites, and satellite core areas, when there was no assurance of when, if ever, such representations would materialize. Thus, these representations were deceptive and misleading.

Horizon's representations that it was a community developer, made in the context of other representations that Horizon was building beautiful communities, golf courses, recreational facilities, shopping centers, and installing utilities in the "building areas" (see Findings 79-80), had the tendency and capacity to mislead purchasers into believing that Horizon was developing or would develop the property being sold and that the property would develop rapidly. These representations were supported by sales presentations utilizing unit maps which showed a plat of what was purported to be a development plan for the property. Representations were made that the HCIA would install utilities, or had the authority to install utilities, or that Horizon or the "developer" would install utilities, etc. (Findings 81-83). The representations about utilities, and the HCIA's and Horizon's future responsibility for development of the land, were vague, and in the context in which made, had the tendency and the capacity to mislead purchasers into believing that the land they purchased would be developed in the near future, and that the price of the lot was all-inclusive. [267]

The tax-free status of the HCIA's strictly limit the activities in which the HCIA's may engage (Findings 81-83). Thus, the HCIA's cannot engage in all the activities set forth in the federal property report, such as installation of utilities. Expert testimony confirms the conclusion that the HCIA's accumulation of funds can never meet the financial requirements of an infrastructure sufficient to provide utilities for the Horizon properties (Findings 81-83). These limitations on the HCIA's ability to engage in authorized activities were never communicated to Horizon's customers. Failure to disclose truthful information about the HCIA's was deceptive and misleading.

The property visit credit, the exchange privilege, and the Horizon guarantee were used in a deceptive and misleading manner. The five percent property visit credit was given only if the purchaser acknowledged that the property had not been misrepresented in any way at the time of the initial sale, a requirement not explained previously to customers. The purchaser was unable to evaluate the investment quality of the property at the time of a property visit and thus unable to determine if the property had been misrepresented.

On-site sales representatives continued to misrepresent the land, and they took advantage of the occasion to sell additional property, or to "trade" the customer into more expensive property, or to "trade" the customer closer to the development area if dissatisfaction with the initial purchase was registered. The Horizon guarantee was presented in a vague manner creating the false implication that it was a money-back guarantee if the purchaser was dissatisfied with the property. The granting of a five percent credit only if the customer will acknowledge that the property has not been misrepresented is unfair.

Horizon's sales representatives were trained to use immediate purchase pressure on prospects by representing that there was going to be a price increase in the near future, or that the property would not be available at a later date. Variations on this theme included representations that the customer had been specially selected, that the property would only be available for a 24-hour period, or that the property could only be offered during a fly-in visit. These representations were false, deceptive and unfair for several reasons. First, they placed unwarranted sales pressure on the prospects. They deprived the prospects of an opportunity prior to making the purchase to review the property reports, to cogitate about the purchase, and to seek legal or other advice about the wisdom of purchasing the property. These representations were additionally false, deceptive, and unfair in that Horizon's lots were basically fungible, and there were and would be an abundant supply of lots available for sale at all times.

There were other misrepresentations and failures to disclose material information. Horizon did not disclose to its customers the size and extent of its properties, or the number of lots in its developments. Horizon did not disclose the size of the core areas in its properties and the fact that these areas would be the areas most likely to be developed in the future. Horizon did not make clear and understandable to customers that Horizon had no obligation, and indeed no plans, to assist customers in the resale or development of their properties, that there were no arrangements or plans for an infrastructure in the undeveloped property, and that development of an infrastructure might prove extremely difficult in the future. Horizon did not make customers aware of the oversupply of lots in or near its projects, such as [268]Amrep's Rio Rancho property near Albuquerque consisting of 91,000 acres (Tr. 6941). Horizon did not make customers aware of the slow pace of development in its projects; *e.g.*, only 800 dwelling units in Rio Communities in about

fifteen years, and only about 800 homes in Horizon City in fifteen years.

Horizon did not disclose to its customers the fact that malapi, earth mounds, arroyos, washes and flood plains exist on its properties which could affect development of some lots (Findings 85-86). Nor did Horizon disclose that water might constitute a problem, or be a future risk to the development of the properties (Finding 135). In sum, all representations about Horizon's properties were overly optimistic; no risks or potential risks were disclosed to purchasers (Finding 52).¹⁵

D. Horizon Did Not Make Disclosure of Material Facts to Customers

Horizon maintains that the weight of the evidence has shown that disclosures were made to customers that there is no certainty as to the future value of the lots purchased from Horizon, that the lots are low in liquidity, that resale should not be expected until the land is held for a long term, that there is no guarantee of appreciation or of resale, that the timing of resale is uncertain, and that there are uncertainties or risks involved in the purchase of land as an investment (RPF, p. 153).

Interspersed throughout Horizon's findings on the disclosures it claims to have made to customers are phrases such as "sales representatives were prohibited from predicting any *specific* future value" (RPF, p. 146); sales representatives pledged never to give any "guarantee of increase in value" or "guarantee of profit" (RPF, p. 147); that Horizon's contract documents had a statement that there was "no *guarantee* of appreciation" (RPF, p. 148); that customers testified that they were given "no *assurance* of appreciation" (RPF, p. 150); customers were informed orally and through written materials that there is "no *certainty* as to the future value of their lots" (RPF, p. 150); sales representatives orally informed customers that they "would have to hold their property for a *long time* before a resale could be anticipated" and that "long term *generally* meant twenty years or more" (RPF, p. 151-52); and that explicit disclosures were made in contract documents that there was "no *guarantee* or *certainty* of resale at any time" (RPF, p. 152).¹⁶ Even assuming that customers were not given an explicit "guarantee" or "assurance" of

¹⁵ Theodore Stone, a former Horizon zone manager, testified:

... I can never recall any instance anyone within the company above my position ever attacking our land, being critical of it, or suggesting that it was not a good investment, or that there were risk factors involved, or that it might go down in value, or that it was speculative, in fact, quite the opposite (Tr. 2072).

¹⁶ Emphasis has been added in each instance.

profit within a "specific" time frame, this does not contradict the findings and [269]conclusions reached herein that representations were made to customers and implications were created that land purchased from Horizon would be highly profitable within a short range of years, and resale would be easily accomplished. False, deceptive, misleading and unfair representations and implications of profitability without risk can be made although not framed in terms of an absolute guarantee. The Commission has stated on many occasions that it is not confined to analyzing isolated words and phrases in determining what representations have been made, but instead may look to the total impressions created by words in the context in which they are used. *The Raymond Lee Organization*, Docket 9045, Opinion of The Commission, p. 11 [92 F.T.C. 489] (November 1, 1978).

The evidence relied upon by Horizon to establish that no guarantee of profitability was extended to customers is not as clear as Horizon would have it appear. There is no evidence that customers read the disclosures in the Horizon documents; nor is there any evidence in training manuals or otherwise that sales representatives were trained to or did call these statements in the documents to the attention of customers. As for customer testimony that no guarantee was given to them, this testimony was elicited in the context that there was no *affirmative* guarantee stated by the sales representatives (see Tr. 1182-83, 1339, 1371, 1551, 4912, 4956-58, 5007, 5009, 5010, 6116, 6131, 6281, 16191).¹⁷ [270]

Horizon relies in substantial measure upon written documents as the means by which material facts were disclosed to customers. According to Horizon "One of the prime vehicles for such disclosure was the 'Principles of Land Ownership'" (RPF, p. 147).¹⁸ Significantly, Horizon did not give customers a copy of the "Principles" until several days after the sales transaction when customers received a copy in their Important Document Package (CX 945A, 951E-F). Horizon's own internal surveys of its sales offices reveal that customers did not read the document when received, nor attach any

¹⁷ Colonel John Yuill testified on cross-examination:

Q. It is true, is it not, that neither Mr. Bussinger or any other Horizon salesman gave you a guarantee of appreciation on the lot. No one gave you a guarantee, did they?

A. No, they did not.

Q. To the contrary, they told you there was no guarantee. Isn't that true?

A. I do not recall him making that statement either. (Tr. 879)

Michael Collum testified on cross-examination about a sales representative's reference to doubling of the investment in five to eight years:

Q. Now, there was no guarantee of that, was there?

A. No. He didn't in so many words say, "I guarantee that would happen." (Tr. 1543)

¹⁸ The "Principles of Land Ownership" are set out verbatim in Finding 57.

importance to it (CX 945A). In a survey of the Chicago office during August 1974, the Horizon survey officials reported:

In not one case did we see evidence of the *Principles of Land Ownership* being used in the sales presentation. Though customers receive the statement in the customer package, . . . few customers have read it upon receipt. Indeed, the policy statement may be avoided purposefully as it contradicts present sales presentations (CX 951E-F).

Horizon points out that the Agreements for Deed have "for many years" included a statement that there is "no guarantee of appreciation" for the property and that the same information has been included in the Receipts of Deposit and the PVCC's. PVCC's were received several days after signing the agreement in the Important Document Package. A close examination of the record reveals that no such statement appeared in any of these documents until after 1972 [sales began in 1959—CX 1538A, 1541]. (See, for example, CX 140 and CXs 147-51.) Horizon also emphasizes in its findings that "more recent contracts" have placed an even greater emphasis on this disclosure,¹⁹ and that the contracts also contain the statement just above the buyers' signatures that there is "no guarantee of appreciation, resale or repurchase," and that "Horizon provides no resale services." In support of this finding, Horizon cites RX 981. What Horizon did *not* disclose in its findings, however, is that this form contract is dated June 1977, over two years *after* the complaint herein issued.

As previously indicated, the use of the disclosure that there is no "guarantee of appreciation" sometime after 1972 in contract documents, is of little significance. There is no record evidence that this disclosure was pointed out to customers in sales presentations, or that customers read and appreciated the disclosure. [271]

Horizon relies on the federal property reports as a disclosure vehicle (RPF, pp. 159-60), and notes that as of December 1973 each property report was required by OILSR to have a section entitled Special Risk Factors (RPF, p. 149). Detailed findings on the use of the federal property report have been made (Finding 77). These findings support a conclusion that the federal property report did not make adequate disclosures to Horizon's customers of the speculative nature of the property and the many risks associated with an

¹⁹ The disclosure reads as follows:

The purchase of all land entails risk. The future value of this land and your ability to resell it are uncertain being subject to many market factors. The future population growth of this subdivision and the surrounding areas cannot be predicted.

investment in Horizon land; in fact, the federal property reports were used by sales representatives more as a sales aid than as a disclosure statement.

It is clear that sales representatives did not emphasize the importance of the property report or its function as an informational device for customers (Finding 77). Sales representatives were trained to refer to the property report in a superficial manner, and to avoid having the customer pick up the property report and read it during the sales presentation, by instructing sales representatives to refer briefly to the property report at the beginning of the sales presentation and then to *replace* it in their briefcase. Sales representatives were instructed that the property report was to be *delivered* to the customer *after* a commitment to purchase had been made and at the same time the customer was busily engaged in signing the contract and other papers connected with the sale, and writing a check for the down payment (Finding 77).

The procedures for delivery of the property report, emphasized in the training manuals, instructed the sales representatives to deliver the property report in an inconspicuous manner along with other papers without giving the customer an opportunity to read the report prior to completion of the sale.²⁰ Further, customers were unable to read and comprehend property reports in the carnival-like atmosphere of the dinner parties (Finding 77).

The record establishes that the significance of the federal property reports was not communicated to customers, that actual delivery of the reports was designed to gloss over its importance as a disclosure instrument, and that customers did not read the reports. Thus, the federal property reports did not make material disclosures to customers about Horizon's property.

TBA maps were used in sales presentations, and Horizon contends that significant disclosures about the property were made on the reverse side of these maps (RPF, pp. 163-65). The TBA maps were used in sales presentations primarily to depict the locked-in growth patterns of the metropolitan areas (*see* CX 205 and 221, for example), and there is no record evidence to support a conclusion that sales representatives were instructed to read the reverse side of the TBA maps to customers, or that customers read the reverse side of the maps (*see* Tr. 1142). [272]

Finally, Horizon argues that disclosures were made orally by sales representatives. This argument is rejected. The record evidence

²⁰ Sales representatives testified that if the customer was reading the property report he would not be listening to the sales presentation (Tr. 4627-28). One sales representative testified:

But you don't go and say, here is a two-hour property report because then people fall asleep and you have no chance to sell anymore. We were out to make money. (Tr. 16108)

supports a conclusion that sales representatives were not trained to make affirmative disclosures to customers. On the contrary, sales presentations were designed to present an overly optimistic image of Horizon land without disclosing any information that might be detrimental to a sale. Many of the disclosures that had to be made, *i.e.*, federal property reports, were made in an inconspicuous fashion; other material facts were disclosed in a vague, self-serving manner; and finally, sales presentations were planned so the prospect could make his own optimistic projections or answer his own questions based on the sales presentation without involving the sales representative, who might have to make an outright misrepresentation or lose a sale.

Although not stressed by Horizon as a disclosure method, property visits did not provide customers with material disclosures about Horizon's property. Property visits always occurred sometime after the initial sale to a customer. Property visits were utilized by Horizon as an opportunity to sell more property to customers. The record also establishes that there were further misrepresentations and deceptions at the time of the property visits. It is also clear that customers cannot make an evaluation of their purchases by a visual inspection of the property (Finding 67).

Thus, a conclusion that Horizon had a policy or practice of disclosure of material information or that Horizon did make disclosure of all material information to customers, is not warranted on this record.

E. Credibility of Horizon's Witnesses

Horizon in its findings relies extensively on the testimony of "satisfied" customers and its officials as support for its policy of disclosure to customers (see RPF, pp. 165-66, for example). Horizon elicited testimony from customer witnesses who testified they were satisfied with their Horizon property, and that the property had not been misrepresented to them at the time of purchase (*see, for example*, Tr. 8065-85, 8086-8134, 8724-54, 8912-40, 8941-72; but see Tr. 8964-65, 8971-72). Assuming that these customers were satisfied and that the property was not misrepresented to them,²¹ does not

²¹ E.E. Golden, a customer witness called by Horizon, testified that he was told, *inter alia*, that Rio Communities property was a long-term investment—ten years or longer (Tr. 8944, 8965); he was traded out of single family property into an acreage parcel in Tierra Grande because the sales representative was "all excited" about Tierra Grande and it was represented that Mr. Golden would "benefit more" from the Tierra Grande acreage property (Tr. 8951, 8964); the Tierra Grande lot was later exchanged into Waterwood (trades always increased the customer's total indebtedness) (Tr. 8956-57); that Albuquerque has only one way to grow (Tr. 8965, 8971-72); that you can trade for a closer lot which would appreciate faster (Tr. 8966); and that Waterwood property was appreciating in value (Tr. 8970-71). Although Mr. Golden may have been a "satisfied" customer, this should not be construed as implying that the property was not misrepresented to him.

refute the testimony of other [273]customers and the substantial evidence of record which establishes that misrepresentations were made and that material information was withheld from customers as a matter of routine operation:

That a person or corporation, through its agents, may have made correct statements in one instance has no bearing on the fact that they made representations in other instances. The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them. *Basic Books v. F.T.C.*, 276 F.2d 718, 720-21 (7th Cir. 1960). See also *Independent Directory Corp. v. F.T.C.*, 188 F.2d 468, 471 (2d Cir. 1951).

Horizon also called as witnesses sales managers and sales representatives who testified that customers were well-informed about Horizon's property and policies, and that the property was not misrepresented. Where this testimony conflicts with the substantial record evidence which demonstrates a continuing practice of misrepresentation, of creating deliberate false implications, and the withholding of material information, it is entitled to and is being given little credence. The testimony of Tony Frederico, zone manager in Horizon's Chicago office, and the testimony of Lee Rempas, office manager in the Chicago office, demonstrate why the testimony of Horizon's sales employees warrants little credence.

Both Mr. Frederico and Mr. Rempas were in the Chicago office during the entire relevant time period of this proceeding (Tr. 11741, 11954). One hundred percent of the zone activity took place in the Chicago office (Tr. 11743); the Chicago office ran a large dinner party operation, as well as in-home sales (Tr. 11744, 11795, 11982). Mr. Frederico testified that if the "Principles of Land Ownership" were not used in the sales presentation, the sales contract was not processed (Tr. 11750, 11813). Mr. Rempas testified that sales representatives always used the "Principles" (Tr. 11957, 11963, 12002, 12005-06). In stark contrast to this testimony, a survey of the Chicago office during August 1974 by Bruce Lehmann and Webb Parker of Horizon's Customer Service Department reported that "in not one case did we see evidence of the Principles being used in sales presentations . . . Indeed, the policy statement may be avoided purposefully as it contradicts present sales presentations" (CX 951E-F).

Mr. Frederico testified that the Chicago office always used long-term investment potential in sales presentations of Horizon's property. His office conducted sales meetings every Monday and Thursday to keep sales representatives informed of the policy of the

company, and to make certain sales representatives "sell right" and tell people the truth (Tr. 11772). The Thursday meeting was an open meeting where sales representatives discussed the right way to sell. Mr. Frederico attended these meetings to make certain everything was in accordance with company policy (Tr. 11777). Mr. Frederico testified that at the meetings he [274] would tell the sales representatives that the Horizon land would be good only for customers' children or grandchildren. Throughout his testimony Mr. Frederico continually emphasized that the Chicago office was selling a long-term product (Tr. 11760, 11763, 11765); that the land should only be purchased for "their kids or grandchildren" (Tr. 11770); "A long time always. We always told them it takes a long, long, long time" (Tr. 11770); sales representatives were trained to use a long, long term (Tr. 11771). Other statements in his testimony included "there would be a long, long time for [lots] to reach the development stage, and I mean a long, long time" (Tr. 11775-76), "30 to 40 years" (Tr. 11776), "a long, long term" (Tr. 11781), "I told them they had to wait a long, long, long time" (Tr. 11798), "I mean between 15, 20 or 30 years" (Tr. 11798), "long-term potential appreciation" (Tr. 11806):

Q. What, again, is long-term, sir?

A. Long-term, again, is 15 or 20 to 30 years. (Tr. 11807)

Mr. Rempas, who served as office manager, trained sales representatives, accompanied them on many sales presentations, and attended hundreds of dinner parties (Tr. 11955-56, 11968, 11980-82; *see also* Tr. 11747, 11751), testified that sales representatives were told that development was a long-term matter and not to guarantee anything (Tr. 11962, 11965). He also testified that sales representatives were instructed not to state a time period within which customers could resell for a profit (Tr. 11963). "It could be 20, it could be 30, it could be 100. I do not have a crystal ball to tell you exactly" (Tr. 11966, 12011-15). Mr. Rempas testified that a time frame to profitability was never used at dinner party presentations (Tr. 11969). He reiterated several times the long-term nature of the product which was utilized by sales representatives in sales presentations, 20 to 30 years (Tr. 12013-14), long-term of 20 years or more (Tr. 12013, 12015). He referred to Whispering Ranch as a "long-term, I mean a long, long, long-term" (Tr. 11994). He testified that time periods of less than 10 years never came up at sales meetings (Tr. 11976). He further testified that he had heard only once a specific time period mentioned in a sales presentation, and he reprimanded that sales representative (Tr. 11971). He also testified that he never

heard a sales presentation that used a specific rate of appreciation (Tr. 12010-11).

This testimony by Mr. Frederico and Mr. Rempas, the Chicago zone manager and the Chicago office manager respectively, was flatly contradicted by Horizon's internal survey of the Chicago office, which was conducted during July and August 1974 (CX 951A-J). This report has the following summary statements:

The Chicago office is not selling a long-term asset. What is being sold is a short term investment opportunity ranging from 4 to 12 years to maturity depending on property type and location (CX 951E).

* * * * *

[275]The Chicago office suffers from one problem. The sales representatives (especially those with longevity) are reluctant to accept the long-term nature of our product (CX 951J).

Sales representatives from the Chicago office testified in this proceeding, and confirmed the widespread and routine use of rates of appreciation to be expected by purchasers of Horizon land, and the time period necessary to realize the appreciation. Anthony Zimmer, employed in the Chicago office from December 1970 to April 1972 (Tr. 6137-38), testified that he received no formal training, but he observed Jerry Steers, a leading sales representative in the Chicago office, make sales presentations as part of his training (Tr. 6139). Mr. Steers used a four to seven year time frame for appreciation, and the value of a \$900 to \$1400 lot would be \$4500 to \$7000 in four to seven years (Tr. 6144). All the sales representatives used the \$4500 to \$7000 figure (Tr. 6151), and Mr. Zimmer used the four to seven year holding period and appreciation to \$4000 to \$7000 in four to seven years (Tr. 6153).

Alvin Schuman, employed in the Chicago office from 1968 until 1975 (Tr. 5960), testified that he represented to purchasers that real estate was appreciating at a 25 percent per annum rate (Tr. 5965, 5997). Mr. Schuman also represented that a \$2700 purchase would be worth between \$9-12,000 in five to seven years (Tr. 5970, 6003-04, 6010-11, 6023, 6026-27). The five to seven year period was used all the time at dinner parties (Tr. 6008-09). Mr. Zimmer testified that he represented that the rate of development was "one square mile per year . . . anytime I needed it" (Tr. 5972). He further testified that the only representation he was ever stopped from using during the entire time he was employed by Horizon was the word "investment". The word appreciation was substituted for investment (Tr. 5983, 6007).

Both Mr. Frederico and Mr. Rempas stressed the practice in the

Chicago office of team selling, that is, the sales representatives generally operated in pairs (Tr. 11751, 11778, 11809, 11965), which practice was confirmed by the internal survey of the Chicago office (CX 951E). Since sales representatives were aware of what each other were doing and discussed sales activities on a twice-weekly basis, and dinner parties were attended by Mr. Rempas on a regular basis (Tr. 11968), it taxes credulity to believe that these two supervisors, who stressed the training and close supervision given to sales representatives in the Chicago office, and whose livelihood depended upon sales made by these sales representatives, were unaware of the misrepresentations being made. It is also significant that the misrepresentations were not made by new or short-term sales representatives, but by sales representatives with longevity (CX 951J; Tr. 6137-38, 5960).

The widespread use of misrepresentations by sales representatives, substantiated by the record and in particular by Horizon's own internal surveys of its sales offices, is a sufficient basis to give little or no credence to self-serving denials and explanations offered by Horizon's officials in their testimony. [276]

F. Horizon's Land Is Not An Excellent Investment And It Has Little Or No Value As An Investment

There are three fundamental factors to be considered in a real estate investment; the property itself, the financial return or investment structure, and the people who are involved as investors, managers and active partners. All three factors must work together; an investment lacking in any one dimension should be rejected. An investment can be rejected based on any one of a number of factors, such as the available supply and demand, the known physical condition of the property or uncertainty as to the physical condition, uncertainty as to title, zoning, water or mineral rights, and uncertainty as to whether an organization exists which has the capability to carry out the investment (Finding 101).

Undeveloped land lacks liquidity and produces no income. Its investment value is related to the end use to which the land can be placed. To have value land must have some utility or some logical use within a reasonable period of time (Tr. 6587, 7581, 7589-90; CX 778H; RX 1551). Undeveloped land's future value can only be estimated by judging when in the future a user market will exist, and what the value of the property will be at that time. Undeveloped land's estimated future value should then be discounted dependent upon the time differential involved to determine its present estimat-

ed value (Tr. 7590, 15310-11; RX 1551). Professor Howard Stevenson, complaint counsel's expert, stated that undeveloped land should be purchased only when a change in use is imminent and when the conditions surrounding that change can be examined and verified (Tr. 6592, 6883). Alan Nevin, Horizon's expert, concurred in that view, and he further stated that the time period involved in investments in vacant land was usually five to seven years (Tr. 16066, 15883-85).

The investment quality of Horizon's land depends upon (1) the rate at which the lots are absorbed—placed into an end use, (2) the price originally paid, (3) the future costs of any development expenses to be incurred, (4) the carrying costs of the property until absorbed or liquidated, and (5) any risk factors involved (Tr. 6880-81). Some of the carrying costs on Horizon land include real estate taxes, HCIA charges, interest paid on the purchase price, interest lost on the money invested in the property, and the commission paid on resale, which on undeveloped land is usually 10 percent of the sale price.

Alan Nevin stated that an investment to be characterized as excellent, and he knew of very few such investments, should have a high guaranteed tax shelter, cash flow, substantial equity built up, guaranteed high level of appreciation - probably 15 to 20 percent or more, and be risk free (Tr. 15955). He further testified that where there is [277]uncertainty as to the time of resale of undeveloped lots, or uncertainty as to the resale price, the property cannot be considered an excellent investment.²²

There is literally a glut of lots in and surrounding each of Horizon's properties. Some of Horizon's properties are so large that it is difficult to comprehend the enormity of the area. Rio Communities, for example, has a total of approximately 249,000 acres divided into 172,020 lots. By contrast, the District of Columbia has 39,680 acres.²³ Rio Communities is over six times as large as the District of Columbia. Horizon City has approximately 87,000 acres divided into 139,507 lots. It is over twice the size of the District of Columbia. Arizona Sunsites is also larger than the District of Columbia, and Waterwood is two-thirds as large as the District of Columbia.

²² Mr. Nevin's testimony, specifically about Horizon's lots, was as follows:

Q. In analyzing a purchase from the point of view of the purchaser, in your opinion, can an investment of Horizon lots, where there is uncertainty as to the time of resale, be considered an excellent investment with little or no financial risk?

A. Absolutely not.

Q. In analyzing a purchase from the point of view of the purchaser, can an investment of Horizon lots, where there is uncertainty with respect to the amount of the resale price, be considered an excellent investment with little or no financial risk?

A. No. (Tr. 15956)

²³ The District of Columbia has 62 square miles within its borders; a square mile has 640 acres ($640 \times 62 = 39,680$). Webster's New International Dictionary, 2nd Ed., pp. 1523, 3052.

The overriding defect in all of Horizon's properties is their tremendous size in relation to the markets in which they are situated. The absorption of these properties is projected so far into the future that it is impossible to foresee the ultimate risks that may exist. Further, there is no organization in existence capable of carrying out the development of such large scale projects. These properties can be rejected as investments for these reasons alone, and an elaborate investment analysis is not necessary to reach this conclusion. A well-informed investor should not buy an undeveloped lot in the sticks where he is competing with thousands of other lots and where there is uncertainty as to the time of resale of the property and uncertainty with respect to the resale price.

In the Albuquerque area, there is an abundance of land available for development purposes. The 1985 land use plan, prepared by the Albuquerque Planning Department in 1964, concluded that there was sufficient developable vacant land within the Albuquerque area to accommodate 2 [278]million people. The population of Albuquerque as of 1985 was projected to be 685,000.²⁴ In addition, the report noted that Indian reservations to the north and south of Albuquerque and the Mesa to the west are potentially available for urban-type development (CX 828Z-3). There are numerous subdivisions surrounding Albuquerque that are developing and can be developed, an unlimited supply of land. For instance, just north of Horizon's Paradise Hills project is Amrep's Rio Rancho project of approximately 100,000 lots with only about 2,000 homes at present (Tr. 3153). Professor Stevenson testified that the availability of land in the Albuquerque area exceeds the full needs of the community under even the most optimistic population projections through the end of this century and perhaps well into the 22nd century (Tr. 6676).

Horizon owned at one time in excess of 4,500 lots in Paradise Hills. As of June 1978, there were approximately 1,100 dwelling units in Paradise Hills, with about 100 units under construction, an average of less than 100 units constructed each year since the beginning of Paradise Hills in the early 1960's (Findings 8-10, 118). Horizon now has approximately 3,500 lots in Paradise Hills which are available for development. Individual lot owners must compete with Horizon in any attempt to sell their lots. Further, the bulk property owners will likely have to await absorption of the platted lots before their

²⁴ The Middle Rio Grande Council of Governments published a report in 1972 which projected a population of 580,000 for Albuquerque in 1985, and a population of 762,000 by 1995 (CX 836, pp. 9, 11-12). Dr. Benjamin Stevens, Horizon's expert, has projected an Albuquerque population of 605,000 as of the year 2005 (RX 1557D), and Mr. Nevin, another Horizon expert, has projected a population of 1,250,000 by 2005 (Tr. 15909). Population projections for Albuquerque have been declining since the early 1960's, demonstrating the unreliability of area population projections far into the future.

bulk lots will be marketable. Most of the Paradise Hills property was sold prior to 1970. Thus individual lots owners will have to wait many decades to liquidate their property.

In Rio Communities, Horizon owns 5,400 acres in the core area where approximately 800 houses have been built over the past several years. The 5,400 acres are subdivided into 5,600 single family lots, 50 acres multi-family, 300 acres commercial and 600 acres industrial. Additionally, Horizon owns 11,100 acres in three other core areas and six town centers throughout Rio Communities where no development has taken place (Findings 11-13, 119). At the present rate of building, it will take decades to absorb Horizon's core areas. Individual lot owners will have little opportunity to liquidate their investments until Horizon's existing inventory of lots has been exhausted. This could be well into the next century, if then.

Rio Communities is 35 miles south of Albuquerque and is viewed as a "satellite" of Albuquerque by Horizon's expert, Dr. Stevens (Tr. 14807). Dr. Stevens, in projecting the population growth of Rio Communities, relied to a substantial extent on an influx of retirees to accelerate growth. Dr. Stevens admitted that projecting retirement migration was much more difficult than predicting economic growth (Tr. 14825).

Rio Communities growth has been at a rate of less than 100 houses per year in the past. Its future growth rate is uncertain. If the past [279] growth rate over several years is duplicated each year in the future, it will take 130 years to fully utilize all the lots in Rio Communities. It is concluded, therefore, that an individual lot owner has little prospect for liquidating his investment in a Rio Communities lot until well into the next century.

El Paso has a history of orderly growth through annexation of surrounding lands, and growth and development is concentrated within the annexed area where city water, sewer, and other services are made available (Tr. 2595-96, 15213-218, 7023-24, 6988-89). The City of El Paso in the past has been growing in a three-directional dimension - to the northwest, the northeast and the southeast. Studies by the El Paso Planning Department project that growth will continue in this same manner in the future. The population of the El Paso SMSA is projected by the Planning Department to be 742,450 by the year 2005 (CX 876), a projection accepted by Joseph Lusteck, complaint counsel's expert in this proceeding, and by D.A. Lomax, Horizon's expert (CX 876; Tr. 6988, 15216).²⁵

²⁵ Dr. Benjamin Stevens, Horizon's expert witness on regional planning, projected a population for the El Paso SMSA for the year 2005 of 863,700 as a high, 809,800 as a medium, and 745,000 as a low (Tr. 14717; RX 1557B). Thus, Dr. Steven's low projection comports with the El Paso Planning Department's projection. Mr. Nevin projected a population of 850,000 by the year 2005 (Tr. 15912-13).

There is sufficient vacant land within the El Paso city limits and the 5-mile extra-territorial jurisdiction of the city to satisfy the urban needs of the City of El Paso through the year 2005 (Tr. 7020-27, 7043). The Horizon City project falls largely outside of this area where urban growth can reasonably be expected to occur (Tr. 7043). Mr. Lusteck projected that only 2,859 acres, or 3.3 percent of the total acreage in Horizon City, will be absorbed by 2005. Mr. Lusteck testified that the Horizon City project is so large that there is a very slim chance for 97 percent of the Horizon City lots to be absorbed by the year 2005 (Tr. 7043, 7078-79).

Horizon's experts, Dr. Stevens and Mr. Lomax, projected the land absorption in Horizon City to be 19,000 acres by the year 2005 (Tr. 14713, 14779, 15224). Mr. Nevin, another Horizon expert, projected land absorption in Horizon City of 20-22,000 acres by 2005 (15912-13). Thus, Horizon's experts project absorption of less than 25 percent of the land in the Horizon City project by the year 2005.

At present, Horizon owns 10,400 acres of land in two core areas of Horizon City (Finding 120). There is 6,400 acres in the core area nearest the El Paso city limits, which has 10,000 single family lots. There are approximately 800 homes in this core area which have been built in a period of over ten years. It is concluded that most of the development in Horizon City that will occur by the year 2005 will be in the 6,400 acre core area nearest to El Paso, with some development in the core area near the lake, if Horizon finds it expedient to develop the second core area. Horizon has the financial ability to develop lots in its core areas over the next three decades; individual lot owners are incapable of developing an infrastructure to provide services to the individual lots. There may be some few lots owned by individuals and located within the extra-territorial jurisdiction of El Paso adjacent to the core area that will [280]be developed by the year 2005, and there may be some lots along Horizon Boulevard that will be developed,²⁶ but the percentage of these lots where development is possible to the total lots in the project will be very insubstantial.

Because of the historical growth pattern of El Paso, the individual lot owners in Horizon City will have to await the arrival of city services for an opportunity to develop their lots, or to sell their lots to a demand market. The fractionalization of ownership of the individual lots in the Horizon City project makes it highly unlikely that a developer will attempt to assemble and develop Horizon City lots absent arrival of the city services, especially when there is

²⁶ The record does not make clear who owns the lots along and adjacent to Horizon Boulevard. It is entirely possible that Horizon has retained ownership of all or a substantial portion of these lots.

available other developable land with potential city services and under a common ownership where no title clearance problems will exist. Thus, it is concluded that the Horizon City project is "grossly excessive", relative to the size and potential for growth of El Paso (Tr. 7041), and that there is little chance for the individually-owned lots to be placed in urban use by the year 2005 (see testimony of Joseph Lusteck, Tr. 7041, 7043, 7078-79).

Arizona Sunsites and Whispering Ranch are located in areas where there is an oversupply of vacant land in subdivisions available for development purposes through the year 2000 (Finding 108).

Whispering Ranch is located in a remote area far removed from economic activity of any kind. Whispering Ranch is suitable only for the cattle grazing purposes for which it was used prior to Horizon's acquisition of the property. The location has no labor force, no roads, no utilities, and it is extremely unlikely that it will have any utility for residential, commercial or industrial purposes within the next thirty years (Tr. 3396). Fractionalization of the land makes it unlikely it will be used for a purpose such as cattle grazing, or by a large industrial user desiring a large tract of land.

Arizona Sunsites is located in an area where there is an oversupply of subdivided vacant land, and land that readily could be placed in subdivisions if a demand warranted (Tr. 4816-17). Arizona Sunsites is primarily a retirement community. It has no labor supply and consequently no potential for industrial development. It also is unlikely to develop as a retail trade center because of the sparse population. The growth of nearby towns and cities has had, and is likely to have little impact on the growth of Arizona Sunsites. It is dependent upon retirees for future growth, but its limited medical facilities is not conducive to substantial growth as a retirement center (Tr. 3400-14). Frank Mangin, Program Director for Economic Development for the Arizona Governor's Office, noted that Arizona Sunsites started in 1961 and in 1977 had a population of 850 persons, an annual growth rate of approximately 60 persons per year. He projected that this limited growth rate would continue in the future (Tr. 3400-16). [281]

Waterwood is a 25,000 acre recreational project (Tr. 15957, 14879-83) located at Lake Livingston, 100 miles north of Houston. As of 1978, there were approximately 120 houses in Waterwood and 40 to 50 houses under construction (Finding 21, p. 16). Approximately 7-8000 acres have been subdivided. About 1,000 acres have been fully improved, which includes the golf course and other facilities. Horizon owns 2,823 single family lots, 230 multi-family lots and 12 commercial lots in Whispering Pines units, none of which have been

sold. Deer Creek Village has 4,976 single family lots and 159 multi-family lots, of which 1,589 had been sold as of May 4, 1978. As of that date, Green Tree Village had 2,356 single family lots and 133 multi-family lots, 993 of which had been sold (Finding 121).

Dr. Stevens, based on highly speculative reasoning, projected 5,000 dwelling units to be built in Waterwood by the year 2005 (Tr. 14879-83, 15029-31, 15045). A continuous marketing program is necessary to promote Waterwood as a recreational area (Tr. 15957-58). Horizon, which owns well over 3,000 lots in the Whispering Pines and Country Club Estates Units, none of which have been sold to the public, is in a much stronger position to market these lots to the public than an individual lot owner. Additionally, Horizon owns some 18,000 acres in Waterwood and can subdivide any number of additional lots, as the market may demand. Further, Horizon has sold less than half the lots in Deer Creek Village and Green Tree Village.

Horizon's expert, Charles Osenbaugh, testified that Horizon will "get the first crack" at any interested buyer, and Horizon's prices will set the upper limit of any resale market (Tr. 15794-95; see also Tr. 8153). Professor Stevenson placed the potential absorption of the Waterwood lots many decades in the future. Professor Stevenson reasoned that because of the distance of the project from Houston, the availability of a substantial number of competing recreational projects much nearer to Houston, some with the infrastructure in place and the total number of lots in the project known, and because of the potential competition Horizon could bring into the site from the 18,000 acres of unplatted land; there was little opportunity for upside potential on the Waterwood lots (Tr. 6761-63).

At the present time, there is no resale market for any of Horizon's lots outside of the core areas. Extensive findings demonstrating the lack of a resale market have been made (Findings 123-128). Evidence supporting a lack of a resale market and an absence of present market value includes: (1) inability of real estate brokers to resell the land and even a refusal to accept listings on Horizon's lots; (2) unsuccessful attempts by individuals to sell their lots; (3) the substantial number of forfeitures by purchasers; (4) the substantial number of Horizon lots auctioned at tax sales; (5) the failure of the land auction sales to attract bids on the Horizon lots; (6) testimony of the expert witnesses who were unable to find a resale market for Horizon lots; and (7) the assigning of a minimum appraisal value to the lots for tax purposes. In a few isolated instances where lots have been sold by individuals, it appears that the lots were sold for less than the price at which Horizon originally sold the lots.

The ultimate in a lack of value is a lot nobody wants. The fact that there is no resale market for Horizon's lots, even after some of the property has been held for up to fifteen years, is a strong indictment of Horizon's sales program, which has lured thousands of people to purchase [282]sight unseen as an excellent investment, what is virtually worthless desert land. Horizon, while selling its lots at an inflated price, knew of the lack of a resale market, but did not disclose this material fact to purchasers. Horizon's knowledge can be imputed, *inter alia*, from the substantial number of forfeitures, from the inquiries which it received from customers wanting to sell their lots, from the extensive tax sales and the auction sales, and from the actions of the real estate boards in Albuquerque and El Paso in refusing to list Horizon lots for sale.

Horizon called several expert witnesses to testify that its prices for its lots at the time of the sale to purchasers represented market value. These experts also projected the future value of the lots to establish that the lots were, in fact, reasonable investments.

Horizon's expert witnesses, D.A. Lomax, Sanders Solot, Charles Osenbaugh and Alan Nevin, as part of their evaluation of the Horizon lots as an investment, determined that the purchasers of Horizon's lots were knowledgeable buyers, and that the prices at which the lots were sold by Horizon represented market value at the time of the sale.²⁷ This determination, which is contrary to the conclusions reached herein, was based on superficial surveys of purchasers of Horizon's lots (Tr. 15112-14, 15630-31, 15916-20; RX 1574, 1568), which appear to have been conducted with a foreordained result as the objective. These expert witnesses concluded that Horizon's selling prices for its lots, *e.g.*, \$1,000 per lot, represented market value at the time of the sale, even though these witnesses recognized that there was no present market of any kind for the lots (Tr. 15289, 15687-90, 15761). The superficiality of the surveys, and the conclusions drawn from the surveys as to knowledgeability of the purchasers of Horizon's lots, casts a cloud over the credibility of these witnesses in all respects.

The determination by the witnesses that Horizon's selling prices represented market value is crucial to the testimony of these witnesses as to the future value of Horizon's lots. Horizon's witnesses concluded that Horizon's selling prices represented market value. They then projected these "market prices" into the future based on a compound annual rate of appreciation, approximating what the witnesses anticipated the inflation rate will be in the future.

²⁷ One of the conditions implicit in a determination of whether the selling price of property reflects "market value", is a knowledgeable buyer—a well-informed or well-advised buyer (Tr. 7578, 15092, 15762, 15782).

Assuming land will generally appreciate in value in the future at a compound rate related to the rate of inflation, to arrive at an estimated future value you must start with a realistic present market value.

Horizon's experts used Horizon's inflated selling prices as the market value. This incorrect base figure skewed the future projections of value. For example, Horizon paid an average of approximately \$55 per acre for the Rio Communities property and sold the land at a price of approximately \$5,000 per acre (Finding 137). [283]

\$55 at an 8% compounded rate for 30 years = \$553.45

\$5,000 at an 8% compounded rate for 30 years = \$50,313.28

Horizon paid approximately \$135 per acre for the Horizon City land and sold the land for approximately \$6,000 per acre (Finding 137):

\$135 at an 8% compounded rate for 30 years = \$1,358.46

\$6,000 at an 8% compounded rate for 30 years = \$60,375.94

Horizon paid approximately \$150 per acre for Whispering Ranch property and sold the land for approximately \$700 per acre (Finding 137):

\$150 at an 8% compounded rate for 30 years = \$1,509.40

\$700 at an 8% compounded rate for 30 years = \$7,043.86

There are other significant reasons for attaching little credibility to the future value projections offered by Horizon's expert witnesses. D.A. Lomax, when interviewed by complaint counsel as a prospective witness at a time prior to his engagement by Horizon as an expert witness, took positions directly contrary to his testimony in this proceeding (Finding 114). His answers to complaint counsel's questions comport more with the evidence in this record than his testimony for Horizon at trial. Mr. Lomax admitted stating to complaint counsel during the interview that a well-informed purchaser would never have bought Horizon's land, that an individual investor does not buy a lot in the sticks where he will be competing with 100,000 other lots. Mr. Lomax also admitted stating to complaint counsel that he would not recommend that anyone under any circumstances buy Rio Communities lots, with the possible exception of lots in Tierra Grande. Mr. Lomax's answers to complaint counsel, when he was an uninterested and unpaid land

appraiser, are far more credible than his testimony in this proceeding.

Sanders Solot accepted Horizon's sales prices as establishing market value, based on a highly superficial survey, when he knew there was no present market for Whispering Ranch property. His selection of comparable properties are suspect, as they were located many miles from Whispering Ranch. His appraisal also differs from testimony of real estate brokers located in the Whispering Ranch area (Tr. 3233-35, 3260-61). His appraisals are entitled to little weight. The Whispering Ranch appraisals of Roy Humble, Arizona's tax assessor, is more credible based on this record.

Charles Osenbaugh's purported determination of the knowledgeability of purchasers of Waterwood lots, based in substantial part on the purchasers' addresses, points up the cursory nature of his investigation of the market value of the Waterwood lots.

Alan Nevin, while recognizing the massive failure of the New Towns, which had federal government assistance, found Horizon's [284]developments to be viable. The superficiality of Mr. Nevin's testimony is highlighted by his conclusion from a buyer profile he compiled from existing Horizon records, that purchasers of Horizon's lots had used "discretionary" funds in purchasing Horizon lands. Examples of information which Mr. Nevin did not have in compiling his buyer profile, was the number of dependents a purchaser had or the amount of his debts. Forty percent of the purchasers in Mr. Nevin's profile had incomes of less than \$10,000 per year. It is unlikely these purchasers had "discretionary" income to invest in distant land.

Mr. Nevin did recognize, however, that Horizon has the best of both worlds. Horizon has shifted its financial burden to the lot purchasers. It has sold off for cash the undesirable lots in the outlying areas at inflated prices while retaining the most desirable land in its core areas. The money realized from the sale of the outlying lots is available to Horizon to develop its core areas. Therefore, Horizon does not have the heavy carrying costs that usually cripple new towns (Tr. 16032).

There are numerous risks in purchasing one lot in Horizon's enormous projects. One of the risks beyond mere supply and demand is the fractionalization of ownership of the land. As time passes, title problems become more severe. Builders prefer to utilize several lots at a time. It is uneconomical to develop one lot at a time. The lack of an infrastructure to provide utilities is a significant risk. The financial outlay necessary to provide city services to one of Horizon's developments 30 years in the future is so large as to be almost

incalculable (Tr. 6690, 7048-51). There are many unknowns when looking 30 years or more into the future such as water and sewage problems. The physical condition of the property, *i.e.*, arroyos, flood plains, malapi, and earth mounds pose problems for some lot investors.

The uncertainties as to ultimate absorption, the lack of an infrastructure, the fractionalization of ownership, and the unknown risks associated with long-term development over the next several decades, make Horizon's lots bad investments. Professor Stevenson recommended defaulting and taking a tax loss on Rio Communities lots (Tr. 6752-54). Jack Mann recommended that owners of Horizon City lots discontinue the payment of taxes, thereby defaulting on the property and claiming an investment loss as an income tax deduction (CX 892). These conclusions are supported by the record. Horizon's lots are not only bad investments, they are worthless as investments.

G. Retention Of Money By Horizon

Count XXXII, Paragraphs 81 and 82, alleged that Horizon has induced members of the public through unfair and deceptive acts and practices to pay substantial sums of money towards the purchase of lots located in Rio Communities, Horizon City, and Whispering Ranch when said lots are of little value to purchasers as investments and little use as homesites, and has failed to offer to refund or refused to refund such money to purchasers. The continued retention of the money is alleged to be an unfair act or practice.

It will be observed that the complaint allegations of Count XXXII specifically designate only three of the six properties with which this [285]proceeding has been involved. Complaint counsel contend that Horizon was notified by complaint counsel's trial brief filed November 23, 1976 that complaint counsel intended to offer proof that the continued retention of funds received through the sale of all of Horizon's land is an unfair practice. Complaint counsel therefore contend that respondent was placed on notice that Paragraphs 81 and 82 cover all of Horizon's properties.

Horizon objects to complaint counsel's efforts to enlarge the scope of these paragraphs (RRB, p.267).²⁸ Horizon's primary basis of objection is the unambiguous language of Paragraph 81 which specifically designates only three properties, and the passage of over three years since issuance of the complaint, during which complaint

²⁸ See complaint counsel's letter and respondent's letter setting forth their respective positions on Count XXXII, which have been incorporated into this record (see Order Incorporating Letters Into Record, dated September 6, 1979).

counsel never sought to amend the complaint to designate other properties. Horizon further contends that the other paragraphs of complaint counsel's trial brief contradicts the paragraph of the brief relied on by complaint counsel, leaving the general understanding to be derived from the trial brief ambiguous as to complaint counsel's intentions.

The allegations of Count XXXII that the lots in Horizon's Rio Communities, Horizon City and Whispering Ranch "are of little value to purchasers as investments and little use as homesites," introduce no new issues to this proceeding. The entire record consists of evidence establishing the representations which were made as to the investment quality of all of Horizon's lots, and evidence respecting the value of those lots currently and into the future. This evidence concerned all six properties, not just the three properties enumerated in Count XXXII. The additional allegation stated in Count XXXII is Horizon's continued "retention of the sums" paid for lots of little value as investments and little use as homesites. Evidence adduced in this proceeding has shown that Horizon has retained the sums paid in on lots in all six properties. There was no separating out evidence as to just the specifically enumerated properties, nor is there any indication whatsoever that funds from the enumerated properties were handled differently than funds paid for the other properties.

Adding the three additional properties to the allegations of Count XXXII does not introduce any new issues to this proceeding, nor does it alter the underlying theory behind the complaint.²⁹ Horizon was put on notice by complaint counsel's trial brief that complaint counsel intended to offer proof that the continued retention of funds as to all of Horizon's properties was an unfair trade practice.

Horizon was accorded every opportunity to offer evidence relevant to the allegations of the complaint, and after being put on notice of complaint counsel's trial intentions, offer evidence to rebut complaint counsel's case-in-chief. Thus, Horizon has not been prejudiced by complaint counsel's failure to move to formally amend the complaint. [286]

As to the substantive allegation of Count XXXII, the retention of the sums paid for lots having little value as investments and little use as homesites, the Commission recently considered such an allegation in *The Raymond Lee Organization, Inc.*, Docket 9045, Opinion of the Commission, pp. 29-36 [92 F.T.C. 489]. In the *Raymond Lee* matter, the Commission considered the value of

²⁹ See *Capitol Records Dist. Corp.*, Dkt. 8029, Interlocutory Order Remanding Motion To Amend Complaint For Determination Of The Hearing Examiner, 58 F.T.C. 1170, 1174.

services rendered in light of what was promised by the respondents in advertising, promotional and sales pitches. The Commission concluded:

In our view, the record convincingly demonstrates that respondents provide worthless services that bear little resemblance to what they tout in their advertising, promotional, and sales pitches. These unfair and deceptive practices are exacerbated by respondents' acceptance and retention of the substantial fees that inventors pay in the reasonable hope and expectation that respondents will provide the expert assistance they represent. We conclude that the complaint allegations have been sustained. (Opinion of the Commission, p. 36).

In the instant matter Horizon touted its property as an excellent investment. There is a gross disparity between what the investor received for his money and what Horizon led the investor to believe. While it may be assumed that land has some intrinsic value, under consideration here is the value of the land as an investment, the product which Horizon was selling. The record clearly has shown that the land is actually a bad to worthless investment.

Horizon contends that the exchange privilege whereby a purchaser could exchange an undeveloped lot for a developed lot in the building area, gives Horizon's lots value as homesites (RPF, pp. 183-84). The record establishes that the exchange privilege has added no value to the undeveloped lots. This privilege has had no impact on the pace of building in Horizon's properties. It is evident that the exchange privilege cannot accommodate all the lot purchasers with a building site. Thus, the exchange privilege does not give value to Horizon's undeveloped lots as homesites. Moreover, Horizon's undeveloped lots were not sold as homesites, but as investments that could be resold to a demand market in a short time at a substantial increase in price.

The complaint allegations have been sustained. Horizon has sold thousands of undeveloped lots having little value as investments and little value as homesites and has retained the sums paid and has refused to refund the sums and failed to offer to refund the sums.

H. Jurisdiction

Congress granted the Federal Trade Commission jurisdiction to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce, and more recently, in or affecting commerce. 15 U.S.C. 45. Horizon's acts and practices as a corporation in the sale of land in interstate commerce bring it within the Commission's jurisdiction to determine whether the acts and practices in question were unfair or deceptive. [287]

Horizon states that primary jurisdiction over the interstate sale of land is vested in the Office of Interstate Land Sales Registration (OILSR) of the Department of Housing and Urban Development (HUD). Horizon maintains that this jurisdiction of OILSR bars action on the part of the Federal Trade Commission (RPF, pp. 399-408). The Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.* (1968), and regulations, 24 CFR 1700 *et seq.*, promulgated thereunder, are basically registration acts requiring developers to disclose. In conjunction with its duty to administrate the registration of subdivisions to be sold in interstate commerce, OILSR has the ability to seek both civil and criminal penalties for violations of the Land Sales Act. 15 U.S.C. 1709, 1717. Yet, neither OILSR's regulations prohibiting false or misleading advertising, nor its ability to judicially seek compliance for violations, renders OILSR exclusively in charge of protecting the public interest in the area of sales of subdivided land.

Nowhere in the ILSFDA is there an express grant of exclusive jurisdiction. In the absence of such an express grant of exclusive jurisdiction, where two acts cover the same subject, rules of statutory construction favor giving effect to both acts and concurrent jurisdiction to the agencies empowered to enforce those acts. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963).

The ILSFDA itself indicates that there was no congressional intent to impliedly repeal the strictures of the Federal Trade Commission Act. 15 U.S.C. 1713 states:

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist in law or in equity.

When coupled with exemptions from the ILSFDA listed in Section 1702, surely this leaves room for the Commission to examine acts and practices in connection with interstate land sales for unfairness and deception, as well as for private citizens to seek remedies for fraud, duress or mistake.

The field covered by the Federal Trade Commission Act (FTCA) is not coterminous with the ILSFDA. Practices and acts which comply with the letter of ILSFDA may still function to deceive. The FTCA is a pervasive regulatory scheme which is not repugnant to nor even in conflict with the purposes of the ILSFDA. Thus, there can be no implied repeal in favor of the ILSFDA, and no exclusive jurisdiction in the OILSR.

Nor is the doctrine of primary jurisdiction applicable. As the Second Circuit Court of Appeals found in a case involving the

Federal Maritime Commission, (FMC) the FMC did not have primary jurisdiction because "no special expertise is necessary to resolve the issue presented; there were no technical words which required expert construction, nor are there complicated facts whose significance can be grasped only by expert analysts. Additionally, there are no circumstances here which addressed themselves to administrative discretion or the need for uniform decisional law." *United States v. Pan American Mar/Line Inc.*, 32 Ad. L.2d 946 (S.D.N.Y 1972). [288]

What is in question here is not a complex construction of the Land Sales Act and regulations (although there do appear to be some violations of those clear and explicit regulations), but a combination of acts and practices which were unfair and deceptive to the public. OILSR has been granted jurisdiction over a registration statute and the authority to prosecute for non-disclosure and false and misleading disclosure; it does not have the primary mission of ferreting out unfairness and deception in the market place, which has been vested in the Federal Trade Commission.

This case presents no circumstances which necessitate the administrative expertise of the OILSR. The Commission is fully competent to proceed in this matter, which is concerned with an area of unfair and deceptive trade practices. The Commission thus has jurisdiction over the subject matter of this complaint.

I. Unfair Contractual Provisions

Horizon's contract contains several provisions which are unfair to purchasers; in particular, the forfeiture clause and the integration clause were oppressive and caused substantial injury to Horizon's customers. The unfairness of these provisions is amplified by the fact that these and other significant contract terms appear on the reverse side of the Agreement for Deed in a manner which does not apprise the purchasers of the importance of these terms. The training manuals have no instructions to sales representatives to explain the forfeiture provision to customers, and there is no testimony in the record by sales representative or customers that this provision was a part of sales presentations.

(1) *Horizon's Adhesion Contract*

It is important to bear in mind that Horizon's form contract constitutes a contract of adhesion—a contract in which one party must adhere to the whole contract as presented or forego entering into any contract. Horizon's contracts did not permit parties of equal strength to bargain for contract terms, a practice which is tradition-

ally considered the essence of a contract. Rather, Horizon presented the customer with a highly refined product prepared by experts—a printed contract whose terms benefitted Horizon, and it was presented to the customer on a take it or leave it basis.

The fact that Horizon's contract was an adhesion contract is important because, as Administrative Law Judge Paul R. Teetor concluded *In the Matter of Amrep Corp.*, Docket No. 9018 (July 18, 1979), the standards of fairness to be applied and the legal consequences which ensue depend in a large part on the method of contracting.

(2) *Integration Clause*

An integration clause forecloses any question about the completeness or integration of a written contract; the clause formally prohibits the contradiction of any terms in the written contract by any [289]prior agreement or contemporaneous oral agreement. Although the parol evidence rule would generally prohibit tampering with the written terms of any bargained contract, those contracts which contain integration clauses make the finality of their terms explicit.

However, in the case of an adhesion contract, no bargaining has occurred. To treat such a one-sided contract with the same deference the law pays to a fully integrated contract, which is intended as the final expression of the parties' bargained-for agreement, is an absurdity. There is no agreement or "meeting of the minds" in Horizon's adhesion contract. The record herein establishes beyond any doubt that oral representations of the investment quality of Horizon's land was the most persuasive constituent of Horizon's sales scheme. Customer testimony would indicate that they considered statements by sales representatives to be part of the contractual agreement (Tr. 915, 940, 942, 1171, 1392-94, 1426, 1563, 1594, 1659-60, 5010, 5016, 5018, 5021, 5187, 6108, 6116, 6369, 6437, 16651-52).

In light of the high pressure sales tactics used by Horizon's sales representatives and the Draconian terms of its contracts, it is not reasonable to assume its customers knew and understood the nature and consequence of the contracts they signed. Respondent's inclusion of an integration clause, rendering all representations and agreements between Horizon sales representatives and respective customers unenforceable, was oppressive, unscrupulous and unfair, and causes substantial injury to consumers.

(3) *Forfeiture Clause*

Horizon included a forfeiture clause in its contract that permitted it to terminate the purchaser's interest on default and retain all previously paid installments. A substantial number of contracts and sums of money have been forfeited under the Horizon contract (Findings 129-131). It will never be known how many customers continued making payments because of the Hobson's choice presented by the forfeiture clause. Although forfeiture clauses in installment contracts are legal in a majority of jurisdictions, they are unfair to the purchaser. Dobbs, *Remedies* Section 12.14 (1973). Upon forfeiture, the seller receives the benefit of the land and all previous payments; he is unjustly enriched at the expense of the purchaser.

In an effort to reach equitable results, an increasing number of states have departed either legislatively or judicially from the ancient common law rule of forfeiture. By preventing forfeitures, installment land sales contracts are brought into line with mortgages and installment sales of goods under the Uniform Commercial Code. Neither mortgage law nor the U.C.C. permits forfeiture, but limit the seller to his actual damages. Dobbs, *Remedies* Section 12.14(1973), U.C.C. Section 2-718.

Limiting recovery to actual damages is more compelling where the contract containing the forfeiture clause is an adhesion contract. In this case the stronger party, Horizon, has secured for itself a remedy for contract breach that far exceeds its anticipated actual damages. Had this been a liquidated damages clause, it would have been struck down as a penalty because it bears no relationship to anticipated damages. [290]

The penal nature of the forfeiture clause, particularly in combination with the duress of an adhesion contract, is indicative of the oppressiveness of forfeiture and the unfairness of Horizon's forfeiture clause. Concluding that the forfeiture provisions of Horizon's contracts are unfair represents a departure from an old and oppressive rule; yet, it does not break new ground, for equity has long abhorred a forfeiture.

J. Horizon Is Liable For The Unfair Or Deceptive Acts Of Its Sales Representatives

In reports filed with the Securities and Exchange Commission, ("SEC"), Horizon has reported that its sales representatives are full-time employees (CX 64D, 65E). For the fiscal year ended May 31, 1974, Horizon reported to the SEC that "the Company's own sales organization" accounted for 98 percent of its sales (CX 66C). Thus,

the relationship between Horizon's sales representatives and Horizon Corporation is that of principal and agent. Horizon, having clothed its sales representatives with apparent authority in the form of contracts, TBA maps, unit maps, property reports, films, presentation manuals, and Horizon-sponsored dinner parties, is responsible for their sales representations even if unauthorized. *Goodman v. F.T.C.*, 244 F.2d 584, (9th Cir. 1957). (The technical form of the relationship is not determinative; in a similar sales situation a corporation was liable for the acts of its jobbers considered independent contractors. *Star Office Supply Co.*, 77 F.T.C. 383, 446-46 (1970)).

Horizon points to the integration-disclaimer clause of its contract claiming exculpation from liability and lack of apparent authority in the sales representatives. It is clear from customer testimony that they perceived the representations of sales representatives as those of Horizon. Mere disclaimer clauses cannot absolve Horizon of the continuous and significant, both in substance and number, of misrepresentations made by its sales personnel. It is clear from the internal surveys of its sales offices that Horizon knew of these unfair and deceptive acts and practices and tacitly condoned them. In fact, testimony about sales training and the training manuals themselves show Horizon as the initiator of many of the unfair acts and practices.

Even if it were to be found that Horizon honestly and systematically dismissed sales representatives who violated their pledge, this would not exonerate Horizon of liability. As the Second Circuit Court of Appeals noted in *Standard Distributors, Inc. v. F.T.C.*, 211 F.2d 7, 13 (2d Cir. 1954): "unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act."

K. Neither Laches Nor Equitable Estoppel Bar Relief

The issuance of an order in this case is not barred by the equitable defenses of laches and equitable estoppel. As the Commission recently noted in *In the Matter of SKF Industries, Inc.*, Docket No. 9046, Opinion of the Commission, p. 8 n. 8 [94 F.T.C. 6 at 83] (July 25, 1979), neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917); *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 623-24 (1953); *United States v. Firestone Tire & Rubber Co.*, [291]374 F. Supp. 431, 433 (N.D. Ohio 1974). The Commission's investigation of Horizon, which commenced in October 1971 (CX 65D), is of signifi-

cance to this proceeding in that Horizon, knowing it was under investigation, failed to take significant steps to correct its misleading and deceptive sales programs. Horizon's internal surveys alone constitute sufficient evidence to demonstrate that there has been no discontinuance of the unfair and deceptive practices prior to issuance of the Commission's complaint.

L. Remedy

It is well established that the Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices," and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946). The courts have repeatedly affirmed the power of the Commission to go beyond the specific violations found and to prohibit similar practices, *FTC v. Mandel Bros. Inc.*, 359 U.S. 385, 392-93 (1959), "so that its order may not be by-passed with impunity." *FTC v. Ruberoid, Co.*, 343 U.S. 470, 473 (1952). The Order entered herein is necessary to achieve the objective of preventing unfair, misleading and deceptive sales practices in the future.

Horizon suggests that any order exempt (i) property which is exempt from the scrutiny of OILSR pursuant to 15 U.S.C. 1702, (ii) single transactions in which the purchase price is greater than \$25,000, (iii) parcels of 50 acres or more in size, and (iv) lots for which utilities are or will be available within a date certain and upon specified conditions (Respondent's Reply To Complaint Counsel's Proposed Order, pp. 12-13). Such exemptions are not justifiable. It is clear that the purchaser of large quantities of land is not immune from deception; indeed, large purchasers may be more in need of the protection provided by this Order since the ILSDA does not require disclosures on large parcels. The public interest is not served, nor Horizon's unfair or deceptive acts or practices stopped, by placing such limitations on the scope of this Order.

In consideration of Horizon's contention that the order should be limited to undeveloped land which is subject to no obligation to develop (Respondent's Reply To Complaint Counsel's Proposed Order, p. 11), the scope of the Order has been limited to vacant land, undeveloped land, predeveloped land, or any other land which is not immediately available as a building site with utilities in place or under construction. This limitation is intended to exclude from the coverage of the Order, building lots with houses constructed thereon,

or with utilities in place and available for immediate building purposes.

Section I

Section I of the Order consists of three subsections which order Horizon to cease and desist from (A) making 15 specific representations, (B) referring to 8 listed topics, and (C) engaging in 9 listed acts or practices. Although a number of these prohibitions are far reaching, the findings would indicate that such unfair and deceptive conduct by Horizon [292] was instrumental in persuading customers to purchase Horizon property. The breadth of these prohibitions is a reasonable preventative measure against new but similar unfair or deceptive sales schemes which would enable Horizon to by-pass with impunity this Order.

Section II

The provisions of Section II affirmatively require Horizon to notify prospective purchasers of the potential risks and the material facts regarding the purchase of land from Horizon, and to offer a refund or exchange where there has been a material failure to provide a contracted-for improvement.

Paragraph II A, "Notice To Buyers," provides consumers with basic factual information about the offered property two days prior to any in-person sales contact. The two-day period permits the consumer to assess the merits of the property without being subject to Horizon's sophisticated sales techniques and sales pressures. The Notice informs consumers in an objective way that (1) the topic is land sales; (2) the location and average cost of the land being sold; (3) the uncertainty of investment value or ability to resell; and (4) the availability and cost information for the following improvements: roads, water, sewers, electricity, telephone service and recreational facilities. At its conclusion, the "Notice To Buyers" states the advisability of seeking professional assistance and of reading the property report.

Paragraphs II B and C verbally and physically incorporate the "Notice To Buyers" into the sales contract.

Paragraph II D states the method and terms of a refund procedure in the event that Horizon has failed to provide contracted for improvements within six months of the time specified in the contract. This provision, to be included in all contracts, requires affirmative notification on the part of Horizon, which is justifiable under the circumstances of a failure to meet contract terms.

Section III

Section III requires Horizon to disclose the risky nature of land investment and the purchaser's right to reconsider and cancel the contract during a period of insulation from Horizon's sales representatives. The terms of the adhesion contract are cleansed of some unfairness by prohibiting the integration and forfeiture provisions.

Paragraph III A requires Horizon to "clearly and conspicuously" include in all sales and promotional materials a specified warning about the uncertainty of land values and of resale potential. Such an unequivocal disclosure about the risks in purchasing land should mitigate any conflicting implications of land as an excellent, risk-free investment.

Paragraph III B requires Horizon to incorporate into its contract a clause granting a right of cancellation within ten days after signing the contract. To insure that the purchaser can truly reflect on the sagacity of his purchase, all communications from Horizon must cease during the ten-day period. Other provisions insure that purchasers have knowledge of and do not waive or forfeit their cancellation right. [293] Horizon is required to include a separate paragraph calling the purchaser's attention to the ten-day period; to include two copies of a separate form entitled "Notice Of Right Of Cancellation"; to orally notify purchasers of the right to cancel; and to notify purchasers so that they can cure any deficiency in the "Notice Of Right Of Cancellation."

Where an exchange privilege exists, Paragraph III F requires Horizon to specifically disclose the fact that building exchange lots may increase purchaser indebtedness and may not be in desirable locations.

Paragraph III G institutes a mandatory refund privilege conditioned on the purchaser making a personal visit to the property within one year. Although this provision turns Horizon's refund privilege from an optional to a mandatory one, requiring that Horizon provide a personal visit-refund provision is not unreasonable in light of the time limitation imposed, Horizon's unfair and deceptive acts and practices in the past, and Horizon's chosen method of selling its land sight unseen to buyers located at great distances from the property.

Despite the fact that Horizon routinely included a personal visit-refund provision coupled with a property visit credit in its contracts, the record shows that few people exercised this refund option and in fact often were reloaded when they did make a property visit, even though they were not satisfied with their original purchase. To

protect against a reoccurrence of the above situation, Horizon is required to: (1) clearly disclose the terms of the refund privilege, (2) provide the purchaser with a specific "Notice Of Cancellation After Inspection," and (3) refrain from communicating with the purchaser during the five-day refund period subsequent to the property visit.

Paragraph III H requires Horizon to make public the names and addresses of purchasers of its lots. This will enable the public, including builders, to contact lot purchasers about the purchase or sale of the property. It takes away the monopoly which Horizon has on the names and addresses of lot purchasers prior to recording a deed to the property.

Subsections I through L of Section III go to remedying the evil of forfeiture in Horizon's adhesion contract. Horizon will be permitted to collect or retain only its actual damages both in future contracts and in contracts which are in existence as of the time this Order becomes final. This Order does not grant complaint counsel's requested retroactive relief for contracts in which forfeitures have occurred prior to the effective date of this Order. In light of *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) and 15 U.S.C. 57(b), such restitution is not ordered. However, failure to grant administrative relief in the form of restitution should not be considered indicative of a failure of Horizon's customers to qualify for relief; rather, the Commission should seek judicial redress for penal forfeitures in accordance with 15 U.S.C. 57(b).

In addition, Horizon is prohibited from enforcing the integration clause of its contract. The record shows a substantial number of material representations made apart from the written contract. These representations were unfair and deceptive and were relied on by [294]purchasers. Purchasers should not be prevented from using these representations as proof in any contract dispute with Horizon or in any subsequent litigation.

Paragraph III N authorizes a letter (Appendix A) be sent to all purchasers of Horizon's land. The letter serves to inform purchasers of this lawsuit and of the rights and options open to them.

Section IV

Section IV requires a change in the management structure of the HCIA's. Horizon is prohibited from controlling the management of the associations and is thereby prevented from utilizing the resources of the HCIA's for its own benefit. Further, HCIA members are given the opportunity to postpone payment of HCIA assessments until the lot being assessed is ready for development. Payments over

a forty-year period on a lot which may never be developed is particularly onerous. Further, HCIA payments to an association by those who have forfeited on their lots, and have no interest whatsoever in the development should be refunded. These payments are in an escrow account, are readily available for refunds, and refunds seem just and proper.

Section V

Section V requires Horizon to inform its present and future agents and affiliates of the contents of this Order. It further commands Horizon to police the activities of its agents and affiliates to insure compliance with this Order. In light of Horizon's past history of failure to prevent misrepresentations by its sales force, this section is both reasonable and necessary.

While the notice and disclosure requirements of this Order duplicate in some respects information in the property reports, such additional disclosures are obviously necessary since the property reports have not apprised purchasers of all information material to a decision to purchase respondent's land.

Redress

The Commission has stated in its complaint that it may seek redress for injury to consumers in the form of restitution and refunds for past, present and future consumers, and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act, as amended (15 U.S.C. 57(b)), if the record of this proceeding, and other factors, make such course of action necessary and appropriate. For this reason, full redress for consumers has not been ordered by the undersigned. However, it is recommended that the Commission now proceed under Section 19(b).

The record in this proceeding reveals a course of conduct filled with deliberate misrepresentations and the withholding of material information from consumers. The end result of this planned course of conduct was to appropriate from consumers millions of dollars for virtually worthless desert land that was represented to be an excellent [295]investment. This entire sales scheme was made with deliberateness and with the knowledge of its falsity, and it unjustly enriched a few at the expense of thousands of unsuspecting consumers. Commission redress for these helpless victims of a vicious consumer fraud is not only warranted, but may be the sole remaining hope for any consumer relief.

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CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.
2. The challenged acts, practices and methods of competition of respondent are in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.
3. Respondent Horizon Corporation has engaged in the sale of land, located in the States of Texas, Arizona and New Mexico, and has utilized in connection therewith false, misleading, deceptive and unfair representations and acts and practices, and has failed to disclose to purchasers material information in respect to such land.
4. Through the use of the aforesaid unfair or deceptive acts or practices, respondent has caused purchasers of its land to pay substantial sums of money to it for land that has little value as investments and little use as homesites, and has received and retained such sums of money and has failed to offer to refund or refused to refund such money to such purchasers.
5. The use by respondent of the aforementioned unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are true, and into the purchase of substantial amounts of respondent's land because of said mistaken and erroneous belief.
6. The aforementioned acts or practices were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. [296]

ORDER

I

It is ordered, That respondent Horizon Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, contracting or other promotion of vacant land, undeveloped land, predeveloped land, or any vacant land which is not immediately usable as a building site with utilities in place or under construction, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing, directly or by implication, through the use of any means, that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment;

2. There is little or no financial risk involved in the purchase of respondent's land;

3. The resale of land purchased from respondent is not, or [297] will not be difficult;

4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, *unless* such is a fact, and *unless* the terms, conditions and arrangements for repurchase, resale, or assistance are clearly and conspicuously disclosed at the time such representation is made;

5. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise;

6. Lots designated by respondent as "single-family residential", "multi-family residential", "commercial", or terms of similar import have a significant difference in present or expected value;

7. The price set by respondent for the land is equivalent to the market value of the land, *unless* adequate market data on resales of similar land (land in a similar location with the same degree of development) by previous purchasers in the possession of respondent substantiates this representation;

8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money;

9. The purchase of land in general is a good, profitable, safe or sound investment; [298]

10. The demand for land offered for sale by respondent has increased, is increasing, or will increase;

11. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing;

12. Purchasers must purchase immediately in order to ensure that a particularly desirable location will be available, or that lots similar to those being offered for sale may not or will not be available at the same price in the foreseeable future;

13. Purchasers have been specially selected;

14. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is

not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided*, that respondent may accurately recite the terms and conditions of the contract and of a refund privilege, if any, or of a cancellation right, if applicable; [299]

15. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in prices, including reference by actual dollar amount, percentage increase, or by any other means as indicative of market value, or of a change in market value;

2. The past, present or future population, employment or industrial statistics or trends or other statistics or trends in a geographic area, unless respondent has a reasonable basis at the time of the statement or representation to conclude that such statistic or trend either now has or, within the near future, will have a significant effect on respondent's property or a part thereof, other than those parts of each property which respondent has reserved for development, to which such statement or representation refers or relates;

3. The present, planned, proposed or potential development, improvement or facilities of the particular land being offered or of the subdivision or project in which the offered land is located that [300]differs in any material respect from the relevant language of the most current property report or from the "Notice to Buyers" (set forth in Part II of this Order);

4. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment;

5. The purchase, reservation, contracting or consideration by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to, any reference to any other person having a "hold" on a lot;

6. Respondent's reputation, size, assets or listing on any stock exchange; *provided*, that respondent may make such references as are required by statute or regulation in the place and manner required by such statute or regulation;

7. The present, planned, proposed or potential development of any land by anyone other than respondent;

8. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means: [301]

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with the purchase decision or the purchase of respondent's land;

2. Failing to provide any required federal or state property report sufficiently in advance of the signing of a contract so as to enable the purchaser to read it completely without interruption or distraction by respondent's representatives or employees;

3. Filling out a contract with the purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he desires to purchase the land being offered;

4. Subjecting a purchaser who has evidenced a desire not to purchase respondent's land to continued sales effort from any sales representative or other employee other than the original sales person, *i.e.*, any continuation of the "T.O." or "takeover" system;

5. Including in any contract or in any other documents shown or provided to purchasers, language stating that no express or implied representations have been made in connection with the sale of respondent's land, or that any particular representation has not been made in connection therewith;

6. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any [302]material respect from the rights or obligations of the parties as stated in the contract of sale, the Notice to Buyers provided for in Section II of this Order, and the property report;

7. Including any contract language permitting respondent to retain all sums previously paid by the purchaser upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract;

8. Failing to disclose, clearly and conspicuously, in all sales presentations, promotional materials, contracts and advertising relating to specific lots the existence, nature, location, size and significance of any and all easements, and any other physical features which could affect the full use and enjoyment of a lot;

9. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours.

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II

It is further ordered, That respondent Horizon Corporation shall:

A. Distribute to all purchasers a copy of the following "Notice to Buyers" at least two days prior to any in-person sales contact. (1) In [303]cases where the purchaser is invited by mail to attend a meeting sponsored by respondent, the Notice shall be included with the invitation. (2) In cases where respondent arranges to meet with the purchaser in the purchaser's home, or other location, respondent shall mail the Notice to the purchaser allowing sufficient time for the Notice to arrive two days prior to the meeting. (3) In cases where the initial contact with the purchaser is in-person (as, for example, at a booth located in a public place) respondent shall, after identifying briefly the purpose of the contact, give the Notice to the purchaser, request that the purchaser read it, and provide ample uninterrupted time for the purchaser to read it completely before continuing with any sales presentation. (4) In cases where the sale is to be completed entirely through the mail, the Notice shall accompany the initial mailing to the purchaser. The Notice shall be on a separate sheet of paper not attached to any other paper and shall contain only the required information and no other writing, unless approved in advance by the Commission. The Notice shall be in the following format and content:

NOTICE TO BUYERS

NAME OF SUBDIVISION

NAME OF SELLER

EFFECTIVE DATE OF NOTICE

THE PURPOSE OF [DESCRIBE THE TYPE OF MEETING OR CONTACT] IS TO PERSUADE YOU TO SIGN A CONTRACT FOR THE PURCHASE OF LAND IN [NAME OF STATE] AT AN [304]APPROXIMATE COST OF [AVERAGE LIST PRICE FOR THE LOTS BEING OFFERED], OF AN AVERAGE SIZE OF _____ ACRE(S), WHICH IS A COST PER ACRE OF \$ _____.

IMPORTANT

THE SELLER ADVISES YOU THAT IT IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS A FINANCIAL INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. THE FUTURE VALUE OF LAND IS VERY UNCERTAIN. EVEN IF THE DEVELOPMENT PROCEEDS ON SCHEDULE, YOU WILL FACE THE COMPETITION OF THE SELLER'S OWN SALES PROGRAM IF YOU OFFER YOUR LOT FOR SALE. THIS USUALLY INVOLVES AN EXTENSIVE SALES CAMPAIGN BY THE SELLER AND MARKETING COMMISSIONS WHICH YOU MAY NOT BE ABLE TO MATCH. YOU MAY ALSO FACE THE POSSIBILITY THAT REAL ESTATE

BROKERS MAY NOT BE INTERESTED IN SELLING YOUR LOT OR LISTING YOUR LOT FOR SALE.

[State the number of lots sold in the subdivision by the seller from the initial sale to the date of this Notice. State the number of unsold lots currently available for sale. State the number of lots which the seller intends to offer in the future to complete sales in the subdivision.]

[PROVIDE the following development information for the unit(s) being offered:]

ROADS

(INFORMATION TO BE APPLICABLE TO THE ROADS FRONTING PURCHASER'S LOTS) [305]

State who is currently responsible for construction and maintenance and whether the roads will be maintained by a public authority, a property owners' association or some other entity at some time in the future. State the cost to buyer for construction/maintenance, if any, during interim and after turnover.

State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the roads as represented. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE ROADS; THEREFORE, THERE IS NO ASSURANCE THAT THEY WILL BE COMPLETED.

Provide the following roads information:

Unit	Starting date	Percent now complete	Estimated completion date*	Present surface	Final surface**
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* If not known, insert the following warning: WARNING: THE PLANS FOR THE ROADS ARE SO INDEFINITE THEY MAY NOT BE COMPLETED.

** If unpaved then state "UNPAVED" and describe the surface. [306]

WATER

If water is to be supplied by an individual private system, state the estimated cost to the buyer of installation, treatment facilities, necessary equipment and any other required costs. If individual wells are to be used, state whether or not a refund or exchange will be issued in the event a productive well cannot be installed. If yes, state the terms and conditions thereof. If no, insert the following warning: WARNING: A SUCCESSFUL PRODUCING WELL IS NOT GUARANTEED. NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO DIG A SUCCESSFUL WELL.

If water is to be provided by a central system, state whether the buyer is to pay any construction costs, one-time connection fees, availability fees, special assessments or

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deposits for the central system. If so, state the estimated cost. If the buyer will be responsible for construction costs of the water mains, state the costs to install the mains to the most remote lot covered by the Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: **WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL WATER SYSTEM; THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED. [307]**

Provide the following water information:

Unit	Starting	Percent now	Service Available
	date	complete	date*

* If not known, insert the following warning: **WARNING: THE PLANS FOR THE CENTRAL WATER SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.**

SEWER

State the method of sewage disposal to be used. If by septic tank or other individual system, state the estimated cost of the system and any necessary tests. State whether a permit is required. If so, and if each and every lot has not been already approved, insert the following warning: **WARNING: THERE IS NO ASSURANCE PERMITS CAN BE OBTAINED FOR THE INSTALLATION AND USE OF SEPTIC TANKS OR OTHER INDIVIDUAL ON-SITE SEWAGE SYSTEMS.** State whether or not a refund or exchange will be issued in the event a permit is denied for the particular lot purchased, and the terms and conditions thereof. If neither will be issued, insert the following warning: **WARNING: NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO INSTALL A SEPTIC TANK OR OTHER ON-SITE SEWAGE SYSTEM.**

If a central sewage treatment and collection system is being installed, state who is responsible for construction of the system. State whether [308]buyer will pay any construction costs, special assessments, one-time connection fees, availability fees, use fees or deposits. State the amounts of these charges. If the buyer is to pay the cost of the sewer mains, state the cost of installation of the mains to the most remote lot in this Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: **WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL SEWER SYSTEM; THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED.** Provide the following sewer information:

Unit	Starting date	Percentage of completion	Service Availability date*
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* If not known, insert the following warning: WARNING: THE PLANS FOR THE CENTRAL SEWAGE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

ELECTRIC SERVICE

If the primary service lines have not been extended in front of, or adjacent to each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges [309] for extension of primary lines. Based on that policy, state the cost to the buyer for extending primary service to the most remote lot in this Notice. Provide the following electric service information:

Unit	Starting date	Percentage complete	Service Availability date*
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* If not known, insert the following warning: WARNING: THE PLANS FOR THE ELECTRIC SERVICE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

TELEPHONE SERVICE

If the service lines have not been extended in front of, or adjacent to, each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges for extension of service lines. Based on that policy, state the cost to the buyer of extending service lines to the most remote lot in this Notice. [310]

Provide the following telephone service information:

Unit	Starting Date	Percentage complete	Service Availability date*
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* If not known, insert the following warning: WARNING: THE PLANS FOR THE TELEPHONE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

RECREATIONAL FACILITIES

Identify each recreational facility. For each facility, provide the following information:

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Facility	Percent complete	Date of start of construction	Date Available for use*	Financial Assurance of completion**	Buyer's cost and assessments***
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* If not known, insert the following warning: WARNING: THE PLANS FOR THE (identify the facility) ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

** If none, state "none". If such exists, state the type and amount.

*** State any construction or use costs to the buyer including any [311]applicable property owner's association assessment, maintenance assessment or use fee.

At the conclusion of the Notice, place the following warning set off by a box outline: IMPORTANT, OBTAIN AND READ THOROUGHLY THE FULL PROPERTY REPORT BEFORE SIGNING ANYTHING. THE PROPERTY REPORT CONTAINS ADDITIONAL INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE CONTRACTING TO PURCHASE THIS LAND. IT IS DESIRABLE TO SEEK THE ASSISTANCE OF COUNSEL OR A QUALIFIED REAL ESTATE PROFESSIONAL FOR ASSISTANCE IN EVALUATING THE TERMS OR MERITS OF THIS PURCHASE BEFORE SIGNING ANYTHING. RETAIN THIS NOTICE—REPRESENTATIONS CONTAINED IN IT BECOME A PART OF ANY CONTRACT YOU MAY SIGN WITH THE SELLER.

If you wish to obtain more information or if you wish to cancel any appointment we may have arranged with you, you may call this toll-free number: 800 _____.

—(End of Notice)—

B. Include in all contracts of sale the following provision:

The representations and statements made by seller in the Notice to Buyers and in the Property Report regarding roads, utilities, improvements and recreational facilities are hereby incorporated into, and made a part of this contract as if set forth fully herein. [312]

C. Attach to the contract a copy of the Notice to Buyers that was given to the purchaser when the purchaser was first contacted by respondent.

D. Include in all contracts the following provision:

In the event the subdivision or the lot which is the subject of this contract has not been provided with or does not have available any contracted-for improvement or utility, or there has been a material failure to provide or make available any contracted-for recreational facility, amenity or structure, within six months of the time specified in the contract, the seller will, within 30 days after the expiration of the six-month time period, provide the buyer by certified mail, return receipt requested, with notice of such failure to provide or such unavailability, and of the buyer's right to a refund of all moneys paid (including, but not limited to principal, interest, taxes, and assessments) under the contract, plus interest at the rate of 7 percent per annum computed from the date of seller's default.

Provided, however, That at the time the purchaser is notified of such

refund, the purchaser may also be offered the option of selecting, instead of such refund, an exchange of the purchaser's lot, at no additional cost to the purchaser for another lot to which all contractual obligations of [313]seller have been met, which was or would have been of at least equal price on the date the purchaser's contract was signed, which is located in the same subdivision, has the same zoning classification, has the same utilities and improvements as seller was obligated to provide under the original contract, and is located no further from the same or substantially similar recreational and commercial facilities and amenities as the original lot. Where the buyer has received a deed or other evidence of interest in the property other than this contract, purchaser may be required, as a condition of obtaining a refund, to return such deed or other evidence of interest.

E. Carry out the notification and refund provisions as set forth in Paragraph D above and, in connection therewith not solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon the right of a purchaser to a refund as set out in Paragraph D of this Order, except that respondent may require a purchaser to exercise his option for a refund within a stated time period of not less than forty-five days after receipt by the purchaser of the Notice required by Paragraph D of this Order.

III

It is further ordered, That respondent Horizon Corporation shall:

A. Include clearly and conspicuously in all sales presentations, promotional materials, printed advertisements and radio and television commercials, the following statement: [314]

THE FUTURE VALUE OF LAND IS VERY UNCERTAIN. THE SELLER ADVISES YOU THAT IT IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS A FINANCIAL INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. IT IS SUGGESTED THAT YOU DISCUSS ANY POSSIBLE PURCHASE WITH A LAWYER, REALTOR OR OTHER QUALIFIED PROFESSIONAL.

B. Include clearly and conspicuously in each contract for the sale of respondent's land the following statement, in 12-point boldface type:

YOU, THE BUYER, HAVE THE RIGHT TO CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

SHOULD YOU CHOOSE TO CANCEL WITHIN THIS TIME, ANY PAYMENTS

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MADE BY YOU UNDER THIS CONTRACT WILL BE RETURNED AND ANY LEGAL DOCUMENT SIGNED BY YOU WILL BE CANCELLED AND RETURNED, WITHIN TEN BUSINESS DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE.

TO CANCEL THIS CONTRACT, YOU MUST MAIL OR DELIVER A SIGNED COPY OF THE 'NOTICE OF RIGHT OF CANCELLATION' (THAT WILL BE FURNISHED BY THE SELLER), OR SEND A TELEGRAM, OR SEND ANY OTHER WRITTEN NOTICE OF CANCELLATION TO SELLER AT SELLER'S [315]PLACE OF BUSINESS. A MAILING MUST BE POSTMARKED, OR A TELEGRAM MUST BE FILED FOR TRANSMISSION, NOT LATER THAN MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

During this ten-day period after the signing of a land purchase contract all communications, personal, telephonic or otherwise, between respondent and purchaser are forbidden and the initiation of any such communication by respondent shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable anytime before the purchased land is fully paid for and deeded to purchaser.

C. Print the following in 12-point boldface type as a separate paragraph of the contract immediately preceding the space provided for the purchaser's signature:

ATTENTION: WHILE YOU HAVE 10 BUSINESS DAYS IN WHICH TO RECONSIDER YOUR DECISION AND CANCEL THIS CONTRACT WITH FULL REFUND, WE RECOMMEND THAT, *BEFORE SIGNING*, YOU CONSIDER YOUR NEEDS CAREFULLY AND HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, REAL ESTATE AGENT OR OTHER QUALIFIED PROFESSIONAL.

D. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in 12-point [316]boldface type "NOTICE OF RIGHT OF CANCELLATION," which shall contain in 10-point boldface type the following information and statements:

Date of Transaction

Lot Identification(s)

Contract Number**NOTICE OF RIGHT OF CANCELLATION**

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT. USE THIS TIME TO EXAMINE WITH CARE THIS CONTRACT AND THE PROPERTY REPORT. YOU SHOULD ALSO USE THIS TIME TO HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, REAL ESTATE AGENT OR OTHER QUALIFIED PROFESSIONAL.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY [317]DOCUMENT YOU SIGNED WILL BE RETURNED WITHIN TEN BUSINESS DAYS AFTER THE SELLER RECEIVES THIS CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [name of respondent], AT [address of respondent's place of business] POSTMARKED (if mailed) OR FILED FOR TRANSMISSION (if telegraphed) NOT LATER THAN MIDNIGHT OF _____, [Date]

I (WE) HEREBY CANCEL THIS TRANSACTION.

(EACH BUYER MUST SIGN THIS NOTICE.)

[Date]

[Signature of buyer(s)]

-(End of Notice)-

Respondent shall, before furnishing copies of this "Notice of Right of Cancellation" to the purchaser, complete both copies by entering the name of respondent, the address of the respondent's place of business, the date of the transaction, the contract number and lot identification(s), and the date, not earlier than the tenth business day following the date of the signing by the purchaser, by which the purchaser may give notice of cancellation.

Respondent shall, where the signature of a purchaser is solicited during [318]the course of a sales presentation, inform each purchaser

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er orally, at the time the purchaser signs the contract, of the right to cancel as stated in this Paragraph of this Order.

E. Honor any signed and timely notice of cancellation by the purchaser, and within 10 business days after the receipt of such notice, (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

Whenever a timely notice of cancellation is received and said notice is not sufficient or proper in any manner, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the third business day following the purchaser's receipt of the mailing, if the purchaser is to obtain a refund.

F. Whenever respondent extends a privilege or other right whereby the purchaser may exchange the undeveloped land for a building lot, respondent shall:

1. Include in all materials, including the contract, which discuss the privilege or right, or if such privilege or right is described orally, include in such oral discussion, and in a concurrently delivered written notice, the following statement: BUILDING EXCHANGE LOTS EQUAL IN SIZE [319]AND COST TO THE LOT YOU ARE PURCHASING MAY BE LOCATED SUBSTANTIAL DISTANCES FROM THE ESTABLISHED DEVELOPED AREAS, AND THEY MAY HAVE LESS DESIRABLE ROADS, UTILITIES AND APPEARANCE SO THAT YOU MAY WISH TO EXCHANGE FOR OTHER MORE ATTRACTIVE BUILDING LOTS THAT THE SELLER MAY OFFER. THESE OTHER LOTS MAY BE SMALLER IN SIZE AND MAY REQUIRE YOU TO PAY MORE MONEY THAN YOU ARE NOW CONTRACTING TO PAY; and

2. State the specific financial terms or formula for exchange of the purchaser's equity in the original lot into the building lot, in the same place and manner as the statement in subparagraph 1 above.

G. Whenever respondent sells property site unseen it shall extend a refund privilege conditioned upon the purchaser making a personal visit to the property within one year after purchase and notifying respondent within five days after inspection that a refund desired. Respondent shall:

1. Provide the purchaser with a copy of the following "INSPEC-

TION AND REFUND PRIVILEGE NOTICE" at the time the contract is signed. The Notice shall be on a separate sheet of paper containing no other writing. The Notice shall be worded as follows: [320]

INSPECTION AND REFUND PRIVILEGE NOTICE

Personal inspection of any land purchase is highly desirable. If you should decide to inspect your purchase in accordance with the requirements of the refund privilege, you should be aware that it will be in seller's interest during the visit to encourage you to retain your property and to perhaps purchase additional land or trade for a more expensive parcel. Therefore, you may encounter additional sales presentations.

You should take the time during your inspection to visit the local area and examine the real estate market where the property is located. You should, on your own, contact local independent real estate agents for information.

In the event you decide to cancel this purchase, you will not be reimbursed by seller for your travel expenses.

THIS INSPECTION AND REFUND PRIVILEGE IS IN ADDITION TO AND DOES NOT TAKE AWAY YOUR 10-DAY CANCELLATION RIGHT. SEE YOUR CONTRACT.

-(End of Notice)- [321]

2. Provide the purchaser five business days *after* making the personal inspection within which to request a refund.

3. Include in any contract, in immediate proximity to the provision setting forth the availability of this refund, the following statement: YOU, THE BUYER, HAVE UNTIL MIDNIGHT OF THE FIFTH BUSINESS DAY AFTER THE CONCLUSION OF YOUR IN-PERSON INSPECTION IN WHICH TO NOTIFY THE SELLER OF A DECISION TO CANCEL. YOU MAY CANCEL THE ORIGINAL PURCHASE AS WELL AS ANY PURCHASE MADE DURING THE INSPECTION VISIT. NO REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS FIVE DAY PERIOD.

4. Ensure that every purchaser who seeks to make this inspection visit sees the precise lot identified in the purchaser's contract.

5. Orally inform the purchaser of this post-visit 5-day cancellation right at the time the contract is signed and again at the

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conclusion of the inspection visit; the visit shall be deemed to conclude:

a) after the purchaser has inspected the precise lot contracted for; and,

b) at the end point in the visit or tour when all contact with the purchaser by any employee or representative of respondent terminates. [322]

6. Furnish each purchaser, at the conclusion of the inspection visit (as determined in Paragraph G 5 above), with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION" which shall contain in boldface type of a minimum size of 10 points the following statements:

NOTICE OF CANCELLATION

AFTER INSPECTION

Date of conclusion of inspection tour of property

Lot Identification(s)

Contract number(s)

YOU MAY CANCEL YOUR CONTRACT(S) WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE FIFTH BUSINESS DAY AFTER THE ABOVE DATE. NO REPRESENTATIVE OF SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS FIVE DAY PERIOD. IF ANY REPRESENTATIVE OF SELLER DOES CONTACT YOU, PLEASE NOTIFY SELLER AT THIS TOLL-FREE NUMBER: 800 _____.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY LEGAL DOCUMENTS YOU SIGNED WILL BE RETURNED TO YOU WITHIN 10 BUSINESS DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE. [323]

TO CANCEL YOUR CONTRACT(S), MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: (Name of Respondent), AT (address of respondent's place of business), POSTMARKED (IF MAILED) OR FILED FOR TRANSMISSION (IF TELEGRAPHED) NOT LATER THAN MIDNIGHT OF _____.

(WE) HEREBY CANCEL THE ABOVE-DESCRIBED CONTRACT(S). (EACH BUYER MUST SIGN THIS NOTICE.)

(Date)

(Buyer's signature)

(Buyer's signature)

7. Before furnishing the purchaser copies of the "Notice of Cancellation After Inspection" set forth in Paragraph G6. above, complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property, the identifying contract numbers and the date, not earlier than the fifth business day following the conclusion of the inspection (as determined in Paragraph G5. above), by which the purchaser may cancel the purchase(s). [324]

8. During the post-inspection cancellation period all communications, personal, telephonic or otherwise, between respondent and the purchaser are forbidden and the initiation of any such communication by respondent shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable anytime before the purchased land is fully paid for and deeded to purchaser.

9. Investigate any notification received from purchasers of contact violating the provisions of Paragraphs G3. and G8. above, and comply with the requirements of Section V, Paragraphs F and G herein.

10. Honor any signed and timely Notice of Cancellation After Inspection by a purchaser, and within 10 business days after the receipt of such Notice (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

11. Where a timely Notice of Cancellation After Inspection is received purportedly in accordance with the requirements of this section, but where said notice is not sufficient or proper in some manner and respondent does not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the [325]purchaser must be mailed by midnight of the fifth day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

H. Unless otherwise requested by the purchaser, promptly record, with the appropriate authority of the county in which the land is located, all contracts for the purchase of respondent's land, and take such steps as may be necessary to advise such county authority from time to time of the last known mailing addresses of the purchasers under such contracts, but in no case later than the end of the calendar month following that in which respondent

becomes aware of any change in such mailing addresses. Once a lot is deeded, Horizon's obligation hereunder shall expire.

I. Include in all contracts for the sale of land a provision limiting the amount of moneys to be forfeited by a purchaser in the event of the purchaser's default under the contract to an amount not greater than respondent's actual damages from such forfeiture.

J. Refund to purchasers who are deemed in default after the effective date of this Order all moneys paid under the contract, including but not limited to principal, interest, taxes, and assessments which in the aggregate exceed respondent's actual damages within 60 days after the purchaser is deemed to have defaulted; *provided*, that this paragraph shall not preclude respondent from offering a defaulting purchaser additional alternatives which may be selected at the purchaser's option, in lieu of a refund. For purposes of this section of the Order, a purchaser shall be deemed to have defaulted when either of the following occurs: [326]

1. purchaser notifies respondent of intent to default; or
2. purchaser has failed to make a payment for a period of six months from due date of such payment.

K. Forbear from relying upon or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any purchaser the following contract clauses:

1. Respondent's contract clause which provides that the seller may retain all sums previously paid by purchaser in the event that the purchaser fails to pay any installment due or otherwise to perform any obligation under the contract; and
2. Respondent's contract clause to the effect that no express or implied representations have been made in connection with the sale other than those appearing in the contract.

L. Not misrepresent, nor solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon, the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation. [327]

M. Include in all contracts of sale of land a provision insuring free alienability of the purchaser's interest therein and extending the contractual rights and privileges of the purchaser to subsequent purchasers or assignees from the purchaser.

N. Mail to all purchasers of respondent's land, both those who are deeded and those who are under contract for the purchase of

such land, regardless of whether or not they are in default, the Notice attached to this Order as Appendix A.

IV

It is further ordered, That respondent shall:

A. With respect to any improvement association, however designated, which has jurisdiction over any land within any of respondent's subdivisions:

1. Take such actions, including the casting of all of respondent's votes and the soliciting of votes from purchasers of land known to be members of a given association if necessary, as are needed to call a special meeting of the members of said association no later than 60 days after this Order becomes final. [328]

2. Take such actions as are needed to notify all members of said association of the purposes and proposals to be made at such meeting as specified in subparagraph (3), and recommending that they vote for such proposals; *provided further*, that such notice shall be clear and conspicuous, shall be sent to all members by first class mail not later than 30 days before the scheduled date of such meeting and shall include no information other than the information contained in subparagraph (3).

3. Propose at any such meeting called pursuant to subparagraph (1), the following amendments in the articles of incorporation and by-laws of each such association as may be needed to accomplish the following:

(a) A limitation on the holding of positions on the Board of Directors, any Committee or as an officer of said association by anyone who, while serving in that position, is or has been a director, officer, employee, agent or representative of respondent or any of its subsidiaries or divisions to less than a majority of Board members. [329]

(b) Elimination from such by-laws and articles any powers, such as to extend utility lines, which the association has not and is not likely to use because of adverse effects on its non-taxable status.

(c) Postponement of the annual charges and assessments by each undeveloped lot owner until such time as water, sewer and electric utilities are in place in the street in front of each lot, or until such time as the utilities have been contracted for and the date of installation is certain.

(d) Refund of all HCIA charges paid by any purchaser whose

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contract has been forfeited or cancelled, together with a refund of a pro rata share of any interest earned on such payments to the date of refund.

(e) If (c) above is adopted, postponement of a purchaser's right to vote on association business until such time as the purchaser is liable for payment of charges and assessments. [330]

4. Cast all of respondent's votes in favor of all of the amendments in the articles of incorporation and by-laws which are described in subparagraph (3).

V

It is further ordered, That respondent Horizon Corporation shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future sales representatives and other employees, independent brokers, advertising agencies and others who sell or promote the sale of respondent's land or who otherwise have contact with the public on behalf of respondent;

B. Provide each person so described in Paragraph (A) above with a form to be returned to respondent, clearly stating that person's intention to conform his or her business practices to the requirements of this Order;

C. Inform each person described in Paragraph (A) above that respondent shall not use any such person or the services of any such person, unless such person agrees to and does file notice with respondent that he or she will conform his or her business practices to the requirements of this Order;

D. In the event such person will not agree to so file notice with respondent and to conform his or her business practices to the requirements of this Order, respondent shall not use such person or the services of such person;

E. Inform the persons described in Paragraph (A) above that respondent is obligated by this Order to discontinue dealing with those persons who engage on their own in the acts or practices prohibited by this Order, or who fail to adhere to the affirmative requirements of this Order;

F. Institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in Paragraph (A) above conforms to the requirements of this Order, and promptly investigate and resolve any complaints about such persons received by respondent, and maintain records of such complaints, investigation and disposition for five years from the date of the disposition of the complaint;

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G. Discontinue dealing with any person described in Paragraph (A) above, revealed by the aforesaid program of surveillance, who more than once engages on his own in the acts or practices prohibited by this Order; *provided, however*, that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondent in any proceeding brought to recover penalties for alleged violation of any other paragraph of this Order;

H. Create, maintain and staff a toll-free telephone number service that consumers may employ during regular business hours to request information, to cancel an appointment or to notify respondent of a [332]complaint. Provide this number in the space provided in the Notice to Buyers (Section II herein) and in the Notice of Cancellation After Inspection (Section III, Paragraph G6. herein).

VI

It is further ordered, That in the event respondent transfers all or a substantial part of its business or its assets to any other corporation or to any other person, including a transfer of all or part of the ownership interest of any or all respondent's wholly-owned subsidiaries, respondent shall require said transferee to file promptly with the Commission a written agreement to be bound by the terms of this Order; *provided*, that if respondent wishes to present to the Commission any reasons why said Order should not apply in its present form to said transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

VII

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its subsidiaries.

VIII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a [333]successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

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IX

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

APPENDIX A

IMPORTANT NOTICE TO LOT BUYERS IN
(Name of Subdivision)

The Federal Trade Commission is sending this letter to all (insert subdivision) lot buyers. It contains facts you should know about your purchase and about the seller.

In 1975, the Federal Trade Commission brought a lawsuit against Horizon Corporation, the parent company of (insert subdivision). This letter is part of the order issued when the lawsuit was decided.

Please read this letter carefully and consider the alternatives suggested in Part II. The Commission cannot advise you as to which decision is best for you.

I. LOT VALUE AND RESALE

There is virtually no resale market for (insert subdivision) lots which have not been developed with utilities. If your lot is presently undeveloped, it is unlikely that you would be able to resell it now except at a substantial loss. The extent of community development and population growth in the particular area of (insert subdivision) where your lot is located will determine whether or not you could resell your lot once it is developed. The population growth and community development necessary to enable you to sell your lot at or near the price you paid or are paying for it may not occur for many years, if at all. If the lot may be exchanged for a developed lot, there may be some small demand by builders for a limited number of such lots at the present time.

You should be aware that Horizon is not obligated in any way to buy back your lot or help you resell it.

II. OPTIONS AVAILABLE TO PURCHASERS

There are a number of options available to you at this time which you should review based on the information provided in this notice.

1. You can continue making your payments.
2. You can refuse to make any further payments and perhaps take a tax loss. According to the FTC Order you *cannot* be required to pay any more money, but if you elect this option, you will lose your land and all the money you have paid. However, if

you purchased your lot as an investment and not for your own use as a homesite, you might be able to declare the money you lost as a tax loss, deductible from your income on federal and state tax returns. It is suggested strongly that you contact your local District Director of the Internal Revenue Service *before* deciding whether to stop payments, if your decision is based on the possibility of taking a tax loss. Whether your loss is deductible will be based on your specific situation and you should *not* rely on this letter as authority for a deduction.

3. You can stop making payments and seek satisfaction against Horizon in a private lawsuit. You should consult an attorney before electing this option. The Commission's Order may be relevant in such a suit and your attorney should obtain a copy.

4. You can relocate to (insert subdivision) and, if possible, build on your lot or exchange for a building lot if so permitted by your contract or by company policy. You may, however, be required to pay more money for this exchange lot. Check with the company for details.

If you have any questions about the contents of this letter, write to me. Please do not telephone.

If you have questions about your account, or the development of your specific lot, call Horizon toll-free at (). A representative will return your call. Instead of calling, you may wish to write to:

(
(Insert respondent's address)
()

In any letter, you should include your name as set forth in your contract, your account number, your lot identification number, your current address and telephone number, and the name of the subdivision in which your lot is located.

Sincerely,
Attorney

OPINION OF THE COMMISSION

By BAILEY, *Commissioner*:

The Horizon Corporation is a land sales company incorporated under the laws of Delaware, with its principal office in Tucson, Arizona. At the time of this proceeding, it was engaged in the business of buying large parcels of unimproved land, developing core residential areas within those parcels, and selling the remaining unimproved lots to the public to be held primarily as investments. The large parcels of Horizon properties that were the subject of this case are Horizon City, near El Paso, Texas; Waterwood, near Houston, Texas; Rio Communities and Paradise Hills, near Albuquerque, New Mexico; Arizona Sunsites, near Tucson, Arizona; and Whispering Ranch, near Phoenix, Arizona. With the exception of Waterwood, which partially fronts Lake Livingston, Texas, Horizon's

properties are located in desert regions. As of May 31, 1976, the combined land area of these properties was 440,000 acres, or 687.5 square miles, and 280,200 acres had been sold. (See I.D. 8-22)¹ [2]

In marketing its properties, Horizon relied on national advertising, dinner parties held for potential purchasers, and in-home sales solicitations. The complaint alleges that during its marketing presentations, the respondent committed unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (FTC Act or Section 5), by making false and misleading representations to potential buyers of its land, by failing to disclose material facts and by using "high pressure" sales tactics. The heart of the complaint lies in counts I and II, which charge that Horizon marketed its undeveloped properties as excellent investments with little or no financial risk when in fact those properties were financially risky investments both because their future value was uncertain and because purchasers would probably be unable to sell their lots at or above the purchase price at the time of represented liquidity. (See I.D.p. 1) Other complaint counts, which will be discussed below, allege specific misrepresentations through which Horizon conveyed the net impression of its "excellent, financially risk-free" marketing theme.

The proceedings in this case were lengthy, lasting over 80 days; the record includes nearly 17,000 pages of transcript and 2,500 exhibits; and the proposed findings and briefs exceed 1,000 pages. Administrative Law Judge (ALJ) Ernest G. Barnes issued an Initial Decision, containing 295 pages and 137 findings of fact. He found that representations alleged in the complaint occurred in a significant number of Horizon's sales presentations, and that the net impression created by those representations was that Horizon property was an excellent, short-term investment with little or no financial risk. Based upon extensive expert testimony concerning the actual value

¹ The following abbreviations will be used in this opinion:

I.D.	- Initial Decision finding number
I.D.p.	- Initial Decision page number
Tr.	- Transcript page number
CX	- Complaint Counsel's exhibit number
RX	- Respondent's exhibit number
RAB	- Respondent's appeal brief
CAB	- Complaint Counsel's appeal brief
R. Ans	- Respondent's answering brief
C. Ans	- Complaint Counsel's answering brief
R. Rep	- Respondent's reply brief
C. Rep	- Complaint Counsel's reply brief
RPF	- Respondent's proposed findings
CPF	- Complaint Counsel's proposed findings

of Horizon land vis-a-vis its represented value, Judge Barnes concluded that this net impression was both false and misleading. (I.D.p. 256)

Respondent appealed the Initial Decision, arguing that the weight of the evidence is insufficient to establish liability. Complaint counsel cross appealed, seeking several substantial changes in the order entered by the ALJ. Oral argument was heard on May 8, 1980. During the argument, Commissioner Bailey asked respondent's counsel whether the parties had considered settling the case. Counsel responded that they had, but that he had agreed with complaint counsel not to mention that fact during the oral argument. (Oral Argument, Tr. 28)

On May 15, 1980, Commissioner Bailey received a letter from respondent's counsel (with copies to all participating Commissioners and complaint counsel) stating that settlement discussions had been revived. However, the Commission continued to consider the case and prepare its opinion on the merits because it did not have before it any motion to withdraw the case from adjudication so that the terms of an appropriate settlement could be considered. [3]

On November 26, 1980, the Commission received a "Joint Motion for Stay of Proceedings" from the parties requesting a stay in the Commission's consideration of this matter for seventy-five (75) days so that counsel for both sides could "finalize the remaining provisions of a proposed consent order for submission to the Commission." The Commission granted this motion in part, stating that no opinion would issue during the 75-day period but that it declined to stay consideration of the case. On February 17, 1981, the parties requested a twenty-one (21) day extension of the stay; the Commission also granted this request. On March 9, 1981, complaint counsel filed a "Motion for Leave to Modify Appeal." The motion stated that complaint counsel sought leave to modify their appeal from the Initial Decision. The proposed modification would "substitute proposed amendments to the findings, conclusions (of law) and order in the initial decision." Complaint counsel stated that they "seek leave to proceed in this manner so that this matter may remain in litigation for determination of legal and factual issues by the Commission." Simultaneously, respondent filed a "Response to Motion for Leave to Modify Appeal" which stated that respondent "consents" to complaint counsel's motion and that respondent intends to "withdraw its appeal from the initial decision and waive all appeal rights if the Commission accepts no later than May 15, 1981, the findings, conclusions and order to be proposed in complaint

counsel's modified appeal." The Commission granted complaint counsel's request for leave to submit a modified appeal.

On March 24, 1981, complaint counsel submitted its "Modification of Appeal" (hereinafter "proposed modifications"). Simultaneously, respondent submitted a "Response to Modification of Appeal" stating that, while it continues to assert that "evidence in the record does not support any findings or conclusions that respondent violated Section 5 of the Federal Trade Commission Act. . . , should the Commission accept the findings and conclusions substantially as offered by complaint counsel, or otherwise finds that the Act was violated, respondent joins complaint counsel in recommending the cease and desist order proposed by complaint counsel." However, respondent stated that it conditioned its recommendation on issuance of a final order (or an order subject only to public comment) by the Commission not later than May 15, 1981. On April 10 and April 14, 1981, at the request of the Commission, the parties filed briefs addressing some of the issues raised by the proposed modifications.

On April 24, 1981, the newly appointed Director of the Bureau of Consumer Protection,² filed a motion requesting additional changes in the order recommended by complaint counsel and respondent and asked that the Commission give respondent 10 days to respond to those suggestions. After reviewing the cease [4]and desist order recommended by the parties, and the Bureau Director's proposed changes, the Commission decided to make several modifications in the order's provisions before considering its final issuance. On April 30, 1981, the Commission directed the parties to submit briefs addressing the changes it had made in the cease and desist order they had recommended. These briefs were submitted on May 8, 1981.

After considering all briefs and the parties' proposed modifications, as well as the entire record developed in this case and the Initial Decision, the Commission has decided to issue this opinion and the attached order. The Commission agrees with the ALJ's holding that respondent has violated Section 5 in several respects. We largely concur in his Initial Decision, and with certain modifications discussed below and enumerated in Appendix A to this opinion, the Commission adopts findings of fact numbers 1 through 137.

The opinion set forth here is the product of the Commission's independent consideration of the record in this case. While the Commission has given due consideration to the proposed modifications of the findings of fact and conclusions of law submitted by

² James H. Sneed, the actual appointee to the position of Bureau Director, recused himself from this matter and the Deputy Director of the Bureau, Linda Colvard Dorian, acted in his behalf.

complaint counsel, and adopted those which it believes to be appropriate, the final conclusions of law entered here reflect changes in the Initial Decision which the Commission believes are supported by its review of the record as a whole.

As regards the order recommended by complaint counsel and respondent, the Commission has made modifications in some provisions but has substantially adopted the overall remedial scheme suggested by the parties. This scheme, taken as a whole, adequately addresses the violations of Section 5 committed by Horizon. However, the Commission notes that since the remedial scheme was developed in the context of respondent's offer to withdraw its appeal if the Commission adopted complaint counsel's proposed modifications of the ALJ's order, the Commission will not necessarily view this remedial scheme as a model for relief in future land sales cases.

The Commission's discussion of the violations committed by Horizon will focus first on the nature of Horizon's representations concerning the investment potential of its land, and second on whether those representations were true.³ In brief, we conclude [5] that Horizon marketed its land as an excellent, risk-free, short-term investment when in fact the investment potential of this land has not been and will not be realized in the time frames represented.

In addition, this opinion will discuss the role of so-called "high pressure" tactics in the sale of Horizon land, finding that some of these tactics constitute deceptive trade practices because they occurred in the context of deceptive misrepresentations concerning the land's value as an investment.

This opinion will also address the complaint allegations concerning the unfairness of five standard provisions included in Horizon's land sales contracts. The Commission upholds the ALJ's finding of liability with respect to one of these provisions—the forfeiture clause, but reverses his findings of liability regarding the other four

³ Although six separate Horizon properties were under investigation in this proceeding, the evidence presented at trial was structured more toward proof of company-wide violations than toward individual analyses of the six different properties. As a result, the ALJ found liability for all of the properties without separating out the evidence for each property individually.

In analyzing the record evidence concerning what representations were made, the Commission will also adopt a company-wide approach because we have been able to determine that Horizon's marketing approach was substantially similar for all six properties which are the subject of this proceeding. The record evidence on representations includes testimony of consumers as well as former sales representatives, training manuals, newspaper advertisements and celebrity promotional films. Consumer and sales representative testimony touched on virtually every property and reveals a substantially similar marketing approach to each. Training manuals, advertisements and celebrity promotional films further document Horizon's official policy and also reveal a unified marketing approach. However, when the Commission analyzes the truth of the representations made, we will consider each property separately. The six properties differ in several key respects (e.g. location, size, terrain, degree of development etc.). To sustain a conclusion that any given property is not in fact an "excellent, risk-free investment", we must analyze the evidence pertaining to the investment value of each individually.

provisions—the integration clause, property visit credit, guarantee and exchange privilege.

The Commission then considers the various general defenses raised by respondent, concluding that none individually, nor all collectively, should bar its findings of liability and entry of an order in this case.

Finally, the Commission rejects respondent's assertion that it does not have jurisdiction over the instant case and concludes that its jurisdiction over Horizon's land sales practices is complementary but not coterminous with that of other federal and state agencies. [6]

I. REPRESENTATIONS

The first step in determining whether Horizon violated Section 5 is to review the substantial record evidence concerning what representations Horizon made to consumers interested in purchasing its land. These representations define the nature of the investment consumers thought they were obtaining, and provide the framework for analyzing whether this investment is in fact what Horizon said it would be. A review of this evidence indicates that, through false and misleading representations and material omissions of fact, Horizon left prospective purchasers with the net impression that the land they were buying was an excellent, financially risk-free investment which would mature over a short-term.⁴

Horizon's typical sales presentation relies on a technique that it calls "funnelling": an approach that is designed initially to interest a prospect in investments and in land generally, then to focus the presentation on Horizon's various properties, next to narrow the focus to a single property, and, finally, to center on the specific lot that the sales representative is authorized to sell. (I.D. 39; I.D.p. 256) The representations alleged in the complaint are most easily understood if put into the context of a typical "funnelled" presentation.

The starting point in Horizon's marketing approach was an attempt to convince prospective investors that the safest and most financially rewarding investment possible is land. (I.D. 39 and 49) Horizon's sales representatives bolstered their sales pitch by comparing the investment value of land to the value of all other major types of investments. Consumers and former sales representatives testified at trial that prospects were repeatedly assured that their lots would

⁴ The Commission does not intend to rigidly define "short-term" or "long-term" investment. Respondent defines long-term as greater than twenty years. (See, e.g., RX 67) For purposes of this opinion we will accept that definition of long-term, and define as short-term any representations that an investment would mature in less than twenty years.

appreciate in value at a higher rate than other types of investments such as stocks, bonds, savings accounts and insurance, and that the rate of appreciation would outpace inflation. (I.D. 49; *see, e.g.*, CX 527c, w; Schuman, Tr. 5245; Kelly, Tr. 16431; and RPF 138; complaint counts I, II, and XXXI) To graphically convey this "fact" regarding land generally, Horizon's sales representatives frequently invoked a concept referred to as the "four pillars of investment." (*See, e.g.*, Schuman, 16431) Tr. 5244-45; Kelly, Tr. The four pillars represent stocks and bonds, savings accounts, insurance, and land. Sales representatives told prospects that regardless of which of these four investments they placed their money in initially, their money would always end up in land. Horizon claimed that this result was assured because the sophisticated investors who float stocks and [7] bonds, and who control banks and insurance companies, know that land yields the highest profits. Prudence therefore demands they commit their money to the purchase and development of real estate. (I.D. 49)

Horizon sales representatives, as well as Horizon's promotional materials, repeatedly stressed Federal Housing Administration (FHA) statistics, showing a 20 per cent/per annum increase in the value of land nationally between 1946 and 1968. (I.D. 51)⁵ One Horizon training manual refers to these statistics as "the most powerful selling tool ever devised." (CX 962a) The FHA statistics reflect the average appreciation of land throughout the country, from unimproved city lots to suburban and rural acreage. In applying these statistics to its own unimproved lots located in sparsely populated areas, Horizon made no effort to qualify their value as an accurate projection of the appreciation Horizon investors could expect. Although accurate in and of themselves, the FHA statistics were used to create the thoroughly misleading impression that government figures projected a return of 20 per cent/per annum on Horizon land.⁶

Horizon also trained many of its sales representatives to cite specific examples of extraordinary profits that had been made in the past on land in the United States, especially examples of tremendous profits that had been made on land in the locality where the sales presentation was being made. (I.D. 50, 53-55) Some of these examples

⁵ The use of these statistics was deemphasized in 1972 and eliminated from respondent's sales presentations in 1974. (I.D. 51)

⁶ It is a long-established principle of Section 5 law that "words and sentences may be literally and technically true and yet framed in such a setting as to mislead and deceive." *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943). Thus, in *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950), the Court stated:

To tell less than the whole is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.

included extraordinary profits that had allegedly been made on land purchased from Horizon. However, these claimed "profits" were calculated by comparing the escalating prices Horizon charged for its land over the years rather than any profits realized by consumers in the resale of their [8]Horizon lots. The use of atypical claims of profit made on land, even if true, can be misleading (and therefore deceptive) in the absence of a disclosure that such profits may be atypical.⁷

Once sold on a "smart" investment in "choice" land, the prospect was then directed to Horizon land.⁸

When the sales presentation "funnelled" to Horizon land, four general assertions served as the cornerstones of respondent's investment theme: (1) the rate of population growth in the southwestern United States would increase dramatically; (2) the increased population would settle in and around Horizon properties; (3) population growth would spur community development, which in turn would act as a catalyst for the establishment of an active resale market; (4) as a consequence of development and resale, the purchaser's investment would mature within a short-term. (Complaint counts III, IV, VI, VII, and VIII)

All four cornerstones are found in Horizon promotional films narrated by celebrities Merv Griffin or Leif Erickson. The films were regularly shown at Horizon's promotional dinner parties. (I.D. 36) They were also frequently shown during in-home sales presentations, or else representations similar to those in the films were conveyed to prospects by sales representatives. (I.D. 39)⁹ The thrust of the representations, as stated in the Merv Griffin film, is that "investors in Horizon land can be assured that they are investing in the very best type of profit potential land." (CX 527z-17) Both the films and the sales representatives stated that Horizon properties were located in growth areas of the Southwest, that by the year 2000 the population of the United States would increase from 200,000,000 to 300,000,000, and that most of that increased population could be expected to settle in and around growth cities such as El Paso, Houston, Albuquerque, [9]Tucson and Phoenix. (See, e.g., CX 527)

⁷ See, e.g., *National Dynamics Corp.*, 82 F.T.C. 488, 564-65 (1973), *aff'd in part and remanded in part*, 492 F.2d 1333, 1335 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974), *modified on remand*, 85 F.T.C. 391, 393-94 (1974), *reconsideration*, 85 F.T.C. 1052, 1053-54 (1975).

⁸ Although the Initial Decision primarily addresses issues relevant to Horizon's properties, the law judge did find, and we affirm, that Horizon had no basis to represent that land is generally superior to all other forms of investment, or that land will always appreciate in value at a rate higher than the rate of inflation. (See I.D. pp. 265-66).

⁹ These films were one of Horizon's most effective sales tools. The Commission's screening of representative copies of the films expedited our consideration of this case. Transcripts of the films' dialogue appear at CX 526 and 527. For a description of the films, see I.D. 46 and 87.

Horizon's promotional literature characterized these cities as lying in the "path of people and progress." (See, e.g., CX 274)

Horizon's dinner parties and in-home sales solicitations also featured representations concerning the growth capacity of its communities. For example, CX 858 is a script used by Horizon's dinner party speakers at various times in the Denver, Colorado, area. During those parties, prospects were told that according to a Presidential Commission the population explosion would require the building of "a new community of 250,000 every forty days," and that such new communities would "develop on the outskirts of existing [growth cities.]" (CX 858f) Speakers added that investors who own land on the outskirts of these existing cities would profit as their property becomes absorbed for development. (CX 858f-g)

Horizon further represented through written, oral, and visual media that dramatic population increases, coupled with "locked-in" growth corridors in the El Paso and Albuquerque metropolitan areas, would lead to development, resale, and profitability of lots in Horizon City and Rio Communities within a relatively few years. (See, e.g., CX 527z-3) These representations were intended to convey the impression that El Paso and Albuquerque could grow only in the direction of Horizon's properties, or that "almost all" or "most" of the growth of these cities would be toward Horizon's properties. Thus, these properties would develop quickly and profitably for lot owners. Respondent's promotional campaign stressed that in all of North America, only three existing cities have "locked-in" geographic corridors that allow population growth to occur "in one direction and one direction only," and two of these cities are El Paso and Albuquerque. (CX 858g)¹⁰

Horizon's sales representatives claimed repeatedly that El Paso is one of the fastest growing cities in the United States and that natural and artificial barriers surrounding El Paso will cause growth to be locked-in toward the direction of Horizon City. These barriers include the Rio Grande River, which separates the United States from Mexico at a point southwest of the city to a point south of the city, the Franklin Mountains, which dominate portions of land north and northwest of the city, and Fort Bliss Military Reservation, which stretches to the northeast. Respondent concludes that as the population of El Paso grows toward Horizon City, an increasing demand for living space will confront a necessarily limited supply of land, resulting in appreciation of the land's value. (I.D. 75) [10]

Like El Paso, Albuquerque was represented to be a bustling city

¹⁰ The other North American city represented to have a "locked-in" growth corridor is Vancouver, Canada. Findings relevant to Horizon's "locked-in" growth claims are summarized at I.D. 73 and 75.

with a "locked-in" growth corridor that leads directly to Horizon property. (I.D. 73) Sales representatives and promotional films informed consumers that natural barriers surrounded Albuquerque, creating a "fence" that constrained growth. The barriers included the Sandia and Manzano Mountains, three Indian reservations, three land grants, and a United States military installation, none of which, according to Horizon, was available for development.

When selling land in Rio Communities, sales representatives stated that growth could no longer occur within the "fenced" area, but that a freeway leading south from Albuquerque to Rio was a "gate" in that fence, and that because of the freeway growth would "leapfrog" the intervening barriers. (*See, e.g.*, I.D.p. 113) To graphically emphasize this point, sales representatives folded over promotional maps to demonstrate that Albuquerque was only three and one half "building miles" from Rio Communities. The ALJ summarized the situation as follows:

Albuquerque is described as a dynamic, pulsating city with a wall surrounding it on all four sides, bursting at the seams, with more and more people arriving each and every day. A freeway was built to the south to relieve the pressure and it leads to Rio del Oro, a completely preplanned community. [As Horizon said]—"Doesn't this look like a money making situation" (CX 160X, Y, Z1). (I.D.p. 112)

The remaining part of the sales presentation concentrated on the final two cornerstones of respondent's investment theme: community development and resale markets, and the length of time until investment maturity. Former sales representatives testified at trial that when funnelling the presentation to a specific property they played up Horizon's corporate image as a "community developer." They represented alternatively that Horizon was one of the leading community developers in the Southwest, that it was one of the leading community developers in the nation, or that it was one of the leading community developers in the world. (I.D. 80) One advertisement, emphasizing that land is only as good as the company you buy it from, stated that Horizon had \$150 million in assets, a net worth of \$60 million and an inventory of land valued at \$240 million. (CX 352) [11]

Sales representatives claimed that as a development company Horizon would establish residential areas, build country clubs and shopping centers, develop industrial and recreational parks, attract hospitals and universities, and set up improvement associations for continuing development. (I.D. 79-80; *see also* I.D. 81-83) Horizon representatives boasted that the company had retained a prominent planning firm, Gruen Associates, to "master plan" its properties, and that it had designated each lot within a property to be used for

specific residential or commercial purposes. (I.D. 79) During solicitations, consumers were presented with unit maps for each property that purported to show each lot and the specific, designated end use that each lot was assigned. (I.D. 78; I.D.p. 266) Prospects were also shown "TBA" maps, which are promotional maps printed by Horizon that depict the overall property "To Be Allocated," and its proximity to a neighboring city. Many of the "TBA" maps contain glossy photographs of residents enjoying themselves at recreational facilities in the property's core area. (See, e.g., CX 206-10, 230-32) Presentation manuals used during in-home sales solicitations and celebrity films also include many attractive scenes of the Southwest and Horizon communities. (CX 195-197, 526-27) During property visits and fly-in tours, customers were shown through the developed core areas where there were homes, golf courses and other amenities. Many consumers were led to believe that the property they were purchasing would soon be part of such a community. (I.D. 67)

Horizon represented that it was obligated to build roads within eight years of purchase. (I.D. 80; see, e.g., CX 932e, 949d) Images were conjured of properties criss-crossed with highways and secondary roads, and of communities humming with traffic and commerce. (See, e.g., I.D. 78-80) However, as the ALJ found, "[as] to most of its properties, Horizon's only contractual commitment is to stake the lot and to cause a road fronting on the property to be completed within thirty days after the purchaser has completed his payments or approximately eight years from the date of signing the contract, whichever is later." (I.D.p. 10) The "roads" need be no more than bulldozed strips in the desert sand because Horizon is not contractually obligated to provide road surfacing or maintenance. (I.D. 80)

The record indicates that the net impression of consumers following sales presentations was that their lot would be provided with utilities by either Horizon, the community improvement associations, or some other "developer." (I.D. 83; I.D.p. 266; see, e.g., CX 927f-g, 929i, 930g, 943a-b, 944e, 947f, [12]i, l, m, 948e)¹¹ These utilities are the key to any successful community development, for without them the "city" has no light and the desert land remains arid. Respondent failed to inform consumers that if neither Horizon, the improvement associations, nor any other developer were to install utilities, the cost to consumers of individually extending utilities to their lots would be prohibitive.¹² (See, e.g., *infra*, p. 32, note³³; p. 37, note³⁹)

¹¹ A number of transcript pages cited in I.D. 83 have been renumbered. Pages 5925-26, 6180, 6202, 6213, 6296, 6477-78, 6486, and 6577 are currently pages 5204-05, 5459, 5481, 5492, 5577, 5760-61, 5769, and 5830, respectively. Transcript pages 5918-6567 (Volume 9017-2-7) have been renumbered 5197-5850.

¹² The record reveals that community improvement associations exist for Rio Communities, Paradise Hills,

(Continued)

The Commission agrees with the ALJ's finding that the net impression¹³ created by Horizon's sales representatives was that roads and utility hookups to the consumer's property either [13] existed or would exist by the expiration of the land sales contract. (I.D.p. 266) The effect of these representations on consumers cannot be underestimated: roads and utilities mean the possibility of communities, communities mean resale, and resale means profit. Moreover, the incessant use of the terms "community" and "community developer" in Horizon's promotional literature and sales presentations had an undeniable capacity to mislead consumers into believing that Horizon was obligated to develop their property.¹⁴ Horizon was characterized as a Herculean enterprise, registered on the New York Stock Exchange, that had the financial capability to carry out a development program, and the managerial responsibility and expertise to put such a development program into action.¹⁵ Barbara Kelly, a former sales trainer and sales representative, succinctly made this point by describing the instructions from her own training:

Don't sell dirt. It doesn't matter where people own land, as long as Horizon is involved. They are the people that are going to make it happen. They are not a land sales company but a development company. That is the way we felt. (Kelly, Tr. 16,432)

These representations of a developed community, one well thought out and planned in advance, complete with schools, hospitals, residences, parks, industry, country clubs, and a permanent improvement association, had the capacity to lead consumers to believe

Horizon City and Waterwood. Under the land sales contract, membership is mandatory and annual membership fees in the range of \$10-120 are assessed. (I.D. 81-83) Testimony at trial indicated that the tax-free status of the community improvement associations (other than the association established for Waterwood) may limit their activities. For example, the associations may not be able to install utilities without losing their tax exempt status. (Roach, Tr. 13194) Further, expert testimony confirms the conclusion that the associations' accumulation of funds to date cannot meet the financial requirements of an infrastructure sufficient to provide utilities for the Horizon properties where they exist. (I.D. 81-83) Nevertheless, sales representatives used the associations' general contribution to development as a sales tool. (I.D. 82) Thus, Horizon not only misrepresented the role the associations could realistically play in developing the properties, but deceptively failed to disclose material information about the limitations on their activities. (See, e.g., *The Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 649 (1978), citing *Portwood v. FTC*, 418 F.2d 419, 424 (10th Cir. 1969); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 891 (6th Cir. 1967); and *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963), cert. denied 375 U.S. 944 (1963))

¹³ In making these determinations, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. (See, e.g., *Beneficial Corp. v. FTC*, 542 F.2d 611, 617-18 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977); *Continental Wax Corp. v. FTC*, 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2nd Cir. 1944))

¹⁴ The ALJ found that Horizon's characterization of itself as a "community developer," and of its properties as "communities," were misleading but not false because "the evidence is undisputed that Horizon has spent millions of dollars in its several properties." (I.D. 79) We affirm this finding.

¹⁵ See, e.g., "Waterwood Training film," CX 169c. The film stated that, at the time of Waterwood's development, total investment by everyone concerned will be 2.5 billion dollars, and that "Horizon Corporation is one of the few community developers in the industry with the resources to undertake a development of this dimension."

that they were purchasing an excellent, financially risk-free investment, which would prove to be rewarding within a short-term.

Horizon defends against this charge by saying that it made no representations regarding its development obligations and that no contract document commits it to accomplish development. (See, e.g., RAB 27-31) The assertion that no representations regarding development were made is belied by the record; the assertion that Horizon had no contractual obligations, even if true, misses the point. [14]

False verbal representations by a seller constitute deception within the meaning of Section 5. The fact that such representations are omitted from a written contract does not alter their status under Section 5.

The final level of Horizon's funnelling sales presentation was to concentrate on specific lots which were available for sale at the time of the presentation in question. Within each property,¹⁶ Horizon zoned lots for three types of use: single family units, multiple family units, and commercial property. (I.D. 69-70; complaint counts VI, VII) Horizon represented that properties zoned for different uses had different values and could be expected to appreciate at different rates. For example, Ms. Kelly testified that she was trained to sell single family property as a modest investment with a good return, multi-family property as a more expensive but more rewarding investment, and commercial property as the "cream of the crop." (Kelly, Tr. 16,432) Lots were also platted as being along a streetfront, on a corner, or in a cul-de-sac. (I.D. 70) The latter two locations were represented to have a greater investment value. Locations near proposed highways and highway loops, schools or university sites, shopping centers and recreational areas were stressed when there was no assurance of when, if ever, such development would materialize. (I.D. 69) Horizon discovered that existing customers were a fertile source of new sales, and those customers were vigorously induced to trade existing property for property zoned for a different use in a different location, always property which was more expensive and which would require a longer time to pay off. (For a description of this "reloading" technique, see I.D. 68; Schuman Tr. 5253-54; see also, I.D. 39 and CX 927e, h, 929c, d, e, 932f, 936c, 937b, 938d, 939a, 943a-b, 947j, n, 950i, 951f, g) However, without development, the only way to tell the difference between the different types of lots was to use a surveyor's map—all were composed of arid land, far from buildings or utility lines, with few access roads or even fences to distinguish between them. (See, e.g., I.D. 67)

¹⁶ With the exception of Whispering Ranch.

The ALJ found that some Horizon lots, although zoned for residential or commercial uses, were rendered useless by natural phenomena such as arroyos, washes and flood plains. (I.D. 85-86) He further found that these unexpected risks were not disclosed to consumers. (Id.) The failure to disclose a significant risk [15] that the purchaser of a product cannot reasonably be expected to anticipate constitutes a material omission of fact and a violation of Section 5's prohibition on deceptive business practices.¹⁷

Because the resale of individual lots would constitute the final disposition of the investment, customers frequently inquired about the existence of a resale market. Training manuals prior to 1971 were silent as to resale, while training manuals after 1971 instructed sales representatives to explain to prospects that lots could be resold by listing them with local brokers. (I.D. 61; *see, e.g.*, CX 157v, 160) Despite the "official" policy after 1971 of prohibiting representations that Horizon would assist in resale, former sales representatives testified that they were trained to, and did, make representations to prospects that Horizon would aid purchasers in their resale effort. (I.D. 61; I.D. p. 261-62; CX 950e) Frequent representations were made that due to a large consumer demand Horizon property was selling at a brisk pace, assuring that investors would encounter no difficulty in resale on their own and raising the possibility of resale prior to the time of development. (I.D. 61-62) Some sales representatives went so far as to suggest to prospects that because Horizon was a development company it might seek to repurchase the lots directly in order to facilitate community planning. (I.D. 62; complaint count VIII) We believe the clear message communicated to consumers from these representations was that an active resale market was already in existence or that one would come into existence during the represented term of the investment. (*See, e.g.*, CX 927n, 932e, 936c, 944e, 946h, 947f, i, l, m, n, 955d)

In fact, as our analysis of the investment value of the six properties will illustrate, there was no resale market for Horizon land. (I.D. 123-128)

Pace of development and availability of a resale market were important to potential investors because those factors determined how long consumers would be required to hold their investment before it could be disposed of for profit. The record indicates that sales representatives were trained to, and did, make specific time frame representations regarding the short-term nature of the

¹⁷ The Supreme Court has determined that in the context of an investment decision, facts are "material" if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway*, 426 U.S. 438, 449 (1976).

investment. (I.D. 53-60; I.D. pp. 259-60). The ALJ found that, "the time in which an appreciation in the price of Horizon's land could be realized was generally stated by sales representatives to be three to five years during the period 1968 to 1970. The [16]time period later was changed to seven to ten years, and there is some indication that more than ten years was used by sales representatives." (I.D.p. 259) The findings of the ALJ are amply supported by the record. The testimony at trial establishes that prior to 1971 sales representatives randomly predicted that customers' investments would mature within one to two years, or three to five, or five to seven. (I.D. 58-59)

Prior to 1971, Horizon's management was either ignorant of its sales force's representations, or else, in the face of brisk sales, it chose to ignore them. However, in approximately 1971, coincidentally the same time that the Federal Trade Commission began its investigation, Horizon management issued verbal new policy directives that its land was to be sold as an investment of at least twenty years. (I.D. 58; RAB 58-59; R. Rep 28-29) Former sales representatives testified at trial that it was virtually impossible to sell Horizon land as a twenty year investment, (I.D.pp. 59, 63) and that consequently representatives ignored the directive. (I.D. 58-59)

In 1973 respondent printed a brochure entitled "Principles of Land Ownership—A Policy Statement by Sidney Nelson, President, Horizon Corporation" ("Principles").¹⁸ The "Principles" state that Horizon land is a long-term investment, defined as greater than twenty years. Horizon maintains that since 1973 it has trained sales representatives to make *no* representations regarding length of holding time, save that appreciation would be long-term. Training manuals printed after 1973 instruct sales representatives to respond to questions, concerning the amount of time before the investment would mature, with the answer that Horizon has no "crystal ball" and that it cannot predict the future. (I.D. 58) Horizon argues that since the introduction of its "Principles" in 1973, it has reformed its sales policies to omit time frame representations, so that even if misrepresentations had been made in the past, that problem has been corrected, making a Commission order in this case unnecessary. (See, I.D. 57-58; I.D.pp. 259, 268; RAB 58-59) However, the record shows that the vast majority of sales representatives failed to conform to this new policy. As late as 1975, representations were still being made that purchasers could realize specific profits within two to ten years, over the "short-term", or over the term of the contract (typically eight to ten years). (See, CX 927h, l, m. 928b, 929k, 930c, d,

¹⁸ A text of the "Principles," RX 67 and 1551, is included in I.D.p. 54-56.

g, 932e, f, 936b, 938d, 942c, 943a-b, 944e, t, 946h, 947f, i, l, m, n, 949d, 950d, i, k, 951e, g, h, 955d.) Further, even if we [17]assume that Horizon management was successful in omitting references from sales presentations, and that this policy is currently in force, this policy does not cure the consumer injury caused by Horizon's failure to apprise investors that undeveloped Horizon land is not a short-term investment. To the extent purchasers are not adequately impressed with the fact of the extremely long-term nature of the investment—well into the twenty first century or beyond, as we find below—there is a deceptive omission of a material fact. Accordingly, even if Horizon successfully implemented this new sales policy, Horizon violated Section 5 of the FTC Act.

In addition to complaint counts I and II, which were affirmed by the ALJ, complaint counts III and IV charge that Horizon represented to consumers that their lots would be located within fully developed communities by the end of their eight to ten year land sales contract with Horizon, and that therefore, their investment would mature by that date. Our review of the record has disclosed that in most instances where time frame representations were made, purchasers entered into contracts with Horizon after being told that their investment would mature in ten years or less. (I.D. 58-59) In instances where sales representatives avoided time frame representations, consumers routinely inferred from the net impression of the presentation that maturity would be reached at the end of the eight to ten year period. (See I.D. 58-59; I.D.p. 259) Accordingly, we find that the record amply confirms the charges contained in complaint counts III and IV as to most of Horizon's sales. In the remainder of its sales, Horizon's representatives uniformly stated that the time until maturity would be ten to eighteen years. On the record before us, the Commission is hard pressed to find a significant number of Horizon sales where lots were represented as long-term assets.¹⁹

In sum, respondent's assertion before the Commission that short-term representations were never made is contradicted by the record. The alternative assertion, that respondent did not know of the overzealous claims of its errant sales representatives, lacks credibility and, even if true, cannot serve as a defense to Section 5 liability. Uncontradicted testimony establishes that sales representatives encountered difficulty in selling property when prospects were clearly apprised that resale would not be [18]possible for at least

¹⁹ Although Horizon officials testified that consumers were always apprised of the long-term nature of the asset, the ALJ did not find Horizon's witnesses credible on this point. (I.D.p. 273) We uphold his findings with respect to this issue and also affirm his general conclusions concerning the credibility of Horizon's witnesses, except where specifically noted in our modifications of the ALJ's findings of fact (see this opinion and Appendix A). (I.D.pp. 272-75)

eighteen to twenty years. (I.D. pp. 59, 63, 259; *see also*, CX 951i; Miller, Tr. 2356) It is difficult to believe that Horizon management did not searchingly inquire as to the marketability of its product and the manner in which its agents represented that product. As the ALJ points out, the law of agency demands no less. (I.D.p. 290) However, even if Horizon management chose to remain ignorant of the time frame representations made by its sales force, its ignorance constitutes a failure to exercise reasonable diligence in controlling sales practices in the field, and does not serve as a defense to Section 5 liability. We find that Horizon knew, or with the exercise of reasonable diligence should have known, that representations regarding the short-term nature of its product were regularly made by its agents. The Commission also finds that respondent knew, or with the exercise of reasonable diligence should have known, that a resale market for its properties would not develop prior to the year 2000, and that consequently Horizon land should not be marketed as a short-term investment.²⁰ Therefore, we conclude that Horizon allowed its agents to make false and misleading statements in marketing its properties.²¹

Horizon rejects the ALJ's characterization that the above evidence constitutes representations of an "excellent" investment. Instead, Horizon maintains that it represented its properties as "a desirable expenditure of discretionary funds." (RPF 137, p. 80; *see, also*, RPF 135-136) Alan Nevin, a realty investment expert, testified on behalf of Horizon that an "excellent" investment must have "a high guaranteed tax shelter, cash flow, substantial equity built up, tremendous tax shelter, guaranteed high level of appreciation probably 15 to 20 percent or more and be risk-free." (Nevin, Tr. 15,955; *see* I.D.p. 263) Horizon argues that because it made adequate disclosures of uncertainty as to time of resale and appreciation, its property was not represented as an excellent investment as that term is understood by an investment analyst. (RPF 134-137; R. Rep 12-17) This argument must be rejected because it relies upon a fundamental misunderstanding of Section 5 principles. In this regard, the Commission is in complete agreement with Judge Barnes' statement of the law: [19]

It is the impression conveyed or the implication created *in the mind of the ordinary purchaser* that is the concern in this proceeding, not whether the representations fit

²⁰ See individual property analyses, *infra* at pages 26-48.

²¹ Horizon relies on testimony of "satisfied" customers to prove that it did not misrepresent its properties. However, as the law judge points out, respondent cannot escape liability for a significant number of misrepresentations merely because in other instances misrepresentations may not have been made. (I.D. pp. 272-73) Nor is it a defense to a charge of deception under Section 5 that some customers were satisfied with the product, despite false and misleading representations having been made. (I.D.p. 272, n. 21)

precisely into the mold of an excellent investment created by a sophisticated realty investment expert. The word "excellent" has a dictionary meaning of "superior, very good of its kind; [e]minently good; first-class." *Webster's Seventh New Collegiate Dictionary*, 1969. Horizon, in almost every conceivable way short of an absolute guarantee, represented its land to be an excellent investment, better than savings accounts, stocks and bonds, and insurance, and risk free [I]t is concluded that Horizon represented its land to be a superior investment, [e]minently good, first-class Beyond any doubt, Horizon created the impression that its properties were excellent investments. (I.D.p. 263) (emphasis added)

The Commission has examined the evidence of record from the posture of a typical consumer who bought Horizon land. We have viewed both Horizon's representations and disclosures in the context of how and when they were made. We find that Horizon made unqualified representations concerning the appreciation of land as an investment, misrepresented its development obligations and failed to inform consumers of hidden risks when they existed; and we conclude that these claims and omissions of material facts violated Section 5. We further find that the net impression created by the representations detailed in I.D. 1-137 is that Horizon land is an excellent, financially risk-free, short-term investment. To determine if these general investment claims also violate Section 5, we turn now to an analysis of whether the evidence concerning Horizon's various properties contradicts those claims.

II. INVESTMENT VALUE OF HORIZON'S PROPERTIES

The Commission bases its findings regarding the truth of Horizon's representations concerning the investment value of its properties on the testimony of expert witnesses at trial who identified several factors that must be considered in evaluating the quality of land investments. The most important factors cited were: (1) the likelihood that the properties will absorb future population growth and development; (2) the future costs of any development expenses to be incurred by the purchaser; (3) whether the purchase price of the land was equal to the market value of the land; (4) special risk factors associated with the property; and (5) the carrying costs of the property until liquidation. (I.D.pp. 276-77; *see, generally*, I.D. 101-117) [20]

Of these five criteria, expert witnesses testified that an economic analysis of the investment characteristic called "absorption" (factor (1) above) was the most crucial test of a property's investment value, and consequently the Commission's determination of the truth of Horizon's representations centers on that criterion.

The record reveals significant variations among the six Horizon

properties with respect to absorption and also development costs (factor (2) above). Therefore, those factors will be separately considered in the discussions of each property which follow.

However, the record indicates with respect to factor (3) above, that lots in each of Horizon's six properties are susceptible to the same analysis with respect to market value. Rather than review that evidence six times, the Commission's finding concerning market value for all properties will precede the property-by-property analyses.

Similarly, the evidence concerning factor (4)—special risk factors, such as fractionalization of ownership and adequacy of development plans—applies equally to all six properties and will be considered as a whole before proceeding to the property-by-property analyses.

With respect to factor (5), carrying costs,²² complaint counsel offered some limited evidence to show that such costs existed, however this evidence is insufficient to establish that they posed material costs to investors in this case. Therefore, the Commission will not consider them in determining the truth of Horizon's investment claims.

A. Market Value and Special Risk Factors

An important criterion used by expert witnesses to evaluate the investment quality of Horizon land was whether the purchase price established by Horizon was equal to the land's market value. According to expert witnesses, the market value of land is the price arrived at through arm's length bargaining; it is essential in determining market value that both parties be well informed, that they are each motivated by their best self-interest, that they have a reasonable time to complete the transaction, and that the purchase price be unaffected by external factors. Respondent defines market value as "the highest price in terms of money which a property will bring in a competitive and open [21]market, under all conditions *requisite to a fair sale*, the buyer and seller each acting prudently [and] *knowledgeably*, and assuming the price is not affected by any undue stimulus." (Lomax, Tr. 15271, emphasis added; RAB 19).

Based on testimony of consumers and local real estate agents, the ALJ found that a resale market for undeveloped Horizon land was virtually nonexistent, now and in the foreseeable future,²³ and

²² Carrying costs include such expenditures as property taxes, improvement association charges and interest paid on the purchase price.

²³ Extensive record evidence reveals that, outside of the development core, at the time of trial little development existed on any property (I.D. 8-22; I.D.pp. 277-81), and virtually no resale market existed for lots within any property. The evidence concerning the availability of resale markets shows that (1) real estate brokers were unable to resell the land and therefore refused even to accept listings on Horizon's lots; (2) several individuals

(Continued)

concluded that that is strong evidence that undeveloped Horizon land has no market value. (I.D. pp. 281-82) He also found that even if the price Horizon originally paid to purchase its land represented market value, the tremendous disparity between Horizon's purchase cost and selling price is evidence that Horizon's selling price is far in excess of market value. (I.D. pp. 281-84)

Horizon urges reversal of this finding on a number of grounds. (See RAB 17-22; R. Rep 17-24) Horizon argues first that lack of a resale market evidences only present illiquidity, and does not prove that the land has no investment value. (RAB 21) The Commission must reject this argument for several reasons. By 1978, when the record closed in this proceeding, consumers who purchased lots in 1969 on the basis of representations that their investment would mature in seven to ten years had already been disappointed. Further, Horizon's argument fails to distinguish between short and long-term investment value. Lack of present liquidity is probative of whether a resale market may be expected to develop over the short-term. Also, other available evidence, particularly the absorption studies which will be discussed below, establishes that the present illiquidity of Horizon land will extend over the short-term. [22]

Horizon next argues that its expert witnesses have concluded that the purchase price consumers paid Horizon for the land represents its market value. (RAB 19) Horizon concedes that its experts based their testimony about market value "primarily upon a showing that the purchasers of the land were knowledgeable." (*Id.*) However, since the Commission finds in the property-by-property analyses below that Horizon's representatives significantly misrepresented the nature of the investment consumers were buying, the Commission cannot accept Horizon's conclusion that those consumers were "knowledgeable" in their investment decisions. (See C. Ans 23)

Horizon further contends that no conclusion regarding low market value may be properly drawn from the disparity between Horizon's acquisition cost and its selling price, and that such consideration by the ALJ was arbitrary. (RAB 21) Horizon reasons that it is illogical to compare the price it paid in 1959 with the price it asked in 1972; that the price Horizon paid per acre was much lower because it

made unsuccessful attempts to sell their lots; (3) a substantial number of purchasers eventually gave up efforts to sell their lots in frustration and defaulted on their contracts; (4) a substantial number of Horizon lots were auctioned off at tax sales but even those auctions sometimes failed to attract bids for Horizon lots; (5) expert witnesses could not discover a resale market for Horizon lots; and (6) some lots were ultimately assigned a minimum appraisal value for tax purposes. We further agree with the ALJ that Horizon officials were on notice of the lack of a resale market because they knew about the events described immediately above. (I.D. 123-128; I.D.p. 281)

bought the land in bulk; and that Horizon's master plan for development increases the land's value.

The Commission agrees with respondent that the bulk acreage it acquired in 1959 was a vastly different asset from the fractionalized property Horizon sold to consumers in 1972. However, this fact leads us to a different conclusion than the one Horizon posits. Horizon's division of its properties into small lots, which it sold principally to individual consumers rather than to large developers, frustrated a coordinated development effort. Thus, short-term development of Horizon land was unlikely even if Horizon properties were able to attract the population levels widely predicted by respondent. Because development of Horizon properties over the short-term was unlikely, no resale market for that land developed. Accordingly, consumers were left holding land that today lacks any short-term market value. Therefore, although the ALJ should have recognized the difference in the nature of the asset Horizon bought and the one it sold, the Commission affirms the ALJ's finding that undeveloped Horizon lots have no short-term investment value because no market exists to buy and sell those lots.

In sum, we conclude that respondent's definition of market value is fatally flawed for the purposes of this case by its own requirements regarding the knowledgeability of the buyer and the fairness of the sales transaction. Considering all of the evidence, we conclude that the purchase price established by Horizon bore little relation to the land's market value principally because of our agreement with the ALJ that there is virtually no resale market for Horizon land. [23]

Another element of investment value identified by expert witnesses at trial is the existence of special risk factors, such as physical characteristics of the land that determine whether it can be developed, the availability of an adequate water supply, the expertise and capability of the people involved in managing the investment, the adequacy of development plans and whether the ownership of the property is too fractionalized to enable a realistic achievement of development plans. The two most pertinent special risk factors which affect equally the majority of Horizon lots are fractionalization of ownership and lack of achievable development plans. As discussed above, the fractionalization of the ownership of Horizon lots has frustrated any meaningful development to date because individual lot owners, who in many instances live long distances from their property, cannot organize collective development efforts effectively. Further, the development plans promised by Horizon have not materialized and therefore cannot supplement or replace owner efforts. These problems have substantially contrib-

uted to the failure of the land as an excellent, risk-free investment that will mature over the short-term, which is how the land was marketed.

B. Absorption and Costs of Development

"Absorption" was defined at trial as the analysis of when a property will be placed into a specific "end use." (*See, e.g.*, Stevenson, Tr. 6589) "End use" is the purpose for which a purchaser ultimately buys property from an investor; it is generally a productive retail use,²⁴ but can also embrace non-productive financial transactions, such as holding valueless land for purposes of taking a tax loss deduction. (I.D. 105) End use is crucial to an informed investment decision because if the represented end use of a specific property is not in fact a reasonable end use for that property, that investment cannot correctly be characterized as "excellent." By selling its properties for ultimate residential and commercial end uses within a short-term, Horizon impliedly represented that those were reasonable end uses of its properties. Consequently, the Commission must determine whether it was reasonable for Horizon [24] to represent that its lots *would* be used for residential and commercial purposes over a short-term time frame of less than twenty years, and in many cases less than ten years.

One method of determining whether the represented end use is reasonable is to compare the represented end use with expert testimony concerning a property's "highest" or "best" end use. "Highest" end use is determined by analyzing the use of the property that at the time of final disposition will yield the greatest return on the investment dollar.²⁵ For example, one expert witness testified that the best end use of Whispering Ranch lots would be for cattle grazing. (Mangin, Tr. 3424)

The rate at which a property will be placed into its end use is the subject of an absorption study, which predicts the resolution of a supply and demand clash for property in a given study area.²⁶ At

²⁴ "End Use" was discussed by complaint counsel's expert witness, Professor Stevenson. Professor Stevenson testified:

[S]ound investment value must ultimately be related to use, which is basically a retail end user use. I think this is true in the stock market where you see many of the promotions that had no fundamental end market for their product got burned. This has been true in real estate. You can ride bubbles, you can ride dreams, but fundamentally it is end use that creates value (Stevenson, Tr. 6587).

²⁵ "Highest end use" was discussed by complaint counsel's expert witness, Jack Mann. Mr. Mann testified: Highest and best use is one of the basic principles. It is defined as that legal reasonable approximate utilization that results in the greatest net return to the land, legal in the sense that it must not be illegal, reasonable in the sense it must be susceptible of achievement and approximate is another word for "near," which simply means it is a use which must occur within the reasonably near future. (Mann, Tr. 7583).

²⁶ Respondent did not offer into evidence any type of absorption study for any of its properties prepared prior to the time it began to market land as an "excellent, risk-free investment." (I.D. 33) We can only infer, therefore, that no such studies existed. To the extent it made representations relevant to the absorption of its properties

least four distinct types of absorption studies were [25]proffered at trial.²⁷ The first type of absorption study is called a "trend curve" or "growth curve." (See, e.g., Stevens, Tr. 14731-34) It involves plotting a curve on a graph that represents the historical growth rate in a given study area, and extending the curve to predict future growth. The second type of absorption study is a statistical model that focuses on economic and demographic factors. (See, e.g., Stevens, Tr. 14749-54, 14892) Among the factors indexed in the studies before us are population density changes derived from census data, income data, tax rates, labor costs, land costs, percentages of ethnic populations, and desirability of climate.

The trend curve and statistical absorption studies described above were used by expert witnesses and city planners to predict future absorption in large geographic areas, such as regions and major cities. From this data, a third type of absorption study was prepared to predict specifically the absorption of population and industry by Horizon's properties. Thus, the third type of absorption study is another statistical model. By computing, in a mathematical function, economic and demographic factors that appear to influence the population distribution and growth among different sections of specific cities, analysts are able to project future growth trends in suburban areas close to those cities. Using this approach, witnesses testified to the percent of a study area's future population that a Horizon property may be expected to garner. (See, e.g., Stevens, Tr. 14695-96)

A fourth type of absorption study was used for Waterwood. Because Waterwood was designed primarily as a recreational community and not as a residential community, an economic study was prepared to aid in predicting the rate of "consumption" of units

without establishing "prior substantiation" for those representations, it may have violated Section 5. (See *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *aff'd in part and remanded in part*, 492 F.2 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974), *modified on remand* 85 F.T.C. 391 (1974), *reconsideration*, 85 F.T.C. 1052 (1975); *Pfizer Inc.*, 81 F.T.C. 23 (1972)) However, because the complaint did not allege a lack of substantiation, and because our review of the record indicates that this question was not tried by the express or implied consent of the parties (see *Commission Rules of Practice*, 16 C.F.R. 3.15(a)(2)), we decline to find an independent violation of Section 5 on this ground.

Expert testimony at trial clearly demonstrates that such studies are a prerequisite to the development of a truthful marketing program. (I.D. 133) In future cases, the Commission will consider carefully the adequacy of the substantiation possessed by a land sales company at the time representations are made in evaluating whether Section 5 violations have occurred.

²⁷ Horizon has argued that complaint counsel produced absorption studies for only one property, Horizon City. (RAB at 17-18) While Horizon is correct that Horizon City is the only property for which complaint counsel contracted with a private analyst to prepare an absorption study, complaint counsel nevertheless did produce existing studies prepared by state and local planning offices that yield absorption data. If a specific absorption study—the analysis of when a property is expected to be placed into a specific end use—is deemed credible, it makes little difference whether the study was prepared by a city's planning department or by a private economist. Indeed, Horizon's own expert witnesses treat city planning projections as absorption studies. (See, e.g., Stevens, Tr. 14731-2)

in Waterwood, rather than the rate of growth of Waterwood's permanent population. (See Stevens, Tr. 14696) [26]

The Commission below analyzes the various absorption studies in the record on a property-by-property basis. In balancing the investment value of each property against Horizon's investment claims, particular attention is directed to two central questions: (1) based on absorption analysis, will respondent's properties be placed into residential and commercial end uses in a short-term period of less than twenty years; and (2) based on the time until absorption, can residential and commercial end uses be considered reasonable end uses of respondent's properties.

The second factor identified by expert witnesses as important to evaluating land investment decisions concerned the future costs of any development expenses to be incurred by the investor. Consideration of this factor is particularly appropriate in this case, because the parties have debated whether consumers understood both that Horizon was not obligated to develop its properties and that development costs of a consumer's lot could be many times the purchase price of that lot. The Commission therefore also reviews the evidence concerning this issue in the property-by-property analyses below.

Horizon City

As of May 31, 1976, Horizon City contained 135.94 square miles or 87,000 acres, (some 60,000 of which had been sold) and was located 5-19 miles southeast of the city limits of the City of El Paso, Texas. El Paso contained 160.71 square miles and had a population of approximately 400,000 when the record closed. (I.D. 17; CX 874 p. 48)

Horizon City lots were platted and sold for residential and commercial end uses. Whether these were reasonable "end uses" over the short-term time frame represented is a function of the interaction between the supply of land in the El Paso metropolitan area and the demand for that land. In this regard, both sides at trial produced absorption studies that describe the outcome of El Paso's supply and demand duel, and which inform us whether, where, and when people are expected to move into the El Paso area. Despite the attempt at trial to prove whose projected population figures were more accurate, the Commission affirms the ALJ's finding that the parties differed only insignificantly with regard to El Paso's expected future population. (I.D.p. 279)

In preparation for trial the parties prepared thirty year absorption studies of both the El Paso Standard Metropolitan Study Area (El

Paso SMSA) and Horizon City, for the years 1975–2005. At trial, the two sides each called witnesses who were experts in the fields of economics, demographics, and real estate planning. Expert witnesses called by complaint counsel projected a population of the El Paso SMSA for the year [27]2005 of approximately 742,450.²⁸ (I.D.p. 279) Expert witnesses called by Horizon projected a medium population for the same year of approximately 809,000 and a low projection of 745,000.²⁹ (*Id.*) [28]The difference between complaint counsel's figure and respondent's low figure is less than 5,000, a difference that we find is meaningless in the context of a projection thirty years into the future.³⁰

Because the parties substantially agree on the likely population of the El Paso SMSA in 2005, the real controversy centers around whether Horizon City can be expected to absorb enough of that population in order to establish an active resale market. Horizon contends that, due to high growth and a locked-in corridor of development, sufficient resale markets will develop. Respondent's expert witnesses Dr. Stevens and Mr. Lomax both project populations of approximately 75,000 for Horizon City in 2005. (I.D. 111, 113) Based on these projections, respondent expects absorption of land in Horizon City to be 19,000 acres, or 21.8 per cent of the land, by the year 2005. (I.D. p. 279) By contrast, complaint counsel's experts

²⁸ Among the evidence most heavily relied upon by complaint counsel witnesses was a 1970–74 demographic study prepared by the Department of Planning, Research and Development, City of El Paso (Planning Department), which assessed current and future transportation needs of the El Paso SMSA through the year 2000. Complaint counsel's expert, Joseph Lusteck, used the Planning Department's study to project the 2005 population of 742,450.

Mr. Lusteck is a real estate planning consultant and President of the Real Estate Division of Wortman and Mann, Inc., a real estate and financial services company located in Jackson, Mississippi. Prior to his employment by this firm, he was with the Pima County [Tucson, Arizona] Planning Department and then with the Jackson [Mississippi] Planning Board. (I.D. 103)

The record also indicates that the Planning Department's 1970–74 study predicted a year 2000 population for the El Paso SMSA of 680,750. A Planning Department study conducted in 1976 revised the projected figure to 685,000, a difference of 4,250. (I.D.p. 279; compare CX 876 with CX 797)

²⁹ Horizon's expert witnesses were Dr. Benjamin Stevens and D.A. Lomax. Dr. Stevens prepared an absorption study projecting populations of 863,700, 809,000, and 745,000 as high, medium, and low populations, respectively, for the El Paso SMSA in 2005. D.A. Lomax accepted the Planning Department's figures as accurate and produced a population projection that was in accord with Dr. Stevens. (I.D.p. 279)

Dr. Stevens is the President, Director and senior research associate of the Regional Science Institute, a non-profit research corporation doing work in regional analysis, regional economics, industrial location, land development and urban planning. The field of regional science encompasses the fields of economics, demographics and planning. Dr. Stevens received a Master's Degree in city planning and a Ph.D. in regional planning and economics from the Massachusetts Institute of Technology. He has authored or co-authored 60 articles, reports and discussion papers on various aspects of regional science. For the last twenty years, he has been co-editor of the *Journal of Regional Science*, the most highly regarded professional publication in its field. (I.D. 110)

Mr. Lomax is a professional real estate appraiser and consultant, who specializes in land in Texas, New Mexico and Arizona. He had been an appraiser for 25 years at the time of his testimony and is a member of the American Institute of Real Estate Appraisers, a senior Real Estate Appraiser and an Accredited Rural Appraiser. At the time of trial, he was national vice president of the Society of Real Estate Appraisers and had served for six years on the Society's Board of Governors. He is the author of the *Rural Appraisal Handbook* for the New Mexico State Tax Commission and has written several articles for professional Magazines on appraising. (I.D. 112)

³⁰ The expert witnesses agreed that the more distant the projection the greater the chance of statistical error. (See, e.g., Mann, Tr. 7700, 7738)

predict a population in 2005 sufficient only to absorb 2,859 acres, or 3.3 per cent of the land in Horizon City. (I.D.p. 279) Horizon has argued that "[a] city is never fully absorbed; few cities even exceed 70-75% absorption." (RAB 18) While it may be true that few cities ever exceed 75 per cent absorption, in the instant case, respondent's best estimate is that by the year 2005 Horizon City will remain 78.2 percent *unabsorbed*. Complaint counsel estimate that Horizon City will be 96.7 per cent *unabsorbed*.

Although respondent has disputed that significant numbers of short-term representations were made, respondent has never seriously contended in this proceeding that Horizon City could be developed within a short-term of less than twenty years. As stated, we find that a significant number of short-term representations were made. Accordingly, we hold that representations of [29]excellent, financially risk-free investments regarding unimproved lots in Horizon City, which were due to mature within a short-term, were false and misleading and were deceptive within the meaning of Section 5.³¹ [30]

Although we have found that respondent's best estimates of potential Horizon City absorption are insufficient to stimulate a resale market over the time frame represented by Horizon, we further find that even those projection are overly optimistic and predicated on unlikely assumptions. Mr. Lomax's population projection of 75,000 for Horizon City was based on the assumption that,

all of the lands . . . immediately contiguous to the basic development area of Horizon City would be absorbed into the community, [the city of El Paso,] and would be a part of the community. *This is assuming that the community were to grow in a very straight pattern*, taking in every section of land as it moves from where it is now out to that point in time. (Lomax, Tr. 15217) (Emphasis added)

The assumption of a "very straight" growth pattern has its genesis in respondent's belief that growth in the El Paso SMSA is locked-in to a geographic corridor leading from El Paso's city boundaries to Horizon City's front door. To rely on such an assumption, respondent

³¹ Further confirmation of our conclusion exists in the fact that resale of Horizon City lots has been insignificant through the time of trial. (See, generally, I.D. 125) Illustrative of the situation is the experience of the El Paso Board of Realtors, which operates a Realtors Listing Service (RLS), and which increased its membership from 166 in 1970 to 354 in 1977. The ALJ found that of "about 1400 inquiries to the RLS there were approximately 266 listings and 14 sales of Horizon City property during the period from 1970 to 1976 (Tr. 2376, 2388-89.)." (I.D.p. 238) Consumer testimony also indicates that little or no resale market existed. (I.D.p. 240)

Respondent additionally contends that Horizon City is in fact a desirable long-term investment, which could mature within twenty to thirty years. We do not have to reach the merits of this contention since we find that short-term representations were made. However, we note in passing that even if we assume that Horizon made long-term representations and that respondent's absorption estimates are more accurate than complaint counsel's, we doubt that an absorption of only 21.8 per cent of Horizon City's lots will result in the stimulation of a sufficient resale market to enable the owners of Horizon land to engage in competitive dispositions of their investment over a twenty to thirty year period.

must ignore both the past directions of growth surrounding El Paso, and the official future development plans of El Paso's Planning Department. Jonathan Cunningham, the Director of the Planning Department, testified at trial regarding issues concerning the direction of El Paso's growth. The Planning Department has prepared annual demographic studies of the El Paso SMSA since 1960 and has prepared several studies encompassing a number of years. Major studies were undertaken in 1963, 1969, and 1976 in conjunction with El Paso County, the Texas Highway Department, and the Bureau of Public Roads (now the Federal Highway Administration). (Cunningham, Tr. 2514) These studies were developed to assess the current and future transportation needs of the El Paso SMSA. [31]

Mr. Cunningham's testimony is summarized by the ALJ at I.D. 76. He testified that since his incumbency began in 1958, El Paso has grown, and is expected to continue to grow, in more than one direction. Although natural and artificial barriers constrain growth on three sides of El Paso, these barriers are not a solid curtain. The Planning Department expects significant growth to continue on either side of the Franklin Mountains, to the north and to the west, as well as in the "Lower Valley" area to the southeast. The Lower Valley contains vast acreage of fertile to arid land between the Rio Grande River and Interstate Highway 10, south of Horizon City. Limited growth is also expected in the vast acreage between Ft. Bliss and Horizon City, north of Horizon City.

Mr. Cunningham testified that El Paso has vigorously pursued a policy of annexing developing communities that border the City. He stated that the City was currently engaged in constructing a major "North-South Freeway," which will lie between the Franklin Mountains and Ft. Bliss. Community development has already begun along this highway as the City annexes land and extends utilities and City services. One of complaint counsel's experts, Joseph Lusteck, testified that in addition to the vast tracts of land surrounding El Paso, as of the date of trial, sufficient vacant land existed within the city boundaries to accommodate *all* of El Paso's projected growth through the year 2005. (I.D. 104)³² Moreover, the land within the City would have the advantage of ready access to city services and city utilities. Considering the vast amount of unimproved land both within and without the corporate city, Mr. Lusteck concluded that the principal flaw in the Horizon City property was

³² For a description of Mr. Lusteck's qualifications, see, *supra*, p. 27 at note ²⁸.

the oversupply of land in relation to the relatively small projected demand for that land. (*Id.*)

The oversupply problem is magnified by the difficulty of extending utilities to Horizon City. Respondent divided Horizon City into small lots, which it sold principally to individual consumers rather than to large developers. Without the sincere effort of a developer who has the financial capacity to extend utilities to Horizon City, the fractionalization of land ownership in Horizon City results in an inadequate infrastructure which is incapable of [32]establishing utilities. (I.D.p. 284) The cost of development is extremely high, and few, if any, individual consumers could be expected to have the financial capacity to extend utilities to their own lots.³³ [33]

³³ Complaint counsel has compiled the following data from Horizon's federal property reports. (CPF 4.219, 4.220)

As of May, 1975, the costs of providing utility services to the various areas of Horizon City could be as high as the following amounts:

<u>Service (and Comments)</u>	<u>Amount</u>
Water (drilling individual wells not permitted)	\$200,000 (CX 35p-q, 36o-p) \$2.00 per foot
Gas line beyond 150 feet alternative is LP bottled gas with storage tank	\$180,000 (CX 35q-r, 36p-q) \$200
Telephone	\$135,000 (CX 35r, 36q)
Sewage - central system	\$1,000,000
septic tank	\$450 (CX 36q-r, 35r-s)

The estimated cost of installing an electric line to the Horizon City lots listed below, which are nine of the "typical" lots used in Mr. Mann's appraisals, (CX 892g-x), are as follows:

<u>Lot and Location</u>	<u>Electric Line Cost</u>
(1) Lot 1 - Mountain Shadow Estates Unit 54, Block 389	\$23,729
(2) Lot 2 - Horizon City Estates, Unit 19, Block 19	38,797
(3) Lot 3 - Horizon City Unit 44, Block 318	3,472
(4) Lot 4 - Mountain Shadow Estates Unit 30, Block 232	55,937
(5) Lot 5 - Sunland Estates Unit 19, Block 69	7,452
(6) Lot 6 - Horizon City Unit 82, Block 687	13,591
(7) Lot 7 - Horizon City Estates	47,305
(8) Lot 8 - El Paso East	1,546
(9) Lot 9 - Horizon City Estates Unit 15, Block 2	23,594

(CPF 4.219, 4.220)

When Horizon began to market its land in the 1960's, it represented to consumers that it or some other developer would develop the property over the short-term. However, according to complaint counsel's proposed findings of fact, when the record in this proceeding closed in 1978, Horizon City had been developed to the following extent:

The Horizon City property consists of about 87,000 acres. (Lusteck, Tr. 7039). That acreage includes [an] existing development "core" with a total size of 6,400 acres (CX 1563b). As of June, 1978, 18 years after Horizon began selling lots in this property (RX 1538a-h), buildings had been constructed on only about 600 acres in that existing core (Steele, Tr. 14019-20). There were about 700 to 800 dwellings in Horizon City as of June, 1978 (Steele, Tr. 14022). Only two other homes were located outside that core in the rest of the property (Steele, Tr. 14022). No homes had been built as of that time in the 4,000 acre core area surrounding the lake (Steele, Tr. 14022; RX 1536b). Various other holdings by Horizon total another 1,500 acres. (RX 1536b) Thus, the total area within the property on which building has occurred after more than 18 years is about 600 acres out of 87,000 acres. That amounts to less than 7/10ths of 1% of the land in that property. (CPF 4.215, p. 140)

We find that the preponderance of the record evidence establishes that growth in the El Paso SMSA is not significantly "locked-in" toward Horizon City. The record also indicates that due to a massive oversupply of land surrounding El Paso, coupled with the availability of city services and utilities to communities which develop within the City, little if any land in Horizon City can be expected to develop in the foreseeable future beyond the small core area where respondent has committed the necessary funds for development. Accordingly, we conclude that Horizon violated Section 5 when, through false and misleading representations and material omissions of fact, it marketed Horizon City lots as an excellent, financially risk-free, short-term investment. [34]

Rio Communities

As of May 31, 1976, Rio Communities contained 249,000 acres, or 389.06 square miles, and was located 3-18 miles east of the town of Belen, New Mexico. Some 159,000 acres had been sold. (I.D. 11) Rio's northern edge is 35 miles south of Albuquerque, New Mexico. (*Id.*) Horizon literature points out that its Rio property "blankets a land area larger than the combined cities of San Diego, Las Vegas and Philadelphia." (CX 155c) Horizon began purchasing land for Rio Communities in the 1960's; in mid-1978 there were approximately 700 homes on the property with an estimated population of between 2,500 and 3,000. (I.D. 13) The population of Belen, in 1976, was approximately 5,000. (I.D. 11)

Whether Horizon's representations concerning Rio Communities were true depends upon the reasonableness of the represented end use of Rio lots in the context of the represented time until absorption. At trial, complaint counsel called economic and demographic experts to testify, as well as the Director of the City of Albuquerque Planning Department (Planning Department) and the Director of the Middle Rio Grande Council of Governments (COG). COG is an association of local governments that was established to coordinate planning for the entire Albuquerque area. (I.D. 74)³⁴ Complaint counsel also produced absorption studies prepared by the Planning Department and by COG. For example, Exhibit CX 828, entitled "Land Use Plan-1985-Albuquerque, New Mexico" (Land Use Plan), is a 1964 Planning Department economic and growth analysis, with projections through 1985. This study has been on the public record during the entire time in which Horizon has made representations relevant to the absorption or marketability of its Rio lots. The "Land Use Plan" concludes:

Albuquerque has an abundance of vacant land available for urban development. Even the most optimistic growth projections would not utilize this land within the current century. (CX 827z-11; see also, Carruthers, Tr. 3036)

Absorption studies conducted by COG after 1964 downwardly revise the Planning Department's population projections. (I.D. pp. 118, 278 n.24) COG further concludes that the most efficient planning strategy in the Albuquerque area is for development to occur in vacant land in and around existing cities, so that [35] utilities and city services can be made readily available. (See, e.g., CX 837 pp. 23-27) Given this conclusion, we can infer that COG's planning efforts are and will be geared toward developing land both within Albuquerque's city limits and in its immediate suburbs. Thus, local government entities will be working at cross purposes with any effort to develop Rio Communities (some 35 miles south of Albuquerque) over the short-term.

Complaint counsel's expert witness, Professor Howard Stevenson, supports this conclusion.³⁵ Professor Stevenson did not prepare an absorption analysis of his own; his conclusions rested on an analysis

³⁴ It is worth noting that neither Rio Communities nor Paradise Hills are represented in the COG and therefore are not active participants in that group's development planning. (Id.)

³⁵ Dr. Howard Stevenson is an associate professor at the Harvard University School of Business Administration. He holds doctorate and master's degrees from the Harvard Business School. His doctorate focused on business policy and long-range planning, and his master's, which he received with high distinction, involved specialization in investment finance. Dr. Stevenson is a trustee of a successful real estate investment trust, a director of a company which invests long-term pension accounts in the United States realty market, a director of a company whose activities include building and development, and a trustee of a non-profit charitable organization whose primary purpose is acquisition and development of raw land which is deemed to be of a critical conservation interest. (I.D. 101)

of studies already published. The Initial Decision incorporates Professor Stevenson's conclusions at page 200:

The total of lots available in [Rio] sites exceeds the full needs of the community of Albuquerque under the most optimistic projections through—and I have to think back, given what I just included—well beyond the end of the century and depending on which projections you read, perhaps well into the 22nd century (Stevenson, Tr. 6676).

Since at least 1972, COG reports have consistently predicted that the greatest share of Albuquerque's future growth, through 1995, would occur in the northeast sector. (CX 836 p. 11, 828g; Pierce, Tr. 3117) Population projections of respondent's expert witnesses were basically in accord with those of COG, however respondent differed with respect to the direction of growth.³⁶ [36]

Horizon's expert witness, Dr. Benjamin Stevens, testified that Albuquerque's population growth will allow Rio Communities to develop as a satellite city.³⁷ Dr. Stevens analyzed industrial location and employment in Rio Communities, predicted the number of commuters between Rio and Albuquerque, predicted the migration of retired couples to Rio, predicted the secondary employment generated by the projected population of Rio (Stevens, Tr. 14850), and concluded that the likely population of Rio Communities in the year 2005 would be 60,000 but could be as low as 30,000 or as high as 90,000. (Stevens, Tr. 14867) Even if respondent's projections are accurate, the Commission finds that the absorption of only 60,000 people (an event not predicted to occur until beyond the close of this century) in a property that contains 690 square miles (six times the size of the District of Columbia (I.D.p. 277)) will not result in the stimulation of a resale market of sufficient size to enable the owners of Horizon land to engage in competitive dispositions of their investment within the short-term.³⁸

Evidence supporting respondent's "locked-in" claim is similarly unconvincing. At best, the evidence produced by Horizon supports only the conclusion that growth would be locked-in over the long-term. Relying on testimony of its own expert witness, Horizon has stated: ". . . *by the end of the century* the major portion of Albuquerque's growth would be channeled in a southern direction toward Rio Communities (Nevin, Tr. 15874-75)." (emphasis added,

³⁶ COG projected a population in the Albuquerque area by the mid-1980's of 800,000 people (Pierce, Tr. 3112-15); the city itself projected a population of 825,000 people by the year 1985 (Carruthers, Tr. 3035). Horizon's expert witness gave a somewhat more conservative projection of 700,000 to 750,000 (Lomax, Tr. 15159).

³⁷ For a description of Dr. Stevens' qualifications, See, *supra*, p. 27, note 29.

³⁸ Detailed findings concerning the lack of a resale market for undeveloped Rio lots, at the time of trial, are found at I.D. 124. These findings, which we uphold, conclude that there was no resale market for undeveloped lots in Rio Communities as of 1978.

RPF 103) At no time on appeal has Horizon pointed to evidence that would indicate a rapid locked-in growth pattern over the short-term in which its sales force represented development would occur. It is certain that growth is not significantly locked-in for the seven to ten year time period generally represented, and unlikely that growth will be significantly locked-in at any time during this century. Accordingly, we affirm the ALJ's conclusion that representations of locked-in growth were false.

Respondent further contends that absorption of Albuquerque will not necessarily precede absorption of Rio simply because vacant land is available within Albuquerque. The argument is bottomed on the fact that the price of a building lot in Rio may be vastly cheaper than a comparable lot in Albuquerque. (RPF p. 135 n.94) Respondent's analysis, however, fails to consider all [37]relevant information. While the cost of *purchasing* a lot for a homesite in Rio may indeed be relatively inexpensive, the cost of *developing* a Rio lot outside of the development core is prohibitive to the ordinary consumer.³⁹ Horizon has not contracted with any other development company to begin improvement in a significant number of Horizon lots, and the fractionalization of ownership in Rio has prevented the development of an infrastructure capable of coordinating development. The result is that after close to two decades of Rio land sales, only 800 dwelling units had been constructed, concentrated on 500 to 1,000 acres within the Enchanted Mesa development core, out of Rio's 249,000 acres. (Steele, Tr. 14013-16; RX 1541a-i)

In conclusion, we find that the massive oversupply of land in Rio Communities, the distance of Rio Communities from Albuquerque, the multi-directional growth of Albuquerque at present, the availability of land and utilities within Albuquerque, and the prohibitive cost of obtaining utilities in Rio Communities effectively preclude

³⁹ Complaint counsel compiled the following data from Horizon's federal property reports. Cost of installing utilities to lots so that those lots could be used for building are considerable. As of May, 1975, costs for utilities within the various subdivisions of Rio then being offered for sale could be as great as the following amounts:

Electricity		\$142,500	(CX 11n)
Water	- extension of line	\$340,000	(CX 10m)
	- drilling well	\$ 12,500	(CX 10m, 11m)
Gas	- lines not available, use bottled gas instead;	\$ 500	for storage facilities (CX 12n)
Telephone	- line	\$165,000	(CX 12n-o)
	- radio telephone	\$ 2,500	(CX 12n-0)
Sewage	- septic tank	\$350,600	(CX 10-0)

In addition, it was not possible to drill for water on lots within Rio del Oro (CX 10/1-m). Septic tank use was subject to the granting of a variance because some lots were below the minimum size required, following an increase in that minimum by local authorities, apparently after the lots were planned by Gruen Associates and subdivided by respondent (See, e.g., CX 10n-o, 11n-o). (CPF 4.128)

the establishment of an active resale market for Rio lots over the short-term. Therefore, representations of excellent, risk-free, short-term investments regarding Rio lots were false and misleading and deceptive under the FTC Act. [38]

Paradise Hills

As of May 31, 1976, Paradise Hills consisted of 13,000 acres, or 20.3 square miles, and at its closest border was located 3 miles northwest of Albuquerque, New Mexico. Some 9,000 acres had been sold. Paradise Hills was Horizon's first property to be purchased and marketed. The ALJ found that, "[s]ales of acreage parcels have been insignificant since 1970. . .". (I.D. 8)

The analysis of whether Paradise Hills lots were properly sold with the expectation of their evolution into a fully developed community within a short-term follows closely the preceding analysis of Rio Communities. Complaint counsel argue that Paradise Hills will not be developed over the short-term because of the ample availability of vacant land within Albuquerque, where utilities and municipal services already exist, and because of the fractionalization of ownership of vacant Paradise Hills land, which casts doubt on any rapid expansion of Albuquerque's utility system. This argument is supported by expert testimony, and embraced by the ALJ, who found that if Paradise Hills' past growth rate is duplicated each year in the future, it will take over a century to fully utilize all lots. (I.D. 102; I.D.pp. 277-78; *see, supra*, Rio Communities analysis.) Although Horizon represents that Paradise Hills is its model community, local realtors confirmed at trial that virtually no resale market exists for Paradise Hills lots outside of the core area.⁴⁰ [39]

Respondent's defense relies primarily on the testimony of two expert witnesses to prove that Paradise Hills lots are an "excellent investment".⁴¹ These witnesses, D.A. Lomax and Alan Nevin, produced detailed investment analyses which traced the historic rise in land values in the Albuquerque area, and which conclude that Paradise Hills lots can be expected to continue to appreciate throughout this century. (I.D. 113, 117)⁴² [40]

⁴⁰ The resale market for undeveloped Paradise Hills land has always been insignificant. (*See, generally*, I.D. 123) For example, the Albuquerque Board of Realtors' Multiple Listing Service reports only one sale of undeveloped Paradise Hills land between 1970 and 1974. (CX 817A-N) Also, William A. Kelly, a Paradise Hills realtor and former Horizon sales representative, testified that the lack of a local resale market resulted in his having to refuse the 50-100 persons who sought bulk acreage listings of undeveloped Paradise Hills land with his firm between 1975 and 1978. (I.D. 123)

⁴¹ Actually, Horizon's expert witnesses characterized the investment as "very good". (Lomax, Tr. 15207; Nevin, Tr. 16071)

⁴² For a description of Mr. Lomax's qualifications, *see, supra*, p. 27, note 20.

D.A. Lomax's credibility was hotly disputed by the parties at trial because he was interviewed by complaint

The Commission finds that Horizon's defense fails to respond to the gravamen of the complaint, which charges that Horizon sold land as a rapidly appreciating asset which would be liquid within a short-term. The investment analysis of respondent's witnesses overlooks the fact that virtually no resale market exists for those lots or is likely to exist within the short-term. If a consumer purchased land in Paradise Hills in 1965, with the expectation of using investment profit to help finance retirement in 1985, the knowledge that the value of the land has theoretically risen offers little consolation to the consumer, when in 1985 no one wants to buy that land. Accordingly, while it is unclear whether Paradise Hills will attract a sufficient population to establish a resale market over the long run, the record is sufficiently clear to enable the Commission to confirm the complaint's allegations with respect to Paradise Hills. We hold that Horizon violated Section 5 when, through false and misleading representations, it marketed Paradise Hills lots as excellent, risk-free, short-term investments.

Arizona Sunsites

As of May 31, 1976, Arizona Sunsites contained approximately 47,500 acres, or 73.4 square miles, and was located in Cochise County, Arizona, between 12 and 31 miles from Wilcox, Arizona, approximately 55 miles north of Douglas, Arizona, and 100 miles southeast of Tucson, Arizona. Some 35,000 acres had been sold. Wilcox and Douglas had approximate populations of 3,000 and 12,000, respectively. (I.D. 14) Horizon describes Sunsites as "thinly populated . . . consist[ing] primarily of undeveloped land, grazing land and farm land." (CX 67z-4, 10-k report for fiscal 1976) At the time of trial, Arizona Sunsites had a population of 1,150, with thirty-five homes located outside of the core area. (I.D. 14, 15) Sales of Arizona Sunsites land began in 1962. (RX 1542b)

counsel prior to his engagement by Horizon as an expert witness and took positions directly contrary to his subsequent testimony for Horizon at trial. For example, on cross examination, complaint counsel elicited the following testimony from Mr. Lomax:

Q. Do you recall also stating [at an earlier interview with complaint counsel] that if Horizon subdivisions grew as fast as Albuquerque, it would be the 22nd century before lots would be developed, all lots would be developed?

A. Yes, I probably made that statement. (I.D. 114)

The ALJ therefore gave little weight to Mr. Lomax's testimony. (I.D.p. 283) We uphold the ALJ's findings concerning Mr. Lomax's credibility.

Mr. Alan Nevin is a consulting economist and senior vice president with the Sanford Goodkin Research Corporation of Del Mar, California. Sanford Goodkin provides investment advice to the real estate and lending community. Mr. Nevin's areas of expertise include land, new construction and the technicalities of feasibility. His previous employment included jobs with Ernst & Ernst, Gladstone Associates and the American Housing Guild. He holds a Master of Arts degree in statistical research from Stanford University and a Masters Degree in Business Administration from American University. (I.D. 117)

Horizon represented that investors could realize short-term profit from Sunsites lots based on end uses of commercial and residential development. The record strongly supports complaint counsel's allegation that commercial and residential lots will not develop within a short-term, and that Sunsites will not likely be developed anytime within this century. In support of this finding, the ALJ and the Commission rely heavily on expert testimony of economic development planners employed by the State of Arizona and Cochise County. [41]

At the time of trial, Frank Mangin had been Program Director for Economic Development for the Arizona Governor's Office, Planning Department since December 1975.⁴³ He was responsible for attracting employment-based industries to Arizona. (Mangin, Tr. 3372) Mr. Mangin testified that he has received no inquiries from industry regarding potential development in Arizona Sunsites, and further that the property "lacks the first ingredient" necessary to attract industry, "a demonstrable labor supply." (Mangin, Tr. 3401) Mr. Mangin also stated that neighboring towns could not provide jobs for residents of Arizona Sunsites. (Mangin, Tr. 3401-04) He concluded that the population was too thin in Sunsites and neighboring towns even to support a retail trade center. (Mangin, Tr. 3406)⁴⁴

Mr. Mangin further testified that seventy-five per cent of the residents of Sunsites are retired. (Mangin, Tr. 3404) There are no schools in Sunsites, and the nearest high school is 28 miles away. (*Id.*) Moreover, Mr. Mangin testified that the economy of Arizona Sunsites won't support an adequate medical infrastructure, and that Arizona Sunsites had not a single doctor. (Mangin, Tr. [42]3398-99, 3415, 3471-2)⁴⁵ Relying on Mr. Mangin's testimony, the ALJ correctly identified a contradiction in Sunsites development: the community is dependent upon retirees for growth, but medical facilities and personnel are inadequate either to support a geriatric

⁴³ Mr. Mangin's experience has also extended to similar employment on behalf of Cochise County and Douglas, Arizona. (See I.D. 106; Mangin, Tr. 3374-5, 3396, 3433-37) He was therefore familiar with Arizona Sunsites.

Prior to his employment in the Governor's office, Mr. Mangin was Executive Director of the Douglas (Cochise County) Arizona Chamber of Commerce and consultant to the City of Douglas Industrial Development Authority. Mr. Mangin was also employed by Arizona's Valley National Bank as vice president of Industrial Development. He was a real estate broker from 1959 until 1965. (I.D. 106)

⁴⁴ Mr. Mangin explained that major retail outlets generally require a population far in excess of Sunsites' current population or future population expectations.

There aren't enough folks to have a 30,000 square foot Sears or 75,000 square foot K-Mart. In the case of, for instance, a major retail discount house, they usually like trade area populations of 50,000, so that's why the only major retail outlets in Cochise County are in Sierra Vista and Douglas, because Douglas and Agua Prieta combined are about 60,000 and the Sierra Vista trade area is about 50,000.

⁴⁵ Mr. Mangin testified to the difficulty of attracting doctors to rural communities. In 1972 there were 46 physicians (41 medical doctors and five doctors of osteopathy) servicing a population of one physician per 1,500 people. Because of the insufficient medical market in Sunsites, the Planning Department has made little effort to attract medical personnel to the Sunsites area. Mr. Mangin stated that while some rural communities in Arizona have incentive programs to attract doctors, Sunsites does not. (Mangin, Tr. 3398-98, 3472)

community or to spark growth or development as a retiree center. (I.D. 106; I.D.p. 280)

David Altenstadter, Cochise County Planning Director since 1970, prepared an absorption study in 1975, entitled Cochise County Projective Allocation Model. (CX 860) This report, which was widely disseminated in Cochise County, projected year 2000 populations of 152,778 in Cochise County and 5,000–6,000 in Arizona Sunsites. (I.D. 109) While the relationship between a population of 5,000 and land spanning 73.4 square miles was never translated into an absorption percentage, we conclude that absorption will be insufficient to enable competitive disposition of investment property over the short-term.⁴⁶

In addition to the vast oversupply of land at Sunsites, the cost of utility extension is prohibitive.⁴⁷ [43]

Respondent's sole expert witness regarding Sunsites was Sanders Solot, a Tuscon real estate appraiser.⁴⁸ Mr. Solot analyzed the investment value of Arizona Sunsites and concluded that the value of Sunsites lots would increase at a rate at least equal to the cost of living, approximately 7 per cent to 10 per cent per year between 1978 and 2005. (Solot, Tr. 15738, 15750) Mr. Solot testified that all of the land in Sunsites was developable; he did not testify as to when, where, and how development would occur. (Solot, Tr. 15645, 15706) He concluded ultimately that Arizona Sunsites lots are a sound 20–30 year *long-term* investment of discretionary funds. (Solot, Tr. 15646, 15677)

In light of the Commission's finding that Horizon marketed Sunsites as a short-term investment, respondent's best evidence—that Arizona Sunsites is a sound long-term investment of discretionary funds—amounts to a virtual concession of complaint charges that respondent deceptively represented to purchasers that their lots would be located within fully self-contained communities within a short-term. We hold that Horizon's use of false and misleading statements to market Arizona Sunsites property constitutes a violation of law under Section 5 of the FTC Act.

⁴⁶ Detailed findings concerning the lack of a resale market for undeveloped Sunsites lots, at the time of trial, appear at I.D. 128.

⁴⁷ See, e.g., Fusco, Tr. 4030 (cost of extending electric lines to property is \$1.50 per foot plus \$50 standby charge); Bethel, Tr. 4171 (some properties would require four mile extensions from existing electric lines); Fusco, Tr. 4031 (cost of drilling a well is \$10 per foot, with an average well being 350 to 500 feet).

⁴⁸ Mr. Solot had been an appraiser for 25 years at the time of his testimony, working primarily in Arizona. He is a member of the American Institute of Real Appraisers and is a Senior Real Estate Appraiser with that organization. He is a graduate of the University of Arizona and has taught real estate appraisal courses at the University. (I.D. 115)

Whispering Ranch

As of May 31, 1976, Whispering Ranch contained approximately 19,000 acres, or 29.6 square miles, and was located in Maricopa County, Arizona, approximately 36 miles northwest of Phoenix, Arizona. (I.D. 16) With the exception of unpaved roads constructed by Horizon, Whispering Ranch has no current development, including no development core. (*Id.*) In a 1969 prospectus, Horizon describes the property's terrain as hilly range land, its soil as generally coarse granular to sandy loam in character, and its vegetation as primarily southwestern desert type, namely [44]cactus, yuccas, and mesquite.⁴⁹ Whispering Ranch was Horizon's only property that was not zoned for any specific end use.⁵⁰ However, Horizon represented that the land would become absorbed for residential and commercial purposes as Phoenix expands. (I.D. 88; *see, also*, Horizon's SEC 10-k report for fiscal 1976, CX 67c)

Frank Mangin testified as an expert witness on behalf of complaint counsel.⁵¹ The ALJ summarized his testimony as follows:

In Mr. Mangin's opinion Whispering Ranch is suitable only for cattle grazing (Tr. 3424). He testified that Whispering Ranch is so far removed from economic activity and utilities that no one to his knowledge has thought about Whispering Ranch as a potential residential area (Tr. 3389). It does not have any value for any commercial or industrial purpose (Tr. 3390). The location has no labor force, transportation access or utilities (Tr. 3390-93). Mr. Mangin cannot conceive of Whispering Ranch having any value within the next 30 years for residential, commercial or industrial purposes (Tr. 3396). He testified that Whispering Ranch was "removed from people, roads, utilities and, consequently, demand for the use of it" (Tr. 3424). (I.D. 106; *see, also*, I.D. p. 280) [45]

Although respondent represented that its communities would grow rapidly because they are located near growth cities such as Phoenix, Mr. Mangin does not believe there will be rapid growth on the Whispering Ranch property. He testified that Phoenix has grown in a multidirectional pattern, and that as growth moves out 360 degrees from the center of Phoenix there is an exponential increase in the available supply of inexpensive vacant desert land. Accordingly, Mr. Mangin foresees no development whatsoever at Whispering Ranch within at least the next thirty years. (Mangin, Tr. 3394-96, 3427-28, 3468) David Hamernick, a planner in Arizona's Office of Economic Planning and Development, was in accord with Mr. Mangin's assessment of the availability of land for private commercial or home use. (I.D. 108; *see, also*, Hamernick, Tr. 3677-78, 3672-

⁴⁹ Prospectus, Horizon Corp., February 26, 1969, CX 632-15.

⁵⁰ A consumer's description of her Whispering Ranch purchase is contained in I.D. pp. 94-95. (Testimony of Nancy Tweedy)

⁵¹ For a description of Mr. Mangin's qualifications, *see, supra*, p. 41, note 43.

74, 3668; *see also*, CX 843, pp. 31-32—Report of Planning Department) Due in part to this vast undeveloped acreage, and the fractionalization of land ownership in Whispering Ranch, the cost of extending utilities was prohibitive.⁵²

Sanders Solot was respondent's sole expert witness concerning the investment value of Whispering Ranch.⁵³ He testified that the best end use of Whispering Ranch property is long-term land investment, defined as 20-30 years. (I.D. 115; Solot, Tr. 15607) The record is unclear as to whether Mr. Solot meant a 20-30 year period beginning as of the date that he testified, or as of the date the consumer's contract was signed. (I.D. 115) Mr. Solot did not have an opinion as to when Whispering Ranch would be developed for use as home sites. (I.D. 115; Solot, Tr. 15706) He predicted that Whispering Ranch property would appreciate in value at a rate at least equal to the rate of inflation. (I.D. 115) He acknowledged, however, that a possible reason no current resale market existed for Whispering Ranch lots was due to an inordinate supply of land in the area.

Since we find that Whispering Ranch property, like Horizon's other properties, was marketed as a short-term investment, Mr. Solot's testimony amounts to a virtual concession of the complaint's charges with respect to Whispering Ranch. We would also note that Mr. Solot's projection of 20-30 year investment liquidity was at loggerheads with the testimony of complaint counsel's expert witnesses. The preponderance of evidence supports complaint counsel's argument that Mr. Solot's 20-30 year projection is overly optimistic. [46]

In conclusion, we find that Whispering Ranch lots will not be placed into commercial or residential end uses during the short-term represented to consumers by Horizon and chances are remote that lots will be placed into commercial or residential end use until sometime in the next century. We conclude that Horizon's marketing representations were deceptive and in violation of Section 5 of the FTC Act.

Waterwood

Respondent has sold lots in Waterwood, its latest property, since 1973. (RX 1543b) As of May 31, 1976, Waterwood contained 25,000 acres, or 39 square miles, and was located 19 miles from Huntsville, Texas, which had a population of 15,000. Some 1200 acres had been

⁵² *See, e.g.*, Campbell, Tr. 3296 (400 foot well would cost \$4,000, exclusive of the \$500 pump); Mattison, Tr. 3567 (basic cost of overhead single-phase electric line would cost \$10,000 per mile, plus approximately 25-30 per cent more to account for the difficulties to construction posed by the hilly terrain).

⁵³ For a description of Mr. Solot's qualifications, *see supra*, p. 43, note 48.

sold. Waterwood is approximately 100 highway miles north of Houston. (*Id.*) At the time of trial, 7,000 acres of Waterwood had been platted and were for sale; Horizon held the remaining 18,000 in acres in reserve. Waterwood borders the 90,000 acre Lake Livingston, fronting 44 miles of the lake's 450 mile shoreline. (RPF 30) Lake Livingston is the second largest artificially-made lake in Texas, and the largest lake completely within Texas' borders. (*Id.*)

Unlike Horizon's other properties, Waterwood was designed primarily for resort and second home end use, although Horizon also envisioned a demand for primary homesites to house a permanent population of retirees and a workforce employed in the Waterwood area.

The homesites projected were for single family and multi-family dwellings. Sales included lots fronting Lake Livingston and Waterwood golf course. Complaint counsel allege deception in Horizon's represented end use, arguing, that due to an oversupply of similar recreational communities in the same market, Horizon's claims regarding time to development and resale of Waterwood lots were overly optimistic.

At trial, complaint counsel's sole witness was Professor Howard Stevenson.⁵⁴ The Commission can find no evidence indicating that Professor Stevenson relied on, or produced, absorption studies in preparation of his testimony. It appears, rather, that Professor Stevenson's opinion was based solely on his having visited the Houston area just prior to appearing in this proceeding. He testified to the existence of a number of similar [47]recreational communities in the Houston market area, pointing out that several of these communities were already complete with marinas and utilities. He testified that several communities were being developed by firms with assets greater than or equal to Horizon's, including one community which was being developed by a subsidiary of the Exxon Corporation. Professor Stevenson concluded that due to the number of recreational communities in the Houston market, relative to the demand for such communities, Waterwood would have an insufficient absorption within the foreseeable future to be considered an excellent, financially risk-free, short-term investment. (Stevenson, Tr. 6770-72)

Professor Stevenson further pointed out that when Horizon disposes of its original 7,000 acres of platted lots, it can then market its remaining 18,000 acres. In that event, consumers seeking a resale market for their land would come into competition with Horizon's

⁵⁴ For a description of Dr. Stevenson's qualifications, see, *supra*, p. 35, note 35.

selling efforts. (Stevenson, Tr. 6762) Complaint counsel argue that this constitutes deception, because prospects believed that they would be able to resell after absorption of the original 7,000 acres.⁵⁵

Respondent argues that Professor Stevenson's testimony was unreliable because of his failure to provide a data base for his conclusions. Respondent produced three expert witnesses whose testimony relied on absorption analyses of Waterwood. We agree with respondent that its witnesses' testimony concerning Waterwood absorption were more reliable than complaint counsel's. But our analysis of the evidence offered by respondent's witnesses leads to a finding that respondent violated Section 5.

Charles Osenbaugh testified as an expert for Horizon.⁵⁶ In its proposed findings, respondent characterizes Mr. Osenbaugh's testimony as suggesting that "an extensive resale market would [48] develop by 1984." (RPF 186) We believe that this statement mischaracterizes his testimony, the thrust of which was not that a resale market would exist *by* 1984, but that none would exist *prior* to 1984 because lots would have no resale value without utilities, which Waterwood Improvement Association was obligated to install by 1984.⁵⁷ Assuming that utility installation begins by 1984, approximately eleven years after sales began, a resale market might begin to develop at that time. (Osenbaugh, Tr. 15,671) If Mr. Osenbaugh is correct that no significant resale market will develop until utilities are substantially in place, we conclude that an adequate resale market cannot exist within the short-term time frame represented by Horizon.

Horizon called two other expert witnesses, Dr. Stevens and Alan Nevin, both of whom agreed that absorption of Waterwood will occur by the year 2005.⁵⁸ Both relied on Dr. Stevens' absorption studies extending to that date. The unmistakable inference from their testimony is that absorption is not likely to be sufficient at any time before the end of this century. Additionally, these studies did not

⁵⁵ Detailed findings concerning the lack of a resale market for undeveloped Waterwood lots, at the time of trial, are found at I.D. 126.

⁵⁶ Charles Osenbaugh is a real estate appraiser and consultant with Osenbaugh & Associates. He is a member of the American Institute of Real Estate Appraisers and a Senior Real Estate Appraiser. He has taught for the Society of Real Estate Appraisers, and at the University of Oklahoma, University of Santa Clara, Louisiana State University and University of Houston. Osenbaugh & Associates have performed numerous appraisals for the federal government, State of Texas, several school districts and many private corporations. Mr. Osenbaugh has testified as an expert appraiser in the United States Tax Court, federal district courts and state and county courts in Texas. (I.D. 116)

⁵⁷ Waterwood Improvement Association was obligated to construct fronting roads and extend utility service to the community within ten years from the date of a sale. Under the terms of this land sales contracts, consumers were assessed both an annual charge (\$120 for single family homes) and a capital improvement charge (\$2000 for single family lots) to pay for these services. (I.D. 81)

⁵⁸ For a description of Dr. Stevens' qualifications, see *supra*, p. 27, note ²⁹; for a description of Mr. Nevin's qualifications, see *supra*, p. 39, note ⁴².

contemplate resale competition from Horizon's remaining 18,000 acres of unplatted land.

We hold that the preponderance of record evidence establishes that Waterwood is not an excellent, financially risk-free, short-term investment, and that in marketing them as such Horizon violated Section 5 of the FTC Act. [49]

Conclusion

In sum, we have considered in detail the truth of respondent's claims concerning the investment value of its properties. We have concluded in the property-by-property analyses that the various absorption studies establish the falsity of a number of Horizon's representations: the population surrounding these properties has not increased at a rate sufficient to absorb Horizon properties over the short-term; El Paso and Albuquerque do not have locked-in growth patterns toward Horizon properties; and, neither the Horizon Corporation, the improvement associations, nor any other developer could have been expected to carry out respondent's master plan for development. Thus, based on the absorption analysis, we have found that respondent's properties will not be placed into residential or commercial end uses in a short-term period of less than twenty years.

The preponderance of credible evidence adduced at trial indicates that substantial development in any of the properties will not begin to occur prior to the year 2000, and most probably will take place many years after that, rendering the properties an inappropriate *short-term* investment, which is how they were marketed. The record indicates that either insufficient populations will exist to occupy and spur development of certain properties, or that an oversupply of undeveloped land coupled with multidirectional growth patterns in neighboring cities will result in much of Horizon's land remaining unoccupied and undeveloped at least into the next century.⁵⁹ It is also clear from reading Horizon's contractual documents, where development obligations are carefully omitted, that Horizon never intended to develop any of its properties outside of the core areas.⁶⁰ Horizon argues that its initial expenditures were meant to attract industry, homeowners and other developers who would in turn

⁵⁹ The ALJ found that "The overriding defect in all of Horizon's properties is their size in relation to the markets in which they are situated. The absorption of these properties is projected so far into the future that it is impossible to foresee the ultimate risks that may exist." (I.D. p. 277) We concur in his statement of the overall problem with Horizon's marketing plan.

⁶⁰ Horizon disclosed in its annual financial report to the Securities and Exchange Commission what it failed to disclose to its customers: "The 'laying out and planning' of a project or community is not analogous to the 'development' of a project or community." (Horizon's SEC 10-K report for fiscal 1976, CX 67c)

assure development. (See, e.g., RAB 29-32) However, by fractionalizing the ownership of the land in all of its properties among individual consumers scattered throughout the country, Horizon ensured the frustration of any coherent development plan that some other developer might have otherwise wished to undertake. Horizon's argument further [50] lacks credibility because Horizon knew, or with the exercise of reasonable diligence should have known, that its land would remain unused as residential or commercial property throughout this century. Because no resale market will develop for Horizon's residential and commercial lots within the foreseeable future, residential and commercial uses cannot be considered to be reasonable end uses for those lots. It also follows that because no resale market existed for *any* of Horizon's undeveloped lots, no difference in value could have existed between Horizon's differently zoned lots. (See I.D. pp. 265-66)

On the basis of the foregoing analysis of the evidence applied to the factors⁶¹ expert witnesses identified as most important in evaluating the quality of land investments, we hold Horizon's claims that its land was an excellent, financially risk-free, short-term investment were false, misleading and deceptive and a violation of Section 5 of the FTC Act.

III. HIGH PRESSURE SALES TACTICS

Complaint count XVIII alleges deception or unfairness in Horizon's sales practice of representing, "directly or by implication, that a prospective purchaser must purchase a lot immediately to insure that the price will not increase or that the desired location will be available."

Based on testimony of former sales representatives and consumers, the ALJ found that Horizon used representations of periodic price increases to accomplish three purposes: to create a sense of "urgency" in the sales presentation; to mislead consumers into believing that a rise in Horizon's selling price indicated an increase in the investment value of the land; and to aid in reloading sales to existing customers. (His findings are summarized at I.D. 71-72; see also I.D. 68. In general, we uphold his findings of fact, with the modifications enumerated in Appendix A.) [51]

Horizon employed a number of techniques to stimulate immediate purchases. For example, sales representatives interrupted in-home

⁶¹ The Commission's consideration of evidence regarding the first factor alone enables us to conclude that Horizon land was not an excellent, risk-free, short-term investment. Our consideration of evidence regarding the second, third and fourth factors confirms this conclusion. Therefore, complaint counsel's failure to meet their burden of proof on the last factor is not fatal to their case.

sales presentations to make phone calls to Horizon's home office in Tucson, on the pretense of urgently trying to reserve a lot for the consumer while he or she decided on whether to purchase the lot. Sales representatives sometimes called the Tucson office on the pretense of ascertaining whether a specific lot remained available. The call was unnecessary, as one former sales representative testified, because lots in a given unit or subdivision were generally allocated to specific sales representatives for specific days or evenings. One former sales representative testified about a "reloading" technique whereby a representative arrived at a consumer's home to update the consumer on previously bought property. While there, the representative received a pre-arranged phone call informing him or her that a piece of property, with a specific use designation, was available for about an hour or so. Similar techniques were used at dinner parties, where sales representatives announced that they were reserving choice lots for the consumers sitting at their table. (I.D. 71)

Horizon trained sales representatives to represent to consumers that if they did not immediately purchase a specific lot, the lot's purchase price could significantly rise overnight, the specific lot would probably be sold to someone else in the immediate future, or that an entire Horizon property would be imminently sold out. Horizon's goal was to create an atmosphere where consumers believed that if they did not act immediately to purchase Horizon land, they would be forever foreclosed from participating in Horizon's excellent investment opportunity. (I.D. 71-72)

Consumers testified that they were told of "hot property", i.e. property that would be sold shortly, or property that would imminently rise in value and price. (*Id.*)

The ALJ concluded that these practices were deceptive because Horizon's undeveloped lots were sufficiently fungible so that there would be an abundant supply of them at all times. (I.D.p. 267) He concluded that the practices were unfair because they placed "unwarranted sales pressure" on prospects, depriving them of a full opportunity to consider or obtain advice about their purchase. (*Id.*)

The Commission does not accept "unwarranted pressure" as a test of unfairness under Section 5. We hold, however, that Horizon's high pressure sales tactics violated Section 5 because they occurred in the context of pervasive deception as to material facts. Specifically, representations that price and value of land would imminently increase and that land would become imminently unavailable were artificial devices contrived by Horizon's [52]management to mislead consumers. Respondent used price increases to represent past and

future increases in the value of its land, even though its prices bore no relation to the land's market value. (I.D. 71-72; I.D. pp. 258, 265; see discussion *supra*, pages 20-23) Respondent implied that consumers would lose the opportunity to invest in Horizon land if they did not act immediately, even though as of August 1975, Horizon's vast properties contained approximately 356,000 lots, nearly 80,000 of which were unsold even after many years of intense marketing. (I.D. 23)⁶²

In this context of deception, consumers were pressured into making immediate decisions, without the benefit of sober reflection or the aid of a qualified real estate professional. The Commission concludes that Horizon's practice of misleading consumers into believing that they had to purchase immediately in order to avoid imminent price increases and to assure availability of lots, constitutes a deceptive trade practice under Section 5 of the FTC Act. [53]

IV. HORIZON'S CONTRACT PROVISIONS

Five provisions of Horizon's standard form contracts were challenged in this proceeding: (1) the integration clause; (2) the forfeiture clause; (3) the property visit credit; (4) the guarantee; and (5) the exchange privilege.⁶³

The ALJ found that all five contract provisions were deceptive

⁶² Horizon's appeal brief states that the "crucial issue is the truth or falsity of the alleged representations." (RAB 37) The brief later defines these representations as those "concerning the need for promptness." (RAB 38) Respondent argues that so long as price increases were actual, and that so long as a possibility existed that a prospect could lose a specific lot, Horizon's representations were not false. Horizon cites the following as authority to support the proposition that it cannot be a violation of Section 5 to inform consumers of unavailability of supply or of price increases when such representations are not false: *Guides Against Deceptive Pricing*, 16 C.F.R. 233 at 233.5 (1968); *Readers Digest Association, Inc.*, 64 F.T.C. 1276 (1964); *Prentice-Hall, Inc.*, 64 F.T.C. 30 (1964); *Velox Service, Inc.*, 56 F.T.C. 1311 (1960); *Artistic Modern, Inc.*, 54 F.T.C. 225 (1957).

Horizon's reliance on these authorities is misplaced. In the instant case, Horizon's representations that price increases reflected increases in investment value and demand, and that Horizon properties would be imminently sold out, were false, and Horizon's representations that there was a "need for promptness" were also untrue. The cited cases, in fact, resulted in orders prohibiting direct or indirect representations that supplies were limited, when such was not the case. Thus, Horizon's representations were unlawful under the authorities it cites.

⁶³ Horizon has used two different formats for its land sales contracts. During most of the period in which Horizon sold land, its contracts consisted of two separate documents—a Receipt of Deposit (hereinafter "Receipt") (see, e.g., CX 141) and an Agreement for Deed (hereinafter "Agreement") (see, e.g., CX 151). The Receipt was a single page document, containing the price of the property, the terms of financing and one version of the Horizon Corporation guarantee. The Receipt incorporated by reference the provisions contained in the Agreement. The Agreement was also a single page document containing additional conditions of sale which formed the principal terms of the contract between Horizon and the purchaser. These conditions included a second version of the guarantee, the property visit credit, the exchange privilege and the forfeiture and integration clauses discussed below.

Beginning in 1976, Horizon combined these documents into a single contract entitled "Contract for Purchase of Land" (hereinafter "Contract") which it continued to use at least until the record in this proceeding closed in 1978. (See, e.g., RX 984) The conditions of sale are set forth at the start of the Contract and are individually captioned. In addition, a section headed "Highlights of this Contract" directs the consumer's attention to specific provisions, including those relating to default and forfeiture, taxes and prepayment. The integration clause is set forth in a paragraph entitled "General Provisions". Only some contracts retain the exchange privilege. (Compare RX 180 (contract for Horizon City with exchange privilege) with RX 979 (contract for Paradise Hills without exchange privilege)) The property visit credit and the Horizon guarantee are omitted from all post-1976 Contracts.

and/or unfair. (His conclusions regarding the integration and forfeiture clauses appear at I.D.pp. 288-290; his conclusions concerning the property visit credit, guarantee and exchange privilege are set forth at I.D.p. 267.)

For the reasons set forth below, we reverse his findings of liability concerning the integration clause, property visit credit, guarantee and exchange privilege used in Horizon's land sales contracts. We uphold his finding of liability concerning the forfeiture clause. [54]

The ALJ found that Horizon's land sales agreements were contracts of adhesion because one party (i.e. the consumer) must "adhere to the whole contract or forego entering into any contract." He concluded that the adhesive nature of Horizon's contracts was important because "the standards of fairness to be applied and the legal consequences which ensue depend in a large part on the method of contracting." (I.D.p. 288)⁶⁴

We agree that Horizon's land sales contracts, in both their pre- and post- 1976 forms, were adhesive in nature. We also agree that that conclusion establishes the level of scrutiny to be applied to the five provisions at issue. Standard form contracts, negotiated on a take-it-or-leave-it basis, are unexceptional in consumer transactions. However, if a contract is adhesive in nature and its terms appear unreasonably harsh, the Commission will, as the courts have, scrutinize those terms carefully to determine if they are unconscionable, unfair, or deceptive. As the discussion below will indicate, the determination whether a term is unfair or deceptive depends on its operation in a specific factual context.

The courts have developed standards for defining and scrutinizing adhesion contracts. If a contract is memorialized in a pre-printed form, they will construe its terms most strongly against the party who prepared it. They will also consider the ability of the weaker party in the transaction either to bargain or shop for better terms. (See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 84-97 (1960); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965; *Fleischmann Distilling Corp. v. Distillers Co., Ltd.*, 395 F. Supp. 221 (S.D.N.Y. 1975); and *Farmer's Union Grain Terminal Ass'n v. Nelson*, 223 N.W. 2d 494 (N.D. 1974))

Commentators have also defined contracts of adhesion as those arising from a situation where one of the parties is in a disadventa-

⁶⁴ In urging reversal of the ALJ's conclusions, respondent argues as a threshold matter that the adhesive nature of Horizon's land sales contracts was neither alleged in the complaint nor litigated and briefed by the parties in the proceeding below. (RAB 44) We cannot accept this argument because complaint counts XXIII and XXVI both allege the existence of elements critical to a determination of whether the Horizon contract has features of an adhesion contract. Further, the record taken as a whole contains evidence that is more than adequate to define the nature of the transaction between Horizon and its customers, especially their relative bargaining positions when contracts were signed.

geous position because the contract's provisions are standardized and stereotyped. They agree that such contracts are usually narrowly construed against the author. (See 4 *Williston [55]on Contracts* Section 626 at 855-57 (3d ed. 1961); see, also, *Corbin on Contracts* Sections 1-559 A-I (Supp. 1980); J. Calamari and J. Perillo, *Contracts*, Sections 1-3 at 6 (2d ed. 1977); Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract", 43 *Colum. L. Rev.* 629 (1943); and Duncan, "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code", 34 *L.A. L. Rev.* 1081 (1974))

The Comments to Article Two of the Uniform Commercial Code (UCC) have adopted these principles in defining contracts which the court may refuse to enforce on grounds of unconscionability. (See Comments to UCC 2-302:10-19 at 400-405 (2d ed. 1970)) The UCC Comments suggest that inequality of bargaining power, the relative experience of the parties and the circumstances surrounding execution of the contract should all be considered in determining whether its terms are unconscionable.

In addition, the Commission, in 1975, promulgated a trade regulation rule concerning the Preservation of Consumers' Claims and Defenses, 15 C.F.R. 433 (hereinafter "Holder Rule"), relying in part on the law of adhesion contracts to find unfair and deceptive standard form clauses that cut off consumers' claims and defenses against assignees of certain types of credit contracts. The Statement of Basis and Purpose for the Holder Rule states:

[P]romissory notes and waivers of defenses are inserted as boilerplate in installment agreements. . . . [C]onsumers rarely comprehend the significance of these devices at the time when the transaction is consummated. . . . *The Commission believes that relief under Section 5 of the FTC Act is appropriate where sellers or creditors impose adhesive contracts upon consumers, where such contracts contain terms which injure consumers, and where consumer injury is not off-set by a reasonable measure of value received in return.* (emphasis added) 40 Fed. Reg. 53523-53524 (1975).

The Commission then went on to consider the nature and scope of the consumer injury caused by holder-in-due-course clauses, their offsetting benefits and the full range of public policy issues affecting any determination whether they are deceptive or unfair.

The Commission's use of the law of adhesion contracts in the Holder Rule Statement of Basis and Purpose suggests the appropriate relationship between the definition of a contract as adhesive and a declaration that any of its provisions are unfair or deceptive under Section 5. A simple finding that a contract is adhesive does not end the inquiry. Rather, that finding, as a matter of policy, defines the

level of scrutiny the Commission applies to an inquiry into whether any of that contract's terms is unfair or deceptive. [56]

Applying the criteria outlined by the authorities as discussed above, we must agree with the ALJ that Horizon's land sales agreements (both pre- and post- 1976 versions) had features of an adhesion contract. They were all pre-printed and contained standard boilerplate provisions. There is no evidence on the record that consumers ever did or could have bargained for modifications in the conditions of sale that are at issue in this proceeding. Thus, at least with respect to those provisions, the contracts were presented to consumers on a take-it-or-leave-it basis. Consumers were in an unequal bargaining position vis-a-vis Horizon both because, as lay investors, they were generally unsophisticated concerning the key factors which must be weighed in making an informed decision to invest in undeveloped land and because Horizon misrepresented the nature and value of the land it was selling.

Respondent has argued that its contracts cannot correctly be characterized as adhesion contracts because: (1) the fact that a contract consists of standard terms does not make it adhesive; (2) purchasers were able to negotiate the terms of payment on their contracts; and (3) contracts of adhesion by definition must concern necessities of life which are "unobtainable elsewhere" and Horizon lots were neither necessities of life nor unique. (RAB 44)

As we have indicated above, we do not rely on the simple fact that Horizon's agreements were pre-printed in finding them adhesive. Rather, we have used other criteria in conjunction with the pre-printed nature of Horizon's forms to define their adhesive nature.

Consumers' ability to "negotiate" one aspect of their contracts with Horizon—i.e. to choose one of several payment plans—similarly cannot vitiate our conclusion that the contracts had adhesive features. Consumers did not have the opportunity to negotiate the other major conditions of sale imposed by Horizon and it is those non-negotiable provisions that are challenged in this proceeding.

In asserting that adhesion contracts must by definition apply only to the purchase of necessities of life, Horizon relies solely upon a New York state court case, *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S. 2d 681 (1975), *aff'd* 84 Misc. 2d 782, 386 N.Y.S. 2d 276 (App. Term 1975). [57]

In fact, courts are divided on the question of whether the law of adhesion contracts is limited to agreements for the purchase of necessities.⁶⁵ And, recent commentary on this issue does not

⁶⁵ For examples of cases where the doctrine has been applied to sales of goods or services which cannot be considered necessities of life, see *Bank of Indiana, Nat. Ass'n v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979)

acknowledge any "necessities" limitation. (See *Corbin on Contracts* Sections 1-559 A-I (Supp. 1980)) Further, the unconscionability provisions of the Uniform Commercial Code contain no limitation on the type of contract to which special scrutiny should apply. (See Comments to UCC 2-302:1 *et seq.* at 391 (2d ed. 1970))

For purposes of applying Section 5, the Commission believes that the authorities omitting this limitation are better reasoned. It therefore concludes that an adhesion contract analysis is applicable in Section 5 proceedings to agreements concerning the purchase of goods and services besides those viewed strictly as necessities.

As for respondent's contention that an adhesion contract can only exist where the goods or services in question are "unobtainable elsewhere", we can find no support for this suggested limitation in any generally recognized authorities which discuss the subject. Further, as complaint counsel points out, the only case cited by respondent as support for this proposition involved a situation where a farmer entered into a standard form contract to sell grain but, following the buyer's breach of the contract, the farmer managed to sell his grain to another party. (C.Ans 43, *citing Farmer's Union Grain Terminal Ass'n v. Nelson*, 223 N.W. 2d 494, 496 (N.D. 1974))

Having concluded that Horizon's contracts were adhesive in nature, we turn to an examination of the five challenged provisions. [58]

A. Integration Clause

Count XXV of the complaint alleges that respondent utilizes a standard form contract which contains a "condition of sale" to the effect that there exists no understanding or agreement between the parties except as "expressly set forth" in their written land sales contract. The complaint charges that the use of such an integration clause is unfair or deceptive because "respondent makes representations . . . which differ in material respects from the obligations of respondent or purchasers under said contract."⁶⁶

In sustaining this allegation, the ALJ concluded that respondent's inclusion of an integration clause is "oppressive, unscrupulous and unfair" and causes substantial injury to consumers. However, he did not define the precise nature of this injury other than to state that

(voiding deficiency clause in dairy farmer lease agreement); *Steven v. Fidelity and Casualty Co. of New York*, 377 P.2d 284 (Cal. 1962) (voiding a clause limiting coverage of airline passenger accident insurance); *Gray v. Zurich Insurance Company*, 419 P.2d 168 (Cal. 1966) (voiding an exception clause to an insurer's general duty to defend in a comprehensive personal liability policy); and *La Sala v. American Savings & Loan Association*, 489 P.2d 1113 (Cal. 1971) (invalidating certain clauses found in loan contracts where the purposes to which the loan proceeds were applied were not part of the factual record of the case).

⁶⁶ The integration clause included in Horizon's contracts reads:

There is no understanding or agreement between the parties except as expressly set forth herein. . . . RX 984-C

the integration clause makes "the finality of the contract's terms explicit" and that Horizon's contracts contained "Draconian terms". (I.D.p. 289)

The Commission considers a finding of substantial, unjustified consumer injury essential to a conclusion that a business act or practice is unfair.⁶⁷ Therefore, the issue presented is whether the record in this proceeding demonstrates any substantial consumer injury flowing from Horizon's use of an integration clause. For the reasons discussed below, we find that it does not.

An integration clause reenforces the standard legal interpretation of land sales contracts which prevails in American jurisprudence. Under the statute of frauds, contracts for the sale of land must be in writing to be enforceable. *Restatement of Contracts* Section 178 (1932) If the written contract appears complete on its face, courts will generally assume the contract is intended by the parties to be a complete expression of their agreement. The addition of an integration clause is generally viewed by the courts as a further indication of the parties' intent that the contract serve as a complete expression of their agreement. [59]3 *Corbin on Contracts* Section 578 (1960 and Supp. 1980) If the Court determines that the contract is a complete expression of the parties' agreement, then under the parol evidence rule neither side may introduce into a court proceeding any evidence of oral (or written) representations or agreements made prior to or contemporaneous with the execution of the final written contract. *Restatement of Contracts* Section 237 (1932)

However, the statute of frauds, the parol evidence rule and the inclusion of an integration clause do not prohibit a purchaser of land from introducing oral or written evidence into a court proceeding to establish that the parties do not have a binding contract because of illegality, fraud, duress, mistake or insufficiency of consideration. *Restatement of Contracts* Section 238 (1932)

Thus, the inclusion of an integration clause in Horizon's standard form contracts will not, as a legal matter, bar Horizon purchasers from suing the company and asserting claims of fraud at the inception. At most, the presence of the integration clause will introduce an additional legal issue into the proceeding. Given the operation of the contractual principles described above, we cannot find that the potential evidentiary implications of the clause cause injury to consumers.

Complaint counsel suggest that the real reason for the insertion of the clause is to discourage consumers from pressing otherwise valid

⁶⁷ See, e.g., Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). See, *infra*, p. 62, note¹¹.

claims. The consumer injury caused by the clause is that "consumers induced by oral or other claims to sign contracts will believe that the clause is fully enforceable when respondent invokes it to defeat their claims." (C. Ans 44-45)

Complaint counsel do not cite any record evidence that consumers have in fact been chilled from asserting their legal rights by Horizon's integration clause or that respondent ever misrepresented the nature or effect of the clause. And, in fact, the one piece of evidence cited by the ALJ in support of his finding of unfairness is testimony by consumers that they believed statements by sales representatives to be part of their contractual agreements with Horizon. (I.D.p. 289)

In the absence of concrete evidence that consumers were chilled from asserting their legal rights when they read the integration clause contained in Horizon contracts, or that respondent misrepresented the operation of the clause, we decline to find that respondent's use of such clauses constitutes an unfair practice. Accordingly, we reverse the ALJ's decision regarding this contract clause. [60]

B. Forfeiture Clause

Complaint counts XXIX and XXXIII contain allegations concerning the forfeiture clauses included in Horizon's land sales contracts. Count XXIX alleges that the forfeiture clause set forth in the pre-1976 Horizon Agreement—which allows Horizon to retain *all* sums paid by the purchaser in the event of a default on *any* installment—is unfair because "the sums retained by respondent are not calculated to bear any relation to actual damages . . . sustained . . . by reason of the purchaser's default." Count XXXIII alleges that respondent's "continued retention" of any payments which are in excess of "reasonable damages" is also an unfair act or practice.

At trial, the evidence revealed that Horizon has used three different versions of a forfeiture clause in its standard form contracts. The first version was in use in the early (pre-1976) sales contracts which are the subject of the complaint. In the event of purchaser default on an installment due under the contract, this early forfeiture clause provides, in the alternative, that Horizon may terminate the contract and retain as liquidated damages all sums previously paid by the purchaser, or that Horizon can pursue any other remedy available to it at law or in equity.⁶⁸

⁶⁸ Horizon's pre-1976 forfeiture clause is one of several conditions of sale continued on the back of the Agreement for Deed. The clause provides as follows:

This Agreement is not divisible and prompt payment of all sums due from Buyer under this Agreement is a condition of this Agreement and failure to make such payments according to the plan selected by Buyer shall entitle Seller to terminate this Agreement and re-enter and take possession of the property and to retain all

(Continued)

In 1976, Horizon modified this version of the provision to make forfeiture Horizon's sole remedy for a purchaser's [61]default, expressly disclaiming any personal liability on the part of the purchaser.⁶⁹

The most recent contract contained in the record, RX 981, reveals yet a third variety of forfeiture clause. This contract, dated June 1977, provides that upon a purchaser's default or cancellation, Horizon must refund any sums paid toward the principal by that purchaser in excess of 45 percent of the purchase price. This refund must be made within 30 days.⁷⁰

The ALJ found that at least the first two versions of Horizon's forfeiture clauses were unfair because they were "penal" in nature, were contained in an adhesion contract and operated to "unjustly enrich" the seller. (I.D.p.290) [62]The ALJ entered an order prohibiting Horizon from collecting or retaining upon default more than its actual damages both under future contracts and under contracts which are in existence at the time that the order becomes final. But he declined to grant complaint counsel's request for retroactive relief for consumers who forfeited payments before the order's effective date, citing the limitations imposed by *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). (I.D.p. 293)

For the reasons explained below, we affirm the ALJ's finding of unfairness with respect to those versions of Horizon's forfeiture clause which allowed the company to retain upon default all sums previously paid by the buyer. To reach this conclusion, we apply the legal standards embodied in our unfairness authority.

In finding the existence of legal unfairness, the Commission focuses primarily on two criteria: the existence of unjustified, substantial consumer injury and the violation of established public policy.⁷¹ To be legally "unfair", consumer injury must satisfy three

sums paid under this Agreement as liquidated damages, or, at the option of Seller, to pursue any other appropriate remedy available at law or in equity.

CX 142-B

⁶⁹ Most of the contracts now used by Horizon contain a separately numbered and titled paragraph captioned "Buyer's Default." That paragraph states:

Buyer shall have no personal liability under the terms and conditions of this contract and Horizon's sole remedy in the event of Buyer's default hereunder shall be to terminate this contract and re-enter and take possession of the property and retain all sums paid under this contract as liquidated damages.

RX 984-C

⁷⁰ The only contract in the record that contains this language is for Rio Communities. Paragraph 8 of the contract provides:

Buyer's Cancellation or Default

Buyers shall have no personal liability under the terms and conditions of this contract and Horizon's sole remedy in the event of Buyer's cancellation or default hereunder shall be to terminate this contract and re-enter and take possession of the property and to retain all sums paid under this contract as liquidated damages except for any principal payments made in excess of 45% of the purchase price which shall be refunded to the Buyer by Horizon within thirty (30) days from declaration of default or notice of cancellation.

⁷¹ See Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). The letter delineates the Commission's views of the boundaries of its consumer unfairness

(Continued)

tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice at issue produces; and it must be an injury that consumers themselves could not reasonably have avoided. [63]

The record below clearly establishes that substantial consumer injury occurred as a result of Horizon's retention of all sums paid in the event of buyer default. (I.D.131) The record shows that for the most part, the 100 per cent forfeiture provisions enabled Horizon to retain sums greatly in excess of any actual damages occasioned by purchaser default. We are unable to detect any countervailing benefits to consumers or competition that the practice produces. Further, we conclude that the injury produced by the 100 percent forfeiture clauses could not reasonably have been avoided by consumers who were unable to bargain over these clauses which were contained in a contract that is adhesive in nature and signed in an atmosphere of deceptive misrepresentations by the seller about the value of the investment and the nature of the deal being offered under the contract.

Respondent argues that no consumer injury was caused by the presence and operation of the forfeiture clauses. It contends that the ALJ's decision was based solely on an injury which might "hypothetically" flow from the use of a forfeiture clause. (RAB 47) Respondent apparently overlooks the specific and substantial consumer injury demonstrated in the record. (CX 852).

Respondent also contends that the ALJ improperly included interest payments in the calculation of consumer injury. (R. Ans 41). We do not reach the question of whether in an ordinary land sales transaction a forfeiture clause which allows a seller to retain interest payments could violate Section 5. We do find that where, as in this case, the transaction occurred in an atmosphere of pervasive deception about the value of the purchase and the nature of the terms and conditions of sale coupled with the adhesive nature of the contract in question, the ALJ properly included interest payments retained under a 100 percent forfeiture clause in his calculation of consumer injury.

The second criterion considered by the Commission in determining a practice to be legally unfair is whether that practice violates public policy. We conclude that that criterion is satisfied in this case. [64]

jurisdiction. The criteria relied on here were first summarized in 1964, when the Commission issued its Statement of Basis and Purpose for the trade regulation rule entitled Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964). Those criteria were later quoted with apparent approval by the Supreme Court in *FTC v. Sperry & Hutchinson*, 405 U.S. 223, 244-45 n. 5 (1972).

Horizon argues that forfeiture clauses do not violate any recognized public policy because most states do not prohibit such clauses. But that argument, directed at forfeiture clauses in general, is wide of the mark. Horizon's forfeiture clause offends the clear public policy that the law should not countenance harsh contract terms which are unreasonably favorable to one party when the other party lacked meaningful choice because of deception in the inducement of the contract. The public policy abhorring unconscionable terms when the contract has been negotiated in an atmosphere of deception has been clearly articulated by the courts⁷² and is the basis for the Uniform Commercial Code's unconscionable contract provisions. (UCC Section 2-302 (1970 version)) Also, we note in passing a developing trend in state and federal law toward the imposition of limitations on the provisions of forfeiture clauses in installment contracts for the sale of land.⁷³ Thus, there is no developing trend in the law that is inconsistent with the position we take here. Rather, the trend is to the contrary. [65]

In sum, we find that the two versions of Horizon's forfeiture clause which allow the company to retain upon default all sums previously paid by the buyer were contained in a contract which is adhesive in nature and was negotiated and signed in an atmosphere of unequal bargaining power, high pressure sales tactics and deceptive misrepresentations; and we hold that they are unfair in violation of Section 5 of the FTC Act. Because the forfeiture provisions at issue in this case arise in the context of land sales accomplished through a deceptive marketing scheme, we need not reach the question of

⁷² See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir.1965); *Fleischmann Distilling Corp. v. Distillers Co., Ltd.*, 395 F. Supp.221, 232 (S.D.N.Y. 1975); *New York Jewelry Co.*, 74 F.T.C. 1361, 1406-07, 1412 (1968).

⁷³ The Interstate Land Sales and Full Disclosure Act (ILSFDA) Amendments of 1979 expressly provides that any contract for the sale of land in interstate commerce which does not contain a clause limiting forfeiture rights of the seller in the event of a buyer's default to 15 per cent of the purchase price or the seller's "actual damages" (whichever is greater), can be revoked by the purchaser any time within a two-year period from the date the contract was signed. 15 U.S.C. 1703 (1979). Also, Maryland and Oklahoma have enacted statutes specifically forbidding forfeiture clauses. (Md. Real Property Code Ann. 10-101 to 108 (1974 & Supp. 1980); Okla. Stat. Ann. Tit. 16, 11A (West Supp. 1980)) Ohio effectively prevents forfeiture clauses from resulting in the payment of penalties by requiring judicial sale of the property when, prior to default, the customer has paid 20 per cent or more of the purchase price. (Ohio Rev. Code Ann. 5313.01-10 (Page 1970)) Many other states provide grace periods during which the buyer can remedy his or her default. The time periods vary from ten days in South Dakota to as much as one year in North Dakota. (S.D. (Compiled) Laws Ann. 21-50-1 to -3 (1979); N.D. Cent. Code 32-18-01 to 04 (1976)) An alternative statutory approach is to impose mortgage foreclosure requirements on the termination of land contracts. (See, e.g., Fla. Stat. 697.01 (1969) and Mich. Stat. Ann. 27A.3101 (1962))

The courts have developed many other tools to blunt the force of strict forfeiture. Waiver of default by the vendor is one concept which is frequently employed. (See, e.g., *In re Northern Ill. Dev. Corp.*, 309 F.2d 882 (7th Cir.1962), cert. denied, 372 U. S. 965 (1963)) Courts have also recognized an equitable right of redemption. (See, e.g., *Ward v. Union Bond and Trust Co.*, 243 F. 2d 476 (9th Cir. 1957); *Nigh v. Hickman*, 538 S.W.2d 936 (Mo.App.1976)) For an overview of the trend of state court decisions in this area, see G. Nelson and D. Whitman, "The Installment Land Contract: A National Viewpoint", B.Y.U.L. Rev. 541 (1977) and J. King, "Forfeiture: The Anomaly of the Land Sale Contract", 41 A.L.L.Rev. 71 (1977).

whether the forfeiture clauses at issue in this proceeding are, without more, unfair in a land sales transaction. [66]

C. Property Visit Credit, Guarantee and Exchange Privilege

1. Property Visit Credit and Guarantee

The property visit credit provision of Horizon's land sales contracts says that if consumers visit their land within one year of purchase, Horizon will give them a "credit" in the form of a five percent deduction (up to a maximum amount of \$600.00) from the cash price of the lot. The amount of the credit will be deducted from their account balances at the tail end of their payments. The credit is offered "for the purpose of encouraging personal inspection of the subdivision in which the property purchased is located." (See, e.g., CX 152-B)⁷⁴

Receipt of the credit was conditioned on the consumer acknowledging that the land was not misrepresented at the time of sale. While the contract provision described the reimbursement aspects of the credit, it did not mention this requirement. Instead, the requirement was set forth for the first time in a "Property Visit Credit Certificate" that Horizon mailed to consumers in an "important document package" several days after the sale. The pertinent portion of that certificate states:

TO BE COMPLETED AT THE TIME OF PROPERTY VISITATION TOUR

I have seen my land. It is as represented and I am satisfied with my property investment. Please credit my account in accordance with this certificate.

Landowner (s) signature (s) _____
(I.D. 64) [67]

The property visit credit provision of Horizon's contract was related to the provision extending a "Horizon guarantee". Indeed, the guarantee presents the converse of the property visit credit waiver requirement: the guarantee states that Horizon will refund all money paid on the property if the property was misrepresented at the time of sale. However, requests for such refunds may only be made at the property in question upon completion of a company-

⁷⁴ The full text of this provision reads:

Upon confirmation and acceptance by Horizon Corporation or applicable subsidiary, Buyer will be issued a Property Credit Allowance Certificate in the amount of 5% of the cash price (net additional sales price in superseding sales) up to a maximum amount of \$600.00. The Property Visit Credit Allowance is issued for the purpose of encouraging personal inspection of the subdivision in which the property purchased is located. The Allowance granted herein is deductible from the remaining account balance at the time the principal balance is equal to the amount of the Certificate, providing that the personal inspection and company guided tour is made within one (1) year of the date of the acceptance of this Agreement and providing that the payments due hereunder have been current throughout the term of this Agreement.

(CX 152-B)

guided inspection tour which occurs within one year of the date of purchase.⁷⁵ Obviously, consumers confronted with both the property visit credit certificate and the guarantee were put to a choice: in order to obtain reimbursement of their travel expenses, they must certify that no misrepresentations occurred. However, by certifying that no misrepresentations occurred, they sacrifice their right to a refund.

The record below indicates that both the property visit credit and the guarantee were used as sales tools by Horizon sales representatives. (I.D. 66) Both provisions were discontinued when Horizon revised its contracts in 1976.

Count XV of the complaint alleges that Horizon's property visit credit is deceptive because respondent has represented, directly or by implication, that it entitles consumers to immediate reimbursement for their travel expenses, when such is not the case. In fact, the complaint continues, the property visit credit merely entitles consumers to a deduction from remaining account balances when those balances equal their travel expenses (i.e. at the tail end of their payments).

The ALJ refused to uphold the allegations contained in Count XV because, although he found that the reimbursement aspect of the property visit credit operates exactly as described in the complaint, he also found that this aspect of the credit was "typically explained accurately to the customers" and that, therefore, no deception occurred. (I.D. 63) Complaint counsel do not appeal this finding. We affirm the ALJ's conclusion. [68]

Count XXX of the complaint alleges that the "Property Visit Credit Certificate" used by Horizon further specifies that purchasers may only qualify for reimbursement if (1) they tour their land within one year of the date of purchase and (2) they declare that the land is as it was represented to be and that they are satisfied with their property investments. Count XXX alleges that the imposition of these conditions is an unfair practice because the consumer often cannot ascertain whether misrepresentations have occurred at the time of the property visit.

The ALJ upheld these allegations of unfairness contained in the complaint. He based his conclusions on two facts: (1) the requirement that purchasers declare no misrepresentations had occurred was not

⁷⁵ The guarantee provision read:

Horizon Corporation or applicable subsidiary guarantees to refund all money paid on your property if it was MISREPRESENTED to you at the time of sale. Requests for such refunds may be made only at the property upon completion of buyer's initial company-guided personal inspection tour within one year of the date of purchase by stating the details on the company's refund request form.

(CX 139-A)

adequately explained to Horizon customers and (2) in any case, consumers were unable to execute a knowing waiver because they could not evaluate the investment quality of the property at the time of the property visit. (I.D.p. 267)

Complaint Count XXX also alleges that the guarantee is deceptive because the purchaser may not be able to ascertain whether the property has been misrepresented on a company-guided inspection tour.

The ALJ upheld this allegation, concluding that the guarantee "was presented in a vague manner creating the false implication that it was a money-back guarantee if the purchaser was dissatisfied with the property." (I.D.p. 267)

The Commission is unable to uphold the ALJ's findings that the property visit credit and the guarantee, operating together, were deceptive and unfair. The ALJ's conclusion that consumers understood they would only receive the credit in the form of a deduction at the tail end of their installment payments fatally undermines his findings of liability. Under these circumstances, consumers knew (or should have known) before they visited the land that if they wished a refund, they would never get the opportunity to receive a credit on the account balance because the refund would wipe out the account. Consumers therefore must have understood that the two provisions were mutually exclusive. This understanding removes any deception from Horizon's explanation of the operation of the two provisions.

The Commission recognizes that deceptive misrepresentations continued during company-guided inspection tours. (I.D. 67) These misrepresentations have been considered in our findings concerning Horizon's deceptive sales practices in general. However, we are unwilling to find that these misrepresentations rendered the property visit credit and guarantee *independently* deceptive or unfair in view of our conclusion that consumers understood the operation of the two provisions before they visited the land. [69]

2. Exchange Privilege

Horizon offered an exchange privilege to purchasers of its undeveloped lots, which permitted them to exchange their land for land located in other areas, including those where development had occurred, under certain circumstances.⁷⁶ No complaint count alleges

⁷⁶ A typical clause reads:

At any time prior to delivery of the Warranty Deed, the SELLER agrees to accept the above land in trade, applying the full principal paid, for any other available land, except land located within any designated building area, which is, at the time of exchange, equal to or greater than the original price of the traded property. In addition, upon commitment to buy or commence construction of his home within NINETY (90) DAYS and complete construction within ONE HUNDRED TWENTY (120) DAYS thereafter, PURCHASER

(Continued)

that the exchange privilege clause contained in some of Horizon's contract documents is either deceptive or unfair. Nevertheless, the ALJ found that the exchange privilege was used in "a deceptive and misleading manner", although he did not give any reasons for this conclusion. (I.D. p. 267) [70]

Respondent has argued that its use of the exchange privilege was not only nondeceptive and fair, but actually enhanced the value of Horizon's lots as homesites. Respondent essentially contends that the opportunity to exchange undeveloped lots for lots in developed areas assured that consumers could use their land as homesites when they wanted to. (RPF pp. 183-184; RAB 34-35) Respondent specifically disputes the ALJ's finding elsewhere in his opinion that the privilege has had no impact on the pace of building in Horizon's properties. The ALJ entered this finding because "it is evident that the exchange privilege cannot accommodate all the lot purchasers with a building site" and "Horizon's undeveloped lots were not sold as homesites, but as investments" (I.D.p. 286)

Complaint counsel defend the ALJ's conclusion, contending that exchange areas in currently developed core areas cannot accommodate everyone and that so-called "satellite core areas" have never materialized. (C. Ans 24) Further, complaint counsel argue that because the exchange privilege is limited to owners of single-family lots, it cannot offer relief to many of the consumers affected by this proceeding. (C. Ans 33)

We must conclude that the parties have fought to a draw on this issue. We decline to uphold the ALJ's finding that the exchange privilege was used in a misleading manner. However, we also reject respondent's contention that the exchange privilege enhanced the investment value of its lots, both for the reasons stated by complaint counsel and because the privilege was limited to those who would commit themselves to starting construction of a home within 90 days of an exchange, and completing such construction within 120 days thereafter. Because of these limitations on consumers' exercise of the exchange privilege, we agree with the ALJ that the privilege did not materially enhance the investment value of Horizon land. [71]

V. HORIZON'S DEFENSES

Horizon asserts a number of defenses to bar findings of liability

may exchange one single-family residential lot for a similar size lot in any building exchange area within the same development, so long as one is available, without any increase in the purchase price of the land. The then current utility costs to the lot line and proportionate street improvement costs are to be paid for by the PURCHASER at the time construction is to commence, or shall be included in the cost of the house if purchased from the Company.

under Section 5. Respondent maintains that complaint counsel have failed in their burden of proof of establishing a violation of law. Respondent contends that it disclosed all material facts concerning its land through the dissemination of various documents to consumers, and that those disclosures eliminated any possible deception which might otherwise have occurred. Respondent next argues that it should not be held liable for the unauthorized statements of its sales representatives. Lastly, respondent asserts that this proceeding is barred by the doctrines of laches and equitable estoppel.

A. Burden of Proof

Commission Rule 3.51(b), 16 C.F.R. 3.51(b) requires that an initial decision be based upon a consideration of the record as a whole, and supported by reliable, probative, and substantial evidence. (*See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)) Respondent contends that the ALJ ignored substantial record evidence in concluding that complaint counsel met its burden of establishing by a preponderance of the evidence that Horizon violated Section 5. (RAB 7-13)

On page 256 of his Initial Decision, the ALJ concluded that Horizon marketed its property as an excellent, risk-free investment. He goes on to state that "[i]n making this determination, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. *See Beneficial Corp. v. FTC*, 542 F.2d 611, 617-18 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Continental Wax Corp. v. FTC*, 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2nd Cir. 1944)."

Respondent maintains that in evaluating the record, the ALJ failed to heed the requirement of *Universal Camera*, 340 U.S. at 448, that the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Horizon argues that certain findings of fact could not have been entered if the ALJ had actually considered the record as a whole. (*See* RAB 7-10) In its brief, Horizon asks that the Initial Decision be reversed on this ground. At oral argument, counsel for respondent commented that "[p]erhaps the Commission will have to look at the record as a whole. . . . I respectfully request the Commission do that. . . ." (Oral Argument, Tr. 16) [72]

The Commission has studied the whole record in this case. We find

that the record as a whole adequately supports most of the findings and conclusions entered by the ALJ.⁷⁷ In this opinion, the Commission has noted where it has modified the specific findings of fact entered by the ALJ. (See, e.g., Appendix A)⁷⁸ The Commission affirms the ALJ's conclusion that complaint counsel have met their burden of proof in this matter and we accordingly reject Horizon's defense.

B. Written Disclosure Documents

Horizon defends against this action by asserting that it disseminated to customers various documents, chiefly a federally required property report, which disclosed material information concerning the customer's purchase. Horizon argues that in reaching his conclusion of liability, the ALJ only considered evidence of verbal representations made to consumers. Respondent's appeal brief states that it "is patently unfair to reach conclusions on the net impression of a sales presentation unless a customer's recollection is placed in the context of the entire presentation—both written and oral." (RAB 14) [73]

Horizon's position assumes that Horizon itself gave equal weight to verbal and written representations in its sales program. However, if the Commission finds that Horizon's verbal presentation so overpowered its written disclosures to the extent of rendering the latter ineffective, then the Commission must reject Horizon's defense. (See *Raymond Lee Organization*, 92 F.T.C. 489 (1978)) Complaint Count XXII alleges that Horizon distributed its disclosure documents "under such circumstances that it is likely that many purchasers will not read such documents. . . ." Count XXII charges that Horizon's obtaining substantial financial commitments from consumers under these circumstances independently constitutes an unfair or deceptive act or practice. For the reasons below, the Commission rejects Horizon's defense and concurs in the ALJ's affirmance of complaint Count XXII. (I.D.pp. 270-272; see I.D. 77)

The Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C.

⁷⁷ Respondent objects to the weight the ALJ assigned to testimony of its witnesses, whom the ALJ deemed were less credible than complaint counsel's witnesses. (I.D.pp. 272-75) However, it is the ALJ, as trier of the facts, who has lived with the case, and who has had the opportunity to closely scrutinize witnesses' overall demeanor and to judge their credibility. Accordingly, absent a clear abuse of discretion, the Commission will not disturb on appeal the ALJ's conclusions as to credibility. (See *Lenox, Inc.*, 73 F.T.C. 578, 604 (1968), *aff'd*, 417 F.2d 126 (2d Cir. 1969)) The Commission finds no evidence of abuse of discretion in this case which would lead it to disturb the ALJ's conclusions concerning the credibility of Horizon's witnesses, except where specifically noted in our modifications of the ALJ's findings of fact. (See this opinion and Appendix A)

⁷⁸ The preponderance of the record evidence supports the Commission's finding that respondent marketed its properties as excellent, risk-free, short-term investments. This finding describes the net impression of respondent's marketing theme. When finding a specific net impression "the entire mosaic should be viewed rather than each tile separately." *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2nd Cir. 1963).

1701-1720 (1979), requires land sales companies to deliver to each of its customers a federal property report, intended to disclose material information. Although ILSFDA contains no instruction detailing methods of delivering the property report, the Office of Interstate Land Sales Registration (OILSR), which is charged with administering ILSFDA, has promulgated the following regulation:

... [T]he following practices shall be deemed to be a violation of the Act.

....
(b) Giving the property report to a purchaser along with other materials when this is done in such a manner as to conceal the property report from the purchaser. 24 C.F.R. 1715.25(b) (1980).

The record evidence reveals that sales representatives treated the property reports in three different ways during sales presentations: either the reports were given a cursory examination, or following the signing of a contract they were left with the customer with their importance unemphasized, or else they were used during the sales presentation to indicate federal government approval of Horizon properties. (See generally, I.D. 77) CX 157 is representative of a number of training manuals introduced into evidence. The manual instructs the representative to remove the property report from the representative's briefcase, at an appropriate moment in the presentation, and to briefly inform the prospect of the type of information the report contains. The representative is next instructed to "replace sample in briefcase." [74](CX 157f) Although the property report would then be left with the customer if he or she made a purchase, the customer rarely appreciated the importance of the report's information due to Horizon's overwhelming verbal assurances. Sales representatives testified that consumers were not encouraged to read property reports during a sales presentation, because if customers were reading reports they were not listening to the sales pitch. (See, e.g., Doyle, Tr. 4627-28; Dmitry, Tr. 16108) Consumers testified that due to the nature of the presentations they did not realize the importance of the property reports, and they did not read them. (I.D. 77) The ALJ concluded that the "significance of the federal property reports was not communicated to customers, that actual delivery of the reports was designed to gloss over its importance as a disclosure instrument, and that customers did not read the reports." (I.D.p. 271)⁷⁹

In addition, one former sales representative testified that he was

⁷⁹ The ALJ, at I.D.pp. 270-71, reviewed Horizon's other supposed disclosure documents, including Sydney Nelson's "Principals of Land Ownership" (see, *supra*, discussion at 16-17) and statements contained in certain contract documents and on Horizon's TBA maps. Like the property reports, the record supports the conclusion that

(Continued)

trained to represent that the property report "actually was an endorsement by the federal government. An endorsement . . . that what we say in there has been checked and looked at and approved by the federal government as being true as stated." (Hillman, Tr. 4740-41)

In upholding the ALJ's conclusion that the federal property report was delivered to purchasers in a manner calculated to conceal the importance of the disclosures it contained, the Commission does not address the question of whether Horizon complied with OILSR regulations. As we note, in our discussion of jurisdiction, *infra*, OILSR and the Commission share complementary jurisdiction over marketing practices in the land sales industry. It is the Commission's function to appraise the net impression of respondent's marketing scheme, and to determine the effectiveness, in a specific factual setting, of required or voluntary disclosures. [75]

In the context of Horizon's numerous verbal misrepresentations, highlighted throughout this opinion, written disclosures could not easily have overcome consumers' net impression of excellent, risk-free, short-term investments. We find that the manner in which Horizon delivered its disclosure documents was designed to obscure their importance, and thus rendered the documents ineffective as disclosure instruments. Therefore, we reject Horizon's defense that such documents cured any deception which might have occurred. In addition, we affirm complaint Count XXII to the extent that Horizon used the property reports to indicate federal government approval of its properties, and we hold that such a practice is deceptive under Section 5.

C. Representations of Sales Representatives

Horizon argues that it is not liable for any unfair or deceptive acts or practices of its sales force because: (1) Horizon was generally unaware of such acts or practices; (2) when Horizon became aware of such acts or practices the sales representative was either deprived of his or her commission or was fired; and (3) Horizon's sales representatives were not clothed with apparent authority. (RAB 54)

As our discussion indicates, *supra*, pages 17-18, the Commission is unconvinced that Horizon management was unaware of the manner in which its sales force marketed its property. In addition, the Commission agrees with the ALJ's reasoning that dismissal of a representative who violated company policy does not relieve Horizon

these documents were delivered in such a manner as to distract the consumer's attention from the disclosures they contained.

of liability. (See I.D.p. 290; see, also, *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13 (2d. Cir. 1954)). Lastly, we agree with the ALJ that Horizon "clothed its sales representatives with apparent authority in the form of contracts, TBA maps, unit maps, property reports, films, [and] presentation manuals . . . , [and as such Horizon] is responsible for their sales representations even if unauthorized. *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957)." (I.D.p. 290)

D. Laches and Equitable Estoppel.

The Commission affirms the ALJ's conclusion that neither laches nor equitable estoppel is a defense to an action brought by the government in the public interest. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-9 (1917); *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 623-24 (1953); *United States v. Firestone Tire & Rubber Co.*, 374 F. Supp. 431, 433 (N.D. Ohio 1974). [76]

VI. JURISDICTION

Respondent contends that the Commission lacks jurisdiction over this matter because Congress gave the Department of Housing and Urban Development (HUD) exclusive jurisdiction over every facet of the land sales industry when it enacted the Interstate Land Sales and Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.* (1979). Respondent argues that the pervasiveness of the Act and its implementing regulations, 24 C.F.R. 1700 *et seq.* (1979), and the fact that those laws grant HUD power over fraudulent sales practices, indicate that Congress intended HUD's Office of Interstate Land Sales Regulation (OILSR) to be the exclusive regulator of interstate land sales. Respondent further argues that regulation and review of land sales practices by both OILSR and the FTC would produce conflicting standards of conduct for the sales industry. Finally, it contends that the Initial Decision usurps OILSR jurisdiction by finding that compliance with OILSR regulations constitutes an unfair business practice. (RAB 51)

We reject respondent's arguments for the following reasons. First, ILSFDA does not expressly grant OILSR exclusive jurisdiction over fraudulent land transactions. Second, neither the language of the statute nor the legislative history supports implied repeal of Section 5 of the FTC Act with respect to interstate land sales practices. Third, regulation under ILSFDA and the FTC Act do not pose the threat of conflicting regulatory standards. Finally, we conclude that

the FTC and OILSR serve complementary but not coterminous regulatory roles.

To support its contention that Congress' enactment of ILSFDA granted exclusive jurisdiction over unfair and deceptive practices in the sale of land to OILSR, respondent must demonstrate that Commission jurisdiction under Section 5 has been either expressly or impliedly repealed. *See generally, United States v. National Association of Securities Dealers, Inc. (NASD)*, 422 U.S. 694 (1975).

Respondent has failed to identify any express grant of exclusive jurisdiction in ILSFDA. Our own review of the statute indicates that no such express repeal exists. Accordingly, respondent must rely on the doctrine of implied repeal.

The Supreme Court has long held that it is "a cardinal principal of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *see also, Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Gordon v. New York Stock Exchange*, [77]422 U.S. 659, 682 (1975). Therefore, the proponent carries a heavy burden to show that it was Congress' "clear and manifest" intention that the statute in question was to be repealed. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). In determining whether a statute has been impliedly repealed a court will first scrutinize the plain language of the allegedly preemptive statute, and then, if necessary, look to the legislative history. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184-185 (1978). If a Congressional intention to repeal is not evident from either of these sources, the two statutes in question must be in irreconcilable conflict, or the later act must have been "clearly intended as a substitute" before a court will apply the doctrine of implied repeal. *Posadas*, 296 U.S. at 503; *see also, NASD*, 422 U.S. at 719-20; thus, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see, also, Gordon*, 422 U.S. at 685 (1975).

On its face, ILSFDA contains no language or provisions that could be interpreted as an expression of Congressional intent to grant OILSR exclusive jurisdiction over interstate land sales practices or to limit other agencies' authority in that area. On the contrary, Section 1713 of ILSFDA explicitly provides that alternative avenues of legal recourse are retained despite the passage of the special legislation directed at land sales transactions. That section states that "[t]he rights and remedies provided by this chapter shall be *in addition to any and all* rights and remedies that may exist at law or in equity." (emphasis added) 15 U.S.C. 1713 (1979). An example of a

legal remedy not available under ILSFDA is the Commission's broad redress authority under Section 19 of the FTC Act, 15 U.S.C. 57b (1976).

The fact that some of ILSFDA's provisions give OILSR review authority which is similar to the authority exercised by the FTC under Section 5 cannot be read as an expression of Congressional intent to grant exclusive jurisdiction. The FTC shares authority over various advertising and sales practices with several other agencies including the Consumer Product Safety Commission, the Food and Drug Administration and the Justice Department. Yet, despite these instances of overlapping agency authority, the FTC can be and is considered the agency with the foremost enforcement authority and expertise in the area of unfair and deceptive trade practices.⁸⁰ [78]

The legislative history of ILSFDA indicates that Congress was aware of the involvement of other agencies, including the FTC, in reviewing interstate land sales practices at the time the Act was adopted and during the course of its many amendments but did not choose to include an express or implied exclusivity provision in the Act.⁸¹ The legislative history further indicates that Congress anticipated a system of dual jurisdiction over the land sales industry. The most explicit statements of this intention are contained in the 1978 House and Senate hearings on proposed amendments to ILSFDA.

During the 1978 hearings of the House Subcommittee on Housing and Community Development, the dual jurisdiction over deceptive and unfair advertising between the FTC and OILSR was directly discussed. Various passages of testimony reveal that in 1978 the Committee members assumed the existence of concurrent jurisdiction. Typical of these remarks is a question by the Subcommittee Chairman to an FTC representative:

Chairman Ashley. Mr. Steinman, since most consumer complaints regarding land

⁸⁰ See, e.g., *FTC v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972).

⁸¹ See, e.g., *Interstate Land Sales Full Disclosure Act: Hearings on S. 2672 Before A Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2nd Sess. 307-308 (1966) (Letter of FTC Chairman Paul Rand Dixon); *Oversight of the Interstate Land Sales Full Disclosure Act: Hearings on H.R. 10999 Before the Subcomm. on General Oversight and Renegotiation of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess. 350 (1978) (testimony of Bureau of Consumer Protection, FTC); *The Interstate Land Sales Full Disclosure Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development, of the House Comm. on Banking Finance and Urban Affairs*, 95th Cong., 2nd Sess. 566-567 (1978) (testimony of Bureau of Consumer Protection, FTC); *Interstate Land Sales Program: Hearings on S. 2716 Before the Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess. 38-39 (1978).

Congress has included exclusivity provisions when it intended to limit jurisdiction over a particular subject matter to one or a few agencies. See, e.g., *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 n. 27 (1962).

Such provisions have been included by Congress when it was aware of and wanted to avoid the potential for conflict between agencies having dual jurisdiction. See, e.g., *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 130, (1974); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178-188 (1978).

sales appear to involve deceptive marketing practices, would it make sense to consolidate enforcement for fraud in the FTC *instead of maintaining the dual jurisdiction involving both the FTC and HUD?* (emphasis added) *The Interstate Land Sales Full Disclosure [79] Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess. 669 (1978).⁸²

The fact that Congress envisioned a system of concurrent jurisdiction is most clearly stated in the House Report that accompanied the 1979 amendments.⁸³ When discussing the new provision for a biennial report from OILSR to Congress, the House Committee stated:

Often improved industry practices, unanticipated trends in consumer problems and new remedies devised by other agencies who also review the land sales industry will suggest needed amendments to existing law. (emphasis added) H.R. Rep. No. 96-154, 96th Cong., 1st Sess. 40-41 reprinted in [1979] U.S. Code Cong. & Ad. News 2346, 2356.

Therefore, we conclude that Congress not only was aware of FTC activity in the land sales area, including the instant suit against respondent,⁸⁴ but also that it intended a system of overlapping jurisdiction.

Respondent argues that concurrent jurisdiction will subject land developers to conflicting regulatory standards, citing as an example the ALJ's finding that Horizon complied with OILSR regulations and yet violated Section 5. (RAB 51) However, [80] as our discussion above indicates, the Commission finds that although Horizon disclosed in its property reports the information required by OILSR, these disclosures did not ameliorate the deceptive misrepresentations through which it marketed its land. Compliance with OILSR's requirements cannot be construed as immunizing a company's overall sales techniques from scrutiny under Section 5. The OILSR regulations are meant to be preventive safeguards against improper sales tactics. Situations will exist, as in the instant case, where the overall sales plan is such that consumer injury results despite technical compliance with OILSR requirements. Thus, the issue is not whether compliance with an OILSR regulation constitutes an unfair business practice but rather whether respondent's sales

⁸² See, also, *The Interstate Land Sales Full Disclosure Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess., 112-113 (1978) (remarks of Chairman Ashley); *Id.* at 73 (remarks of Rep. Brown); *Id.* at 55-56, 73 (remarks of Rep. Minish); *Id.* at 550 (testimony of Patricia Worthy, Administrator of OILSR); *Id.* at 73 (remarks of Rep. Brown); *Id.* at 112 (testimony of Patricia Hynes, Assistant U.S. Attorney, Southern District of New York).

⁸³ The House Report was adopted by the Conference Committee. [1979] U.S. Code Cong. & AD. News 2346, 2346.

⁸⁴ *Interstate Land Sales Program: Hearings on S. 2716 Before the Senate Committee on Banking, Housing and Urban Affairs*, 95th Cong., 2nd Sess. 35 (1978) (testimony of the Bureau of Consumer Protection, FTC).

practices, taken as a whole, have negated the preventive utility of technical compliance with OILSR requirements.⁸⁵

We conclude that regulation of fraudulent land sales practices under both ILSFDA and Section 5 is a complementary but not coterminous process. Review of land transactions is complementary because the ultimate regulatory goal—protection of consumers from fraudulent business practices—is the same under both statutes. Yet, the scope of each agency's review authority and its ability to rectify abusive practices are vastly different. Therefore, repeal of Section 5 as to the land sales industry is not necessary for ILSFDA to work as intended. *Gordon*, 422 U.S. at 685; *Silver*, 373 U.S. at 357.

For the foregoing reasons we reject respondent's contention that the Commission does not have jurisdiction over the instant case. [81]

VII. ORDER TO CEASE AND DESIST

The order to cease and desist entered by the Commission in this case is substantially similar to the order recommended by the parties. The Commission believes that this order, taken as a whole, adequately addresses the violations of Section 5 committed by Horizon and provides a basis for resolving this matter without the delay and uncertainty of entry of a cease and desist order, followed by appellate review and a separate Section 19 redress action in federal district court.⁸⁶ However, the Commission will not necessarily view this remedial scheme as a model for relief in future land sales cases.

The order requires payment of \$14.5 million in redress over a six year period to past purchasers of Horizon land. It also requires Horizon to ensure that it, or some other entity, spends \$45 million over a 20-year period for improvements at any of the six Horizon properties which were the subject of this proceeding. The order enjoins Horizon from committing unfair or deceptive acts or practices and contains affirmative requirements designed to eliminate further violations of Section 5. The prospective relief contained in the order differs depending on whether the land sold is "developed" or "undeveloped", as those terms are defined in the order's preamble; sales of "developed" land (Sections I-III) are treated less

⁸⁵ As we mentioned above, OILSR recognizes the possibility of this kind of situation:
... (The following practices shall be deemed to be a violation of the Act.

(b) Giving the property report to a purchaser along with other materials when this is done in such a manner as to conceal the property report from the purchaser. 24 C.F.R. 1715.25(b) (1980).

⁸⁶ Additional litigation in pursuit of further monetary relief for purchasers of Horizon land would apparently be fruitless in light of the limited assets available to respondent. (See supplemental briefs filed by the parties on May 8, 1981.)

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stringently than sales of "undeveloped" land (Sections IV-VI). The Commission believes that this different treatment is justified by the record, which primarily concerned sales of undeveloped land.

APPENDIX A*