

IN THE MATTER OF

AMREP CORPORATION

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

Docket 9018. Complaint, March 11, 1975—Final Order, Nov. 2, 1983

This Final Order requires a New York City land sales company, among other things, to cease representing that the purchase of land is a sound investment; that resale is not difficult and that the price set by the company is the land's fair market value, unless such claims can be substantiated by competent and reliable data. The order requires that all advertising, promotional materials and sales contracts include prescribed disclosures advising purchasers of the risk involved in undeveloped land and of the importance of obtaining a property report and inspecting the land prior to purchase. Respondent is prohibited from misrepresenting the present or potential development of any land by others; the direction of population growth or other demographic factors; and the true nature and purpose of any promotional event or activity. Respondent is further prohibited from discouraging purchasers from consulting with a real estate specialist prior to purchase; using high pressure sales tactics; and utilizing certain contractual provisions, including one whereby defaulting purchasers forfeit all payments made. Additionally, respondent must provide customers with cooling-off periods; make specific disclosures regarding rights to cancellation and refunds; and maintain a surveillance program designed to ensure compliance with the order's provisions.

Appearances

For the Commission: *George E. Schulman, Perry W. Winston and Jon R. Calhoun.*

For the respondent: *Solomon H. Friend, Theodore R. Schreier, Michael E. Schoeman and Peter Williamson, Friend, Dorfman & Marks, New York City and Louis Barton, in-house counsel, New York City.*

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 AMREP Corporation, a corporation, hereinafter sometimes referred to as respondent, by itself and through its wholly-owned subsidiaries, 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:

PARAGRAPH 1. Respondent AMREP Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business located at 16 West 61st Street, New York, New York.

PAR. 2. Respondent AMREP Corporation now maintains, and for some time past has maintained, control over the business operations and policies of its land sales and housing sales subsidiaries.

PAR. 3. Respondent AMREP Corporation is now, and for some time past has been, engaged, by itself and through its wholly-owned 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. Among the subdivisions in which lots have been and are being offered for sale by respondent are the subdivisions known as Rio Rancho Estates, New Mexico; Silver Springs Shores, Florida; Oakmont Shores, Missouri; and Eldorado at Santa Fe, New Mexico. The acreage of each of these subdivisions is substantial. Such subdivisions are the property of wholly-owned subsidiaries of AMREP Corporation. Land sales are generally effected through sales offices operated by wholly-owned subsidiaries which are located in approximately 20 states.

PAR. 4. Respondent sells the lots in its subdivisions to purchasers by use of standard form contracts, entitled "Reservation and Purchase Agreements" (hereinafter sometimes referred to in this [2] Complaint as a "contract.") whereby the purchaser pays monthly installments over terms ranging from 5 to 8 years. According to the provisions of the contract, title to the lot remains in respondent until final payment is made, at which time title to the lot is to pass to the purchaser. Purchasers do not, during the term of the contract, have any rights of ownership and cannot use the lot. Purchasers pay interest to respondent during the contract term on the unpaid balance owing on the contract.

PAR. 5. In the course and conduct of its business as aforesaid, respondent now causes, and for some time past has caused, its advertisements, promotional materials, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from its various places of business to agents, representatives, employees, customers, and prospective customers in various other States of the United States. Respondent now maintains and operates, and for some time past has maintained and operated, places of business and has made substantial sales to purchasers in various States of the United States. Respondent has been, and is now, engaged in the practice of conducting tours for prospective purchasers and purchasers of land at its subdivisions. Such tours include the transportation of the prospective purchasers and purchasers from

various States in the United States to subdivisions in Florida and New Mexico. Such tours, and the sales of land and houses made pursuant thereto, constitute a significant amount of respondent's business. Respondent maintains and at all times mentioned herein has maintained, a substantial course of trade in the undeveloped land and houses in or affecting commerce, as defined in the Federal Trade Commission Act.

PAR. 6. In the further course and conduct of the aforesaid business, and at all times mentioned herein, respondent has been, and is now, in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of undeveloped land and houses.

PAR. 7. In the further course and conduct of the aforesaid business, respondent disseminates advertisements 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, 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, diversity, and assets of AMREP Corporation, the backing of respondent's land sales business by such assets, and the good reputation and integrity of the AMREP Corporation.

PAR. 8. By and through the use of such representations and statements, respondent AMREP Corporation has used and is [3] using its name and the prestige and diversification of its holdings for the purpose of selling its subsidiaries' land and houses and deriving pecuniary benefits therefrom.

PAR. 9. In the further course and conduct of the aforesaid business, respondent has made and is making various written and oral statements to the public concerning the purpose of contacting members of the public and inviting them to dinner parties or other gatherings, or offering goods and services free or at low cost. By and through such statements respondent has represented and is representing, directly or by implication, that the purpose in inviting members of the public to dinner parties or other gatherings, or in offering goods or services free or at low cost, is to inform people of the land situation in general, or to accomplish some purpose other than attempting to get invitees to sign contracts for undeveloped land.

PAR. 10. In truth and in fact, respondent's purpose in contacting members of the public, or holding dinner parties or other gatherings, or in offering goods or services free or at low cost, is to induce the signing of contracts for the purchase of respondent's land. Therefore, the acts and practices alleged in Paragraph Nine herein are deceptive and unfair.

PAR. 11. In the further course and conduct of the aforesaid business, respondent disseminates advertisements in various publications of general circulation, distributes promotional materials 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; personal financial security; the stock market, banks and insurance; population growth and movement; the size and diversity of respondent's assets; and various options or financial protections afforded purchasers of respondent's land, including but not limited to purchasers' rights to cancel the contract within six months should they visit the property. By and through such statements and representations respondent has represented and is representing, directly or by implication, that the lots which respondent is offering for sale are an excellent investment for the price at which respondent is offering them for sale, that significant monetary gain can be achieved by purchasing such lots, and that there is little or no financial risk involved in the purchase of said lots at said prices.

PAR. 12. In truth and in fact, in a significant number of instances, lots which respondent has offered and is offering for sale, at the prices at which respondent has offered and is offering them for sale, have been and are poor investments involving a substantial amount of financial risk to purchasers. Therefore, the acts and practices alleged in Paragraph Eleven herein are deceptive and unfair. [4]

PAR. 13. In the further course and conduct of the aforesaid business, respondent, through statements in advertisements, booklets, pamphlets, letters, movies, slides, and oral presentations has represented and is representing, directly or by implication, that the resale of a lot purchased from respondent is not difficult.

PAR. 14. In truth and in fact, there is virtually no resale market for lots purchased at respondent's subdivisions. Therefore the representations, acts, or practices alleged in Paragraph Thirteen herein are deceptive and unfair.

PAR. 15. In the further course and conduct of the aforesaid business, respondent has offered and is offering for sale lots in its subdivisions without disclosing to prospective purchasers that the lots being offered are, at the price at which respondent is offering them, a risky investment 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. Respondent therefore has failed to disclose material characteristics of its lots which, if known to customers, would be likely to

affect their consideration of whether or not to purchase a lot from respondent. The failure to disclose such information is a deceptive and unfair act or practice.

PAR. 16. In the further course and conduct of the aforesaid business respondent, through oral statements and periodic increases in prices of lots, represents, directly or by implication, that the market value of the lots at its subdivisions is rising.

PAR. 17. In truth and in fact, the market value of the land has not been rising. Therefore, the acts or practices alleged in Paragraph Sixteen herein are deceptive and unfair.

PAR. 18. In the further course and conduct of the aforesaid business, respondent has, with respect to its various subdivisions, made representations through advertising, promotional materials and oral statements that the growth of land values at its subdivisions has corresponded and still corresponds to the growth of land values in certain other geographical areas. Through the use of such advertisements and oral statements, respondent has represented and is representing, directly or by implication, that lot values at its subdivisions increase at a rate comparable to those of the certain other geographical areas.

PAR. 19. In truth and in fact, lot values at respondent's subdivisions do not bear any significant relation to land values in these other geographical areas and do not increase at a rate similar thereto. Therefore the acts and practices described in Paragraph Eighteen herein are deceptive and unfair. [5]

PAR. 20. In the further course and conduct of the aforesaid business, respondent has, with regard to the subdivision Rio Rancho Estates, used advertisements, pamphlets, oral statements, movies and slides to give prospective purchasers the impression that the only direction in which the city of Albuquerque, New Mexico can expand is toward Rio Rancho Estates. Through the use of such representations, respondent has represented and is representing, directly or by implication, that the value of undeveloped land in Rio Rancho Estates will increase because of such an expansion.

PAR. 21. In truth and in fact, Rio Rancho Estates is not the only direction toward which the city of Albuquerque can grow. Therefore the acts and practices set forth in Paragraph Twenty herein are deceptive and unfair.

PAR. 22. In the further course and conduct of the aforesaid business, respondent has made and is making various oral and written statements and representations to purchasers under contract with respondent by which respondent has represented and is representing, directly or by implication, that the value of lots has increased significantly since the time of purchase from respondent.

PAR. 23. In truth and in fact, the value of lots has not increased significantly since the purchase from respondent. Therefore, the acts and practices alleged in Paragraph Twenty-two herein are deceptive and unfair.

PAR. 24. In the further course and conduct of the aforesaid business, respondent has made and is making oral statements and representations to members of the public concerning the present and future development of its subdivisions. By and through such statements and representations, respondent has represented and is representing, directly or by implication, that its subdivisions will, in the near future, be developed at least to the extent that all or most lots will be useable as homesites, with potable water, septic tanks or central sewage, electricity and telephone service available without extraordinary charges for hook-up to said utilities.

PAR. 25. In truth and in fact, respondent's subdivisions will not, in the near future, be developed to the extent that all or most lots will be useable as homesites, with potable water, septic tanks or central sewage, electricity and telephone service available without extraordinary charges for hook-up to said utilities. Therefore, the acts and practices alleged in Paragraph Twenty-four herein are deceptive and unfair.

PAR. 26. In the further course and conduct of the aforesaid business, respondent has represented and is representing, directly or by implication, that the particular lot a purchaser buys [6] will, in the near future, or at some specifically stated time, be useable as a homesite, with potable water, septic tanks or central sewage, electricity and telephone service available without extraordinary charges for hook-up to said utilities.

PAR. 27. In truth and in fact, many purchasers bought lots which were not useable as homesites, because potable water, septic tanks or central sewage, electricity and telephone service were not made available without extraordinary charges for hook-up to said utilities within the near future or such specifically stated time. Therefore, the representations alleged in Paragraph Twenty-six constitute deceptive and unfair acts or practices.

PAR. 28. In the further course and conduct of the aforesaid business, respondent has represented and is representing, directly or by implication, that land in the subdivision being offered would soon be unavailable, and therefore that prospective purchasers must purchase lots immediately or risk being unable to do so.

PAR. 29. In truth and in fact, respondent's land has not been and is not selling at such a rate that prospective purchasers could not wait a substantial period of time and still be able to obtain land in the

subdivision being offered. Therefore the acts and practices alleged in Paragraph Twenty-eight herein are deceptive and unfair.

PAR. 30. In the further course and conduct of the aforesaid business, respondent has made and is making oral statements concerning the location of the lots offered for sale. By and through such statements, respondent has represented and is representing, directly or by implication, that prospective purchasers must purchase immediately to ensure that they can obtain what respondent's employees refer to as "desirable locations."

PAR. 31. In truth and in fact, purchasers could wait a substantial amount of time and still have a substantial choice of lots with locations as "desirable" as those offered at the time the representations alleged in Paragraph Thirty are made. Therefore, the acts and practices alleged in Paragraph Thirty herein are deceptive and unfair.

PAR. 32. In the further course and conduct of the aforesaid business, respondent, through advertisements and oral statements, has represented and is now representing, directly or by implication, that the Rio Rancho Estates area is attracting a substantial amount of new industry, and that purchasers who decide to move there will not have difficulty obtaining jobs similar in nature and remuneration to those held in their former place of residence. [7]

PAR. 33. In truth and in fact, jobs for new residents of Rio Rancho Estates are difficult to obtain unless the new resident decides to take either a substantial reduction in salary or a substantially different job, or both. Therefore the use of the advertisements and oral statements alleged in Paragraph Thirty-two herein constitutes deceptive and unfair acts or practices.

PAR. 34. In the further course and conduct of the aforesaid business, respondent has, through oral statements and other means, represented that certain facilities or improvements in Rio Rancho Estates are presently available, or will be available in the near future.

PAR. 35. In truth and in fact, the facilities or improvements referred to in Paragraph Thirty-four herein are not now and will not soon be made available at Rio Rancho Estates. Therefore the acts and practices alleged in Paragraph Thirty-four herein are deceptive and unfair.

PAR. 36. Respondent's land sales contracts contain a declaration by the purchaser that the purchaser understands that no agent or representative of the seller shall have any authority whatsoever to make any other representation on behalf of the seller aside from what is stated in the written contract.

PAR. 37. Use by respondent of the aforesaid declaration is an unfair and deceptive act or practice because respondent and its employees make representations, through advertisements and publications of

general circulation, in promotional materials, and in sales presentations by means of oral statements, slides and movies, which differ in material respects from, or which obscure, the rights and obligations of purchasers and respondent under said contracts.

PAR. 38. In the further course and conduct of the aforesaid business, respondent has made and is making various oral statements in sales presentations concerning the import or significance of signing the contract for the purchase of respondent's land. By and through such statements, respondent (1) has represented and is representing, directly or by implication, that by signing a contract the purchaser is not entering into a binding obligation to purchase land, or (2) respondent has obscured and is obscuring the legal or practical significance of signing a contract.

PAR. 39. In truth and in fact, a person signing a contract which is later signed by respondent, has thereupon entered into a binding obligation to purchase land. Therefore the acts and practices alleged in Paragraph Thirty-eight are deceptive and unfair. [8]

PAR. 40. In the further course and conduct of the aforesaid business, respondent has used and is using in its standard form contracts a provision whereby defaulting purchasers forfeit all payments previously made to respondent under the contract. Respondent has received payments from purchasers who subsequently defaulted on their contracts and has failed to offer to refund or has refused to refund to such purchasers those amounts of the purchasers' total payments which exceed respondent's reasonable damages caused by the defaults. Respondent's continued retention of said amounts constitutes an unfair act or practice and/or an unfair method of competition.

PAR. 41. The use by respondent of the aforesaid contract provisions as described in Paragraph Forty constitutes an unfair act or practice.

PAR. 42. Respondent's contracts contain a six-month refund provision according to the terms of which the purchasers must visit the lot in order to obtain a refund of all monies paid under the contract. Respondent conducts tours to its subdivisions for purchasers ostensibly so that purchasers might examine their land and decide whether or not to request cancellation of the contract. However, respondent actually uses these tours to sell purchasers more land, and to discourage such purchasers from exercising their cancellation privilege.

PAR. 43. The use of the tours mentioned in Paragraph Forty-two to vitiate the effect of the six-month refund provision constitutes an unfair act or practice.

PAR. 44. In the further course and conduct of the aforesaid business, respondent has utilized and continues to utilize a provision in its standard form contracts giving purchasers of land the right to ex-

change parcels of undeveloped land for parcels of comparable value in a developed area. This exchange privilege has also been explained in sales presentations to prospective purchasers. Through the use of this provision and the explanations in sales presentations, respondent has represented and now represents, directly or by implication, that those who are ready to build homes on respondent's property will be able to get a lot of equal size in a developed area without paying additional cash.

PAR. 45. However, when purchasers wish to exchange for a lot in a developed area, respondent uses various means and devices to encourage or coerce purchasers to exchange their lots for smaller building lots and, moreover, to pay extra money to respondent. Among the devices used by respondent to discourage exchanges for equal size lots with no additional cash being paid are representations that such lots are less desirable than others because they require septic tanks, have overhead as opposed to underground utility lines, have no public transportation available, and because financing for homes to be built on them is more difficult to obtain. Respondent does not disclose to purchasers that such practices will be used to discourage them from receiving a lot of equal size in a developed area without paying additional cash, nor does respondent disclose that a substantial number of purchasers do in fact pay extra money and receive a smaller lot in return. Respondent therefore has failed to disclose material facts which, if known to certain purchasers, would be likely to affect their consideration of whether or not to purchase a lot from respondent. Such failure to disclose is a deceptive or unfair practice.

PAR. 46. In the further course and conduct of the aforesaid business, respondent has presented and is presenting purchasers with a contract, a property report required to be provided to the purchaser by federal or state law, and in some instances additional lengthy or detailed documents. These documents contain information and provisions which could affect the decision of certain consumers on whether to sign a contract for the purchase of respondent's land. Respondent frequently has made and is making available the aforesaid documents at dinner parties or other gatherings sponsored by respondent in circumstances where it is likely that many purchasers will not read such documents at all 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. In many instances respondent has withheld reports required to be provided to the purchaser by state or federal law until after an agreement is signed, which practice is in violation of federal or state laws. The soliciting or obtaining under such circumstances of an agreement to purchase respondent's land,

involving a substantial financial commitment by the purchaser, is a deceptive and unfair act or practice.

PAR. 47. In the further course and conduct of the aforesaid business, respondent has utilized and is utilizing contract provisions which are not understandable to many consumers or cannot be evaluated by many consumers. Respondent has made and is making the contract available to prospective purchasers, and solicits and obtains signatures to the contract from purchasers, in circumstances where the purchaser does not have the opportunity to seek assistance of counsel or other professional advice to aid in understanding said provisions. Respondent has discouraged purchasers from obtaining assistance of counsel or other professional advice in order to understand said provisions. The soliciting or obtaining of an agreement to purchase respondent's land, involving a substantial financial commitment by the purchaser, when the purchaser has not had an opportunity to seek assistance of counsel or other professional advice, together with the discouragement of purchasers who wish to seek assistance of counsel before entering into such an agreement, constitute unfair acts or practices.

PAR. 48. In the further course and conduct of the aforesaid business, respondent has utilized artificial props in [10] the production of motion pictures promoting the sale of land in its subdivisions. Typical of the motion pictures in which such props were used, was one for which grass was sprayed green and pine cones were hung from trees in order to make the area appear more appealing.

PAR. 49. The promotional motion pictures referred to in Paragraph Forty-eight purport to accurately and truthfully depict or describe the appearance or habitability of respondent's land. However, by and through the use of the artificial means alleged in Paragraph Forty-eight, said promotional motion pictures falsely represent said appearance or habitability. Therefore, said promotional motion pictures were and are unfair or deceptive.

PAR. 50. Respondent maintains a number of wholly-owned subsidiaries which operate in various states and whose function is to sell vacant land in respondent's subdivisions. Many of such subsidiaries are given names consisting solely of initials. Prospective purchasers of land are often not informed that such sales companies are wholly-owned subsidiaries of respondent AMREP Corporation. Prospective purchasers have thus been and are led to believe that an independent sales company is promoting the purchase of land in respondent's subdivisions. Respondents therefore have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase a lot from respondent. Such failure to disclose is a deceptive and unfair act or practice.

PAR. 51. In the further course and conduct of the aforesaid business, respondent represents, directly or by implication, that financing for homes to be built in respondent's developments will be easily obtained.

PAR. 52. In truth and in fact, certain purchasers experience problems in obtaining home financing. Therefore, the representations alleged in Paragraph Fifty-one constitute unfair and deceptive acts or practices.

PAR. 53. The problems in obtaining home financing are material facts which if known to certain consumers, would be likely to affect their consideration of whether or not to purchase a lot from respondent. Therefore, the failure to disclose such information is a deceptive and unfair act or practice.

PAR. 54. In the further course and conduct of the aforesaid business respondent has induced and is inducing members of the public through deceptive and unfair acts and practices, to pay to it, in advance of passage of title or the obtaining of any rights of enjoyment or possession, substantial sums of money towards the [11] purchase of lots in respondent's developments which are of little or no use or value to the purchasers as investments or for any other purpose. Respondent has received and is receiving the said sums, and has failed to offer to refund or has refused to refund said sums to purchasers. Respondent's continued retention of the sums obtained as alleged in this Paragraph constitutes an unfair act or practice and/or an unfair method of competition.

PAR. 55. 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 to cause the purchase of substantial numbers of respondent's lots because of said mistaken and erroneous belief.

PAR. 56. 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

PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

JULY 18, 1979

SUMMARY OF PLEADINGS*

I. COMPLAINT

The Complaint in this matter issued on 3/11/75. A number of allegations concern Respondent's identity, its activities in and affecting interstate commerce and the Commission's jurisdiction over the subject matter of the Complaint.

Substantively, the Complaint (Par. 3) alleges that Respondent is in "the business of acquiring land, subdividing said land into lots, and advertising . . . and selling (them) to the public" at four large subdivisions known as Rio Rancho Estates, New Mexico, Silver Springs Shores, Florida, Oakmont Shores, Missouri, and Eldorado at Santa Fe, New Mexico. It describes Respondent's sales organization, generally operating through subsidiaries in some twenty states (Par. 3); its use of "standard form contracts" to make 5-8 year conditional (installment) sales of lots at the foregoing developments (Par. 4); and the nature of its selling methods, including dissemination of advertisements, distribution of promotional materials and oral and written statements, slides and movies, particularly at so-called "dinner parties" and similar gatherings (Pars. 7, 9).

The gist of the Complaint is contained in Paragraphs 11 and 12:

... 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; personal financial security; the stock market, banks and insurance; population growth and movement; the size and diversity of respondent's assets; and various options or financial protections afforded purchasers of respondent's land, including but not limited [3] to purchasers' rights to cancel the contract within six months should they visit the property. By and through such statements and representations respondent has represented and is representing, directly or by implication, that the *lots which respondent*

* Abbreviations used:

TR - Transcript of Hearing
CX - Complaint Counsel's Exhibit
CTX - Court's Exhibit
RX - Respondent's Exhibit
R/A - Request for Admissions
CCPF - Complaint Counsel's Proposed Findings
RPF - Respondent's Proposed Findings
CCRB - Complaint Counsel's Reply Brief
RRB - Respondent's Reply Brief

is offering for sale are an excellent investment for the price at which respondent is offering them for sale, that significant monetary gain can be achieved by purchasing such lots, and that there is little or no financial risk involved in the purchase of said lots at said prices. (emphasis added)

In truth and in fact, in a significant number of instances, lots which respondent has offered and is offering for sale, at the prices at which respondent has offered and is offering them for sale, have been and are *poor investments involving a substantial amount of financial risk to purchasers.* Therefore, the acts and practices alleged in Paragraph Eleven herein are deceptive and unfair. (emphasis added)

Most of the rest of the Complaint is made up of more detailed variations on this theme. Respondent's allegedly deceptive representations and/or non-disclosures (or otherwise unfair acts) include:

Pars. 13-14: misrepresentations that resale of a lot purchased from Respondent is "not difficult".

Par. 15: unfair failure to disclose the risky nature of the investment, in that its future is uncertain and the purchaser "probably will be unable to sell his lot . . . at or above the purchase price." [4]

Pars. 16-17: misrepresentations that the market value of Respondent's subdivision lots is rising.

Pars. 18-19: misrepresentations that the growth of land values at Respondent's subdivisions will correspond to such growth in different, unrelated (boom) areas.

Pars. 20-21: misrepresentations that the "only" direction in which Albuquerque, N.M. can expand is toward Rio Rancho Estates.

Pars. 22-23: misrepresentations, including those implicit in its price schedule,¹ that the value of lots purchased from Respondent has increased significantly since the purchase.

Pars. 24-27 and 34-35: misrepresentations as to the development of subdivisions (or particular lots) that all or most will be useable as "homesites" (with the usual utilities available and without extraordinary hook-up charges) in the near future or by a date certain. [Pars. 34-34 relate only to "certain facilities or improvements" in Rio Rancho Estates.]

Pars. 28-31: misrepresentations that land in a subdivision being offered (or at least the "desirable locations") will soon be unavailable unless purchased immediately. [5]

Pars. 32-33: misrepresentations that Rio Rancho is attracting new industry and that purchasers moving there can easily find new jobs similar in nature and remuneration to their old ones.

Pars. 36-37: unfair compulsion of customers to accept a form contract integration clause in the face of materially different misrepresentations by Respondent and its employees.

¹ The complaint reads literally: ". . . . representing, directly or by implication, . . ."

Pars. 38–39: misrepresentations that by signing Respondent's form contract ["Reservation and Agreement to Purchase"] a purchaser is not entering into a binding obligation.²

Pars. 40–41: unfair compulsion of credit customers to accept a form contract provision forfeiting all of purchaser's payments in the event of default by purchaser.

Pars. 42–43: unfair inducement of customers to tour the developments and inspect the lots they have purchased, with the purpose of dissuading them from exercising a cancellation privilege or even buying more land.

Par. 44: misrepresentations that the building exchange provisions of Respondent's form contracts offer lots of equal size when they really offer "comparable value". [6]

Par. 45: failure to disclose to customers that in the event they exercise their building exchange privilege they will be discouraged from seeking a so-called "even exchange" and will be encouraged or coerced into accepting smaller lots and/or paying boot-money to Respondent.

Par. 46: unfairly arranging to give prospective purchasers lengthy and detailed legal documents (such as its form contract and State and Federally-required property reports) at dinner parties and other gatherings where it is likely that many purchasers will not read these documents carefully, if at all. [In some cases, it is alleged, Respondent deceptively withholds the property reports until after an agreement is signed, in violation of Federal or State law.]

Par. 47: unfairly using contract provisions not understandable or evaluable by many consumers who lack advice of counsel or other professionals and, indeed, discouraging reference by consumers to counsel or other professional advisers.

Pars. 48–49: misrepresenting the appearance and/or habitability of Respondent's land by using artificial props for promotional movies (e.g. by spraying grass with green paint and hanging pine cones from trees).

Par. 50: unfair failure to disclose the connection between Respondent and its sales subsidiaries, whose identity was regularly masked by the use of alphabet names [such as "ATC Co."]

Pars. 51–53: misrepresenting the ease of obtaining financing at its developments and unfairly failing to disclose the problems connected therewith. [7]

Par. 54: unfairly compelling credit purchasers to pay substantial sums toward the time price of its lots, even before the purchaser gets title, possession or enjoyment of the property, which, in any event, is of little or no use or value to a purchaser as an investment or for any other purpose.

All of the foregoing practices are alleged (Pars. 55–56) to possess a capacity and tendency to deceive, mislead and/or otherwise injure the purchasing public and Respondent's competitors, thus constituting unfair methods of competition and/or unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

There was served with this Complaint a proposed order which the

² Par. 38 also charges Respondent with "obscuring the legal or practical significance of signing a contract" but this is too obscure a charge for us to comprehend.

Commission then expected to issue if the facts were found to be as alleged in the Complaint. There was also a warning that a judicial redress action under Section 19(b) of the Federal Trade Commission Act, as amended, might be brought by the Commission on the basis of the findings here. Because the order eventually proposed by Complaint Counsel at the close of the evidence varied considerably in form and to some extent in substance from that originally proposed, it would be a waste of time and effort to summarize the voluminous provisions of the order originally attached to the Complaint. Instead, Complaint Counsel's ultimate proposal will be discussed below in connection with the order recommended here.

II. ANSWER

On 5/7/75 Respondent filed its Answer to the Complaint. The Answer conceded Respondent's corporate identity; admitted that it advertises and sells subdivided land at Rio Rancho Estates, Silver Springs Shores and Eldorado at Santa Fe (but no longer at Oakmont Shores); and agreed that it uses the U.S. mail to send out contracts and promotional materials. However, it denied (or severely qualified) [8] almost everything else alleged in the Complaint, including the master allegations of Paragraphs 11 and 12.

In addition to these denials, Respondent's Answer contained four affirmative defenses. The *first* (Answer, Pars. 16-18) pleaded that all of Respondent's advertising since 12/1/73, when the Department of Housing & Urban Development's (HUD's) Office of Interstate Land Sales Registration (OILSR) established "stringent" guidelines with respect to such advertising, has been in complete compliance therewith and asserted that as to advertising material used only before 12/1/73 the Complaint must be moot. The *second* affirmative defense (Answer, Par. 19) pleaded that the Commission had no reason to bring a complaint with reference to Silver Springs Shores and Oakmont Shores because it conducted no pre-complaint investigation at either development. The *third* affirmative defense (Answer, Par. 26) pleaded that substantially all of the advertising used by Respondent and its subdivisions has been reviewed by government experts and found to be not misleading. Respondent's *fourth* and last affirmative defense pleaded that HUD's OILSR has "primary jurisdiction" over interstate land sales and to the extent of any conflict with the proposed order in this case the rules of the government agency having "primary jurisdiction" must prevail.

III. MOTION TO STRIKE AFFIRMATIVE DEFENSES

On 7/21/75 Complaint Counsel moved to strike all of Respondent's affirmative defenses. After Respondent answered Chief Judge Han-

scom on 9/17/75 denied the motion to strike Respondent's *first* defense because the claim of abandonment (although usually rejected) might eventually have some bearing on the case. He made clear, however, his view that Respondent's advertising might conform to HUD guidelines yet violate Section 5 of the Federal Trade Commission Act.

As for Respondent's *second* affirmative defense, it was held that the Commission is the sole arbiter (absent an improper motive) of whether there is enough reason to believe a violation of law has occurred. Accordingly, Judge Hanscom struck Respondent's second defense. [9]

In a dictum concerning the *third* affirmative defense he stated that even aside from the fact that this complaint attacks more trade practices than "advertising", no action or finding of another agency or "government expert" can oust the Commission of its "statutory responsibility". He ruled, however, that because "it cannot be said, at least at this juncture, that review and approval, if such occurred, can have no possible bearing on this proceeding", the motion to strike Respondent's third affirmative defense would be denied but warned that this was not to be taken as "a commitment to extensive litigation of these defenses."

Finally, Judge Hanscom denied Complaint Counsel's motion to strike Respondent's *fourth* affirmative defense (primary jurisdiction in HUD's OILSR) because it related only to an issue of law concerning relief as to which Respondent was entitled to make an argument, "even if unfounded."

CHRONOLOGY OF PROCEEDING

On the same date that this Complaint issued (3/11/75), the matter was assigned to Chief Administrative Law Judge Daniel H. Hanscom. The complaint was served on Respondent on 3/17/75. Pursuant to extensions of time granted, on 5/7/75 Respondent filed its Answer to the Complaint. A prehearing conference on 5/13/75 settled a schedule for initial discovery by both parties. [Most details of discovery and evidentiary disputes other than a few crucial ones will be omitted here.]

A motion by Respondent on 5/28/75 to stay this proceeding pending completion of a related federal grand jury investigation in the Southern District of New York was denied in part and certified in part by Chief Judge Hanscom on 6/27/75 and denied *in toto* by the Commission on 7/29/75. As noted in the above summary of pleadings, a motion by Complaint Counsel on 7/17/75 to strike Respondent's four affirmative defenses was denied by the Chief Judge on 9/15/75 as to the first, third and fourth defense, although granted as to the second.

On 8/13/75 Respondent sued in the U.S. [10] District Court for the Southern District of New York (75 Civ. 4013) to enjoin prosecution of this complaint during pendency of the grand jury investigation there. However, the suit was dismissed as moot by Judge Pierce on 11/3/75, following Respondent's indictment by said grand jury on 10/28/75 on related charges of mail fraud and interstate land sales fraud (75 Cr. 1023).

At a second prehearing conference held on 10/30/75 further discovery for both sides was scheduled, turnover of Complaint Counsel's evidence to Respondent was ordered for 1/30/76, trial of the case-in-chief was set for 2/17/76 and provision was made for a six weeks interval between the case-in-chief and defense. On 11/10/75 this matter was reassigned for trial to Administrative Law Judge Paul R. Teetor, who has continued in charge of the case to date.

On 12/19/75 Respondent moved to stay both discovery and the hearing of this matter pending trial of the related criminal case referred to above. The Administrative Law Judge denied a stay of discovery on 12/29/75 and his recommendation to deny a stay of the whole proceeding was eventually accepted by the Commission on 2/24/76.

Meanwhile, however, Respondent had gone to the U.S. District Court for the Southern District of New York, where it obtained from Judge Metzner, a temporary postponement of scheduled discovery and on 1/15/76 an order that this proceeding might not continue after 7/30/76 until one month after the end of the criminal trial (75 Cr. 1023), over which Judge Metzner would preside. See *AMREP Corp. v. United States*, 405 F.Supp. 1053 (U.S.D.C., S.D.N.Y., 1976). On 3/1/76 the Court of Appeals for the Second Circuit, acting from the bench, upheld Judge Metzner's ruling. See *United States v. AMREP Corp.*, 535 F.2d 1240 (2d Cir., 1976), listing but not publishing the Court's opinion.

On the eve of trial Respondent moved to exclude the public from the hearing of this matter and to gag all witnesses and FTC officials in order to prevent publicity which might prejudice Respondent during its future criminal trial in New York. The motion was denied by the Administrative Law Judge here on 5/22/76 and a further effort to obtain such [11] an order from the U.S. District Court for the Southern District of New York, Judge Metzner, on 5/24/76 was similarly unsuccessful.

Between 6/1/76 and 7/1/76 the first series of evidentiary hearings were held in Albuquerque, New Mexico. Following a brief recess for travel, hearings were then resumed in New York City between 7/14/76 and 7/30/76, the last allowable hearing date under Judge Metzner's order noted above.

On the first day of hearings Respondent moved in open court to sequester all anticipated witnesses. Following Rule 615 of the Federal Rules of Evidence, which makes sequestration mandatory on motion of either party, the Administrative Law Judge issued such an order but excepted therefrom anyone attending the hearings as official representative of the Respondent or the Commission and, by special leave of court, anyone else found essential to present either side's case. Without objection by Respondent it was further ordered that until Respondent firmed up its witness list it would be presumed that any of Respondent's employees might later be called as witnesses and therefore until that time should not attend any of these hearings.

On 6/9/76 Respondent moved to subpoena all materials in the Government's possession tending to exculpate Respondent, invoking *Brady v. Maryland*, 373 U.S. 83 (1963), but the Administrative Law Judge held this rule of a criminal trial "inapposite to Commission proceedings" under *Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969). However, acting under the rule of *Harvey Aluminum, Inc. v. N.L.R.B.*, 335 F.2d 749, 754 (9th Cir., 1954), the Judge granted Respondent's simultaneous motion for the government to produce Jencks-type statements by any of five specified government witnesses, even though found in the files of another arm of the government than this Commission (which had already made such production). Despite receipt of an informal communication from the Assistant Attorney General in charge of the Justice Department's Criminal Division that the Department had nothing producible except grand jury testimony producible only at the direction of the U.S. District Court for the Southern District of New York, the Administrative Law Judge noted that a 1970 amendment to the Jencks Act [18 U.S.C. 3500(c)(3)] had brought grand jury testimony within the definition of a "statement" under that act and accordingly issued a subpoena to the U.S. Attorney for the Southern District of New York to appear at these hearings in New York in July with the specified evidence. [12]

On 6/25/76 the U.S. Attorney for the Southern District of New York moved to quash this subpoena but on 7/6/76 that motion was denied by the Administrative Law Judge. However, the return date was postponed indefinitely to afford the General Counsel of the Commission opportunity to make appropriate arrangements with the U.S. Attorney or apply for a writ of mandamus to compel him to act. Meanwhile, however, this matter had become largely moot. Respondent, in its character as defendant in the parallel criminal case, received all grand jury testimony in the Department's possession except that of one witness here (Heinz). As for the latter, on 9/28/76 the Commission directed that the matter be put over until after conclusion of the parallel criminal trial.

One of Complaint Counsel's witnesses, a former employee of Respondent named Liotta, whose grand jury testimony was obtained in the way just described, testified here twice, invoking the 5th Amendment several times and conceding perjury in earlier testimony. A motion by Respondent in open court at Liotta's testimony to strike it *in toto* was briefed at length during the ensuing recess and granted by the Judge on 12/23/76, citing the maxim *falsus in uno, falsus in omnibus*.

Respondent's parallel criminal trial in the Southern District of New York commenced on 11/8/76 and lasted until 12/28/76, following which Respondent, with certain of its officers,³ were found by a jury to have been guilty of mail fraud and interstate land sales fraud and judgment of conviction was entered on 3/10/77.

Meanwhile, Respondent objected to Complaint Counsel's adding to its case certain witnesses and exhibits not included in its original turnover, most of which had surfaced during the parallel criminal trial. On 4/6/77 [13] these objections were overruled by the Administrative Law Judge, who took the position that a liberal interpretation of his 4/13/76 turnover order was required by the special circumstances of this case. Efforts by Respondent to further argue this objection were similarly denied (4/11/77).

In the course of the foregoing dispute about adding evidence which had surfaced during the parallel criminal trial, reference was made by both parties to the fact of conviction in the criminal case. As a result Respondent moved on 4/18/77 to strike "prejudicial matter" and Complaint Counsel answered, blaming Respondent for having first injected the conviction into this record but now asking the Administrative Law Judge to take official notice that the jury had found Respondent's claims as to the investment value of its land and the direction and extent of Albuquerque's growth to be false. Respondent objected on the grounds that an appeal in the criminal case was still pending and that in any event Complaint Counsel have the burden of proof here and Respondent should not be deprived of due process of law by reliance on a prior conviction.

Thereafter the Administrative Law Judge gave lengthy and detailed consideration to this question, issuing first a preliminary "*Ruling On Effect To Be Given Here To Judgment in U.S. v. AMREP Corp., et al.*" (6/10/77) in which he concluded that the doctrine of collateral estoppel should apply here, but gave both sides opportunity to argue the question further. Thereafter he issued a "*Further Ruling On Effect To Be Given Here To Judgment in U.S. v. AMREP Corp., et al.*"

³ One indictee, Respondent's Senior Vice President and General Counsel, Solomon Friend, Esq., was acquitted by Judge Metzner on 12/30/76 before the case went to the jury.

(6/30/77), in which he reluctantly bowed to the joint objection of *both* parties that collateral estoppel should *not* be applied here.

The principal reason for Complaint Counsel's surprising resistance to winning this case by collateral estoppel was said to be the difficulty inherent in deciding what a jury verdict decided for purposes of justifying particular relief. Although the Law Judge was sceptical as to this proposition, he indicated reluctance to proceed in the face of opposition by both parties, particularly where most of the case-in-chief was by then already in evidence. Having reached such a [14] conclusion, the Judge stated on the record that he would not press further for a collateral estoppel and he would not approach the evidence here with any preconception arising out of the prior criminal conviction (TR 16150). [For further detail and citation of authorities concerning this important question, *see* the above-mentioned rulings of 6/10/77, copies of which are attached hereto as Appendices A1 and A2.]

Meanwhile, presentation of the case-in-chief had been resumed in Ocala, Florida from 5/2/77 to 5/6/77; in New York City from 5/16/77 to 5/25/77; in Springfield, Missouri from 6/13/77 to 6/16/77; and in Albuquerque, New Mexico, from 7/18/77 to 7/27/77. With the close of the Albuquerque hearings on 7/27/77, the case was then recessed until the Fall to allow Respondent time for preparation of its defense presentation, except that it was understood that Complaint Counsel would be allowed a day or more to complete their evidence when hearings resumed.

During the Springfield hearings to which reference has just been made it appeared that one of Complaint Counsel's witnesses, the "Reverend" Thomas Pollock, had been convicted of several felonies. The Administrative Law Judge on 6/13/77 postponed Pollock's cross-examination and ordered a government-wide search for Jencks-type statements by this witness which might affect his credibility. Although Complaint Counsel argued strenuously in a motion for reconsideration (7/22/77) that the Jencks Act does not reach statements unrelated to the subject matter of the proceeding (*i.e.*, statements bearing solely on the witness' credibility), the Administrative Law Judge on 7/22/77 held that Respondent was entitled to such a broad Jencks search and Complaint Counsel, with the cooperation of the Justice Department, thereupon complied with the search orders. Witness Pollock's cross-examination was completed, with benefit of the few materials uncovered by this search, when hearings resumed, on 11/21/77.

Although just prior to the May-July hearings (4/12/77) Complaint Counsel had been denied a broad subpoena of those of Respondent's records which referred to Complaint Counsel's own witnesses, during

the September-October recess [15] Complaint Counsel applied for and on 9/12/77 were granted a subpoena for Respondent to produce more narrowly limited categories of documents in its files in aid of Complaint Counsel's cross-examination of witnesses to be adduced by Respondent during its coming defense. The Administrative Law Judge considered it only fair, particularly after Respondent had received the benefit of the Jencks Act, that it should make a similar file search for Complaint Counsel's benefit, thus insuring a more objective decision as to which of Respondent's file documents should ultimately find their way into the record. A motion by Respondent for reconsideration was denied, with opinion, on 10/5/77.

In fairness to Respondent the time for resumption of hearings was now extended from 10/31/77 to 11/14/77 but Respondent, unsatisfied, on 10/26/77 sought an order from the U.S. District Court for the Middle District of Florida (Jacksonville Division) for Complaint Counsel to show cause why a preliminary injunction further extending Respondent's compliance time should not issue. This petition was dismissed without prejudice for plaintiff (Respondent here) to refile in the Ocala Division. However, on 11/4/77 the parties entered into a stipulation resolving several pending disputes regarding a proper subpoena return and providing that Respondent would not refile its judicial complaint. On 11/8/77 the Administrative Law Judge accepted the stipulation for filing and found most of its provisions reasonable but declined to be bound by the provision whereby Complaint Counsel renounced all right to obtain any of Respondent's attorneys' work product regardless of need therefore or the availability of equivalent alternatives. [*Cf.*, Commission Rule Section 3.31(b)(3).]

Meanwhile, a dispute had developed as to the relevance of certain requests for admissions sought by Respondent on 8/31/77 concerning seventeen other land sales companies allegedly competing with Respondent. These admissions were said to be relevant to Respondent's affirmative defenses of regulation, government review and primary jurisdiction. The Administrative Law Judge on 10/7/77 denied a motion by Respondent to compel answers to these requests, holding them irrelevant because it is [16] immaterial whether competitors follow the same practices as Respondent and *pari delicto* is no defense to a public prosecution.

During the same period much attention was also directed to Respondent's announced intention to adduce many "expert" state and federal regulators to testify to standards of fairness in the land sales business and to Respondent's compliance with state and federal regulations. By order dated 9/30/77 the Administrative Law Judge announced that in no event would he receive proof that some other official had deemed Respondent in compliance with some law, it being

this court's function to make such determination as to Section 5 of the Federal Trade Commission Act and compliance with no other law being in issue here.

With reference to "expert" testimony on proper standards of fairness, the Judge's order of 9/30/77 reminded the parties that Chief Judge Hanscom had early warned against over-litigating this issue. The present Judge, for his part, announced that he would hear no testimony on this issue unless and until briefs and argument on the subject, which seemed to him essentially a question of law, should prove inadequate. The parties both eventually submitted such briefs after the close of most of the testimony and argument was heard thereon the last day of hearings (*see* transcript of testimony for 5/18/77), obviating any necessity, for expert testimony on this subject. Evidentiary rulings during the defense case thereafter followed the pattern laid down in the Judge's above order of 9/30/77.

In response to complaints concerning Respondent's testimonial summaries, witness interviewing, etc., on 10/3/77 the Administrative Law Judge analyzed the status of 155 witnesses supposed to testify for Respondent in New York City. He concluded that 42 so-called "expert" regulators would not be heard, for the reasons set forth in the Judge's ruling of 9/30/77 but that amplification of summaries was required as to 72 witnesses. To permit this the start of the defense case was again postponed, this time to 11/28/77. [17]

On 10/13/77 the General Counsel's office forwarded for use in this case the grand jury testimony of Complaint Counsel's witness Heinz, an Albuquerque realtor, which had been sought in the summer of 1976, pursuant to the Jencks Act, and had finally been released at the Commission's request by order of Judge Metzner of the U.S. District Court for the Southern District of New York on 9/26/77. [Heinz finally testified when Complaint Counsel completed their case, on 11/21/77.]

A motion was made by Respondent on 10/20/77 to strike all of Complaint Counsel's exhibits that were obtained during the investigation out of which this Complaint grew and came into the possession of Complaint Counsel without a subpoena from the Administrative Law Judge [citing *Atlantic Richfield Corp. v. F.T.C.*, 567 F.2d 96 (D.C. Cir., 1977).] This motion was denied on 11/7/77.

During preparation for the defense case various problems arose in connection with Complaint Counsel's attempted interviews of Respondent's proposed witnesses, the most notable of which concerned the attorney-client privilege. Several of Respondent's lawyers who were listed to testify in its behalf nevertheless claimed the attorney-client privilege when interviewed by Complaint Counsel. On 10/3/77 the Administrative Law Judge ruled that Respondent must waive any

attorney-client privilege as to such persons *prior to the taking of depositions or holding of interviews*, or face preclusion of such lawyers' testimony under Commission Rule 3.38. [For further detail on the application of this rule, see Complaint Counsel's subsequent motion to strike (10/25/77), Respondent's opposition (11/1/77) and the Administrative Law Judge's order for oral argument, stressing the importance of the particular facts of each situation (11/14/77).]

Evidentiary hearings were resumed at New York City on 11/21/77. During that week Complaint Counsel completed presentation of their case, as arranged earlier. On 11/28/77 presentation of the defense began and continued daily in New York City until 1/12/78, except for the Christmas holidays. Subsequent hearings were held in Ocala, Florida between 2/6/78 and 2/16/78; in Springfield, Missouri on 3/6-7/78; and in Albuquerque, New Mexico, between 3/20/78 and 4/14/78. [18]

At the start of the defense hearings, on 11/28/77, Complaint Counsel moved the Administrative Law Judge to request the Commission to seek access to transcripts of the grand jury testimony of twelve of Respondent's anticipated witnesses, reciting the unwillingness of both Respondent and the U.S. Attorney for the Southern District of New York to turn over copies to Complaint Counsel without a court order. Reduced to nine (instead of 12) transcripts, this motion was promptly certified to the Commission, which on 12/6/77 directed its General Counsel to seek release of these nine transcripts from the U.S. District Court for the Southern District of New York. Thereafter, on 12/20/77 that Court, Judge Metzner, directed the U.S. Attorney to produce the Grand Jury testimony of all nine witnesses as a result of this Commission's showing that its "particularized need" for these transcripts in aid of cross-examination outweighed the policy of grand jury secrecy in this case. *United States v. AMREP Corp., XI Court Decisions, Federal Trade Commission, 737 (1977)*.

A month in advance of the Albuquerque hearings the Administrative Law Judge determined that Respondent's proposed presentation at Albuquerque would be excessively lengthy, in that sixty-one of Respondent's proposed 125 witnesses were expected to testify in substance merely that they were "contented customers." Citing *Basic Books, Inc. v. F.T.C.*, 276 F.2d 718, 720-21 (7th Cir., 1960), the Judge held that evidence that some customers felt they were treated fairly had no tendency to refute evidence that other customers were treated unfairly and that even if such evidence were admissible the proposed testimony was largely cumulative of previous testimony taken at other project locations. Accordingly, Respondent was directed to delete from its witness list 49 of the said 61 "contented customers",

leaving twelve who would be heard concerning Rio Rancho Estates and Eldorado at Santa Fe.

During the latter part of the defense hearings there was considerable maneuvering on both sides with reference to the proposed testimony of three of Respondent's top executives, Howard Friedman, Daniel Friedman and Chester Carity, all of whom had been convicted of mail fraud and interstate land sales fraud in the parallel criminal proceeding and all of whom, along with Respondent, had by now lost their appeals [19] to the Court of Appeals [*United States v. AMREP Corporation*, 560 F.2d 539 (2d Cir., 1977)], *cert den.*, 434 U.S. 1015 (1978).

Because of the pendency of their criminal appeals and the problems associated therewith, Respondent had been allowed by Complaint Counsel, to postpone until 1/28/78 turning over to the latter their summaries of these three witnesses' anticipated testimony. Shortly before that date Respondent moved for a further extension of time for filing testimonial summaries (until 2/27/78), giving assurance that if Respondent finally decided to put these witnesses on the stand Complaint Counsel would get "ample time" for pretrial interviews "long prior" to such testimony. With Complaint Counsel's consent, on 1/31/78 the Administrative Law Judge granted a further postponement of time for filing such summaries until 2/27/78.

However, the summaries were not, in fact, produced on the appointed date and on 3/10/78, with hearings in Albuquerque scheduled to start in 11 more days, Complaint Counsel moved to delete all three executives from Respondent's witness list. Respondent's answer on 3/14/78 explained that criminal counsel for the three executives were still too busy with a post-appeal motion based on alleged misconduct by the U.S. Attorney to permit interviews of the witnesses by counsel here. It was further explained that two of the three executives⁴ were by now incarcerated in the Federal penitentiary at Allenwood, Pennsylvania, and not available for interviews. However, Respondent's counsel tendered summaries of what they expected the witnesses to say, prepared without benefit of consultation with the witnesses.

The summaries so tendered were not, in fact, satisfactory to Complaint Counsel, who persisted unsuccessfully in their demand for interviews with these witnesses. Still failing to obtain such interviews, on 3/31/78 Complaint Counsel [20] sought and the Administrative Law Judge granted depositions of the three, one in New York City and two in Allenwood Prison. Thereafter, however, Respondent limited its proposed witnesses to one of the three (Howard Friedman), who was interviewed by Complaint Counsel on the eve of his testimony during the final hearings in Los Angeles on 5/16-17/77.

⁴ Apparently arrangements had been made for at least one of the three to be out of prison at any one time in order to keep AMREP's business running as usual.

The Los Angeles hearings (5/16-17/77) were mainly devoted (in addition to Friedman's testimony) to oral arguments supplementing written briefs by both parties on two principal subjects: (1) standards of fairness applicable to a proceeding of this sort in light of State laws and HUD regulations in the same general field; and (2) recommendations as to appropriate relief if a violation of Section 5 of the Federal Trade Commission Act be assumed *arguendo*. In the latter connection Complaint Counsel on 5/3/78 filed a "Supplement to Notice Order," altering the relief sought in certain respects, and on 5/10/78 filed additional comments and an additional proposal under the title "Addenda to Supplement to Notice Order."

In addition to considering proper standards of fairness and relief, at the final session in Los Angeles court and counsel, recognizing the unusual size and complexity of the case (approximately 25,000 pages of testimony and 1500 exhibits) joined in recommending an extension of the usual three months for briefing and decision allowed by Rule 3.51 to nine months, of which six months would be given to the parties (four months for their proposed findings and conclusions and two more for their rebuttal briefs) and the remaining three months would be given to the Administrative Law Judge to prepare and submit his initial decision. This recommendation was forwarded to the Commission on 5/22/78 and adopted by it on 6/21/78, making the Initial Decision due on 2/28/79, nine months after the closing of the record here on 5/31/78. The due date was subsequently extended by the Commission at the Administrative Law Judge's request in three steps to 6/22/79.

Since the closing of the record on 5/31/78, Respondent has made several post-closing motions. A motion to reopen the record principally for reception of [21] so-called "newly discovered evidence" of high prices for land in the core area of Rio Rancho Estates on the ground that the evidence to be offered appeared to have little if any significant probative value here. [Denial of Respondent's Motion to Reopen Proceeding by Order dated Nov. 20, 1978.] Another motion dated 5/1/79 requested the Administrative Law Judge to take official notice of new regulations promulgated as of 6/11/79 by HUD's Office of Interstate Land Sales Registration and to hold another conference or hearing for further presentation of Respondent's views as to the form and content of Complaint Counsel's proposed order. We do not believe such further argument concerning the law would be sufficiently productive to justify interruption of preparation of the Initial Decision and accordingly Respondent's motion of 5/1/79 is herewith DENIED.

All of Respondent's several other motions to reopen the record relate to a patently frivolous claim that in May-June 1978 Complaint Counsel violated the *ex parte* communication rules of this Commission

and/or the Administrative Procedure Act by seeking and obtaining authorization from the Commission to appear and comment on proposed relief in certain parallel private damage suits in the U.S. District Court for the Southern District of New York. All such motions have been denied by the Administrative Law Judge and efforts by Respondent to embroil the Commission⁵ and the Courts⁶ prematurely have all been rebuffed. "Respondent's Motion To Reopen Proceedings For Reception Of Evidence, Comment And Argument Concerning *Ex Parte* Communications," dated 4/24/79, was denied by the Administrative Law Judge on 6/12/79. "Respondent's Motion To The Federal Trade Commission Solely As A Matter Of Administrative Discretion And Public Policy For An Order Granting A Stay Of The Initial Determination Of The Administrative Law Judge And Deciding Whether Respondent Should, As A Matter Of Administrative Discretion And Public Policy, Have Its Opportunity To Address The Commission On The Matter Of *Ex Parte* Communications Prior To The Initial Determination By The Administrative Law Judge," dated 6/14/79, was denied by the Commission on 7/12/79. [22]

⁵ On 10/5/78 the Commission declined to consider a motion by Respondent for an order requiring that *ex parte* communications relevant to the merits of this proceeding be placed on the public record, referring Respondent to its normal motion to the Administrative Law Judge.

⁶ On 2/8/79 Respondent filed suit in the U.S. District Court for the District of Columbia to enjoin further prosecution of this Complaint because of the same alleged violations of the *ex parte* rule. *AMREP Corporation v. Michael Pertschuk, et al.* (Civil Action No. 79-0491). On 4/9/79 Judge Gasch dismissed this Complaint for Respondent's failure to exhaust administrative remedies, referring Respondent to its normal review in the event of an unfavorable outcome of the administrative proceeding.

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List of Witnesses

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Acree, Morris	3840 Cryslar, Independence, Mo.	Complaint Counsel	6/17/77	8860-8889
Adams, James	1617 Silver Pass, Silver Springs Shores	Respondent	2/8/78	16612-16652
Alper, Dexter	3210 Arlington Avenue, Bronx, N.Y.	Complaint Counsel	7/26/76, 7/29/76	5406-5973
Amato, Angelo	47-20 188th Street, Flushing, N.Y.	Respondent	12/6/77	13432-13470
Aschenbach, Lillian	4601 San Jose Road, Rio Rancho	Complaint Counsel	6/15/76	1905-1971
Baca, Albert C., Jr.	3020 San Pablo, N.E. Albuquerque, N.M.	Respondent	3/30/78	20845-20893
Bachim, R. H.	3816 Zion Court, N.E. Albuquerque, N.M.	Respondent	3/29/78	20694-20719[23]
Bailey, Floyd W.	502 Ashberry Court, S.E. Rio Rancho, New Mexico	Complaint Counsel	7/25/77, 3/21/78, 4/6/78	10363-21707
Beller, Anna M.	Route 1, Box 311, Wicks Road, Arnold, Missouri	Complaint Counsel	6/16/77	8702-8761
Benchoff, Marian	Box 181, Arendtsville, Pa.	Complaint Counsel	7/14/76	4268-4353
Benedetto, Di Stephano	4 Elmwood Street, Baldwin, Nassau County, L.I.	Respondent	12/9/77	13790-13817

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Benfante, Maria	2634 West Street, Brooklyn, N.Y.	Complaint Counsel	7/13/76	4127 - 4170
Berg, Robert C.	6001 East-North Tucson, Arizona 85712	Complaint Counsel	7/19/76	4636 - 4742
Blocker, James L.	1236 Southeast 12th St., Ocala, Fla.	Respondent	2/10/78	17056 - 17068
Bondy, Otto S.	97-07 63rd Road, Rego Park, N.Y.	Complaint Counsel	5/19/77, 5/20/77	7465 - 7614
Bongers, Deloris M.	8010 Blue Ridge, Kansas City	Complaint Counsel	6/14/77	8445 - 8525 [24]
Bonnel, Ted A.	535 Cloudfcroft, New Mexico	Respondent	3/21/78	19515 - 19539
Bradley, James	8913 James Northeast, Albuquerque, New Mexico	Complaint Counsel	6/16/76, 6/17/76	2162 - 2205
Brand, C. Henry	2501 Riggsbee Drive, St. Louis, Missouri	Complaint Counsel	6/21/77	9072 - 9149
Bristow, Paula	Route 3, Box 605A, Pacific, Missouri	Complaint Counsel	6/22/77	9244 - 9297
Brodie, Mary	44 Countisbury Avenue, North Valley Stream	Respondent	12/15/77	14505 - 14521
Buccoa, Nicholas	287 Taylor Avenue, Levittown, New York	Respondent	12/7/77	13554 - 13579
Byers, Scott E.	1353-D Golden West Apts., Rio Rancho	Respondent	3/24/78	20253 - 20277
Calandra, Benny	25 Surrey Lane, New Hyde Park, N.Y.	Respondent	12/12/77	14008 - 14012

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Witness	Address	Sponsor	Date(s)/Testimony	Page References
Cameron, Edward A.	47 Piersall Place, Deer Park, New York	Complaint Counsel	6/20/77, 6/21/77	4881 - 4942 [25]
Carruthers, George L.	604 Ridge Place, Northeast, Albuquerque	Complaint Counsel	7/27/77, 1/28/77	10672 - 11213
Cassuto, Flora	1301 East Rio Rancho Dr., Rio Rancho, New Mexico	Respondent	3/20/78	19396 - 19496
Cavallo, Ronnie	515 Avondale Drive, North Shirely, N.Y.	Respondent	12/9/77	13818 - 13849
Capeda, Manuel N.	921 East Silver Springs, Boulevard Ocala, Fla.	Complaint Counsel	5/4/77	6510 - 6597
Christman, Miriam	14 Stream Way, Silver Springs Shores, Ocala, Fla.	Respondent	2/8/78	16568 - 16609
Cohen, Milton	520 Bahia Circle, Silver Springs Shores, Ocala, Fla.	Complaint Counsel	5/2/77, 5/3/77	6237 - 6384
Colegrove, James B.	2922 Broadmore, Rio Rancho	Respondent	3/24/78	20278 - 20336
Cooper, Richard	168 Main Street, East Rockaway, N.Y.	Respondent	1/9/78	15352 - 15361 [26]
Cozy, John J.	38 West Court Drive, Centereach, New York	Respondent	12/6/77	13411 - 13431
Crouch, Eleanor	Forsyth, Missouri	Complaint Counsel	6/20/77	9028 - 9059
Cucciniello, Elaine	485 Ackerman Street Central Islip, N.Y.	Respondent	12/7/77	13539 - 13554

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Cummings, Clarence	P.O. Box 2568, Ruidoso, New York	Respondent	4/4/78	21243 - 21336
Daley, Leonard	17 Buehl Lane, East Northport, N.Y.	Complaint Counsel	5/24/77	7975 - 7996
Daughtery, John B.	No. 9 Conchas Loop, El Dorado at Santa Fe	Respondent	4/3/78, 4/4/78	21080 - 21211
Davis, Linda	521 Sandia Road, Northwest, Albuquerque	Complaint Counsel	6/14/76	1685 - 1717
Deitz, Roscoe	554-8 Midway Drive, Silver Springs Shores	Respondent	2/10/78	17069 - 17086
Dellacona, Janet	2324 60th Street, Brooklyn, New York	Complaint Counsel	7/21/76, 7/22/76	5058 - 5116 [27]
DeVito, Rudolph	43 Locust Avenue, Bethpage, Long Island	Respondent	12/9/77	13773 - 13790
Dickinson, George	9706 Claremont, N.E., Albuquerque, New Mexico	Respondent	3/22/78, 3/23/78	19960 - 20174
Doll, Peggy	2514 Carroll, Albuquerque, N.M.	Complaint Counsel	7/18/77, 7/19/77	9523 - 9642
Douglass, Robert	302 Villa Birdie, Rio Rancho	Complaint Counsel	7/21/77	10065 - 10083
Duda, Louise	31 Oakland Avenue, West Caldwell, N.J.	Respondent	12/12/77	14050 - 14074
Dutton, Faurest Woodrow	Oakmont Shores	Complaint Counsel	3/6/78, 3/7/78	19042 - 19217
Dykes, John Raleigh	Salt Springs, Marion County	Respondent	2/15/78	17459 - 17465

Witness	Address	Sponsor	Date(s)/Testimony	Page References	Initial Decision	
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Eckstein, Simon	153 East 57th St., New York, N.Y.	Complaint Counsel	1/10/78	15533 - 15547 [28]		
Edelman, Edward	582-B Fairway Circle, Silver Springs Shores, Ocala, Fla.	Respondent	2/13/78	17260 - 17274		
Elias, Claude E., Jr.	16231 Taylor Court, Torrance, Cal.	Respondent	4/14/78	23799 - 23991		
Elliott, Timon	Silver Springs Shores, Ocala, Fla.	Respondent	2/8/78	16675 - 16725		
Estrema, Anthony L.	144 Beachview Street, Copiague, New York	Respondent	1/4/78	15127 - 15197		
Farmer, Richard	2208 Lester Drive, N.E.	Complaint Counsel	6/14/76	1616 - 1684		
Fawcett, Arthur	1335 30th Street, Washington, D.C.	Respondent	11/29/77, 11/30/77, 12/1/77, 12/2/77, 12/5/77	12223 - 13308		
Ferraro, Carmen	3601 Saint Andrews Dr., Rio Rancho	Complaint Counsel	7/22/77	10109 - 10210 [29]		
Ferrer, John	162-41 Powells Cove, Blvd. Whitestone, New York	Respondent	12/13/77	14134 - 14165		
Figliozzi, John	Arbor Hill Dr., Road 3, Pleasant Valley, N.Y.	Respondent	12/15/77	14549 - 14604		
Fine, Marilyn	617-A Midway Drive, Silver Springs Shores	Respondent	2/8/78	16653 - 16674		
Finklestein, Wilton, J.	591 Meadowbrook Road, Uniondale, New York	Respondent	12/20/77	14898 - 14910		

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Fisher, Lavina	936 Park Avenue, Westbury, New York	Complaint Counsel	7/21/76	4996 – 5055
Flatow, Max	430 Washington, N.E., Albuquerque, N.M.	Respondent	4/11/78	23059 – 23232
Fosco, Mary	4357 – 170th Street Flushing, Queens	Complaint Counsel	5/23/77	7826 – 7854
Fox, Irving	142 Verano Loop, Santa Fe, New Mexico	Respondent	3/22/78	19941 – 19959
Francis, Theodore F.	197–45 Nashville Blvd. Springfield Gardens, N.Y.	Respondent	12/12/77	14012 – 14050 [30]
Frappier, R. J.	3608 Oakmont Dr., Rio Rancho	Respondent	3/29/78	20746 – 20754
Freund, Jerome	One Mink Lane, East Setauket, N.Y.	Respondent	12/20/77	14839 – 14857
Freundlich, Ida	3101 Ocean Parkway, Brooklyn, N.Y.	Complaint Counsel	7/14/76	4175 – 4255
Friedkin, Hyman	117 Circle Dr. East, Elmont, New York	Respondent	12/21/77	15024 – 15038
Friedman, Howard W.	1036 Channel Drive, Hewlett Harbor, Long Island, N.Y.	Respondent	5/16/78, 5/17/78	24008 – 24292
Mr. Friend's Grand Jury Testimony	60 East 42nd Street, New York, N.Y.	Respondent	5/24/77	7932 – 8019
Fugate, Murray Eugene	3250 Southeast Lake View Avenue, Ocala, Fla.	Respondent	2/6/78	16321 – 16350

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Witness	Address	Sponsor	Date(s)/Testimony	Page References
Gallagher, Florence	6141 Broadway, Bronx, New York	Respondent	12/22/77	15072-15089 [31]
Gallinari, Ida	112 Rockne Road, Yonkers, N.Y.	Complaint Counsel	5/19/77	7404-7465
Gassuto, Flora	1301 East Rio Rancho Dr., Rio Rancho, New Mexico	Respondent	3/20/78	19396-19496
Gennaro, Benjamin	6036 84th Street, Elmhurst, New York	Respondent	12/13/77	14169-14191
Gennaro, Michael	2831-203rd Street, Bayside, Queens, N.Y.	Respondent	12/14/77	14320-14371
Gentile, Alphonse	33 Emerald Drive, Silver Springs Shores	Respondent	2/8/78	16725-16746
Giebel, Frances	3201 Henderson Mill Rd., Atlanta, Georgia	Respondent	2/10/78	17187-17240
Godfrey, Richard G.	457 Washington Street, S.E., Albuquerque, New Mexico	Respondent	4/12/78, 4/13/78	23480-23789
Goldman, Harold A.	223 Stilson Road, Fairfield, Conn.	Complaint Counsel	5/20/77	7614-7694
Graham, Hugh J., Jr.	7408 Osuna, Albuquerque, New Mexico	Respondent	3/20/78	19264-19395 [32]
Graw, Robert	404 Southeast 48th Ave., Ocala, Florida	Respondent	2/14/78	17359-17441
Gray, Clara	1505 Archer Road, Bronx, New York	Respondent	12/14/77	14254-14266
Greene, Daniel C.	3546 Bahia Circle, Ocala, Florida	Respondent	2/9/78	16895-16937

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Gregory, Fountain L.	Star Route, Riggsdale, Missouri	Complaint Counsel	6/14/77	8328 - 8395
Grimaldi, Paula	19 Diane Court, Clifton, New Jersey	Complaint Counsel	6/20/76	4780 - 4881
Harrison, William	504 Southeast 52nd Ave., Ocala, Florida	Respondent	2/9/78	16801 - 16833
Heinz, Paul	3700 32 Circle, S.E., Rio Rancho, New Mexico	Respondent	11/21/77	11316 - 11398
Horosko, John Vinson	163-51 86th Street, Howard Beach, N.Y.	Respondent	12/7/77	13580 - 13613
Hough, Judith	1037 East Lexington, Independence, Missouri	Complaint Counsel	6/20/77	8993 - 9027 [33]
Huckabee, Brad	9304 Avenida De La Luna, N.E., Albuquerque, New Mexico	Respondent	3/22/78	19799 - 19937
Hurza, Joseph	803 Rincon de Romos, Rio Rancho, New Mexico	Complaint Counsel	6/18/76	2395 - 2428
Hutton, James	35 Emerald Court, Silver Springs Shores	Respondent	2/8/78 2/9/78	16747 - 16801
Irizarry, Ferdinand	107 Yawpo Avenue, Oakland, New Jersey	Complaint Counsel	5/18/77	7293 - 7350
Jarrett, Michael R.	512 Washington, Avenue, Santa Fe, New Mexico	Complaint Counsel	7/25/77	10326 - 10347
Jurgens, John	3544 Jerusalem Avenue, Wantagh, New York	Respondent	2/5/78	15270 - 15295
Kantor, Annette	2200 North Central Road, Fort Lee, New Jersey	Respondent	12/8/77	13657 - 13766

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Witness	Address	Sponsor	Date(s)/Testimony	Page References
Kanninen, Virginia	19 Emerald Court, Silver Springs Shores, Ocala, Fla.	Complaint Counsel	5/6/77	6848-6889 [34]
Kaufman, Alan R.	Ass't. U.S. Attorney Federal Courthouse Foley Square New York, N.Y.	Complaint Counsel	5/23/77	7856-7880
Kearney, Mary	16 Monterey Drive, Mount Vernon, New York	Complaint Counsel	1/11/78	15869-15931
Kearns, Michael T.	609 Sycamore Street, Paramus, New Jersey	Complaint Counsel	7/13/76	4020-4127
Keaveny, R. N.	1005 Thirty-Eight Street, Rio Rancho, New Mexico	Respondent	3/29/78	20734-20745
Kimmell, Sherwood	Shaminy Woods Apartments, Croydon, Pennsylvania	Complaint Counsel	7/12/76	3877-3966
Kinney, Harry E.	3006 Vista Grande, N.W.	Respondent	3/21/78	19540-19667
Kiss, Zoltan	85-08 Britton Avenue, Elmhurst, New York	Respondent	12/20/77	14876-14897
Korn, Elias	4225 Bedford Avenue, Brooklyn, New York	Respondent	12/20/77	14910-14934 [35]
Larramore, Clyde B.	200 Southeast 52nd Ct., Ocala, Florida	Respondent	2/6/78, 2/7/78, 3/7/78	16166-19197
Lazarciki, Gregor	633 West 115 Street, New York, New York	Complaint Counsel	1/10/78	15548-15561
Lederman, Morton	475 Ignazio Boulevard, Novato, California	Complaint Counsel	6/7/76	736-831

Witness	Address	Sponsor	Date(s)/Testimony	Page References	1362
Levine, Alvin	16-832 - 112th Street, Bayside, New York	Respondent	12/16/77	14611 - 14633	Initial Decision
Lewis, Richard K.	3708 Southeast 4th St., Ocala, Florida	Complaint Counsel	5/5/77	6660 - 6790	
Lihn, Miles I.	1044 - 19th Street, Santa Monica, Cal.	Complaint Counsel	6/7/76	837 - 849	
Lindsey, Warren A.	1 Spring Road Drive, Silver Springs Shores, Ocala, Florida	Respondent	2/9/78	16833 - 16877 [36]	
Liotta, Robin	10210 Woodbine Avenue, Los Angeles, Cal.	Complaint Counsel	6/10/76, 6/11/76, 7/29/76	1246 - 5871	
LoBlanco, Frank	3825 Island Boulevard, Staten Island, New York	Complaint Counsel	7/19/76	4742 - 4773	
LoGuercio, John	806 LaCasa de Prasa	Respondent	3/27/78	20437 - 20458	
Lombardi, Ernest	21-98 7th Street, East Meadow, New York	Respondent	12/20/77	14857 - 14875	
Lusteck, Joseph A.	656 North State Street, Jackson, Mississippi	Complaint Counsel	6/21/76, 6/22/76, 6/23/76, 6/24/76, 6/25/76	2537 - 3317	
Mandel, Howard	3541 North 54th Avenue, Hollywood, Florida	Respondent	4/7/78	21741 - 21769	
Mann, Jack	218 Brayburn Drive, Jackson, Mississippi	Complaint Counsel	6/28/76, 6/29/76	3324 - 3629 [37]	
Martinez, Richard	8929 Aztec, Northeast, Albuquerque, New Mexico	Complaint Counsel	6/18/76	2447 - 2492	

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Witness	Address	Sponsor	Date(s)/Testimony	Page References
Martire, Emma M.	4420 Flatlands Avenue, Brooklyn, New York	Complaint Counsel	5/23/77	7762-7825
Mastrapasqua, Mauro	1575-64th Street, Brooklyn, New York	Respondent	12/5/77	13309-13334
McCorkle, Darlene	Route 1, Box 154, China Grove, N.C.	Complaint Counsel	6/17/76	2206-2355
McEnery, Patrick	6303 Indian School Rd., Albuquerque, New Mexico	Complaint Counsel	7/26/77	10589-10622
McGuigan, Michael	640 West Avenue, Apt. 7B, New York, New York	Complaint Counsel	1/1/78	15793-15866
McTeigue, Lincoln N.	121 Salerno Drive, Santa Fe, New Mexico	Complaint Counsel	7/21/77	10007-10064
Megee, Leo	301 Sunshine, Branson, Missouri	Complaint Counsel	6/21/77	9149-9203 [38]
Meister, George D.	3 Van Dorn Place, Dover, New Jersey	Respondent	12/12/77	14077-14110
Mellenbrook, Ruth	1302 Bertha Road, Rio Rancho, New Mexico	Respondent	3/27/78	20405-20437
Miller, Patricia C.	Route 3, Box 3021 H, Albuquerque, New Mexico	Complaint Counsel	6/18/76	2358-2393
Mims, Jim	Post Office Box, 335, Silver Springs, Fla.	Complaint Counsel	5/5/77	6790-6817
Moore, Stanley	818 Lee Street, Branson, Missouri	Complaint Counsel	6/17/77	8890-8924
Morrison, William T.	1634 East Lakewood Dr., Springfield, Missouri	Respondent	3/7/78	19217-19231

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Moul, Harry	468 Arroyo Tenorio, Santa Fe, New Mexico	Complaint Counsel	7/26/77	10458 - 10573
Moutz, Willis B., Jr.	2162 East Silver Springs Boulevard, Ocala, Fla.	Complaint Counsel	5/4/77, 5/5/77	6598 - 6654 [39]
Mueller, Joachim	700 Villa Verde, Rio Rancho, New Mexico	Complaint Counsel	7/26/77	10623 - 10659
Murphy, M. J.	4112 El Alto Court, Rio Rancho, New Mexico	Respondent	3/29/78	20755 - 20788
Muzzillo, Joann	3482 East Chester Place, Bronx, New York	Complaint Counsel	5/18/77	7240 - 7292
Nash, Grover E.	4102 La Colorado Court, Rio Rancho, New Mexico	Respondent	3/27/78	20484 - 20508
Nembhard, Ethel	120 East 57th Street, Brooklyn, New York	Respondent	12/22/77	15089 - 15112
Newhouse, Craig S.	11414 Whisper Moss, San Antonio, Texas	Complaint Counsel	7/25/77	10281 - 10325
Odrobina, Robert S.	612 Cerro de Ortega, Rio Rancho, New Mexico	Compliant Counsel	7/20/77	9813 - 9879
Oliveri, Mathew, Jr.	3 Avelaine Court, North Babylon, New York	Respondent	12/16/77	14634 - 14661 [40]
Pagoda, Benjamin	1 Stuyvesant Oval, New York City	Complaint Counsel	7/16/76	4483 - 4510
Pallas, Abraham	14 Wavecrest Lane, Mattituck	Complaint Counsel	7/28/76	5728 - 5796
Parkoff, David	9 Mallow Road, East Rockaway, N.Y.	Complaint Counsel	1/10/78, 1/11/78	15588 - 15793

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Pelkey, Edmond H.	5302 Edith Boulevard, N.E. Albuquerque, New Mexico	Respondent	3/30/78	20813-20843
Perez, George O.	9317 Bahia Tract, Silver Springs Shores, Ocala, Fla.	Respondent	2/13/78	17274-17290
Peterson, Dorothy	Kirbyville, Missouri	Complaint Counsel	6/20/77	9059-9068
Pfesser, Jack	254-198 4th Road, Foral Park, New York	Complaint Counsel	1/10/78	15562-15582
Phillip, Julia C.	1500 Indiana, Northeast, Albuquerque, New Mexico	Complaint Counsel	6/18/76	2493-2504 [41]
Pieloch, Bronislaw	240-44 42nd Avenue, Douglaston, New York	Respondent	12/21/77	15038-15044
Pierce, Bruce J.	13510 Sunset Canyon Dr., Northeast, Albuquerque, New Mexico	Respondent	3/24/78	20214-20253
Pinto, Kathleen	218 South Eighth Street, Lindenhurst, New York	Complaint Counsel	5/17/77	7187-7209
Pitchford, Lorena, J.	612 Truman, Southeast, Albuquerque, New Mexico	Complaint Counsel	7/22/77	10211-10259
Pollock, Alice	Route 2, Box 232, Willard, Missouri	Complaint Counsel	6/15/77	8546-8637
Pollock, Thomas A.	Route 2, Willard, Missouri	Complaint Counsel	6/13/77, 11/21/77	8229-11310
Porreca, Otello	1409 32nd Circle, Rio Rancho, New Mexico	Complaint Counsel	7/20/77	9776-9813 [42]

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Potter, Donovan L.	6 Emerald Court, Silver Springs Shores, Ocala, Fla.	Complaint Counsel	5/3/77	6387 - 6460
Provencher, Paul	10304 Marble Place, N.E., Albuquerque, New Mexico	Respondent	3/23/78	20174 - 20211
Quinn, M.	3611 Oakmont Drive, Rio Rancho, New Mexico	Respondent	3/29/78	20719 - 20733
Raimondi, Anne	224 Yoakum Avenue, South Farmingdale, L.I.	Complaint Counsel	7/22/76	5123 - 5194
Raschke, Carl H.	10 Brook Road, Silver Springs Shores, Ocala, Fla.	Respondent	2/9/78	16937 - 17017
Rash, James A.	Box 224, Route 3, Festus, Missouri	Complaint Counsel	6/22/77	9298 - 9345
Ray, William B.	1331 SE 5th Street, Emerald Beach Estates, Golden, Missouri	Respondent	2/15/78	17444 - 17447
Reynolds, Patricia		Complaint Counsel	6/14/77	8395 - 8444 [43]
Rizzo, Ralph	596 North Kings Avenue, Lindenhurst, Long Island	Respondent	1/5/78	15249 - 15269
Roehrs, Harold	Star Route 1, Branson, Missouri	Complaint Counsel	6/16/77	8643 - 8702
Rogers, Charles H., Jr.	1224 Southeast 9th Ave., Ocala, Florida	Respondent	2/13/78	17240 - 17259
Roomey, Antoinette, M.	216 South Eight Street, Lindenhurst, New York	Complaint Counsel	5/17/77	7162 - 7186
Rosen, Louis	1560 East 33rd Street, Brooklyn, New York	Respondent	1/5/78	15295 - 15302

Witness	Address	Sponsor	Date(s)/Testimony	Page References	Initial Decision	
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Roth, Irving N.	903-J Country Club Dr., Rio Rancho, New Mexico	Respondent	4/5/78	21527-21575		
Rounds, Clifton C., Jr.	P.O. Box 612, Corrales, New Mexico	Complaint Counsel	7/21/77	9965-10006		
Russell, Ronald Robert	2204 Sunnybank Court, Valrico, Florida	Respondent	2/15/78	17447-17459 [44]		
Rydwels, William	37-50 79th Street, Jackson Heights	Complaint Counsel	7/23/76	5199-5368		
Sanchez, Irene Ann	311 Arvada, Northeast	Complaint Counsel	7/20/77	9881-9949		
Sapia, Santo	14 Bahia Loop, Silver Springs Shores, Ocala, Fla.	Respondent	2/10/78	17022-17055		
Sawyer, Charles B.	492 Lake Road, Silver Springs Shores, Ocala, Fla.	Respondent	2/10/78	17086-17089		
Schneider, Arthur	98-01 67th Avenue, Forest Hills, New York	Respondent	11/28/77	12142-12208		
Schulman, George E.	11000 Wilshire Blvd., Los Angeles, Cal.	Complaint Counsel	11/22/77, 11/23/77	11517-11863		
Scitica, Luciano	355 North Long Beach Rd., Rockville Center, N.Y.	Complaint Counsel	7/27/76, 7/28/76	5516-5725 [45]		
Scoville, Keith Nelson	808 Orja De Oro, Rio Rancho	Respondent	3/27/78	20509-20529		
Seay, Lemuel Raymond	Flanders, N.J.	Complaint Counsel	5/16/77	6981-7049		
Siaraldi, Henry	7 Silver Run, Silver Springs Shores, Ocala, Fla.	Respondent	2/10/78	17124-17153		

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Simmons, Florence	103 Alta Vista Court, S.E. Rio Rancho	Complaint Counsel	6/15/76	1775-1903
Simon, Lloyd A.	3198 Old Post Drive, Baltimore, Md.	Complaint Counsel	1/12/78	15997-16026
Smith, Barbara	9002 Liberty Avenue, Ozone Park, N.Y.	Respondent	4/3/78	20909-21068
Solana, George E.	650 Southwest 98th Lane, Ocala, Fla.	Complaint Counsel	5/6/77	6890-6961
Sommerhalder, John E.	6423 Via Estrada, Anaheim, California	Complaint Counsel	7/18/77	9362-9522 [46]
Spence, George B.M.	Middleton Branch, Amado, Arizona	Complaint Counsel	7/1/76	3804-3866
Stempel, Milton	44 Lyon Terrace, Bridgeport, Conn.	Respondent	12/15/77	14427-14503
Stowe, Paul	5 Tudor City Place, New York, N.Y.	Complaint Counsel	7/12/76	3966-4009
Strully, Eleanor	220-55-46th Avenue, Bayside, Queens, N.Y.	Respondent	12/15/77	14522-14549
Strunk, Harold M.	38 Harmon Avenue, Garfield, New Jersey	Respondent	12/14/77	14268-14290
Suchomel, George	43 Mitchell Place, White Plains, New York	Respondent	12/19/77	14695-14705
Swoope, John	165 Mammouth Boulevard, Ocean Port, New Jersey	Respondent	12/14/77	14291-14318
Tafone, Rosemarie	732 Desmond Court, Brooklyn, New York	Respondent	1/9/78	15361-15439 [47]

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Tennant, George	3213 Tenbrook Avenue, Brooklyn, New York	Complaint Counsel	5/16/77	7059-7115
Tesoriero, Umberto	1910-19th Lane, Brooklyn, New York	Respondent	12/21/77	15044-15064
Thuot, Paul William	Mercers Fernery Road, Deland, Florida	Respondent	2/14/78	17295-17306
Timpanaro, Frank	95-04-149th Avenue, Ozone Park, Queens, N.Y.	Complaint Counsel	7/16/76	4511-4580
Tischler, P.S.	3302 Rittenhouse St., N.W., Washington, D.C.	Respondent	4/11/78, 4/12/78	23248-23479
Torres, Herbert	3383 Jefferson Avenue, 4331 SE 20th Street,	Complaint Counsel	4/24/77	7895-7975
Turner, George Henry	1483 Shore Parkway, Brooklyn, New York	Respondent	2/15/78	17465-17472
Unich, Nicholas		Complaint Counsel	7/16/76	4581-4628 [48]
Van Deusen, Clayton	Silver Springs Shores, Ocala, Florida	Respondent	2/14/78	17334-17346
Vandewart, Floyd	14 Drake Avenue, Rye, New York	Respondent	12/17/77	14710-14832
Villarose, Mark Anthony	554-B Fairways Circle, Silver Springs Shores, Ocala, Florida	Complaint Counsel	2/16/78	17485-17542
Wagner, Irene T.	5 Ellen Place, Kings Park, Long Island	Complaint Counsel	7/30/76	5986-6072
Wallace, Don G.	3109 Chaparral Lane, Fort Worth, Texas	Respondent	4/5/78	21376-21513
Wall, Dorothy	224 Rushmore Street, Westbury, Long Island	Complaint Counsel	7/21/76	4942-4996

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Wall, James	1011 Ridgeway Drive, Liberty, Missouri	Respondent	3/27/78	20364 - 20386 [49]
Weber, L.J.	2201 San Pedro, N.E., Albuquerque, New Mexico	Complaint Counsel	6/20/77	8939 - 8988
West, Basil	1407 Anchor Drive, North Bellmore, N.Y.	Respondent	4/7/78	21771 - 21846
Westemeier, Frank X.	1200 Northeast 56th St., Ocala, Florida	Respondent	12/13/77	14121 - 14134
Wiley, James R.	2820 Virginia Northeast, Albuquerque, New Mexico	Complaint Counsel	5/5/77	6655 - 6659
Williams, Ronald A.	105 South 2nd, Branson	Complaint Counsel	6/16/76	2071 - 2161
Williams, Tony Wayne	9313 Shoshone, Northeast, Albuquerque, New Mexico	Respondent	3/7/78	19231 - 19240
Wilson, Richard	4400 Los Reos Road, Rio Rancho, N.M.	Complaint Counsel	7/19/77	9643 - 9752
Wise, Robert	67 Moya Road, El Dorado, Santa Fe	Complaint Counsel	7/28/77	10930 - 11001 [50]
Wozniak, Casimir, J.	Number 1, Bahia Silver Springs Shores, Ocala, Florida	Respondent	3/28/78	20541 - 20614
Wutka, Gerhard	Route 2, Bellevue, Florida	Respondent	2/14/78	17307 - 17334
Yarnall, Margaret B.	Peralta, New Mexico	Complaint Counsel	5/2/77	6113 - 6236
Yguado, Jose Luis	12905 West 66th St., Shawnee Mission, Kansas	Respondent	4/10/78	21867 - 22133
Yowell, Roxy Ann		Respondent	3/6/78	19026 - 19041

Witness	Address	Sponsor	Date(s)/Testimony	Page References
Yuknes, Veronica	2375 Stuart Street, Brooklyn, New York	Complaint Counsel	7/26/76	5384 - 5405
Zaknich, Peter	517 Covered Bridge Rd., Cherry Hill, N.J.	Complaint Counsel	6/8/76, 6/9/76, 6/10/76	876 - 1242
Zdebski, Charles	75 Tracy Lane, East Islip, New York	Complaint Counsel	5/25/77	8023 - 8066[51]

FINDINGS OF FACT*Preliminary and Jurisdictional Findings***I. RESPONDENT'S IDENTITY**

1. Respondent AMREP Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business located at 16 West 61st Street, New York, New York (Complaint ¶ 1 and Answer ¶ 1).

II. CONTROL OVER SUBSIDIARIES

2. AMREP Corporation now maintains, and for some time past has maintained, control over the business operations and policies of the following sales and other related corporate subsidiaries, as shown in Figure 1: [52]

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Figure I
Respondent's Corporate Subsidiaries

Type of Activity	Name	State of Incorporation	75% ownership ¹ or more since	Majority of Officers ² and Directors since	Evidentiary References
Subdivision Subsidiaries	Rio Rancho Estates, Inc.	New Mexico	1961	1961 ³	R/A 1-2, CX 1P
	Silver Springs Shores, Inc.	Florida	1962	1962	R/A 13-15, CX 1P
	Eldorado at Santa Fe, Inc.	New Mexico	1970	1970	R/A 25-27, CX 1Q
	Oakmont Shores, Inc.	Missouri	1971-75	1971-75	R/A 37-39, CX 1Q, CX 5 XX
Sales Subsidiaries	A&C Realty Corp.	Illinois	1967	1967	R/A 73-75, CX 1P
	A.M.R. Realty Corp.	Utah	1971	1971	R/A 84-86, CX 1Q
	A.S.M. Realty Corp.	New York	1971	1971	R/A 95-97, CX 1Q
	A.T.C. Realty Corp.	New York	1963	1963	R/A 106-108, CX 1P
	B.R.X. Realty Corp.	Massachusetts	1969	1969	R/A 117-19, CX 1Q
	B.T.G. Realty Corp.	New York	1967	1967	R/A 128-30, CX 1P
	C&A Realty Corp.	Colorado	1967	1967	R/A 139-41, CX 1P
	D.C.R. Realty Corp.	Kentucky	1968	1968	R/A 150-52, CX 1P
	D.N.R. Realty Corp.	New York	1968	1968	R/A 161-63, CX 1P
	F&D Realty Corp.	New Jersey	1967	1967 ³	R/A 183-84, CX 1P
	Garden Realty Corp. ⁴	Pennsylvania	1967	1967	R/A 205-07, CX 1P
	G.L.B. Realty Corp.	Virginia	1968	1968	R/A 876-78, CX 1Q
	G.S.R. Realty Corp.	Nebraska	1968	1968	R/A 216-18, CX 1P
	H.C.F. Realty Corp.	Maryland	1967	1967 ³	R/A 194-95, CX 1P
	H.N.Y. Realty Corp.	New York	1972	1972 ³	R/A 228-29, CX 1R
	I.D.P. Realty Corp.	Texas	1971	1971	R/A 238-40, CX 1Q
	Irving N. Roth Realty Inc.	New York	1972	1972 ⁶	R/A 480-81, CX 1Q
	J.D.M. Realty Corp.	Connecticut	1971	1971	R/A 249-51, CX 1P
	J.V.C. Realty Corp.	Michigan	1971	1971 ³	R/A 260-61, CX 1Q
	K.G.R. Realty Corp.	Pennsylvania	1967	1967	R/A 271-73, CX 1P
	K.L.X. Realty Corp.	Oregon	1968	1968	R/A 282-84, CX 1P
	L.J.B. Realty Corp.	Michigan	1971	1971	R/A 293-95, CX 1Q
	L.T.A. Realty Corp.	New York	1969	1969	R/A 304-06, CX 1Q
	L.T.P. Realty Corp.	Indiana	1971	1971	R/A 315-17, CX 1Q
	M.B.X. Realty Corp.	Iowa	1971	1971	R/A 898-900, CX 1Q
	M.D.F. Realty Corp.	Michigan	1971	1971	R/A 337-39, CX 1Q

Utility Subsidiaries	M.I.L. Realty Corp.	Minnesota	1971	1971	R/A 370-72, CX 1Q
	O.L.T. Realty Corp.	Illinois	1972	1972	R/A 381-83, CX 1R
	P.M.A. Realty Corp.	Illinois	1969	1969	R/A 392-394, CX 1Q
	Rio Rancho Estates of Nevada, Inc.	Nevada	1971	1971	R/A 403-05, CX 1Q
	R.S.G. Realty Corp.	New York	1968	1968	R/A 414-16, CX 1P
	S.G.R. Realty Corp.	New Jersey	1967	1967	R/A 425-27, CX 1P
	Silver Springs Shores of Georgia, Inc.	Georgia			R/A 920-22, CX 1P
	S&J Realty Corp.	Tennessee	1968	1968	R/A 436-38, CX 1P
	S.W. Realty Corp.	Washington	1967	1967	R/A 447-49, CX 1P
	T.L.F. Realty Corp.	Ohio	1972	1972	R/A 469-71, CX 1Q
Tour Subsidiary	T.M.R. Realty Corp.	Texas	1968	1968	R/A 458-60, CX 1P
	Albuquerque Utilities Corp.	New Mexico	1961	1961	R/A 491-93, CX 1P
	Eldorado Utilities, Inc.	New Mexico	1973	1973	R/A 509-11, CX 1P
	Florida Ridge Utilities, Inc.	Florida	1969	1969	R/A 500-02, CX 1P
	Shores Sanitation Service, Inc.	Florida	1973	1973	R/A 518-20, CX 5W
	Holiday Shores Tours, Inc.	Florida	1970	1970	R/A 572-74, CX 1Q
Motel Subsidiaries	Panorama Inns, Inc.	New Mexico	At least since 1969 ⁶		CX 4 SS
	Panorama Inn of Florida, Inc.	Florida	At least since 1973 ⁷		CX 1Q
	Panorama Inns of Missouri, Inc.	Missouri	At least since 1973 ⁷		CX 1Q
Title Insurance Subsidiary	Sterling Title Company	New Mexico			CX 1Q
Miscellaneous	Carity Hoffman Associates	New York	1971	1971	R/A 663-65, CX 1R
	Sales Research Corporation	New York	1966	1966	R/A 687-89, CX 1P

¹ Refers to ownership by Respondent of at least 75 percent of subsidiary's voting stock.

² Refers to officers and directors of subsidiary who are also officers or directors of Respondent.

³ Majority of directors only.

⁴ Originally known as M.R.C. Realty Corp. (See objection to R/A nos. 909-19 for admission of change of name.)

⁵ Year of incorporation not available.

⁶ Majority of directors only. Also from sometime in 1965 or 1966 to December 1971, Roth Realty was owned by Irving Roth (TR 21528-29, 21544). Roth Realty sold local real estate on Long Island and also represented Amrep Corporation in the sale of its Rio Rancho and Silver Springs Shores properties (during 1965-1971) (TR 21529).

⁷ Amrep Corporation has owned substantially all of the voting securities.

⁸ Amrep Corporation has owned more than 50 percent of the voting stock of Sterling Title Company.

[53] 3. Respondent controls or has the right and power to control the activities of these corporate subsidiaries primarily through its ownership of all or most of their voting stock and the interlocking of its own directors and/or officers with those of such subsidiaries as indicated in Figure 1. It has exercised said control continuously and pervasively from its executive offices in New York by such means as the following:

1. Laying down company policy in memoranda (CX 50-51, CX 103-04; RX 1557, 1562, 1571, 1586, 1659).
2. Requiring its subsidiaries to make reports to Respondent (TR 847, 877, 890, 892, 1164, 1167, 4682-83, 6408, 6413, 6422, 9364).
3. Preparation of speakers' dinner-party presentations (TR 880, 3881, 3968, 4695-97, 7490, 7627) to be varied only to adjust to the speaker's personality (TR 893, 3994, 7626-27).
4. Preparation and review of promotional materials such as sales brochures and films (CX 98D, CX 103A, CX 104, CX 260B; TR 1161-62, 3884, 6396, 7630-32, 8247-49, 8577, 14646).
5. Observation of sales practices (TR 893-98, 911, 3886, 4670-72, 8246-47, 8570, 10336, 10941-42, 14644-45, 24206).
6. Audit of tape-recorded sales presentations (TR 896-98, 990, 1222, 7993, 21757; CX 156-59, CX 455) per company policy (CX 451-52).
7. Setting of selling prices for subsidiaries; land (CX 41 through CX 57; TR 7640, 24108-35). [54]

III. COMPETITION INVOLVED

4. The development and sale of unimproved land, in which Respondent is principally engaged, is a competitive business (CX 5L). Respondent competes primarily with developments in other parts of the sunbelt and more particularly those sunbelt developments that possess effective sales representation in New York and other metropolitan markets of the north, where Respondent has always made most of its sales (CX 5D, L-M, CX 459 O-P). The dinner-party technique of selling sunbelt lots up north is by no means limited to Respondent. One consumer, for example, told of attending some 40 such dinner-parties in New Jersey over a period of a year and a half; only 15 were given by Respondent (TR 2410-11).

IV. INTERSTATE COMMERCE

5. Although the land which it is Respondent's business to develop and sell obviously never moves in interstate commerce, the unfair and deceptive practices incidental to Respondent's substantial sales of land all over the United States are in interstate commerce. From a New York headquarters (Complaint ¶ 1, Answer ¶ 1), Respondent's

top executives direct a 20-state sales operation (CX 4J) that has marketed tens of thousands of lots in New Mexico, Florida (and, from 1971 to 1975, Missouri) (R/A 728) for tens of millions of dollars (Complaint ¶ 5, Answer ¶ 6). Respondent concedes that:

In the course and conduct of its business as aforesaid, respondent now causes, and for some time past has caused, its advertisements, promotional materials, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from its various places of business to agents, representatives, employees, customers, and prospective customers in various other States of the United States (Complaint ¶ 5, Answer ¶ 6).

Moreover, many if not most purchasers of Respondent's land personally travel in tours organized by Respondent to New Mexico, Florida (and, from 1971 to 1975, Missouri) from their homes outside those states to decide whether to exercise their contractual privilege to rescind their purchases within six months of purchase (R/A 730-31).
[55]

V. NATURE OF BUSINESS

6. Respondent AMREP Corporation (hereafter "Respondent") was incorporated as American Realty & Petroleum Corporation under the laws of Oklahoma on 12/27/55 (CX 4D). Its name was changed to its present form on 9/28/67 (CX 4D). Until 1961 it was engaged exclusively in the operation of oil and gas properties in Oklahoma but for many years such oil and gas interests as it retains have been of no major significance to its operations (CX 4D).

7. In August 1961 it entered the business of subdividing large tracts of unimproved land, and selling homesite lots and, to a lesser extent, houses, in such developments by acquiring 31 Florida corporations which were the owners and developers of Rainbow Lakes Estates, a 10,000 acre subdivision a few miles west of Ocala, Florida (CX 4D). [This complaint does not concern Rainbow Lakes Estates.]

8. Respondent's principal business today remains the subdivision of large tracts of raw land, the sale of lots (primarily what it calls "homesite" lots) and, increasingly, the construction and sale of single-family houses and condominium apartments at its subdivisions. (CX 5B, CX 459E).⁷ From its main office at 16 West 61st Street in New York City (CX 459A)⁸ it directs three subdivisions: Rio Rancho Estates, its largest project, near Albuquerque, New Mexico; Silver Springs Shores, somewhat smaller, near Ocala, Florida; and Eldorado at Santa Fe, New Mexico, much the smallest. All are dealt with individually here-

⁷ Although independent contractors now do some building at Respondent's subdivisions (TR 2167, 10069) when this complaint was brought in 1975 Respondent had built most of the homes constructed there (CX 57).

⁸ Complaint ¶ 1 and Answer ¶ 1.

after. A fourth subdivision, named Oakmont Shores, in Missouri's Ozark country, was owned and operated briefly by Respondent between 1971 and 1975 (CX 5 XX), and is one of the subjects of this complaint. [56]

9. As indicated by the following table, Respondent's sales of so-called "homesites" (*i.e.*, land developed to some extent⁹ but not yet improved with a structure) have always accounted for most of its business and, despite a late fall off, still do, as shown in Figure 2.

Figure 2

Respondent's Homesite Sales As A Percentage Of Its Total Sales (1969-76)¹⁰

1969	83%
1970	74%
1971	74%
1972	70%
1973	65%
1974	63%
1975	59%
1976	49.3% [57]

The upward progress and late fall-off of Respondent's recorded lot sales for *all* subdivisions during recent years is shown in Figure 3:

Figure 3

**Respondent's Recorded Lot Sales At All Its Subdivisions (1969-76)¹¹
(in \$ millions)**

1969	\$23.5
1970	\$36.3
1971	\$50.0
1972	\$47.4
1973	\$43.7
1974	\$52.3
1975	\$27.6
1976	\$ 7.5 ¹²
Total	\$288.3 [58]

10. Most purchasers of Respondent's lots buy on conditional sale, paying a small part (typically 10%) of the price down and the balance

⁹ The degree of development (chiefly roads and utilities) necessary to make a lot a "homesite" is an issue in this case, dealt with hereafter under the heading "Development Misrepresentations".

¹⁰ CX 1C, CX 5C, CX 459E. Years are fiscal years ending April 30.

¹¹ CX 1E, CX 5E, CX 459H. Years are fiscal years ending April 30.

¹² During fiscal years 1975 and 1976 more residential lots were restored to inventory due to cancellations than were sold (CX 459H).

in monthly installments (typically over a 5 to 8 year period) (CX 5D). Collections (exclusive of interest income) initially tend to lag behind sales (because only a portion of the price is paid immediately) but for the same reason collections tend to hold up longer, if and when sales later fall off.¹³ These trends are apparent from a comparison of Figures 3 and 4:

Figure 4
Collections (Exclusive Of Interest Income) From
All Respondent's Subdivisions (1969-76)¹⁴ (in \$ millions)

1969	\$ 9.3
1970	\$13.8
1971	\$21.9
1972	\$24.3
1973	\$30.4
1974	\$34.6
1975	\$29.6
1976	\$21.2
Total	\$185.1 [59]

11. During the same recent years Respondent's average lot sale price (regardless of lot size) has climbed approximately 50 percent, as shown by Figure 5:

Figure 5
Average Contract Price, All
Subdivisions (1969-76)¹⁵ (in dollars)

1969	\$3232
1970	\$3458
1971	\$3548
1972	\$3736
1973	\$4018
1974	\$4624
1975	\$4853
1976	\$4899

12. The overall financial operations and financial condition of Respondent and all its subsidiaries, as shown in their consolidated income statement and balance sheet for each of the last four years

¹³ Respondent's own books account for the total price as income shortly after sale, although for tax purposes future installment payments are not treated as income until the year of receipt. CX 5 QQ, CX 5 SS. Years are fiscal years ending April 30.

¹⁴ CX 1E, CX 5E, CX 459H.

¹⁵ CX 1E, CX 5E, CX 459G. Years are fiscal years ending April 30. Note carefully that these prices are not necessarily for the same mix of lot sizes each year. For that or some other reason they fail to reflect the steepness of Respondent's continual price increases during these years, as illustrated by Figure 9, below at page 67.1 [p. 1420], which records prices *per acre*.

preceding issuance of this complaint in March 1975, are indicated in Figure 6: [60]

Figure 6

**Selected Extracts From Respondent's Consolidated
Financial Statements (1972-76)¹⁶**
(In \$ millions unless otherwise indicated)

	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>
Revenues	\$ 59.0	\$ 73.5	\$ 89.4	\$ 69.1	\$ 45.9
Cost and expenses	\$ 51.0	\$ 65.6	\$ 83.3	\$ 72.7	\$ 49.5
Pre-tax income (loss)	\$ 3.9	\$ 3.7	\$ 6.1	(\$ 3.7)	(\$ 3.6)
After-tax income (loss)	\$ 3.7	\$ 3.8	\$ 3.1	(\$ 1.7)	(\$ 1.9)
Per Share net income ¹⁷	\$ 1.16/ share	\$ 1.07/ share	\$.90/ share)	(\$.50/ share)	(\$.56 share)
Assets	\$115.8	\$138.0	\$150.7	\$128.0	\$109.1
Liabilities	\$ 76.3	\$ 94.3	\$105.0	\$ 84.0	\$ 66.9
Stockholders' Equity	\$ 39.5	\$ 43.6	\$ 45.8	\$ 44.0	\$ 42.2 [61]

Although Figure 6 indicates that Respondent's total revenues from 1972 through 1976 amounted to \$291 million, Respondent, in response to a request by Complaint Counsel, admitted only that its consolidated gross sales during the much longer period from 1962 through 1976 exceeded \$250 million (R/A 728).

13. Other financial information in the record is grossly unsatisfactory. For what it is worth, Howard Friedman, Respondent's President from 1968 to 1977, now a so-called "consultant" since he and Respondent were convicted of criminal fraud in that year (TR 24010-11), testified here on 5/16/78 that Respondent's "investment"¹⁸ in Rio Rancho *exceeded* \$100 million (TR 24022), and its "investment" at Silver Springs Shores *exceeded* \$50 million, both figures as of May 1978 (TR 24029). He further testified that Respondent's "initial investment" in Eldorado at Santa Fe was a little over \$7.5 million but he made no current estimate (TR 24040). He also estimated that Respondent had something like \$10 million invested in Oakmont Shores "at its peak" (TR 24037) but Respondent had withdrawn in 1975 from that development with a "net loss" of \$4-5 million (TR 24037). [61.1]

¹⁶ CX 1-HH, CX 1-NN, CX 459Z-30 (balance sheets), CX 1-II, CX 1-00, CX 459Z-31 (income statements). Years are fiscal years ending April 30. See exhibits for further details.

¹⁷ In dollars per share.

¹⁸ Friedman defined "investment" as "all the money that has been put into the development of the property that by the company. Some of that money has been turned over and sold, such as homes, but in essence the company itself invested that money into the property and then it resold some of the, most of the homes, as a matter of fact" (TR 24029).

VI. DESCRIPTION OF SUBDIVISIONS

A. *Rio Rancho Estates*

14. A visitor flying into Albuquerque, New Mexico is confronted with an unusual sight. As shown by aerial photographs in evidence [CX 196A-B, attached hereto as Appendix B] there is a spectacular view not only of the big, burgeoning city of Albuquerque on the east side of the Rio Grande River (bottom center) but also of a strange, vast checkerboard of roads on the west side of the river (upper left). East and west this vast grid of roads stretches as much as 15 miles; north and south as much as 10 miles (CX 263, p. 68, attached hereto as Appendix C). Only in the southeast corner is there any suggestion of human habitation. Most of the grid is made up simply of miles and miles of desert crisscrossed by miles and miles of dusty roads which purport to stamp the imprimatur of civilization on the desert but which, in fact, carry little if any traffic, pass almost no houses and otherwise show few signs of life.¹⁹ One consumer witness described it as "a lot of scrub brush, sand cactus, and *just a tremendous expanse of nothing*" (TR 5537) (emphasis added). This is Respondent's biggest real estate "development": Rio Rancho Estates.

15. Rio Rancho Estates is made up of two huge adjoining tracts of arid rangeland,²⁰ the first of which (about 54,000 acres) was acquired by Respondent in 1961 at \$178 per acre (CX 1F, CX 20) and the second of which (about 37,000 acres) was added by Respondent between 1969-71 at \$223 per acre (CX 1F, CX 459H-I). The vastness of the combined 91,000 acres is difficult to appreciate. It [62] amounts to 142 square miles or a little more than double the 68 square miles of the whole District of Columbia.²¹ Indeed, Rio Rancho Estates is almost twice the size of the sprawling city of Albuquerque, whose satellite Rio Rancho is supposed to be.²²

16. All but about 6,000 of the two tracts' combined total of 91,000 acres have by now been platted (*i.e.*, subdivided into individual lots as shown on so-called "plats" deposited in the county land records) (TR 24240). Moreover, Rio Rancho Estates is saved from being just a "paper subdivision" by the network of roads (described above) that have been constructed by Respondent, following the pattern of its platting. True, only 30 of the 1500 miles of roads are paved (macadamized), leaving the other 98 percent to compacted dirt, clay or

¹⁹ Elementary descriptive material of this sort reflects in part three guided tours through Rio Rancho Estates arranged for the Administrative Law Judge in 1976, in 1977 and again in 1978 by Respondent with the consent and cooperation of Complaint Counsel. See tape recording of commentary by Respondent's local manager and counsel in CTX 2.

²⁰ CX 162N. Average annual rainfall is 8 inches.

²¹ Webster's New International Dictionary, 2d Ed., Pronouncing Gazetteer, p. 3052 (title: District of Columbia).

²² TR 2661-62. See also TR 2739 and make visual inspection of CX 196A-B.

caliche (CX 1625). But the roads are real and more than almost anything else make Rio Rancho seem like a real "development".

17. Beyond plats and roads, however, Respondent has done virtually nothing more to develop and improve any part of Rio Rancho outside the so-called "building areas" in Unit 16 and immediately adjacent land in the southeast corner of Rio Rancho (all of which we shall henceforth refer to as "the Unit 16 Complex").²³ In the Unit 16 Complex, which inspection of Appendix C (CX 263, p. 68) shows to make up less than 5 percent of all Rio Rancho, were concentrated the 1800 residential units that were occupied [63] when this complaint was brought (after 14 years of "development") in 1975.²⁴ Moreover, the excessive cost of extending utility services to individuals whose lots are located in the hinterland, significantly beyond the slowly advancing frontier of the relatively populous "building area",²⁵ makes it virtually certain that most of Rio Rancho will not be settled for many years to come.²⁶

18. Despite this absence of significant development (other than the platting and road network) over the 14 years from 1961 to 1975 and despite the unlikelihood of real development occurring for years to come, the hinterland that makes up 95 percent of Rio Rancho has proved eminently saleable in Respondent's hands. Of a total of 100,-186 platted lots, by 4/30/76 Respondent had sold 75,134 lots.²⁷ Respondent concedes that "the vast majority" of the lots being sold are situated in the hinterland (*i.e.*, outside the Unit 16 Complex).²⁸

19. A former top-ranking sales executive of Respondent's, Zaknich, testified that in all his years of observing Respondent's sales dinner parties in metropolitan areas all over the United States he never saw a lot in an "improved" area offered for sale at such a dinner party (TR 901) as distinguished from sales at Rio Rancho itself (TR 903). Since dinner parties in the metropolitan areas of this country have long been the [64] principal vehicle for Respondent's sales (CX 4J), it follows and we believe it to be the fact that most of Respondent's success has been in selling virtually undeveloped desert lots at dinner parties in New York and other distant metropolitan centers to people who for

²³ For several years after 1961 all building was concentrated in Unit 16 but by the time this Complaint was brought in 1975 small portions of Units 7 and 11 had been classified as "building areas". See lots marked "B/A" in CX 162 EE *et seq.* Respondent's brief here claims that parts of Unit 17 have "most recently" been opened for building but cites no record evidence to such effect.

²⁴ CX 162N. Respondent's manager (Bailey) in 1978 reported another 600 houses sold in 1977 and 800 more a-building in 1978 (TR 19675, 19680).

²⁵ See detailed discussion of the utilities cost problem under heading "Developmental Representations" below.

²⁶ Complaint Counsel's expert, Mann, testified: "... We see no potential for any type of utilization in the near future due to the lack of utilities or the prospect of installation of utilities" (CX 263, p. 22). Semble: p. 26 ("Once again, due to the absence of any utilities we see no foreseeable utilization of this lot.")

²⁷ CX 459-I. In terms of acres instead of lots, Respondent was able to sell 51,193 acres out of a total of 100,186 platted acres.

²⁸ CX 459-I ("in areas where utilities have not yet been installed").

some reason or reasons are not seriously concerned that they are buying currently useless land.

20. Respondent's explanation of this phenomenon is an unusual provision of its land contract,²⁹ commonly called "the building exchange privilege," which permits a buyer of a lot in the hinterland later to exchange the lot there for one in a "building area" (originally on an equal size, later on an equal value basis³⁰) if utilities have not reached this part of the hinterland within 90 days of the time the buyer wants to build a residence.³¹ Respondent's theory is that this privilege makes it immaterial to such a purchaser whether his hinterland "homesite" will *ever* be reached by the utilities.

21. There is some logic to Respondent's position if it could be relied on to honor the privilege. As long as only a few purchasers want to exercise the privilege there may be no trouble. However, if many of Respondent's 75,000 lot buyers were to begin to exercise their privilege [65] at about the same time, it seems doubtful that Respondent could find enough building lots with utilities ready to serve more than a fraction of such lot buyers.³²

22. Moreover, Respondent has recently acknowledged that it might well lack the economic resources to have utilities extended to the hinterland on any large scale and, in any event, has not escrowed or otherwise guaranteed funds for such purpose (CX 162J). Under these conditions it would be understandable that many buyers of lots in the hinterland placed little reliance on their exchange privilege.

23. Complaint Counsel, for their part, would explain the purchase of barren lots in the hinterland largely in terms of high-pressure selling and deceptive practices by Respondent's salesmen who first allegedly minimize the whole problem of incomplete development by directing attention to other matters and then, if necessary, assure customers, without adequate basis, that development generally and utilities in particular will be available shortly.

24. The answer to the question why people buy practically undevelopable land may depend in part on whether such people are buying for residence or investment. It appears from information reported routinely in the large number of purchase contracts in evidence here that approximately 80 percent of the people who have bought lots from Respondent at Rio Rancho (and other subdivisions) say they are doing so far a purpose other than to maintain a principal

²⁹ See sample form contract for Rio Rancho Estates, CX 155B (§ 4).

³⁰ Respondent's earlier contracts used an equal size formula while later ones used an equal value formula. There was an intervening period (1970-72) when the formula was ambiguous and there has been considerable dispute here between Complaint Counsel and Respondent over whether some consumers were deceived or at least confused as to what formula properly applied to their particular situations.

³¹ The privilege does not apply to so-called "commercial" lots.

³² An analogy to the "runs" on banks which precipitated the great bank crisis of 1933 is obvious.

residence there.³³ [66]

25. To some extent purchasers for investment share the concerns of purchasers for residence, because just such concerns affect the resale potential (and thus the investment value) of the land. However, the concern of a purchaser for residence as to whether particular land is really ready for building is essentially different from the concern of an investor. Residential buyers, except those with many years of employment left, must build shortly. A purchaser for investment, on the other hand, has an option to disregard the state of development of his lot if other factors such as the likelihood of profitable resale regardless of development, can be impressed on him with sufficient effect.

26. Respondent's phenomenal sale of 75,000 largely undeveloped desert lots over a decade and a half has no doubt owed something to the reasonableness of the exchange privilege and something to the deceptive assurances of Respondent's salesmen that development was just around the corner but the primary explanation of the phenomenon is Respondent's administered structure of steadily rising prices which carries its own warranty that such regular price increases will continue in the future, as in the past, *regardless of the condition of the land.* [67]

27. Figure 9 (page 1420) is a graphic representation by the Administrative Law Judge of the trend of Respondent's prices from 1962 to date, as shown in CTX 34, for one acre of land in Units 1 and 2, on the far west side, about 10-12 miles from the Unit 16 Complex in the southeast corner of Rio Rancho Estates.³⁴ Since these units are about as far as possible from the Unit 16 Complex, it may be assumed that Respondent's prices for the rest of the hinterland that makes up 95 percent of Rio Rancho (and of course the Unit 16 Complex) were as high or higher.³⁵

28. Against an original raw land cost to Respondent of about \$200 per acre, Figure 9 shows that Respondent started selling land in Units 1 and 2 in early 1962 for about \$1,000 per acre; almost doubled that

³³ In an attempt to satisfy Section 226.9(a) (right to rescind certain transactions) of the Federal Reserve Board's Regulation "Z" (12 C.F.R. 226) pursuant to the requirements of the "Truth in Lending Act" (15 U.S.C. 1601), Respondent's "Reservation And Purchase Agreement" (CX 105A, CX 106A, CX 152A, CX 154A, CX 155A) since 1973 has contained a clause which states:

Each buyer must initial where applicable:

I do _____

I do not _____ expect to use the above property as my principal residence.

There are 173 agreements in evidence which contain this clause. In 167 instances the consumer made a choice. In 80-85 percent of all such choices (depending on whether an exchange was involved and whether we examined Complaint Counsel's or Respondent's exhibits) the consumer indicated that he was *not* expecting to use the property as his principal residence.

³⁴ See Appendix C (CX 263, p. 68).

³⁵ CTX 34 also contains partial prices for Units 23, 24 and 26, in the far northwest hinterland, which tend generally to confirm this statement.

price by the end of the year; maintained a \$2,000 price until mid-1966; then began a steady succession of price increases, annually through 1969 and about twice a year thereafter. Finally, in late 1974 Respondent jumped the price from the \$5,000 level it had by then reached to about \$6,000 per acre. This complaint followed shortly thereafter (3/11/75) and Respondent's 1974 list price apparently remains in effect for such sales as Respondent has made since the start of this litigation.

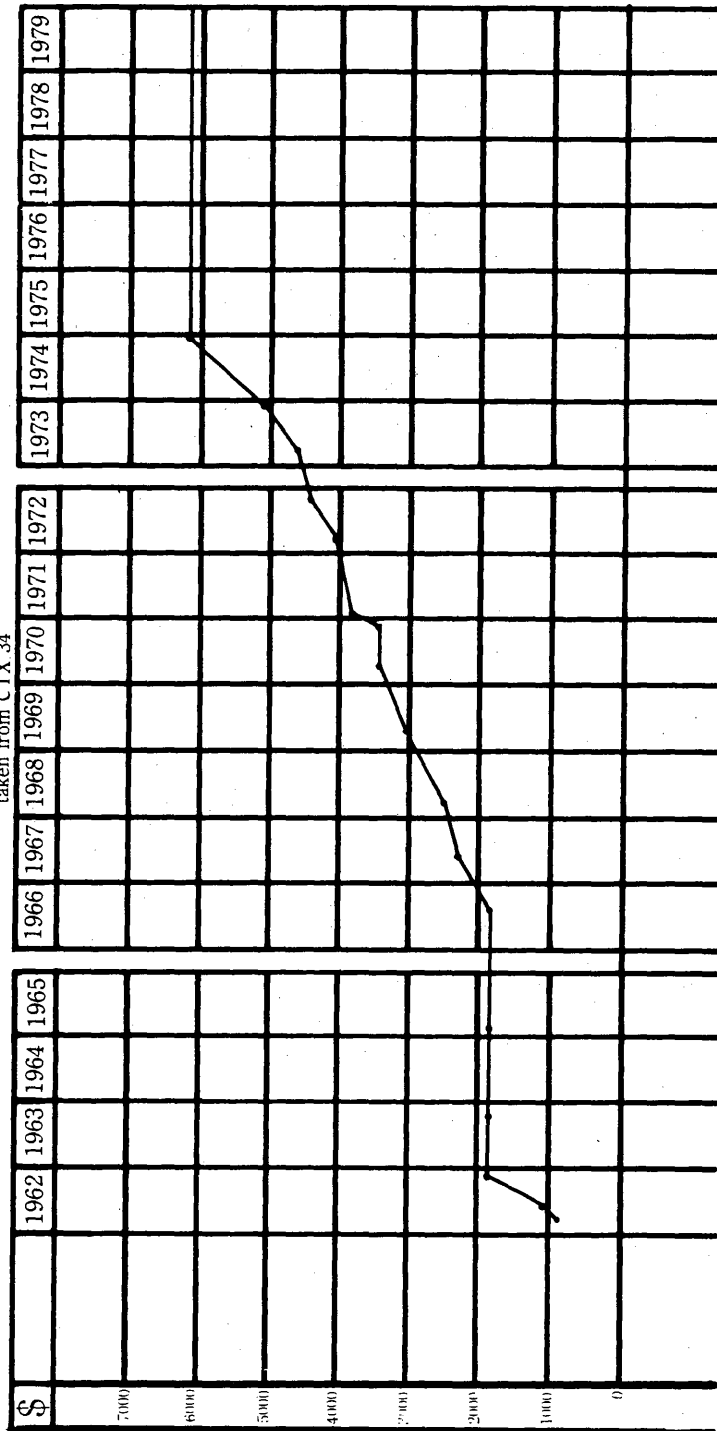
29. By application of these minimum per acre prices to the 50,000 acres of "homesites" sold by Respondent at Rio Rancho (CX 459-I), we can calculate that its gross proceeds of hinterland sales³⁶ must have been more than \$100 million (at \$2,000 /acre) but less than \$300 million (at \$6,000/acre). \$200 million would not seem inconsistent with [67.1]

³⁶ Lots in the Unit 16 Complex were, of course, sold at much higher prices.

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Figure 9
Rio Rancho - Units 1 & 2 - Company Prices Per Acre
(1962 to Date)
taken from CTX 34



[68] Respondent's admission here that its total sales from 1962 thru 1975 have exceeded \$250 million (R/A 728) nor its 1969 statement that "on an accrual basis total sales of homesites at . . . Rio Rancho Estates have far exceeded the total costs of the land³⁷ sold and related selling expense."³⁸

30. Whatever the extent to which sales proceeds "far exceeded" Respondent's sales costs, the principal significance of Respondent's regularly and steeply rising list prices for its lots at Rio Rancho Estates was that customers for a good investment could be shown an unbroken record of price increases that boded no ill for the future. The higher prices that might ordinarily scare off customers in this case actually served to make "the product" even more attractive to investor buyers. "Nothing succeeds like success."

B. Silver Springs Shores

31. Respondent's first land development, known as Rainbow Lakes Estates, consisted of 10,000 acres and, like Silver Springs Shores is located in the central part of Florida. Rainbow Lakes was not, however, included within the scope of this Complaint.

32. Ocala, near which Silver Springs Shores is located, is a city of about 22,583 population (1970) located in Marion County in the north central part of Florida (CX 2E). [69] Basically it serves a surrounding agricultural economy including orange groves and horse farms (CX 476F. See maps at CX 499C or CX 164D). A notable tourist attraction has long been nearby "Silver Springs", where glass-bottom boats reveal the wonders of semi-tropical underwater life (CX 58P, T).

33. Three miles southeast of Ocala's city boundaries (CX 498B) and about 10 miles from Silver Springs (CX 58P-Q) lies a tract of about 18,500 acres (CX 459J). Respondent bought about 12,000 acres in 1962 at \$183/acre and another 7,000 acres in 1969-70 at \$327/acre (CX 1H, CX 2W-X, CX 3S-T, CX 4Q-R, CX 5G; TR 16973-82). The terrain ranges in elevation from 45 to 170 feet above sea level (CX 498B). The soil is sandy and affords good drainage above 55 foot contours (CX 164G). The development contains many typical Florida fresh-water "lakes" to which have been given such enticing names as "Lake Sparkle" (RX 1747; CX 58L).

34. As of 4/30/76, 16,268 acres of Silver Springs Shores' total (18,477) were platted; of these platted acres, 5,521 had been sold or contracted while 5,389 platted acres were still unsold or uncontracted as

³⁷ Raw land cost, of course, remained only \$200/acre. The principal expense was the construction of 1,500 miles of roads but, as noted above, these were 98 percent unpaved. Maintenance was always understood to be a County responsibility (CX 30J) and the County was actually paying 60 percent of maintenance cost by 1975 (CX 162J).

³⁸ CX 4J (15 percent).

of that date (CX 459R).³⁹ It will be observed that Silver Springs Shores is not nearly as "sold out" as Rio Rancho Estates. Thus, it may be calculated that 93 percent of Rio Rancho's acreage is platted and 60 percent of its platted acreage is sold or contracted. In contrast, although 88 percent of Silver Springs Shores' acreage is platted, only 34 percent of its platted acreage is sold or contracted. This probably reflects in part the fact that despite Respondent's original intention to begin selling lots at Silver Springs Shores in late 1963 or early 1964, adverse publicity about the land sales industry and uncertainties about the route of the cross-Florida barge canal (TR 24021) led to the postponement of development until 1970 (CX 2W-X, CX 3S-T, CX 4R; TR 24021). [70]

35. Most of the lots sold or contracted at Silver Springs Shores have yet to be occupied. By early 1976, 19,426 lots had been sold or contracted (CX 459K) but there were still only about 661 homes completed and another 38 under construction (CX 164G). Thus, over 96 percent of the lots sold by Respondent at Silver Springs Shores had not yet been occupied nearly a year after this Complaint was brought.

36. When we turn to other aspects of Silver Springs Shores' "development", we find little done. Although Respondent anticipates paving another 265 miles of roads eventually (TR 16205), only 140 miles of roads had been even "substantially" completed by 1976 (CX 164G). Until paving is complete, lots are accessible only by graded roads (CX 164G). Respondent's arrangements with Marion County for paving these roads contemplate fairly long compliance periods (5, 10, 15 years, depending on lot location) (CX 164G).

37. By early 1976 Respondent's wholly-owned Florida Ridge Utilities Corporation had completed central water and sewer systems serving nine units (1, 2, 3, 11, 15, 43, 47, 48, 49) and parts of two others (4, 40) pursuant to its plan for ultimate supply of piped water and sanitary sewer service to "the more populous areas" (CX 164H).

38. All others must rely on individual water wells (estimated cost \$800) and septic tanks (estimated cost \$400) unless and until a certain population density be reached (CX 164G-H). In the latter case the cost of such individual facilities would be lost because lot owners must connect to central facilities if they become available (CX 164H).

39. From all the foregoing it appears that Silver Springs Shores lacks the clear dichotomy between Rio Rancho's tiny core area (the Unit 16 Complex) and vast surrounding hinterland that makes up 95 percent of the whole subdivision. Because Silver Springs Shores' "immediate building areas" are sandwiched in all through a relatively small subdivision, the contrast between its more and less well developed portions is less obvious than at Rio Rancho. However, the func-

³⁹ Another third (5,355 acres) were devoted to road and community facilities.

tional distinction is real and much if not most of what we found to be true of Rio Rancho's development pattern is true also of Silver Springs Shores. [71]

40. One distinction much pressed by Complaint Counsel is that Silver Springs Shores' form land contract does not contain the same exchange privilege clause as Rio Rancho's. Both permit an exchange (value for value) for another lot, presumably not in a building area, anytime within five years after purchase (CX 154B, ¶ 3, CX 155B, ¶ 3) but only Rio Rancho's contract grants (CX 155B, ¶ 4) an exchange into a building area (value for value) anytime the hinterland lot owner wants to build (within the next 90 days). Respondent's testimony, however, is that its *policy* has, in fact, been to give Silver Springs Shores lot owners the same privilege to exchange into the building area (apparently without reference to the five year limit) as is given by *contract* at Rio Rancho Estates (TR 7677).

C. Eldorado at Santa Fe

41. Respondent's third remaining development, Eldorado at Santa Fe, is located about 14 miles southeast of the historic and colorful capital of New Mexico.⁴⁰ Against a distant majestic mountain backdrop in most directions the near terrain is gently rolling with moderate small timber cover at elevations ranging from 6,500 to 7,000 feet above sea level (CX 161L, CX 83A-B). The air is normally dry, with 12 inch rainfall and 32 inch snowfall annually; the temperature ranges from 19 degrees to 51 degrees during the winter months and 49 degrees to 84 degrees during the summer months (CX 161L).

42. Eldorado is much the smallest of Respondent's remaining three developments. Although the tract originally acquired by Respondent approximated 26,600 acres (CX 5X) about 4,000 acres were early set aside for a wild-life preserve and outdoor recreational facilities (CX 5J). Difficulty with the County government over its refusal to accept 1,371 lots or some half of Respondent's first platting (2,810 lots) (CX 5J) led Respondent to conclude it could not get the necessary approvals for development consistent with its so-called "master plan" (CX 5 XX). Accordingly, it wrote down the fair market value of 16,600 acres by about \$1.9 million and determined to hold it for bulk sale (CX 5J, CX 5 WW-XX). Eldorado is thus now effectively limited to [72] approximately 6,000 acres, as compared with Rio Rancho's 93,000 acres and Silver Springs Shores' 18,000 acres.

43. The sale of lots at Eldorado started in January 1973. By April 30, 1976 (more than a year after this complaint issued) 351 lots had been contracted and an additional 98 lots had been conveyed to pur-

⁴⁰ CX 161L. The "7 miles" claim of CX 83B is wrong.

chasers.⁴¹ However, as of mid-1975 there were only 21 occupied homes in the whole subdivision (CX 161L).

44. Roads and utilities at Eldorado are few and far between. Twenty-nine miles of *roads* are installed throughout the subdivision but in mid-1975 only seven were even graveled, leaving twenty-two to be similarly "improved" (CX 161H). Purchasers can be assessed to reimburse Respondent through the Community Association (which is controlled by Respondent until 7/1/82 or until half of all lots are deeded).⁴²

45. Central *water* is available only from a developer-affiliate and only to 112 lots in "the immediate building area" (Unit 3) where hook-up charges of \$250 apply; a purchaser who drills his own well will probably spend between \$1,750 and \$3,500, an investment he *must* abandon if and when central water reaches his area (CX 161H-I). *Sewage* disposal is entirely by septic tank, installed by each lot-owner at a cost ranging from \$500 to \$900 (CX 161K).

46. The *electric* company (not an affiliate of Respondent) will extend service to any lot but only if the lot purchaser advances the full cost of the extension, which, for the lot furthest from the area then served was estimated in 1975 to cost \$31,258.⁴³ Similarly, *telephone* service [73] is presently available (also from a non-affiliate of Respondent) but only in parts of the subdivision and the cost of extending service to the most distant possible user could run \$7,814, it was estimated in 1975 (CX 161J).

D. Oakmont Shores

47. Oakmont Shores is a 3,500 acre recreational/resort development (CX 1-I) adjoining a 56 miles long man-made lake (Table Rock Lake) in the hilly Ozark country near Branson, in southwestern Missouri (CX 1-I). Elevations range from 936 feet to 1,360 feet above sea level (CX 165J). Temperatures range from 24 degrees to 55 degrees during the winter and from 59 degrees to 87 degrees during the summer (CX 165J). Average annual rainfall is about 42 inches (CX 165J).

48. Respondent owned and operated this subdivision for almost four years from June 1971 until April 1975. It was acquired on credit in 1971 from the trustee in bankruptcy of an earlier (unrelated) developer, Ozark Paradise Village, Inc. ("OPV") (CX 5 XX, CX 165K) under an arrangement whereby payment would be taken out of sales proceeds (RX 1773). At the time Respondent took over OPV, there were about 60 occupied homes (CX 165J) and 62 miles of roads, about 90

⁴¹ CX 459L. Cf. 456 contracts and 69 deeds on 4/30/75 (CX 5J). It would appear that some lots must have been restored to inventory as a result of cancellations.

⁴² As of 4/30/76 only 98 out of 2,810 platted lots had been deeded (CX 459L).

⁴³ CX 161-I. It should be added that the initial purchaser will get refunds as other purchasers hook up to the line but even so the initial investment could be staggering.

percent (CX 1J). Significant sales of land by Respondent did not begin until the summer of 1972 (CX 1-I). By 4/30/73, Respondent had contracted to sell 803 lots and deeded 29 more (occupying approximately 500 acres) out of a total of 2,300 platted lots (CX 1-I).

49. The record apparently contains no more statistical evidence of further lot sales at Oakmont Shores; testimony indicates that shortly thereafter sales fell off badly and the reason, according to Respondent's witnesses, had to do with a nationwide business recession and particularly a shortage of gasoline which allegedly discouraged touring and acquiring distant recreational homes after the Arab oil embargo of late 1973 (TR 21404). Losses of between \$3-4 millions led to cessation of Respondent's promotional efforts (TR 19138, 21402). [74]

50. As for utilities, *water* was available at Oakmont Shores only from individual wells, which cost from \$525 to \$1,525, plus \$600 to \$1,000 for a pump, tank and accessories (CX 165H). *Sewage* disposal was available only by use of individual septic tanks or individual sewage treatment plants (CX 165G). The estimated cost of such septic tank or treatment plant varied from \$300 to \$1,200 (CX 165G). There was a disagreement between Respondent and the Missouri Water Pollution Board as to whether septic tanks and tile fields would function well in this area; in the event their use resulted in pollution of surface and/or subsurface waters, purchasers of lots faced the possibility of an assessment by the Oakmont Community Improvement Association to install an appropriate sanitary sewage system, if required to do so by the State (CX 165G). *Electricity* was available from two nearby cooperatives (one in Missouri, the other in Arkansas) which had indicated that they would expand their facilities to serve additional lots as and when demand should develop, although they were not legally required to do so (CX 165H). *Telephone* service was available from the Missouri Telephone Company, although subject, however, to its usual service extension policies (CX 165-I).

51. In April 1975 (about a month after the filing of this Complaint) Respondent gave up its effort to develop Oakmont Shores, reconveying to the trustee in bankruptcy of the former owner all unsold land, a building, the leisure facilities and personal property, in return for release from a \$3.1 million promissory note (CX 5 XX). Respondent retained, however, an option to buy 1,935 acres of adjoining land which could appreciate in value as Oakmont Shores is developed. This withdrawal arrangement was made on 4/15/75 and approved by the Federal District Court soon thereafter (RX 1829; TR 21424-26). [75]

Respondent's High Pressure Marketing Techniques

I. RESPONDENT'S DINNER-PARTY/TOUR ROUTINE

52. Most people have a hard time selling land "site unseen". Such a sale would seem particularly unlikely in the case of distant, desert-like land such as Rio Rancho Estates. Yet, as we have seen, Respondent has been phenomenally successful in doing just that. By 4/30/76, it had disposed of 75,134 lots at Rio Rancho (CX 459-I); 19,426 lots at Silver Springs Shores (CX 459K); over 832 at Oakmont Shores (CX 1-I); and about 449 at Eldorado at Santa Fe (CX 459L). The question naturally arises: What sales techniques has Respondent used to achieve such astounding success?

53. Significantly, in the case of each of Respondent's subdivisions, a heavy preponderance of the lot buyers have been people living elsewhere than in the state where the subdivision is located. Thus, a mail survey by Complaint Counsel revealed that of 106 Rio Rancho lot buyers, only 10 resided in New Mexico⁴⁴ and of 86 Silver Springs lot buyers, only six resided in Florida (CX 568, p. 21). The Oakmont Shores buyers were all out-of-staters (CX 568, p. 21). [No Eldorado sales were surveyed.] These out-of-state sales were generally made in the metropolitan areas of the North, particularly, it seems, in New York.⁴⁵

54. Until 1965, Respondent marketed its land largely through direct selling to tourists passing by its projects and especially (40 percent) to purchasers by mail (CX 4J, CX 393P). In the latter part of the 1960's, however, it switched to a strikingly successful new method of marketing, sometimes by brokers and sometimes by its own sales force (CX 4J) but either way using (1) the appeal of a free [76] dinner-party where prospects are wined and dined and signed up to buy lots site unseen and (2) the appeal of a holiday air-tour to the subdivision in question to inspect the lot and exercise—or more usually *not* exercise—the contract's pivotal option to withdraw within six months after purchase.

55. A background familiarity with the routine of these dinner-parties and holiday air-tours is necessary for an understanding of the high-pressure sales tactics and deceptive practices which were carried on by Respondent. For no other purpose than such a general orientation we reprint here Respondent's concise statement of its own sales routine, which, with one important exception,⁴⁶ we think to be a fair

⁴⁴ Respondent reported in 1969 that 98 percent of all lots sold at Rio Rancho were sold to out-of-staters (CX 4R).

⁴⁵ Respondent has told SEC that during six months in 1975, over 75 percent of its Rio Rancho lot sales were made in New York (CX 459P). However, the time period was atypical, following hard on the heels of this Complaint.

⁴⁶ We specifically do not concur in the impression given that guests are kept busy reading the property reports and other protective literature which the Government insists on but which, in fact, we later find Respondent's salesmen tend to conceal or minimize as much as possible. See Finding #83.

statement thereof.

A. Respondent's own description

56. Respondent describes its sales routine at RPF 14-18 as follows:

Dinner Sales Program

Since 1964 or 1965, the principal method of selling lots at Respondent's projects has been the dinner sales program. (When the dinner sales program was instituted, the previous method of selling, by mail order, was discontinued (Roth 21533)). In the dinner sales program, potential customers were invited to sales presentation dinners given by various licensed brokers throughout the country. At typical dinners, customers were greeted and escorted to small tables. Usually two or three couples and one sales representative were assigned to each table. In the center of the table were copies of the property reports required by state and federal law, together with some brochures about the project. (In New York, New Jersey, Florida and similar states, all such brochures had previously been submitted to and approved by appropriate government authorities.) [77] After an introductory period of perhaps half an hour, during which customers could examine the property reports and brochures and talk to each other, the speaker gave a short welcoming talk from the front of the room. Dinner was then served. Again, the customers had ample opportunity to examine the property reports and to question the sales representative. After the dinner was concluded, a film or slides explaining the project were shown and a sales presentation was made by the speaker. Frequently satisfied lot owners attending the dinners were introduced and expressed their positive feelings for the project. Each sales representative then discussed specific lots with the couples at his table and presented a form of contract. If the customer wanted to buy a lot, he was asked to sign a contract and was given a receipt and copy for his records along with a copy of each required property report.

Six-Month Visitation Privilege

Respondent's sales presentation at the dinners stressed a six-month visitation privilege expressly set forth in all contracts. If a customer purchased a lot without seeing it, he had the right within six months of his purchase to visit the property and, if he did not wish to retain his lot, he had the option of cancelling his purchase and receiving a full refund of his monies paid. To avoid any confusion or doubt about the exercise of this option, Respondent devised and consistently employed forms to be signed by the lot purchaser on each registered inspection of his lot on which he could indicate his acceptance or rejection of the lot or could indicate his wish to exchange for another lot. The practical effect of the six-month cancellation privilege was to insure that all customers had the opportunity to view their lots prior to the time when their purchase became final. [78]

Tour Program

To facilitate personal inspection by lot purchasers of their property, Respondent also stressed at the dinners an extensive tour program to visit the projects. Respondent arranged for, and partially subsidized organized visits by purchasers to see the projects, the surrounding areas and the particular lots that had been purchased. By the 1970's two or three plane loads of purchasers were visiting their projects each week, partly at Respondent's expense, on four and five day organized tours. On a typical visit to Rio Rancho, for example, customers would be taken to the four corners of the city as well as to their property at the project and side trips, e.g., to Santa Fe, were provided. Customers also had ample free time in which they could talk to residents, explore the

city and do as they pleased. Similar schedules existed at Eldorado and Ocala. Of those purchasers who did go to see their lots, a majority decided to retain them. The minority of customers who wished to cancel were permitted to do so and received their refunds.⁴⁷

Exchange Privilege

One other important feature of the sales program should be noted. From the earliest days, Respondent's sales presentation stressed an exchange privilege, whereby a purchaser of a lot at Rio Rancho could exchange it for a building area lot served by utilities if at the time he was ready to build, the lot which he owned was not serviced by utilities.⁴⁸ This provision in effect guaranteed that a lot purchaser [79] could always use his lot for or towards a homesite in a developing area, even though the lot might be located at a substantial distance from the part of the subdivision at which utilities were installed.

B. Consumer Scirica's description

57. Dozens of consumer witnesses here testified to their experiences during Respondent's dinners and tours. One such consumer whose testimony we believe was very credible and stood up well under lengthy cross-examination was Luciano J. Scirica. His experience was fairly typical of that of many other consumers. His entire examination, including cross-examination, is found at pages 5516-5642 and 5652-5725 of the transcript of testimony. Pages 5516-5541, which relate most closely to the dinners and tours, are attached hereto as Appendix D. *Its reading at this time is recommended to get the flavor of the case.*

II. RESPONDENT'S "ORGANIZED OFFENSE"

A. Element of deliberateness

58. It is important to recognize preliminarily that the success of Respondent's dinner parties in selling distant land "site unseen" and the success of its tours in confirming such sales even after the buyer sees the land—has not been unplanned. Virtually everything that happens at Respondent's dinners and on its tours is the product of organizational forethought and preparation for battle. It is not surprising to find this battle of wits ending thousands of times in favor of Respondent.

59. A striking piece of evidence confirms Respondent's full consciousness of its inherent advantage over its customers in this respect. In a taped pep-talk to his salesmen⁴⁹ (which really ought to be heard to be fully appreciated), Respondent's Sales Manager for eastern

⁴⁷ See discussion under "Tours", *infra*.

⁴⁸ See discussion under "Exchange Privileges", *infra*.

⁴⁹ CX 108A-U (transcript of tape, CX 156, Slide B). At trial, Respondent attacked the Hollander tape on grounds that it was old (1968) and that Hollander was later reprimanded by the National Sales Manager (one Mandel) for saying such things (TR 21743-47). We attach no credit whatever to Mandel's testimony. Indeed it is a close question whether the tape (CX 108B) does not indicate that Mandel was personally present at the lecture. In any event, Hollander himself was never called to testify for Respondent.

United States, one Hollander, unabashedly laid out for his salesmen the secret of Respondent's marketing success: [80]

These people who come to our party [are as?] you against the Green Bay Packers. *We serve them with an organized offense against a disorganized defense. We can kill them. We could walk all over them. And we do,* until we become disorganized, until we no longer cooperate with our speaker, until we no longer do things that we have been organized to do. . . . (emphasis added) (CX 108T)

And with organization goes planning and standardization:

We have a planned format. We have a program, an idea. We have a concept, a concept that has produced millions of dollars worth of business. . . . (CX 108P)

B. Salesmen's advantages

60. It may be that Hollander's language is more colorful than that of some of his cohorts but there is no serious question that his cold-blooded marketing techniques have been those of Respondent generally. The "organized offense" starts with a "sales training manual" (CX 39, CX 309) that goes into such details as the best way to seat two couples at a dinner table (CX 39F-G, CX 309D). Long before the event it reviews the best answers to the most commonly asked questions, such as:

I don't buy what I can't see.

To which "an excellent answer" is provided by Respondent:

Look—right here in the contract it says you have six months to change your mind by making an inspection. There is nothing binding on your part until you have seen the lot, and here it says you have the right to make an exchange—any time.

You have nothing to lose and plenty to gain (CX 39L, CX 309-I).⁵⁰ [81]

⁵⁰ Other likely questions and party-line answers taught one salesman by his superior were explained as follows:

- Q. Could you tell us what you were trained to say when somebody made one of these objections?
* * * *
- A. For example, if the subject came up, "Well, I would like to take this paper to my lawyer" one of the ways to overcome that objection at that time was to say, "Fine, I'd be happy to meet with your lawyer". If you would set up an appointment we will all go down to his office, but keep it in mind, most importantly, you are relating to this particular parcel that you are buying by seeing it, by actually going down there and relating to it.
* * * *
- Q. What did Mr. Miller [his superior] tell you to say if you got the objection, "I won't buy anything site unseen"?
- A. Of course Mr. Jones . . . we want you to see it and we make it quite convenient, as you heard [from the speaker]. We do have these monthly tours, we charter flights and we do want you to see it. We make it quite easy, and inexpensive for you to do so.
- Q. What did Mr. Miller tell you to say if a customer said he was not ready to purchase?
- A. Again, you use that six month refund guarantee as an offset (TR 7470-71).

C. Customer's disadvantages

61. In comparison with this well-prepared and highly motivated⁵¹ "land consultant" (as Respondent prefers to call its salesmen) the typical purchaser may [82] own his own home but otherwise has usually had little if any experience with land sales and land law. He is invited to conduct this business in a social atmosphere. Moreover, his "defense" is affirmatively "disorganized" by a social setting where "wining and dining" is not just a figure of speech. Indeed, in contrast to the salesman—who is specifically warned by his sales training manual *not* to drink alcoholic beverages in such situations (CX 39V, CX 309R)—prospects are regularly served alcoholic beverages at Respondent's parties, both in the metropolitan areas where purchasers are first acquainted with Respondent's program and on tours to "inspect" Respondent's projects.⁵² Respondent can hardly be oblivious to the natural and probable effect of even a little alcohol on such purchaser's judgment. [83]

D. Brochures

62. Respondent's "organized offense" next provides its salesmen with slick promotional brochures for dinner guests cleverly designed to direct a prospect's attention to the attractive core areas and improved lots of the particular project involved and thereby divert his attention away from the barren character of the unimproved and largely undeveloped parts of such project, *where the only lots for sale at Respondent's metropolitan dinner parties are located* (TR 903).

62.1. Consider, for example, one of Respondent's two principal Rio Rancho sales brochures, entitled "How To Live-Retire-Invest in the Sunny Southwest" (CX 30). Much space is occupied by pictures of Albuquerque's Spanish "Olde Town", Sandia Crest (a mile above the city) and other colorful scenes *outside Rio Rancho* (e.g., CX 30B-E, L-M, O, S). As for *Rio Rancho* itself, there are generally two sorts of pictures:

⁵¹ Respondent reported in 1969 that commissions including the salesman's share, were averaging 15 percent of sale price (CX 4J).

⁵² One of Respondent's witnesses testified:

I believe we normally set up the arrangements for dinner and cocktails with the restaurant. I think it was about two drinks per person.

(TR 20403). This statement was made with reference to tour parties but we know no reason to doubt that the same standards of generosity applied at similar dinner parties in the metropolitan areas of the North, e.g., New York (TR 5224, 7527); St Louis (TR 9081); and New Jersey (CX 111A, D). For other references to serving alcoholic beverages at Respondent's parties, see TR 5026 ("Q. Did she tell you she liked what they had seen down there? A. She liked the wining and dining they did for her.") TR 5067 ("... they wined and dined us for the days we were there.") TR 9254 ("a cocktail party"); TR 9543 ("Q. Nobody forced them to attend the cocktail party, did they? A. No, sir, but they came.") TR 20371 ("dinner and a cocktail party," "all meals and cocktails.") TR 20394 ("cocktail parties"); TR 20402 ("cocktails" were included in package price for tour); TR 20403 ("[T]he New Yorkers seem to drink more than the Mormons do. We try to hit a happy medium.") Note also the employment of cocktails at a meeting of company officials with dissident buyers in the vicinity of York, Pennsylvania (TR 17540-41).

(1) Most pictures portray attractive homes, gardens, recreational facilities and other indicia of civilization, all necessarily located in the small "core" or "built-up" area of Rio Rancho (CX 30A [Figure 7] F, H, I, J, M, N, Q, V, W, X), without ever revealing what a relatively small part of the whole is characterized by such homes, etc.—or, indeed, that *any* part of the rest is not like this. (2) A goodly part of the rest of the pictures in this brochure are of the apparently broad, blue Rio Grande River and the shady green picnic spots along its banks (CX 30F, K, N, P, R, S, T), no more than three miles of which adjoin Rio Rancho Estates and none of which is even visible from most locations in the subdivision.⁵³ [83.1]

⁵³ This was an observation of the Administrative Law Judge during his views of the project. See CTX 2.

Initial Decision

102 F.T.C.

Figure 7
(from CX 30A)

IND 6

HOW TO LIVE - RETIRE - INVEST in the SUNNY SOUTHWEST



FACTS & FIGURES

Advantages of acquiring a homestead in the suburbs of sunny Albuquerque, New Mexico, for Relocation - Retirement - Investment.

- ★ How you can acquire a homestead in the Albuquerque area on easy terms or just a few dollars monthly.
- ★ Why the Southwest is the fastest growing region in the U.S. today.
- ★ Why Albuquerque is called "The Climate Capital of the Southwest."

★ **HOW YOU CAN HAVE MORE MONEY ON HAND**

Costs here - **FREE** - **NO** - **NO**

Docket No. _____

In the Matter of _____

9/9/94

Witness _____

Register _____

Welcome to

NEW MEXICO

THE LAND OF ENCHANTMENT

Cop. - Rio Rancho Estates, Incorporated

Rio Rancho Estates
New Mexico
A MASTER-PLANNED COMMUNITY OF AMREP CORPORATION, A PUBLIC COMPANY LISTED ON THE NEW YORK STOCK EXCHANGE.

[84] *Out of a total of 24 pages there turns out to be only one page in this brochure which pictures the hinterland that Respondent's dinner guests are being asked to buy.*⁵⁴ The inevitable result is an erroneous impression that the many pictures similar to the happy, happy barbecuers on the patio of a house in a built-up area (CX 30A) [Figure 7] are the *norm* and the "tremendous expanse of nothing" out in the hinterland (TR 5537; CX 30Q) is *exceptional*.

E. Motion pictures

63. Respondent's "organized offense" also makes available to its salesmen the incalculable assistance of motion pictures which start the intensive indoctrination of the evening at Respondent's dinner parties. One must actually view these quasi-documentary color films like "Albuquerque's West Side Story" (CX 168); "Eldorado, A Gift Of The Sun" (CX 172); "Something New Under The Sun" (CX 174) and "The Race For Space" (CX 170)—in order to appreciate how well they are done. As with the brochures, however, what these films show has precious little to do with the largely undeveloped and undevelopable hinterland.

64. Complaint Counsel also press lesser deficiencies about Respondent's movies. They see deception in Respondent's use of a Chamber of Commerce-type organization of which Respondent was a member to front for it as producer of a promotional film to the making of which Respondent was the largest contributor. They further object to Respondent's editing out shots of competing developments when it used the resulting film at its own dinner parties (CCPF 240-41).

64.1. They also see deception in the making of another of Respondent's promotional films, "Eldorado, A Gift Of The Sun", where the not-very-green grass of the Santa Fe country got an artificial assist from a spray of green paint before the picture was shot (CCPF 215). [85]

64.2. These seem like fairly minor matters and we are loathe to clutter up the record by mentioning them. However, we have no doubt that the charges are true and they do illustrate well the extent to which Respondent goes in planning its high-pressure and deceptive sales offense.

F. Oratory

65. Respondent's "organized offense" then supplements these literally "moving" pictures with oratory of a more old-fashioned kind by Respondent's sales executives or ranking salesmen. Again, one of

⁵⁴ Even that page is mildly deceptive. It is captioned: "Other views of the property *before the march of development starts*" (CX 30Q) (emphasis added). A funeral procession might afford a better analogy.

these "podium speeches" must be heard to be really appreciated. The scripts are carefully prepared by headquarters in New York and distributed from there to the field, to be followed exactly (TR 886, 3881, 4695, 7490, 7627), except for very minor variations, if necessary, to inject some of the speaker's own personality (TR 893, 3994). Such speeches, like the brochures and movies that preceded them, are concerned with everything but what they are selling—undeveloped lots of land. If the appeal is successful, the audience is raised to the proper pitch of interest and excitement.

G. Peak excitement

66. This is the critical time of the evening when the prospects will be turned over to their "land consultants" (salesmen). They must be properly prepared. Urging his salesmen to applaud heartily when a company speaker completes his presentation, Hollander explains:

... [W]hen that speaker says 'thank you very much' you applaud loud and clear. Let's practice it right now: 'Thank you very much.' [Applaud]. Loud and clear because that puts money in your pockets. *You create in that room an electricity. You create an aura that the people cannot understand. When they walk into that room they have a feeling of something happening and they want to get in on it* (emphasis added) (CX 108C). [86]

The whole aim of an "organized offense", he further explains, is to work customers up to a high-pitch of emotion and then quickly sign them up before this emotion state dies away.

Selling is emotional. It's like making love. *You bring the people to emotion, to the peak of emotion, and then you sign them up* (emphasis added) (CX 108C).

67. That such a deliberate effort to inhibit thought by creating emotion can be very successful is evidenced by the testimony of a consumer here. Cross-examined as to how he could have gone ahead and bought a lot if he had really felt (as he said) that a moving picture of one of Respondent's subdivisions was misleading, Consumer Weber could only say:

Sometimes you get carried away. You are easily swayed (emphasis added) (TR 8957).

* * * * *

They go through this so fast and so briefly at these dinners and even after we get out and select the lot we are *so excited* about purchasing it, I am afraid we didn't—we were guilty of not reading it correctly; not taking the time for it (emphasis added) (TR 8759-60).

H. "Holds"

68. In the creation of excitement as the time for signing up purchasers arrives, Respondent's "organized offense" is at its best. All salesmen have so-called "allocation sheets" which list the only lots available for sale at this particular party on this particular night. This is intended to create an illusion of scarcity.⁵⁵ If a salesman can [87] evoke a spark of interest in a particular lot—and perhaps even if he can't—he is taught to call out a "hold" on that lot (by number) so that the lot will not be sold to someone else until the salesman's customer has had a chance to make up his mind about it. Theoretically, the purpose of this exercise is to avoid confusion and duplicative purchases. Actually the purpose is to create general excitement at a critical moment, as the evidence makes quite clear.

69. Respondent's sales training manual lays it right on the line:

Call Out A Hold

Help create excitement. Build it up to a real sales climax (emphasis added) (CX 39-O, 309V).

One of Respondent's former sales managers testified in somewhat more detail:

Q. Now, when you finished with the close portion of your presentation, what happened immediately after you were finished?

A. At the close of my presentation we would have a calling of the holds.

Q. How would that work?

A. It was the job of the land consultant that was sitting at the various tables with the prospective customers, with the people invited, to call a hold, and the hold would mean he would jump up and raise his hand and create a lot of excitement and enthusiasm in the room and said he would like to have a hold and refer to a number, he would say, 'Mr. Bondy, I would like to call a hold on number 2, and number 2 he means he wants to put a temporary hold on that particular property that is indicated on the allocation sheet. It's very difficult to do it without an allocation sheet. It [88] means he is going to tie up, temporarily, without any commitment, a piece of property that was indicated on this particular form.

Q. Why do the salesmen do this?

A. To create excitement, to create an urgency.

Q. Were they told to do this?

A. It was part of our training.

JUDGE TEETOR: You mean you were told to do it, and you told others to do it?

THE WITNESS: Yes. (TR 7499-7500)⁵⁶ [89]

⁵⁵ The Sales Training Manual on "Allocations" reads: "You will be supplied with an allocation sheet for the party. As allocations are sold, they will be called off from the speaker's platform and each man should delete it from his list. This shows activity and will help stimulate people to make up their minds quickly or the allocation under discussion will be gone" (CX 39V, CX 309R) (emphasis added).

⁵⁶ Bondy subsequently added:

Q. Did you ever discuss the use of holds in the time that you were employed at AMREP and ATC?

A. When you say discuss the calling of the holds, with whom?

Q. The salesmen and managers.

A. Very much so.

(footnote cont'd)

For passing references to the use of "holds" at Respondent's dinner parties, see TR 885-86, 3882-83, 4497-4500, 4675-76, 6243, 10625-26 and CX 108L. [Similar use of radioed "holds" and "deletions" during physical lot inspections at a subdivision site is dealt with below under the heading of "tours".]

I. "Deletions"

70. In addition to calling "holds" as a temporary "protection" for customers, salesmen have also been instructed to call "deletions" from the allocation sheet when a customer finally decides to buy the lot in question.⁵⁷ An ex-salesman explained the distinction between "holds" and "deletions":

The salesman did call holds on a particular piece of property he thought would be something they could talk about, to a particular couple that he had chosen. They were then taken, if there was a deletion, if they did get a customer to go along, they would call a deletion. *This was done for general motivation in the room and, well, that was it* (emphasis added) (TR 3889).

71. There is some evidence that "deletions" may be falsified. The same former sales manager testified that about once a week such a thing happened:

... [S]ometimes to create enthusiasm, to add credibility to the product, we did call deletions that were not sold. ...

For example, let's say a salesman had a couple at the door and he was with them a long time and he couldn't make a sale. He would walk them to the door and when they got out of earshot he would say [to the salesman up front] "Would you please delete item so-and-so?" and he [the salesman up front] would delete something. The code word was "please", which would let the [90] salesman [up front] know it was not an actual sale. It was, again, to add credibility to the fact that the people that walked out didn't actually walk out of the room (TR 7512-13).

We do not doubt that such instances of abuse happened but we are more concerned with the normal use of "deletions", like "holds", to raise the emotional temperature of the room to the boiling point.

J. "Now or never"

72. With excitement about as high as it is likely to get, it now becomes the job of each salesman to "close" a deal with the couple or couples at his table with whom he has been getting acquainted during dinner, movies, speech, etc. If such a deal can ever be brought off, this

Q. What was the reason for using holds?

A. The testimony that I just gave: so there won't be double decking; and another very important reason was to create urgency, to create excitement (and) enthusiasm in the room (TR 7588).

⁵⁷ One consumer apparently confused the two terms "hold" and "deletion" (TR 4180).

is the time to do it—and the opportunity will not last long because fires do go out. As the sales training manual puts it:

Close while they're hot (emphasis added) (CX 39R, CX 309-O).

And a former sales manager explained the reason quite simply:

This is the type of sale that if you do not make it that evening, you do not make the sale (emphasis added) (TR 10939).

Similarly, a question to ex-salesman Kimmel about anything he had said from the podium that would encourage people to make a buying decision that night, elicited this simple response:

The entire program was geared to that goal (emphasis added) (TR 3899).

73. So important does Respondent deem it to “strike while the iron is hot” that its sales training manual teaches its salesmen—after verifying the prospect’s [91] ability to pay his interest in investment or residence, etc. (CX 309F)—to “get down to brass tacks” immediately:

Bring out an agreement. Start filling in the specific allocation at the specific terms.

Customer: Don’t write that up for me! I haven’t decided yet!

You: Let me show you what it looks like on paper. If it’s not to your liking, we’ll just tear it up. You’ve nothing to lose (CX 39L, CX 309-I).

K. “Assuming the sale”

74. This technique of preparing a contract for signature even before any agreement is reached is sometimes called “assuming the sale” (TR 7501) and it reflects the concern felt by Respondent’s marketers lest mere mechanics delay and thus endanger getting the customer’s signature on a land contract,⁵⁸ once the customer is ready to sign up. The ever-colorful Sales Manager Hollander, in his taped training session elaborates revealingly on how to prepare properly for a fast closing. His advice is worth reporting in detail:

Now, gentlemen, I’m going to show you how to close. And I don’t want you to ever forget this again, because you have. Mr. Smith, be good enough to have to get me a contract, please, and I’m gonna show you how to close. A blank contract, just any one at all.

* * * * *

⁵⁸ The contract in question is a form contract prepared by Respondent. See CX 152 (Oakmont Shores); CX 154 (Silver Springs Shores); CX 155 (Rio Rancho Estates); and CX 106 (Eldorado at Santa Fe).

[Mr. Hollander] Watch. You already have the people sitting at the table. The speaker from the floor has already shown them a reservation form and contract, purchase agreement. The speaker has already shown them an allocation sheet. We'll just use this as a sample, just right now. The speaker's already shown them an allocation sheet, a price list if you will, and a contract, if you will. From the floor, we've put it in their hands. They've held it. It is no longer a stranger to them. This is not a stranger to them, this is not a stranger to them, because the moment they have come to the door, somebody at the door says, "Would you please sign your name here on our register." And then when they sit down, then you use the profile sheet, again, you put a pen in their hands, and you ask them to fill out the profile sheet. You use the profile sheet.

* * * * *

[Mr. Hollander] The profile sheet. Whether you fill it out or they fill it out is immaterial. Do it your way. Continue to do it your way. Actually, what you are doing, you are preparing the people to recognize the fact that you are going to do writing. So they're accustomed to it. They had a pen in their hand. Now, they see you with a pen in your hand. It's no longer a stranger.

* * * * *

Let's see, today's is the . . . what's today's date? It's the 1st of October, that's right, 1968.

Now, the unit that we're talking about is Unit 10, and the size is one acre, and the purchase price over here. Let's see, is \$2,895, and the total price of \$2,895, [93] and the net purchase price, of course, because there is no discount on this. And the downpayment is \$145. Let's see. \$145. That's \$5. That's \$7. That's \$2,750.

Mr. Jones, would you please check my arithmetic over here to see if I did that correctly.

[Voice] Yeah, that's right.

[Mr. Hollander] Now, Mrs. Jones, I imagine you're the one that handles the pay check, you know, and everything like that.

Ah, usually we have our payments fall due on the 1st, 5th, the 10th, the 15th, 20th, 25th, or the 30th of the month. If you were to do something like this, which one of those days would you like your payments to fall due on?

[Voice] The 15th.

[Mr. Hollander] That's \$35 a month, payable on the 15th of the month. This is the first. I can give you 45 days. So, I can give you until November 15th, before you have to make a payment. Isn't that nice? Now, you're, now I know your last name is Jones, and that's J-O-N-E-S, isn't that right? Now do you use a middle initial when you sign checks? What is the middle initial? [Unintelligible] I see. And your first name is John. Mary, do you use a middle initial when you sign checks?

[Male voice] No, just Mary.

[Mr. Hollander] Just Mary.

[Laughter]

And your correct address right here on this card. And that's your correct zip code number and everything. Read it off to me, would you? While I . . . [94]

[Voice] 1357 Harlan, 80212 is the zip code.

[Mr. Hollander] 80212. And the town is what?

[Voice] Denver—Now, I'm not buying anything tonight.

[Mr. Hollander] Of course not.

[Voice] I don't know why you're filling that out now.

[Mr. Hollander] Well, because this is very simple. This is my job, and you certainly

wouldn't want my manager to come over here and see me not doing my job and getting me fired, would you?

[Voice] No, of course not.

[Mr. Hollander] That's the only reason I'm filling it out. What is your telephone number?

[Voice] 238-5309.

[Mr. Hollander] And the zip code?

[Voice] 80212.

[Mr. Hollander] No. I didn't mean that. I meant the area code.

[Voice] 303.

[Mr. Hollander] See, now our code number in this office. What is our code number, Mr. Smith?

[Mr. Smith] 104.

And the brokers C & A Realty Corp., and my name is Hollander, H-O-L-L-A-N-D-E-R is the way you spell my name. And my number is 01. Now, if you were to do this, you would do it together? You and your wife, together, in joint tenancy, wouldn't you? Now, I have to give you a restrictive covenant. This is the list of the restrictive covenants that I have to give you. [95] So, would you please initial over here that I have given you these restrictive covenants. Right over here. Just initial right here.

[Voice] Well, I'm not signing anything tonight.

[Mr. Hollander] No, just initial the fact that I've given you these restrictive covenants.

[Pause]

[Voice] Well, this is the . . .

[Interrupted by speaker.]

[Mr. Hollander] Okay, now let's stop at this point. I will again repeat my offer. I will give any one of you a \$5 bill, any one of you a \$5 bill, any time somebody does not permit you to get up to that point, providing you give me a \$1 for every one who does. Do I have the names of the people who want to take me on on that? Mr. Smith. Those who want to take me on on that, would you stand up and give Mr. Smith your names. Then really and truly there is no reason for you not to fill out our contract every night, is there?

Really and truly. Do you know that these contracts cost us money? Do you know that they, we don't get them for nothing. And do you know that they are very valuable to us and we don't want you to waste them because any time anybody wastes contracts in this company, it's gonna be a terrible thing, and we may even get that guy fired. And do you know how you waste them? By not filling them out.

Fill them out every night. That's the first thing you do before the map comes out, before any further explanation, before anything else because . . . ladies, if you'll forgive me, I must tell you this. [96]

Selling is emotional. It's like making love. You bring the people to emotion, to the peak of emotion, and then you sign them up. Now, how is it best to bring them to the peak of emotion? Like I just did? By having it all ready for them to put their signature down? Or by bringing them to the peak of emotion and then start filling out a contract, and then watch that enthusiasm wane. Because once it gets to the top, it can only go in one direction, and that's down. So, you sit at that table, and when the speaker finishes, you applaud, you get up, you call your hold, you sit down, explain the hold, and fill out the contract. I have seen salesmen sit at a table with two couples and hand one to this woman and one to this woman and one to this woman and this woman a pen and this women a pen. Now follow along with me, and you write what I tell you to, and they

do it. And they do it. If you don't believe it, try it some night (emphasis added) (CX 108 I-O).

L. Closing fast

75. The strategists who laid down the rules for Respondent's "organized offense" were convinced that the time for parlaying excitement into a contract was usually remarkably brief. The sales training manual states categorically:

It is mandatory that the close last no more than 10 minutes—sometimes 15 minutes at the evening party. If the sale is not consummated in this period, it is time for a T.O. (CX 39T, CX 309Q).

Elsewhere the same authority again stresses that:

Time is of the essence at a party. You cannot spend all night on one customer. So, if you haven't moved into an effective close within 10 minutes or so, get somebody to "T.O." for you—speaker, manager or another salesman (CX 39P, CX 309M). [97]

M. "T.O." system

76. The "T.O." system just referred to was explained by one of Respondent's employees as follows:

"T.O." is a takeover. Let us say you were sitting with a couple and for some reason you had a problem communicating with them or they did not like the length of your hair or something; anyway you had a problem with them. You would invite another salesman over. For instance, let us say a man was interested in housing and you knew you were not really getting along with him too well. You would introduce another salesman: "This is Mr. So and So. He is our housing expert, Housing Manager". He would sit down and he would take a shot at them and see if he could do anything with them. In the meantime, you get up and go get some coffee or something. That is basically how it worked (TR 10341-42).

Another of Respondent's employees had had similar experience:

Q. . . . [I]f you had not made a sale, what did you do next?

A. We tried to refine the problem that they had in their mind. Then, if it was a financial one—or whatever it was—T.O. (bring in another salesman to consult with them) and say, "He is an expert in", if it was money, "financial matters (and) I think he could be a great deal of assistance to you and help you help answer your questions on that."

Q. Was the person that was brought in—this financial expert—was he in fact a financial expert?

A. He was just one of us. We would take turns rotating. But it was just a way to make them feel comfortable if somebody else was going to come in. [98]

Q. If the T.O. was unsuccessful, what was the next thing to be done?

A. Well, if in that salesperson's analysis this was a hard person to sell but still a potential (buyer), the Sales Manager could be brought in (TR 10301).

77. A third employee of Respondent described the tactics employed by him as the second (T.O) salesman:

Q. Were you ever the second salesman in such a situation?

A. Oh, yes, many times.

Q. And what did you say different when you were the second salesman?

A. Well, the pad was there, yellow pad that we used with the felt pen. I could see what ground the other man had covered so I would not go back over the same thing. It was nice to know anyway when you get to the table and one would go on to something else. Sometimes I would ask them if they understood this other situation, if I was lost for words or something. But as a rule I closed a lot of them as the second salesmen. If the salesmen had only covered one or two items [pitches] we would go into three or four but we did not handle them any further than that (TR 9662).

78. Respondent's sales training manual gives salesmen this "warning":

Don't wear the customer out before you call in the T.O. man. Make sure he has a starting point. The best time to ask his help is when you have run into a specific obstacle that you cannot overcome. Then tell your helper before he reaches the table. *T.O.'ing is especially good when a prospect is indecisive* (CX 39P, CX 309M). [99]

In this passage Respondent recognizes that the mere pressure of numbers, which is commonly known as "relay salesmanship"—at least in the context of an "organized offense"—can have some effect on an undecided customer at the critical moment when Respondent's "organized offense" is about to succeed or fail.

79. In the relatively brief period of no more than half an hour from the end of the speaker's presentation (CX 39P, T, CX 309M, Q), the sale is either made or not.⁵⁹ Assuming that a sale has been made, Respondent's job is to keep it intact. This is not an easy thing to do, as we are about to see, but the burden has now shifted: all the forces of inertia will operate hereafter to protect the integrity of the sale, despite two serious challenges which it must undergo.

N. *Seventy-two hour cancellation privilege*

80. The first and less important challenge comes quickly. The occasion is a customer's option, pursuant to law and contract, to withdraw from the transaction anytime during the first three days after signing up. 24 C.F.R. 1710.208(f)(3) gives an interstate land developer a choice between (1) furnishing a prospective buyer with a copy of the developer's governmentally-required "property report" at least 48 hours before a purchase or (2) waiting until the purchase and giving a copy to the purchaser with an option to back out of the deal for 72 hours⁶⁰

⁵⁹ ("This is the type of sale that if you do not make it that evening, you do not make the sale.") (TR 10939).

after receiving the report. This second option is embodied in Respondent's form "Reservation and Purchase Agreement" (e.g., CX 155A).

81. Respondent apparently finds it better strategy to take the second option, thus keeping prospective purchasers in ignorance of the considerable information to be found in a property report until they arrive at the dinner party, where they are not very likely to read this [100] lengthy and complex document and Respondent's salesmen are not very likely to encourage them to do so.⁶¹

82. Having opted for keeping the prospect ignorant of the contents of the report until the time of purchase, Respondent must now worry about whether the purchaser may, in fact, decide to withdraw within his 72 hours. Happily (from Respondent's viewpoint), the basic situation has not changed: the purchaser still has not seen the site he bought. The excitement may be gone but that is now less important since Respondent has the purchaser's signature on the dotted line.

O. "Buyer's remorse"

83. There is such a thing, however, as "buyer's remorse" and Respondent's "organized offense" is ready for this, too. A former sales team captain explained "buyer's remorse" this way: [101]

Q. Let's talk about buyer's remorse. What is buyer's remorse?

A. By buyer's remorse, it simply means that a customer came to a dinner and at that particular time he was very enthusiastic in what he saw, and he made a commitment. And the commitment was that he was reserving a piece of property. And usually a buyer's remorse would take place within the first 48, maximum 72 hours. But I would say in 85 percent of the cases, you would hear about it the following day.

Q. What would happen in a buyer's remorse situation, what is a typical situation?

A. All right. The buyer would call you the following morning in the office and he would give you what I used to refer to at that time as a lot of excuses as to why not.

Q. Why not what?

A. Why he wants to get out of his previous night's commitment of the property that he reserved or purchased with Rio Rancho at the dinner party. It was my job, as a team captain, the following morning to reconfirm with the client; if I knew his business number I would call him at business, but most of the time you would not be able to do

⁶¹ A property report is a fairly lengthy and complex legal document. See for example CX 162 (Rio Rancho Estates) and CX 164 (Silver Springs Shores). One very literate consumer tried to read one during a dinner party but didn't get beyond page 2 (TR 1794) and one salesman testified that it was "very rare" for a property report to be read in its entirety (TR 3978). Moreover, Complaint Counsel maintain, with some support from the record, that property reports have been effectively hidden under stacks of other documents (TR 10337), stuffed into literature kits sent home with purchasers (TR 7512, 9664-65, 10320), and even placed under bread boxes (TR 7486) (although the "bread box" witness agreed that this was not Respondent's official policy) (TR 7486). There was also some evidence that property reports were gotten to purchasers late (in a subsequent mailing) or even not at all (TR 1912, 1938, 4299, 5135, 5140, 5210, 5388, 9925, 10658, 14559), but the ultimate fact was left in doubt by Respondent's regularly initialed receipts for reports and other evidence cited in RRB at 247. Complaint Counsel are certainly right about the absence of any mention of the existence of property reports in the speaker's script for Respondent's dinner parties. (See, e.g., CX 36 and CX 37). It seems a fair inference from all the evidence that Respondent's excitement about its lots did not extend to property reports and that while it did not officially condone their effective concealment at its dinner parties, it did nothing about it, either, despite our reasonable certainty that some effective concealment did occur.

this, or we would talk to the housewife. And it was the manager's job to say, all the papers have been sent, some reassurance; well Mrs. Smith, this morning I spoke to Albuquerque, we are forwarding all the papers down there. And the receipt that we would give the customer that night was a temporary receipt; the official receipt came with his payment books and it also had the corporate seal on it. And it was usually signed by an officer of the company, the vice-president, comptroller, or even someone on the property that was in an executive position. [102] And he would get another copy with the seal on it, which was exactly the same copy that he signed, because that was a snap-out form with about four or five copies inserted.

Q. What happened in the typical situation of a buyer's remorse; let's get back to that.

A. He would call up and say, look, I don't have the money. And after I thought it over, it is something I cannot afford. Your greatest objection was money, that he just did something that he realized that he could not afford. And you must remember, during these type of sales transactions—

Q. Just, Mr. Bondy, is it correct that there were cases where a buyer would call up the day after the sales presentation, the day after he signed, and say he wanted to get out, and in fact you permitted him to get out?

A. Well, I had no choice, really; I had no choice. In the first place, it was the law, there were these rescission notices where a customer had three or five days, they change from time to time. One was a State law, one was a Federal law. I think the Federal law gave a little more time than the State law, or vice versa. So, by law if the customer called you up and said he is cancelling, plus the fact, if I recall correctly, also at the back of the contract, some piece of paper we had to give to the customer, there was this rescission thing, where he simply signed it and mailed it back to us, that shows that he cancelled. But, in most cases, the customer paid us by check and, as most people that are displeased with something, they call up the bank and they will stop payment on the check. [103]

Q. So that if somebody decided to cancel within the cancellation period, and he called you up and told you about it, he was permitted to cancel?

A. Yes.

Q. And that was company policy, is that right?

A. Yes.

84. The way Respondent handles "buyer's remorse" was explained by Sales Manager Hollander to his salesman as follows:

You [salesmen] are cheating yourselves if you do not invite these people back to a party the very next morning. And you get them on the telephone, "Mrs. Jones", cause usually you'll get the woman, the husband is not there. "Mrs. Jones, this is Sid Hollander. I spoke to you last night, do you remember at the party? I just want to call to thank you very much for coming to our dinner, and there's one thing I did neglect to tell you when you were there. Do you know that now, as one of our investors, that you are entitled to come to any one of our parties anytime you want and get a dinner, and we will pick up the tab? And not only that, that you may bring a guest, your guest, and we'll even pick up the tab for your guest. By the way, we are having another party down here at the Holiday Inn on the such-and-such a date. Can you and Mr. Jones make it? And can you bring your neighbor?"

That's your telephone call for tomorrow morning, that's your telephone call for tomorrow morning, you smack her right between the eyes, and you know just ten minutes ago, or an hour ago, or two hours ago, or last night when they climbed into bed together: "Do you know, honey, we shouldn't have done that. You know we shouldn't have involved ourselves with that. [104] Oh, God, what'd we do." You know,

buyer's remorse. Did you ever hear of it? Did you ever go out and buy that new car, and that you've been waiting to buy for months and months and months, and then you buy it, and you get behind the wheel, and you drive out of that show room, and you're going down the street, and you're thinking of \$3,000 worth of payments. Oh, my God!

So, if it happens to you, why shouldn't it happen to them? It's buyer's remorse. The only difference is that you can look out that window, and you can drive up to your house, and your neighbor comes by and says, "My, what a beautiful car. Lots of luck." So, you've got the physical automobile to eliminate the buyer's remorse. So, you now get on the telephone the next morning, and you now say to Mr. and Mrs. Jones, or whoever you get on the phone: "Do you know that you can come to any one of our dinners any time you want, and we'll pick up the check?" And, buddy boy, have you eliminated buyer's remorse? Bing. "Any time your old man feels like taking you out and enjoying some of that capitalist munk, Mrs. Jones, why give us a call, and we'll send you to one of our parties, and you'll have dinner."

P. Six months cancellation privilege

85. The second and more important challenge comes sometime within six months after purchase. The occasion is another option in Respondent's "Reservation and Purchase Agreement," this time for the purchaser to cancel out and get his money back if he makes a personal inspection and—for any or no reason—he just doesn't like it.⁶² Since [105] most purchasers at the dinner parties up North are asked to buy a lot site unseen, such a cancellation option is obviously the greatest importance in persuading dinner guests and any other purchasers to enter into an agreement. But the price of this important sales advantage is the risk that once the site is seen the purchaser will back out.

Q. "Moment of truth"

86. There is good reason for anyone to back out, particularly at Rio Rancho Estates. Most lot-owners who have been fed a diet of pictures of the attractive little built-up area of Rio Rancho (e.g., Figure 7, at p. 83.1 [p. 1432]; CX 30A) hardly fail to be somewhat shocked and disappointed when they see the reality of the barren hinterland (e.g., Figure 8, at p. 105.1 [p. 1446]; CTX 36 or even CX 30P). At most locations in Rio Rancho, in the Administrative Law Judge's experience,⁶³ one scans the barren horizon for miles in all directions without seeing human habitation or even power lines that might herald a future advance. One consumer witness said simply: "[I]t was desert" (TR 2397) (emphasis added). Another noted that "[y]ou really had to

⁶² The Rio Rancho form contract contains the following provision. "Refund Guarantee. Buyer shall have six months from the above date [of purchase] to make a registered personal inspection of Rio Rancho Estates on a Company-guided tour and have every penny paid to Seller refunded if he is not satisfied in any way, provided Seller is so notified at the time of initial inspection on a form provided by Seller. . . ." (CX 155A) For similar provisions re the other projects, see CX 154A (Silver Springs Shores) and CX 106A (Eldorado at Santa Fe). The Oakmont Shores (CX 152) did not contain this "Refund Guarantee".

⁶³ With the consent and cooperation of all parties the Administrative Law Judge took several views of the subdivisions under investigation. A tape recording of a tour conducted by Respondent's manager at Rio Rancho Estates in 1976 will be found in CTX 2.

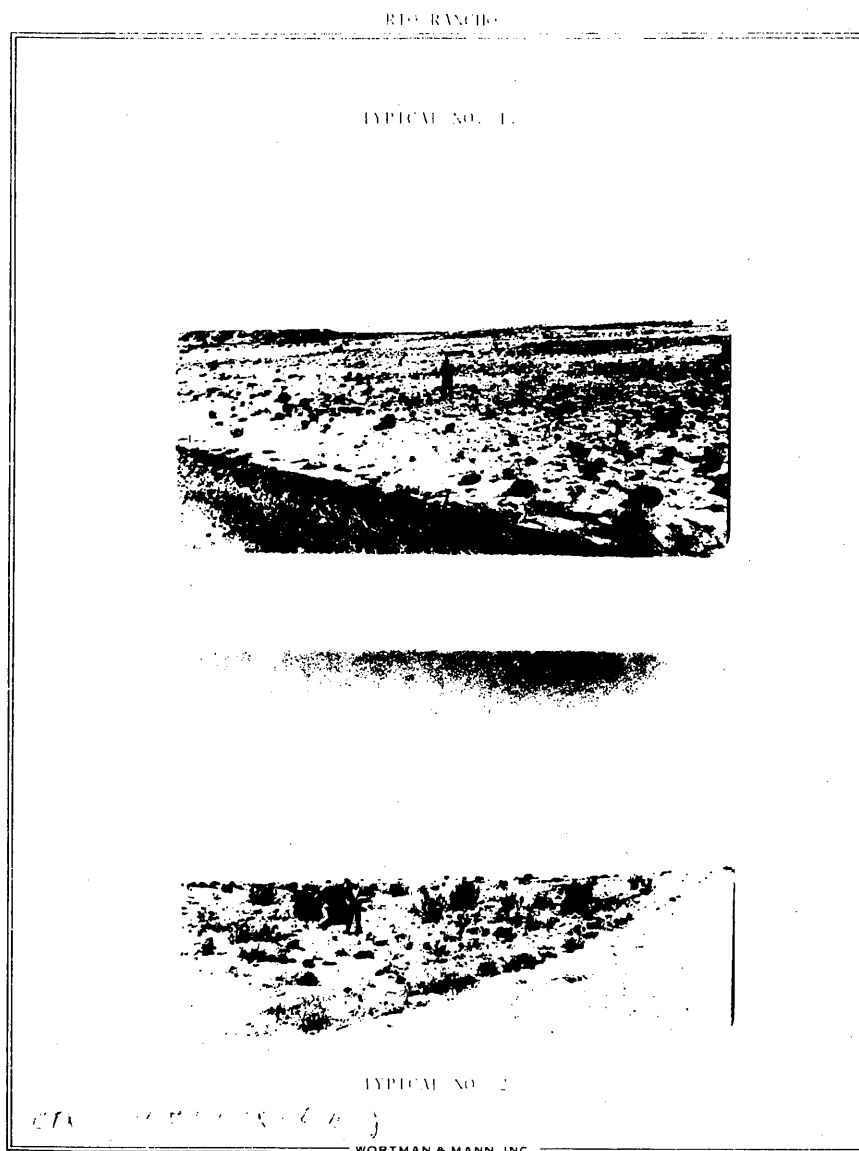
look hard to find the lot stakes" (TR 5537). A good idea of the reaction which many others must have felt is found in the testimony of Consumer Cuccinello:

Q. Did you see your lot?

A. Yes, we went there on the day before the last day [of an inspection tour]; a salesman took us out. [105.1]

Figure 8

(Photographs of Appraiser Mann Standing on Typical Lots #1-2 at Rio Rancho)



[106] Q. Who was that?

A. I really don't know his name.

Q. What happened when he took you out?

A. Well, he just showed us this property. It was a corner property and we were assuming it was ours and he said "This is your property". We got out of the car, looked around. *That was it. There was nothing more you could do. There was nothing more there.*

Q. Did he say anything to you?

A. In reference to what?

Q. Just in general.

A. No, he just let us get out of the car and walk around (TR 13550-51) (emphasis added).

87. Similar if less extreme reactions characterized the moment of truth at other subdivisions. At Silver Springs Shores, for example, Consumer Grimaldi described her guided trip out to see her lot:

A. We drove and drove and drove. We got to this blank piece of nothing with weeds up to here—(pointing)—on all ends.

Q. How high are you indicating.

A. I have never been to Africa but that is the closest description to bush country I could think of.

Q. Do you think the weeds were one foot high or two feet high?

A. The car had to drive through it to push it down.

* * * * * [107]

Q. What else did you see at your lot?

A. *Nothing. Just blank, blank land with lots of high weeds.* The salesman could not find the lot itself. The signs were nowhere to be seen. He was looking for the block number and the lot number and he says: "This, I think, is where it is". Of course, when we saw it, we almost fainted quietly (quite away?) because it was nothing that we had in mind to see. I mean it was a very big disappointment, to say the least (TR 4788-89) (emphasis added).

88. In the face of such unfavorable reactions to the first sight of the site, it is surprising to learn what a small proportion of purchasers take the logical step of exercising their contract privilege to cancel out and get their money back. One of Respondent's ex-sales managers estimated that only five percent to 10 percent of all buyers who visit Rio Rancho to inspect their properties proceed to cancel out (TR 7582). Respondent's own records, which we see no reason to doubt in this respect, indicate a somewhat higher percentage of cancellations by inspecting purchasers: 13 percent of these who were on organized tours shepherded by Respondent's sales personnel and 31 percent of those who made the inspection on their own (CX 151L-M). It thus appears that Respondent has persuaded something like two-thirds to nine-tenths of the purchasers who come to see what they have bought that they should not cancel out—despite the barrenness, isolation,

largely undeveloped character and unpromising future of what they see. How has Respondent managed such a merchandising miracle?

R. Tours

89. Many of the marketing techniques employed by Respondent to sign purchasers up at its dinner parties find their counterparts in the methods used to hold on to such purchasers after the parties. In the first place Respondent does not sit idly by, leaving its purchasers to make their own individual inspection trips. As early as the dinner party where the purchase takes place, buyers are told enthusiastically about Respondent's organized [108] airplane "tours" (TR 7646, 21275; CX 36-I) waiting to take them on a "mini-vacation" (CX 36-I, CX 456-I) to see the distant subdivision where they are to inspect their lots (RRB 210). A dinner speaker's script reads:

We wine you and dine you in some of the finest restaurants and night clubs. We really and truly, ladies and gentlemen, do show you one wonderful time (CX 36-I).

90. These tours are group affairs (commonly 120-185 purchasers at a time on a big chartered plane) at which a holiday mood prevails, perhaps even more than at the dinner parties (TR 5216, 7514). They usually last 2-5 days (preferably encompassing a weekend) (TR 1690, 20367, 21205). The tourists are put up in style at Respondent's Panorama Inn,⁶⁴ where there is frequent partying, including the usual alcoholic beverages (TR 7090, 20371) except when the tourists are on Respondent's guided tours of local sights such as Spanish Olde Town and Sandia Crest in Albuquerque and the famous horse farms and underwater wonders of Silver Springs outside Ocala (TR 20374-75; CX 456-I).

91. The tendency of such a holiday atmosphere and busy schedule⁶⁵ is patently to keep the tourists' minds off such mundane matters as inspecting their lots. Some time during this 2-5 day tour, however, Respondent does [109] give each tourist something like a half hour opportunity to see his lot. A local company salesman⁶⁶ drives the "HSO" (Respondent's abbreviation for "homesite owner") to the "homesite", where, as we have just seen, the moment of truth occurs, with results which differ from individual to individual.

⁶⁴ Respondent's hotel at each of its subdivisions is called "Panorama Inn".

⁶⁵ Respondent's Counsel concede that the tour is a "mini-vacation" (RRB 210) and that consumers are "shown a good time" (RRB 210-11). Complaint Counsel claim the schedule is so tight that a tourist cannot even find time to look at competitive developments in the area (CPF 185) but Respondent's evidence was that there is slack time in the schedule and rent cars are available to anyone who wants to go off on his own (RRB 213).

⁶⁶ Although the buyer's salesman back home (in his metropolitan area) may accompany the tour to the subdivision, the buyer's dealings with Respondent at the subdivision are entirely through a *different* (local) salesman.

S. Consumer's decision

92. In preparation for this moment all salesmen are instructed to leave their two-way radios on in order to communicate with headquarters and particularly to call "holds" on lots for HSO's who want to buy or exchange for other lots (still in the hinterland, of course). This is not an implausible explanation but the record strongly suggests that a more basic purpose is to create an impression of bustling trade in lots much the same way "holds" are used to create excitement at Respondent's dinner parties. There is some evidence that salesmen abuse the system by calling in phony "holds" (as sometimes at the dinner parties) but we think the normal use of "holds" to create an atmosphere of active trade in lots and thereby help the salesman over the customer's moment of truth is more significant than occasional abuse of the system.

93. If the moment of truth does precipitate thoughts of cancelling out on the part of the disillusioned "homesite owner", Respondent's "organized offense" calls for reference to the building exchange privilege. An example will illustrate this. Pressed as to why a newly disillusioned "HSO" should continue to hold on to an unpromising site, Respondent's salesman responded:

Because when (you) buy a piece of property at Rio Rancho, regardless of its location, it's like buying every piece of unsold property at Rio Rancho because of the exchange privilege, and they had their [110] choice of any area that they wanted to go into when the time for development came. So it was really of no consequence when development was taking place in their unit because they didn't have to wait until that time to be able to derive the benefit from the use of their property (TR 21155).

94. There is, of course, more than one way to skin a cat. A disillusioned "HSO" may also be kept in line by a convincing assurance—necessarily deceptive—that development is rapidly approaching and will be at this site before long. [The evidence as to employment of such deceptive assurances by Respondent's salesmen is reviewed hereafter.] And, of course, a buyer for investment may hold on even if barrenness and isolation affect him emotionally as long as he is afforded ground to believe the investment will somehow pay off, anyway.

95. By deceptively dramatizing the active trade and profit potential of these lots, by deceptively suggesting recourse to a practically valueless exchange privilege, by deceptively assuring customers that civilization is approaching swiftly—by these and other means most of Respondent's customers are somehow persuaded *not* to cancel out and get their money back. Whether such deceptions would be enough to achieve this result in the absence of the holiday/tour experience and

the feelings of well-being and loyalty to Respondent created thereby is a question we need not try to answer. [111]

Respondent's Deceptive Practices

I. GROWTH REPRESENTATIONS

96. We turn now from Respondent's marketing methods and particularly its high-pressure tactics to the substantive deceptions which it employed so successfully to convince prospects that buying a building lot at one of its subdivisions was a good idea. These substantive deceptions fall into three major categories: (1) misrepresentations as to the advantageous location and resultant growth potential of each of its subdivisions; (2) misrepresentations as to its subdivisions' investment value and profit potential; and (3) misrepresentations as to the state of development of each subdivision. Within each category we deal with the evidence as to each subdivision separately.

A. *Rio Rancho Estates*

97. Probably the most important part of Respondent's scheme to unload nearly one hundred thousand acres of barren New Mexico land at its hundreds of "dinner parties" in dozens of cities up north has been its theme that the Albuquerque area has had and will continue to have an extraordinary growth and that for certain reasons, to be discussed shortly, that growth must *all* be in the direction of Rio Rancho. The success of this theme of the scheme is evidenced by 75,000 buyers who have been intrigued enough to pay hundreds of dollars for "homesites", site-unseen. Our question is whether Respondent's sales campaign that achieved such success has been expressly or impliedly deceptive or otherwise unfair. We discuss first the quantum and then the direction of Albuquerque's likely growth. [112]

1. Magnitude of Albuquerque's growth

98. Respondent's promotional materials, its speeches and its salesmen all touted the growth of Albuquerque as extraordinary. A few examples of the language used are "booming", "growing fast" (TR 4643); "growing at an unprecedented pace" (CX 81, CX 203); "population explosion" (CX 203); and "wonder city of the Southwest" (CX 30T). Perhaps the most colorful phrase used is "bursting at the seams" (CX 35C-D, CX 38E).

99. Such sales talk is not deceptive, however, because Albuquerque really *is* one of the fast-growing cities of America's sunbelt. We take notice that Census statistics published by the Department of Com-

merce⁶⁷ show the following population growth pattern for the Albuquerque standard metropolitan statistical area ("SMSA") in recent years:⁶⁸

<u>Year</u>	<u>Population</u>	<u>Percentage increase over previous 10 years</u>
1960	276,000	80%
1970	333,000	20%
1975	385,000	15% (over 5 years)

The latest projection of metropolitan Albuquerque's future population by the Census Bureau's affiliate, the Bureau of Economic Research of the Department of Commerce⁶⁹ is as follows: [113]

<u>Year</u>	<u>Projected Population</u>	<u>Percentage Growth Over Previous Decade⁷⁰</u>
1980	369,000	11%
1990	423,000	15%

While Albuquerque's percentage rate of growth, as indicated by these figures, has been notably less since 1960 than during the earlier periods from 1940 to 1950 (110 percent)⁷¹ and 1950 to 1960 (80 percent)⁷² (when Albuquerque was turning from a small town into a big city), its continued healthy growth, though at a reduced rate, is real and we so find.

100. Respondent has not, however, been content to tout Albuquerque's growth in non-quantitative terms but has sometimes used illustrative statistics calculated to exaggerate the city's growth potential. For example, the 1961 version of a standard Rio Rancho promotional brochure on "How To Invest Profitably In Southwest Real Estate" estimated that Albuquerque's 1970 population would be 550,000 (or twice its 1960 population) (CX 393B; TR 3843). As it turned out, this was way off-target. The 1970 Census found Albuquerque's population to be 333,000 or only 20 percent more than in 1960.⁷³ [114]

101. Respondent's counsel argues that what concerns us here is not whether a prediction turned out to be right but whether it was reason-

⁶⁷ *Avnet, Inc.*, 78 F.T.C. 1562, 1563, fn. 2 (1971).

⁶⁸ U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States for 1977*, p. 19.

⁶⁹ U.S. Dept. of Commerce, Social and Economic Statistics Administration, Bureau of Economic Analysis, *Area Economic Projections, 1990* (1974), p. 76. The same source was used with minor modifications by Lusteck, Complaint Counsel's "real estate planning consultant" (TR 2645).

⁷⁰ Calculated by Administrative Law Judge.

⁷¹ U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States for 1952*, p. 16 (largest percentage increase of any SMSA in the United States).

⁷² U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States for 1977*, p. 19.

⁷³ U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States for 1977*, p. 19.

able when made (TR 24073),⁷⁴ and we do not argue with the general corrections of such a proposition. However, such a serious discrepancy as we have here between projection and ultimate truth must prompt careful scrutiny of the reasonableness of the projection at the time it was made. In this instance it is plain from other references in the same brochure (CX 393) that Respondent assumed Albuquerque had doubled its population each previous decade⁷⁵ and cavalierly predicted that the same thing would continue through the coming decade:

... Albuquerque, which has gained 700% in population during the past 30 years now expects to add more people in the next 9 years than in all its previous history (CX 393V).

102. Confirmation that during the '60's Respondent was, indeed, basing its predictions on a simple double-every-decade assumption is found in a 1968 version of its standard "speaker's presentation" for dinner parties:

I'd like to pass along one final conclusive statistic. Albuquerque has established a historic growth pattern over the past 40 and 50 years, of doubling in population every 10 years. *By this estimate* Albuquerque's population by 1975 will be close to 600,000 people (emphasis added) (CX 38D).⁷⁶ [115]

As might be expected, this "projection" proved wide of the mark. Albuquerque's 1975 population in fact turned out to be only 385,000⁷⁷ instead of 600,000. Stated slightly differently, Albuquerque's total population *increase* between 1960 and 1975 (the approximate period covered by this complaint) was only 109,000 persons compared with Respondent's irresponsible doubling prediction, as late as 1968, that the total *increase* between 1960 and 1975 would be 324,000 persons.⁷⁸

103. The wonders that a geometric progression can effect statistically are known to every school boy. Every school boy knows, too, however, that to maintain a geometric progression of growth becomes extremely difficult as the absolute numbers get bigger. That knowledgeable real estate professionals like Respondent's executives could really believe Albuquerque's population would automatically keep on doubling every decade is impossible to accept. Such a belief had to be as unreasonable as it was, in fact, wrong.

104. It obviously makes quite a difference to Respondent's "bursting at the seams" argument that during the whole decade and a half from

⁷⁴ ("[Y]ou can't look at things that were reasonable at the time retroactively for validation or invalidation purposes").

⁷⁵ Even the doubling assumption was not entirely accurate. While it is true that Albuquerque had more than doubled its population in some earlier decades, the rate of increase had fallen from 110 percent during the '40's to 80 percent during the '50's.

⁷⁶ Accord: CX 36H.

⁷⁷ U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States for 1977*, p. 19.

⁷⁸ U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States for 1977*, p. 19.

the founding of Rio Rancho to the filing of this complaint Albuquerque had a maximum spill-over potential of only 100,000 rather than 300,000 people. That Respondent well understood the critical importance of maximizing the potential spill-over is clear from its contemporary effort to shore up its irresponsible double-every-decade prediction by invoking—falsely—the blessing of the U.S. Census Bureau. The same 1968 “speaker’s presentation” just quoted continues: [116]

But ladies and gentlemen, the U.S. Government Census Bureau in Washington, D.C. is even more optimistic. They estimate that Albuquerque’s growth will accelerate at an even faster pace (CX 38D).

The script does not identify either the figure referred to or its documentary source. It could not. We take negative official notice of the fact that the Census Bureau makes no projections of future growth either for cities or for standard metropolitan statistical areas (SMSA’s). Respondent’s effort to fortify its sales talk by falsely claiming support of the Census Bureau reflects badly on the good faith and reasonableness of its “projections”.

105. At the hearing of this matter a great deal of time was spent developing alternative projections by others from whom Respondent might have borrowed its figures and also evidence of contemporary warnings received by Respondent about the unreliability of such alternatives.⁷⁹ At least as respects Respondent’s predictions during the 1960’s, however, we think all this is irrelevant, because the evidence just reviewed shows that borrowing other people’s figures was not the way Respondent came to its “projections”. *All it did was to adopt a puerile theory that Albuquerque’s population could be expected to double every decade.* That being the way Respondent got its figures, it seems quite immaterial whether others such as the City Planning Department were making valid or invalid alternative population studies.

106. We turn next to the period 1970–75, which differs from the period 1960–70 in that population forecasters by now had available the results of a decennial Federal census [117] in April 1970 (released preliminarily in June 1970 (CX 577) and revised finally in February 1973 (CX 576)). The 1970 Census surprised many people by revealing that Albuquerque’s population was growing at a much reduced rate: +20 percent for the decade 1960–70 vs. +80 percent for the decade

⁷⁹ In 1965 a consulting firm named Harmon, O’Donnell & Henninger warned Respondent that the Albuquerque Planning Department’s population projections were probably “too optimistic for Rio Rancho planning bases” (CX 231Q).

1950-60.⁸⁰

107. The record here contains several post-census predictions by Respondent, mostly made around the year 1972, which purport to estimate the population of Albuquerque. We note preliminarily that these predictions are not consistent with each other, either from brochure to brochure or even within the same brochure. Thus, the 1972 version of one of Respondent's principal sales pamphlets called "This Is My Land" projected Albuquerque's 1980 population on one page at over "500,000" (CX 32G, CX 631-I) but on another page as "exceeding 600,000" (CX 32M, CX 631-O).

108. A subsequent explanation by Respondent of the sources for these inconsistent projections indicates that the projection of 500,000-plus population by 1980 came from a source referred to as "the Albuquerque Planning Department's Current Report, as cited by the Chamber of Commerce" (CX 631Z-1-A, CX 631X) while the 600,000-plus figure is explained only as coming from "population predictions—Albuquerque Planning Department" (CX 631X). Since there are no such "current reports" in our record and City Planner Carruthers confirmed (TR 10796)⁸¹ that the Albuquerque Planning Department actually made no more projections of future population after completing a major study in 1962 (CX 251) and a supplement thereof in 1964 (CX 546), we must assume that the 1962-64 Planning Department projections are what Respondent's researchers were referring to. [118]

109. These 1962-64 Planning Department studies had made three (low, medium, high) projections of the Albuquerque SMSA's likely population in each of three years (1970, 1980 and 1985) (CX 251). The "medium" (most likely) projection for the year 1980 was 567,500 (try CX 251Z-56-7 and Z-89) and such a figure would provide a reasonable basis for "This Is My Land's" predictions of 500,000 or 600,000 people in Albuquerque by 1980—assuming that projections made in the 1962-64 period still had validity after the decennial Census of 1970. But the 1970 Census had by then shown that almost every pre-1970 prediction concerning Albuquerque's growth had been much too optimistic.

110. Thus the City Planning Department's medium projection for 1970 had been 388,100 and even its low projection was 336,400 (CX 251-Z-89). The 1970 Census, however, actually turned up only 315,774 people.⁸² Accordingly a reasonable person would have concluded

⁸⁰ See page 112 above. [p. 1450]

⁸¹ He explained that the University of New Mexico's Bureau of Business and Economic Research now supplies the Albuquerque Planning Department with population projections on contract. An example (forecasting a population of 468,000 for Albuquerque in 1995) is in evidence here as CX 551B. There are certain other BBER projections in the record but *only* as bases for opinions of Respondent's expert, Fawcett, and *not* as competent independent proof of the facts alleged therein.

⁸² The preliminary count, released in June 1970, was 315,774 (CX 577) but adjustment to reflect inclusion of Sandoval County in the Albuquerque SMSA brought the final result to 333,000 (CX 576).

that the Planning Department's medium projection for 1980 (567,500) was no longer valid and that even its *low* projection (433,900) was now probably *too high* (CX 251-Z-89). Respondent's willingness to close its eyes to the implications of the 1970 Census for the Planning Department's pre-Census predictions resulted in statistics for "This Is My Land" which exaggerated Albuquerque's likely 1980 population by 100,000 to 200,000 people. The difference between a predicted population increase of, say, 100,000 during the '70's as contrasted with a predicted increase of 200,000 or even 300,000 could obviously make a great difference for present purposes.

111. Respondent had to be aware that population projections of a magnitude of 500,000 or 600,000 by 1980 were probably no longer valid after the 1970 Census. That [119] Respondent was familiar with the results of the 1970 Census appears from the 1972 version of another of Respondent's standard brochures entitled "How To Live-Retire-Invest in the Sunny Southwest" (CX 30):⁸³

The most recent (1970) U.S. Census shows that the metropolitan area has soared well past the 300,000 population mark. And planning experts predict another 32% growth by 1980 (CX 30N).

Whence came the alleged 32 percent growth factor we know not but the end result of such a calculation—a population of the magnitude of 400,000 by 1980—could not be too far off the mark. However, whatever credit Respondent might claim for this recognition of the effect of the 1970 Census on earlier projections is largely dissipated.

112. Despite the fact that neither actual nor projected population figures for the Albuquerque metropolitan area—with one exception—ever reached the 800,000 range, Respondent's former President, Howard Friedman, wanted to testify that figure (800,000) was the one he had always had in mind in this connection and that he had understood this to be the City's projection, never changed to his knowledge.⁸⁴ What Friedman had to be referring to [120] was the "high" of three alternative projections by the City Planning Department in 1964 predicting that on certain assumptions the metropolitan area's population could reach 830,000 by 1985 (in contrast to a "medium" 685,000 and a "low" 500,000) (CX 546M-O).

113. If Friedman ever bothered to make any inquiry into this

⁸³ The "How To Invest" series had a long history. Its changing titles reflect the gradual sophistication of Respondent's investment appeal from CX 393 ("How To Invest Profitably In Southwest Real Estate," dated 1961) to CX 632 ("How To Invest In A Better Life In The Sunny Southwest," dated 1974).

⁸⁴ Respondent's counsel wanted to show not only the general tenor but the details of what Friedman had learned from conversations in Albuquerque. Counsel offered to show that "the witness will testify that he was aware that the City was projecting a population in excess of 800,000 people. And that he had no reason to doubt that projection. And that so far as he is aware, the City has never changed that prediction. And he would also say that this was a matter of common knowledge. . . ." (TR 24059)

unique prediction he must have found that its use was, in fact, expressly restricted to planning permanent municipal facilities rather than to making economic studies or undertaking other planning purposes (CX 546-O). Moreover, Respondent's files reveal that it was expressly warned by a private consultant only a year later (1965) that the City Planning Department's projections were all "too optimistic for Rio Rancho planning bases" and that the "high" (830,000) figure should *not* be used by a private developer (CX 231Q). Friedman testified that he never bothered to read the consultant's report, because, he claimed, one Carity, his predecessor as President (and fellow convict in the New York criminal fraud case) told him the report was "all wet" (TR 24068). We attach no credit to Friedman's testimony and would have attached no more to the testimony offered improperly by Respondent's counsel. Friedman's "800,000 population" defense is rejected. Clearly, Respondent had no adequate basis for its constantly and substantially exaggerated projections of Albuquerque's probable population growth.

114. A related piece of evidence on this subject deserves mention here. Respondent's promotional film "Your Golden Future", which was originally prepared on 2/6/69 but revised on 3/15/72, contains a very brief reference to the "tremendous growth" which Mountain States Telephone & Telegraph Co. foresees for the west side of the Rio Grande River, where Rio Rancho is located (CX 24L). Only four months earlier Mountain States' Forecast Supervisor, one Seay, had made a forward projection for cable Route 41 out of its Corrales office (including Rio Rancho), which indicated that its 925 residential phones there in August 1971 would by 1991 grow to 15,975 installations (implying 57,800 people at an assumed density of 3.4 persons per household) (CX 238 QQQQQ; TR 7034-41).

115. The addition of an average of 800 new phones a year for 20 years may or may not have seemed like [121] "tremendous growth" to telephone company employees⁸⁵ but it is hard to see how it could have seemed like "tremendous growth" to Respondent in the context of convincing lot buyers that Rio Rancho would soon be a populous city. Assuming for the moment the correctness of a prediction by Respondent's expert Fawcett that the area of Rio Rancho can ultimately take about 374,578 people, the population foreseen by Mountain Bell by 1991 would amount to only about 15 percent of Rio Rancho's capacity, leaving some 85 percent of the subdivision as barren, isolated and largely undeveloped as ever. In that context Respondent's representation to potential lot-buyers in "Your Golden

⁸⁵ This projection was not admitted to evidence its truth but merely for the limited purpose of showing what low growth numbers Respondent had or should have had before it when representing in its movie that Mountain Bell thought "tremendous growth" was coming to the West Side.

Future" that the telephone company sees "tremendous growth" coming seems deceptive.

2. Direction of Albuquerque's growth

116. It is important for Respondent to convince prospective buyers of Rio Rancho lots not only that Albuquerque is growing fast (so that sooner or later there must be a spill-over of the big city's potential population) but also that such spill-over must redound to the benefit of Rio Rancho in particular. Even a spill-over in all directions would be worth something, of course; but Rio Rancho would obviously get a much greater benefit if for any reason the spill-over is especially likely to flow in its direction. Such has been Respondent's claims. [122]

117. The earliest sales brochure in this record, "How To Invest Profitably In Southwest Real Estate" (1969) shows that during its first year of business at Rio Rancho Estates Respondent procured from the Sandoval County Commissioners a somewhat unusual resolution reciting that this tract was

excellently suited for homesites . . . because the tract lies *directly and immediately* in the path of the City of Albuquerque's and City of Bernalillo's rapidly-expanding outward growth (CX 393J).⁸⁶

118. Sometime thereafter this sales pitch was refined. Instead of merely referring to an apparent trend of growth toward Rio Rancho, Respondent began pointing to plausible reasons why such a trend was *inevitable*—a twist of considerable importance to investors looking for a "sure thing". Here is part of a taped speaker's November 1977 presentation of what Respondent calls its "frame" theory:

Albuquerque has a very serious problem growthwise. It's growing very fast. Now they have 350,000 people⁸⁷; by 1975 it is predicted that Albuquerque will have over a half-million people⁸⁸ . . . (surrounded) [123] . . . *on three sides* either by mountains or government reserved land. *There is only one open area that it can grow.* And who do you think is sitting right in the path of that one area that it can grow? Directly to the northwest. Of course. Rio Rancho Estates, and that's a fact and *its got to grow directly towards us*, if it grows anywhere. And its got to grow to accommodate people (CX 111B) (emphasis added).

⁸⁶ Respondent's unusually friendly relations with the Sandoval County Commissioners is indicated by another recital in the same resolution: "WHEREAS, the fine reputation of the developers for building sound, well-planned communities is known to us."

⁸⁷ What was then the Census Bureau's latest (1967) *Statistical Abstract of the United States*, at p. 18, would have informed Respondent's speaker that metropolitan Albuquerque's population a little more than a year earlier (1965) was only 288,000.

⁸⁸ The only comparable figure for 1975 in this record is a 600,000 projection in a 1968 speaker's presentation which we found above was based on the indefensible "double every decade" theory.

119. A 1968 speaker's presentation elaborates further on Respondent's "frame" theory (TR 19294-96):

We've seen the charts and diagrams so certainly we must know by now that Albuquerque is indeed *surrounded on three sides*. There is *only one direction in which the City can expand* and that direction happens to be firmly straddled by Rio Rancho Estates. It is *utterly impossible* for the City of Albuquerque to expand beyond Rio Rancho Estates without first going through it (CX 38-O) (emphasis added).

* * * * *

Yes, ladies and gentlemen, Albuquerque is a growth city, an exciting dynamic and vibrant city. But Albuquerque does happen to have one very serious problem. And this very peculiar problem happens to be to our very great advantage. Albuquerque is *surrounded on three sides* by high mountain ranges and government reserved (sic) land which cannot be built on. *Albuquerque is bursting at the seams yet the city can only expand in one direction—to the Northwest*. And this is precisely where Rio Rancho is (CX 38E) (emphasis added).

And from the same year comes another tape of a similar presentation: [124]

[W]hat we are suggesting, ladies and gentlemen, is an opportunity today for profits tomorrow. However, in this area, Albuquerque has one very serious problem. You notice I said "serious"; pardon me, but I'm smiling just a little bit, because this happens to be to our advantage and it can be to everyone's advantage in this room, if you will let me. You see, Albuquerque is bursting at the seams. *We're locked in by three sides*. To the East of us is the Sandia Mountains and to the North and South is government reserve lands on which nobody can ever live and there is *only one logical direction for this fantastic growth to continue* and this happens to be the North and Northwest of Albuquerque, and this is where your host, American Realty and Petroleum, has 55,000 acres, a little over 90 square miles where we are creating and developing a brand, brand new city (CX 110F) (emphasis added).

120. A 1972 version of the standard speaker's presentation followed the same general format, adding such strong phrases as "*surrounded by . . . real estate that is owned by Uncle Sam . . . that will never, ever be for sale*" and "(a)s a matter of fact, today it is *physically and geographically impossible* for the growth of this city not to first come through Rio Rancho Estates before it gets beyond us. Because this entire growth area is straddled by Rio Rancho Estates" (CX 36-I) (emphasis added). See also a 1973 speaker's presentation ("*surrounded on three sides by high mountain ranges and government reserve land . . . on which you can never, ever build*") (CX 35C) (emphasis added).

121. We return now to the standard sales brochures. The 1972 edition of "How To Live-Retire-Invest in the Sunny Southwest" states:

No one can predict the future with any certainty, but because Albuquerque is *surrounded on three sides by Federal, Reserved (sic) or Canyon lands*, the Northwest Mesa where Rio Rancho Estates is located *appears to us to be in the logical path of progress* (CX 30E)

(emphasis added).

* * * * *

Albuquerque's future expansion is already *limited on three sides by mountains and other barriers (such as government lands)*. Thus, the city *must* grow toward the west and northwest suburbs—in the general direction of Rio Rancho Estates (CX 30M) (emphasis added).

[The 1974 edition of "How To Invest . . ." (CX 632G, CX 632-O), although it embodied a number of textual changes, did *not* amend either of the foregoing statements from the 1972 edition.]

122. The most elaborate exposition of Respondent's "frame" theory is found in the 1972 edition of Respondent's sales brochure, "This Is My Land" (CX 32). Accompanied by a color scale map on which an action arrow dramatizes expected population movement from Albuquerque to Rio Rancho in an area otherwise completely boxed-in (see Figure 10; CX 32A-I), the text reads as follows:

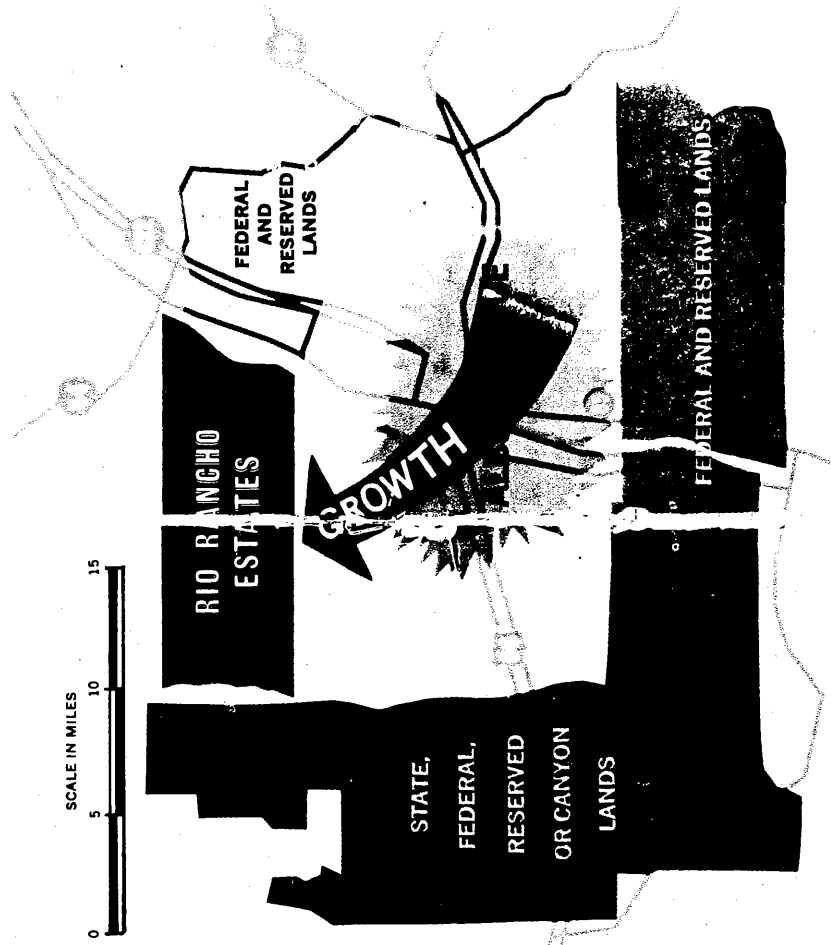
In the case of Albuquerque and her future growth, *limitations on her boundaries have always existed*. Mountains to the East, and federal, state and reserved lands along the northern, southern and part of her western borders are *now virtually 'containing' Albuquerque's future growth*. According to experts, *Albuquerque's future growth pattern is largely determined* (emphasis in original). *Expansion is destined to take place in the general direction of Rio Rancho Estates*. This is where some of the most exciting growth activities are taking place today. This, too, is where the experts indicate the increased populations of tomorrow will settle . . . (emphasis added except as noted otherwise) (CX 32H).

123. The message that Albuquerque is surrounded on three sides by constraints to growth and that therefore it can grow *only* to the Northwest (and particularly Rio Rancho) is a tale told many times. Salesmen have been taught to [126]

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Figure 10
(from CX 32H-I)



[127] repeat the message of the brochures and speakers to prospects at dinner parties⁸⁹ and have done so.⁹⁰ Tour guides in Albuquerque have made sure visitors who have come to inspect their properties get a good view of the constraints on Albuquerque's future growth—and the open road to Rio Rancho.⁹¹ The great daily newspapers of the North have carried Respondent's advertisements (CX 203)⁹² and in sundry other ways Respondent has spread its "frame" theory far and wide.⁹³

124. We proceed now to analyze the nature of the "constraints on growth" said to surround Albuquerque on three sides. The first thing to be noted is a distinction between physical and legal "constraints". Only on one [128] side to the east, where the Sandia Mountains rise precipitously to a height of 10,000 feet (CX 552), can it fairly be said that Albuquerque's growth is "constrained" physically.⁹⁴ It is true that the Sandia Mountains are not impassable; we have seen small settlements all through the Tijeras Canyon to the east and further growth in that area may be expected (TR 23750). In general, however, the mountains are, indeed, a true *physical* barrier to any eastward expansion of the City. Accordingly, we have no trouble with Respondent's many promotional brochures and statements by its employees referring to constraint of the Sandia Mountains, by name (CX 36-I, CX 110F; TR 1847, 2364, 2375, 4999, 9564) or as "(high) mountain ranges" (CX 35C, CX 38E; TR 3972) or just "mountains" (CX 24-I, CX 30M, CX 32H, CX 36-I, CX 81, CX 111E, CX 203; TR 10593-94) (in such cases sometimes explicitly mentioning their location on the east side (CX 24-I, CX 32H) but more often just assuming the reader knows where the mountains are).

125. When, however, we turn from the obvious *physical* constraint of the Sandia Mountains on the east to what are sometimes called *legal* constraints, there is more vagueness about what makes up the rest of the "frame". For the most part Respondent's brochures and advertisements simply refer to Albuquerque's being "surrounded on

⁸⁹ TR 7474 ("surrounded . . . and the growth can only go in one direction").

⁹⁰ TR 3972 ("the only growth pattern"); TR 1286 ("could only grow one way"); TR 2364 ("blocked off on all sides except to the northwest"); TR 4999 ("boxed in on three sides"); TR 1847 ("trend of everything would be toward Rio Rancho and through Rio Rancho"); TR 4161 ("all of the growth was going toward Rio Rancho"); TR 2397 ("everything in Albuquerque was going to the west").

⁹¹ TR 9564 ("three areas on three sides of Albuquerque that kind of socked in Albuquerque"); TR 2375 ("the only way the city could extend itself is to the northwest"); TR 2241 ("view of surrounding areas").

⁹² *N.Y. Times*, 8/29/71 ("because it is surrounded on three sides . . . it can grow in only one direction"); CX 81, *N.Y. Daily News*, 1/22/73 ("surrounded on three sides . . . its further growth can move in only one direction").

⁹³ TR 2226 ("everything was blocked off except Rio Rancho Estates"); TR 2227 ("no other place for Albuquerque to go"); TR 10593-94 ("the only avenues were the growth to . . . the west and north"); CX 24, promotional movie "Your Golden Future" ("already hemmed in on three sides") ("logical path for Albuquerque's most dynamic growth and expansion").

⁹⁴ Respondent's expert, Fawcett, tried to make the north-south "escarpment", located about 4 or 5 miles west of the Rio Grande River, a similar "physical" constraint but it is plain from the testimony of City Planner Carruthers that the only significance of the escarpment is as a handy demarcation line between lands to which the City will or will not willingly extend utilities (TR 10833).

three sides, either by mountains or government reserved land," usually without specifying the nature of the "government reserved land" or stating on which side(s) of Albuquerque such land is to be found.⁹⁵ Respondent's graphic representation of its "frame" theory in its 1972 "This Is My Land" brochure makes it clear, however, that the phrase "federal and [129] reserved land" is used by it for lands north and south of Albuquerque and for some of the lands west of the Rio Grande River (labeled therein "state, federal, reserved or canyon lands") (CX 32H-I).

126. From examination of oversize map (CX 552)—an invaluable if clumsy exhibit with which every reader should make himself familiar—and other evidence,⁹⁶ it appears that the "government reserved land" referred to on the North side is Indian land (Sandia Reservation); on the South it is both Indian land (Isleta Reservation) and military land (Kirtland AFB) [plus the large holdings of the University of New Mexico for investment]. To the Southwest is more of the Isleta Indian reservation, while the large Atrisco and Pajarito Spanish grants occupy the central part of the West side. We must now examine each of these and lesser "legal" (*i.e.*, nonphysical) restraints to see whether their existence will really require Albuquerque to grow toward the Northwest and Rio Rancho.

a. *The North*

127. It is appropriate to look first for vacant land beyond the Northeast of the City because the main thrust of Albuquerque's internal expansion has for many years been to the Northeast (TR 1804-05, 7017; CX 546 and CX 546Z-28). Thus a representative of Mountain States Telephone and Telegraph Company testified that from 1965 to 1975 the number of telephones in the northeast quadrant of Albuquerque grew from 18,252 to 53,555 or an increase of 35,303 phones, while the whole west side, including the Corrales exchange that services Rio Rancho Estates, grew from 3,159 to 13,747 telephones (an increase of only 10,588) (TR 10804). [130]

128. There is still a good deal of vacant (TR 10806) plateau land just north of the east side of the City, between the Rio Grande River Valley and the Sandia Mountains (which are here several miles from the River). Respondent's local real estate expert Godfrey estimated that there are some 3,000 acres left in these "Northeast heights" (exclusive of North Albuquerque Acres) which, at his density factor of 5-7 per-

⁹⁵ See this or substantially similar phrases in CX 35C, CX 38E, CX 81, CX 111E, CX 203, CX 632G.

⁹⁶ The clearest statement is found in saleswoman Miller's testimony about representations at New York dinner parties "that Albuquerque was blocked off on all sides except to the Northwest; that to the North there was Indian land and directly East was (the) natural barrier of the Sandia Mountains. So the growth couldn't go that way. And to the South is military and Indian land; and directly to the West, Spanish land grant(s) or more Government land or Indian land" (TR 2364) (substance repeated at TR 2375). The Indian land "to the west" must refer to Indian land far to the west, beyond the Rio Puerco.

sons per acre (TR 23751-52), would mean room for 15,000-21,000 people.⁹⁷

129. The same land in the Northeast heights was apparently referred to by City Planner Carruthers as the Sims Property (or the Elena Gallegos Grant), which contains about 2,000-3,000 acres beyond the city limits.⁹⁸ Carruthers conceded that two major arroyos create flood problems in this property but pointed out that the major capital investments for flood control (retention dams and major channelization) have already been made by the Flood Control Authority and the City of Albuquerque (TR 11174-76).

130. As noted, the foregoing 2,000-3,000 acres do *not* include North Albuquerque Acres, a 7,500 acre development in this area, with an interesting history (TR 10810-12).⁹⁹ About 1932 this land was sold in one acre parcels by mail order to customers all over the United States and ownership is now in the hands of thousands of people (TR 11171). Unfortunately the straight gridiron platting system installed by the original promoters does not seem to bear any relationship to or provide space for the arroyos which flood about a third of the area (TR 11170-72). The property must [131] be settled and replatted (TR 11172) and for the present about 80 percent of North Albuquerque Acres cannot be redeveloped (TR 11172).

131. However, 20 percent is immediately available for redevelopment (TR 11172) and, in fact, some reassembly has already been done by an enterprising local builder.¹⁰⁰ The Albuquerque Planning Department has recently studied the reported "Legal Alternatives to the Reassembly of North Albuquerque Acres" (TR 11173-74) and while the first results have been disappointing, the mere fact that such an effort is being made tends to confirm the opinion of Respondent's witness Godfrey that "as time passes, I'm sure portions of North Albuquerque Acres will be put back together. . . ." (TR 23753) We conclude that redevelopment of North Albuquerque Acres may yield about 1,500 acres in the near future and another 6,000 can eventually be retrieved.

132. The great question on the North side concerns the developability of certain Indian land owned by the Sandia Pueblo. [See area marked "SI" on CX 552] As with the Isleta Pueblo to the South of Albuquerque (to be discussed shortly) the question is whether there is any real likelihood of non-Indians ever being able to buy or lease

⁹⁷ Calculation by Administrative Law Judge. Note that Godfrey himself actually testified that 35,000-40,000 people could be accommodated but the Law Judge assumes a mistake in Godfrey's calculations on the stand.

⁹⁸ TR 11139 (3,000 acres); TR 10813 (2,000 acres). Annexation was in progress in 1977 (TR 11159). Identified on CX 552 as "EGG".

⁹⁹ Identified on CX 552 as "NAA".

¹⁰⁰ See Bellman's Loma del Norte project, marked on CX 552 as "LDN".

any of this obviously considerable extent of vacant land.¹⁰¹ Respondent Friedman assumed that "those (Indian) lands generally are not available" because "Indian lands can't be sold" (TR 24050).¹⁰² Indeed, it is principally on this assumption, as we shall see, that Respondent bases its "frame" theory that Albuquerque has no place to expand except to the Northwest (and Rio Rancho). We have consulted [132] the authorities on this question¹⁰³ and have concluded that in the short-run Respondent has the better of the argument but that ultimate availability is a real possibility.

133. Although under Spanish and Mexican rule the Rio Grande Pueblos were required to obtain the permission of high governmental authorities to alien tribal land, during the Territorial Period that followed cession to the United States it was held that the Pueblo Indians—in contrast to the Plains Indians—had a right to alien their lands without governmental approval (and a corresponding liability to lose them by adverse possession).¹⁰⁴ After statehood came in 1912, however, there developed considerable controversy and confusion on this matter. In 1924 Congress passed the Pueblo Lands Act,¹⁰⁵ which provided for resolution of various pending controversies and simultaneously laid down in Section 17, an absolute rule that: [133]

... no sale, grant, lease of any character or other conveyance of lands or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or equity unless the same be first approved by the Secretary of the Interior.

A decade later Congress went further and barred all transfers of tribal land except such as are made in exchange for lands of equal value (and have the approval of the Interior Department).¹⁰⁶ This is still the law.¹⁰⁷

134. However, it is important to recognize that an approval requirement is *not* the same thing as an absolute prohibition against disposal of tribal lands. As recognized by the regulations of the Bureau of Indian Affairs, it is always possible to obtain a special Act of Congress

¹⁰¹ Recent population estimates (for 1965–66) show 150 Sandia Indians occupying a 23,000 acre reservation. U.S. Dept. of the Interior, Bureau of Indian Affairs, *Indians of New Mexico* (1968), p. 5.

¹⁰² In fairness to Respondent it should be noted that City Planner Carruthers had the same understanding. TR 11005 ("Indian land, as I understand it, cannot be sold").

¹⁰³ See U.S.C. 177 and 25 C.F.R. 121.1 *et seq.* The history of the law as it relates to the Rio Grande Pueblo Indians is collected in U.S. Dept. of the Interior, Office of the Solicitor, *Federal Indian Law* (1958), pp. 889–927. See also U.S. Congress, 81st Cong., 2d Sess., House of Representatives, Committee on Public Lands, Subcommittee on Indian Affairs, *Compilation of Material Relating to the Indians of the United States and the Territory of Alaska, Including Certain Laws and Treaties Affecting Such Indians* (1950), pp. 451–458 (relative to the Pueblo Indians of New Mexico). For a more general history, see Tyler, S.L., *A History of Indian Policy* (1973).

¹⁰⁴ U.S. Dept. of the Interior, Office of the Solicitor, *Federal Indian Law* (1958), pp. 890–92, 903–04.

¹⁰⁵ "An Act to Quiet Title to Lands Within Pueblo Land Grants and for Other Purposes," 43 Statutes 636.

¹⁰⁶ 48 Statutes 984.

¹⁰⁷ 25 U.S.C. 464. See also 25 U.S.C. 177 and 25 C.F.R. 121, particularly Section 121.21–22.

authorizing a conveyance.¹⁰⁸ Whatever the red tape and/or potential problems likely to be encountered in obtaining Congressional approval of a proposed subdivision of part of a Pueblo Indian Reservation, Friedman's testimony that "Indian land can't be sold" (TR 24050) is simply incorrect. Given a reasonable case for an Indian subdivision of some reservation land to meet Albuquerque's expansion needs, Congressional approval seems by no means unlikely.

135. Indeed, relatively recent legislation has affirmatively sought to open up Indian land to business enterprise by permitting mortgages and long-term leases.¹⁰⁹ An official history, referring to the period around 1960, explains: [134]

Generally under prior laws Indian land could be leased for periods no longer than five years for some purposes and ten years for others. . . . The absence of authority to grant long-term leases discriminated against Indians who owned restricted lands that were suitable for the location of . . . *residential subdivisions* . . . or for other purposes that required a substantial outlay of capital by the prospective lessee. . . . In such cases prospective lessees were willing to undertake these expensive improvements only if guaranteed tenure by a long-term lease. (emphasis added)¹¹⁰

In response to this problem, applicable Federal law now provides, in pertinent part:

(a) Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for . . . business purposes, including the development or utilization of natural resources in connection with operations under such leases. . . . All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico¹¹¹ . . . which may be for a term of not to exceed ninety-nine years. . . . Leases for . . . business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not [135] to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. . . .¹¹²

136. It seems clear that recent governmental policy is to assist such business ventures as the subdivision of Indian land for outsiders and the record here reveals that such has already been happening to the northeast of Albuquerque. There the Sandia Indians have already

¹⁰⁸ 25 C.F.R. 121.22(b).

¹⁰⁹ Of course, Interior Department approval must be gained, usually with such safeguards as appraisal, advertising and bidding where appropriate. See Section 121.33 *et seq.*

¹¹⁰ Tyler, S.L., *A History of Indian Policy* (published by U.S. Dept. of Interior, Bureau of Indian Affairs, in 1973), p. 187.

¹¹¹ It appears from the legislative history of the amendment excepting land outside New Mexico reservations from the 25-year lease limit that neither the Sandia nor Isleta Pueblos have any such land. U.S. Congress, 92nd Cong., 2d Sess., Sen. Rept. 1110 (1972).

¹¹² 25 U.S.C. 415.

prepared a "master plan" to develop part of their land for "other people" (TR 10838) and have actually executed long-term leases of some of their land in Sandia Heights (TR 10807). These seem significant straws in the wind. It may be that no part of the Sandia Pueblo will be subdivided in the immediate future but we cannot call it unlikely in, say, another 10 or 20 years—assuming that there is really enough economic demand for such land to put it on the market in any quantity. Certain it is that Respondent has no reasonable basis for assuming that Indian land is an absolute "constraint" on Albuquerque's growth to the Northeast in the sense that the Sandia Mountains are a "constraint" on growth to the East.

b. The East

137. On the east side of the City, Sandia Heights, a fairly expensive development already referred to above, has pushed up into the foot hills of the Sandia Mountains (particularly in the neighborhood of the Tramway to Sandia Crest) about as far as it is feasible to go (TR 11176).¹¹³ [136] Part of the northern portion is being considered for residential use (TR 10814-15). By and large, however, the Sandia Mountains now operate as a true, absolute constraint on population growth to the East, with one exception: the Tijeras Canyon area.

138. Although there is very little usable land in the National Forest that encompasses the Sandia Mountains (TR 23750), the east side contains several little "mountain subdivisions" in the Tijeras Canyon area (through which Interstate 40 makes its way to the East). Respondent's real estate expert Godfrey estimated a present population of 5,000 people there (TR 23750) and also thought that the Tijeras Canyon area as a whole could take as many as 20,000 to 25,000 more residents (probably at the same time that new population is moving to the Northwest) (TR 23750).¹¹⁴

c. The South

139. In general, the Southeast Heights have changed little since 1960, according to City Planner Carruthers (TR 10800). There are a number of relatively small parcels of vacant land just beyond the City's Southeast quadrant. One called Montessa Park has 200 developable acres (TR 10823).¹¹⁵ Three parcels adjacent to Four Hills could yield 300 acres in toto (TR 10819).¹¹⁶ Albuquerque's Public Schools own a 420 acre vacant tract (TR 10818)¹¹⁷ but it is not clear on this

¹¹³ The houses here range from \$80,000 to \$120,000 in price. Identified as "SH" on CX 552.

¹¹⁴ Tijeras Canyon stretches eastward about 15 miles from the City's eastern boundary to Bernalillo County's eastern boundary.

¹¹⁵ Identified on CX 552 as "MP".

¹¹⁶ Identified on CX 552 as "4H".

¹¹⁷ Identified on CX 552 as "APS".

record whether it was included in the City's Vacant Land Studies (referred to later), so it will be disregarded here to avoid double counting. [137]

140. There is one very substantial and very available tract of vacant land immediately beyond the City's South boundary. This is a tract of some 11,000 uninhabited acres lying just east of the Rio Grande Valley between the City Limits and the vast Isleta Indian Reservation (TR 10820, 11166, 23741).¹¹⁸ All this land is held by the State of New Mexico for the benefit of the University of New Mexico, for investment, not for use (TR 10819-20). There is no restriction on development of any or all of this land for the University's profit and, indeed, that would seem to be a most logical way for the University to profit from its ownership (TR 10819-20).¹¹⁹

141. The difficulty with development of the University's tract for residential purposes is not a legal but a practical one. A glance at the map (CX 552B) will show the proximity of the "UNM" tract to the Airport and Kirtland Air Force Base. The eastern two thirds of the tract is subject to high noise levels due to airplanes flying the approaches to the airport, so much so that restriction of such flights and also of test flights at Kirtland AFB would be desirable to make the UNM tract more liveable. Even if this problem prevents two thirds of the tract from being "immediately available", however, there remain about 3,500 acres "immediately available" for new residential use (TR 10820).

142. Just South of the UNM tract and the Airport and Kirtland AFB, stretching east and west for miles, lies the huge, sparsely settled Isleta Indian Reservation.¹²⁰ As with the Sandia Indian Reservation on Albuquerque's north, the great question is whether and if so when this land will be made available for subdivision and development. [138] City Planner Carruthers made it very clear that both Indian reservations are "developable" in a topographic sense, and that development is economically feasible, at least east of a southward projection of the so-called "escarpment" (west of and parallel to the Rio Grande River) beyond which the City of Albuquerque does not want to establish roads and utilities (TR 10831-33). Carruthers testified to his own opinion that an Indian Reservation could be developed to accommodate migrants to New Mexico "in the same way that Rio Rancho or any other development was put together." It takes developing a utility system and the whole development program, he agreed, but that is possible (TR 10920).

¹¹⁸ Identified on CX 552 as "UNM".

¹¹⁹ The University has already developed the large, new Winrock Shopping Center, holding the land and leasing out the store buildings.

¹²⁰ There were an estimated 2,100 Isleta Indians on a 211,000 acre Reservation in 1965-66. U.S. Dept. of Interior, Bureau of Indian Affairs, *Indians of New Mexico*, p. 5.

143. He could cite no example (TR 10920) and knew of no plans to dispose of any Isleta land to private developers (TR 11004-05) but pointed out that such development had not hitherto been thought necessary "because our population projections really do not support a need for developing that area, so we [the Albuquerque Planning Dept.] have not yet set a time limit" (TR 10918).¹²¹ He did know that the Isleta Indians had built some housing for themselves on the west side of the river, near the freeway and, like the Sandia Indians, had actually designed a master plan to govern development of parts of their reservation land for *others*, although they had not pursued it thus far (TR 10838). As for timing, Carruthers said frankly that he had no idea when the Reservation would be developed: "It could be tomorrow or it could be a hundred years from now" (TR 11002). While he did not think it likely that people would be "flocking" to the Indians "in the near future" (TR 11154), he warned that "they (the Indians) could proceed with the development if they chose to *very soon*" (TR 11003) (emphasis added). It need hardly be said that developers' access to the vast Isleta Indian Reservation would, even more than in the case of the Sandia Reservation, revolutionize the land supply and demand situation in the Albuquerque Metropolitan Area. So, again, examination of the facts makes it clear that there is no absolute constraint on Albuquerque's growth to the South merely because Isleta is an Indian Pueblo. [139]

144. Discussion of Albuquerque's south side does not end with the Isleta Indian Reservation. Beyond that Reservation (which extends about 7 miles North and South) lies a 10-12 mile stretch of land which follows the Rio Grande River and Interstate Highway 25 from Los Lunas (pop. 2,000) to Belen (pop. 4,500-5,000, not including Horizon Corporation's gigantic Rio Communities) (TR 23736, 23743-47).¹²² Respondent's local real estate expert, Godfrey testified that the land around Los Lunas is developable (TR 23754); that there are scattered residential developments all the way from Los Lunas to Belen (TR 23737), and that this area could relieve some of the alleged pressure of population on Albuquerque (TR 23738, 23742-43). However, he thought the area too far south to meet the tests of contiguity and ready access to Albuquerque, which he deemed essential for present purposes (TR 23737). Accordingly, he doubted that the Los Lunas area could handle the population he thinks likely to go to Rio Rancho and the West Side (TR 23742-43). [Interestingly, Godfrey was unable to think of any reason why Respondent's major competitor, Horizon

¹²¹ He added (at TR 10919-20): "It is possible to do it now if there was any need to do it."

¹²² In a 1969 report to the SEC, Respondent referred to Horizon's Rio Communities at Belen as consisting of "over 100,000 acres" (CX 4R).

Corporation, would have located its massive (100,000 acres plus) Rio Communities development at Belen (TR 23753-54; CX 4R).]

d. *The West*

145. The City of Albuquerque has annexed much land in irregular patterns on the West Side of the Rio Grande River. (See red areas on CX 552). Largely to the west of these complex boundaries lie two huge Spanish land grants, the Pajarito Grant¹²³ being the southerly and the Atrisco Grant¹²⁴ the northerly. Taken together they are about 12 miles [140] square and stretch westward to the Canyon of Rio Puerco River.¹²⁵

146. City Planner Carruthers testified, however, that only the part that lies east of a steep north-south lava-flow known as "the escarpment" can be considered developable (TR 10833). Because the cost of providing roads, utilities and other services becomes prohibitive west of "the escarpment", he explained, the City will not now provide such services and expects most of the land west of the escarpment to continue to be used for grazing, except perhaps for a new community center for the Pajarito Grant (TR 10831-33, 11081-82).

147. Even if attention be limited to those portions of the Pajarito and Atrisco Land Grants which lie east of "the escarpment" line, any potential developer faces a problem in either grant. The title to most of this land is in a state of confusion. The record here reveals little about the nature of the legal problem, except that it has to do with the way title was passed down among the heirs to the original Spanish land grants and the effect on title of the Treaty of Guadalupe-Hidalgo, which concluded the Mexican War and ceded New Mexico to the United States (TR 11178). There are thousands of heirs of the original owners, known and unknown (TR 11179). Title insurance is not available for large portions of these grants and much of each is involved in a quiet title action filed in 1976 (TR 11179).

148. Despite the seriousness of the title problem, substantial efforts have been and are being made to cope with it. The quiet title suit just referred to could simplify a great deal (TR 11179). An entity called Westmoreland Corporation has been created for the Atrisco heirs to hold and manage the property for development (TR 10829). Title has actually been cleared on portions of the Atrisco Land Grant, area by area, as development has progressed (TR 10828). Planner Carruthers estimated that title has [141] by now been cleared on 5,000 of the

¹²³ There are two portions of the Pajarito Grant, one being identified on CX 552 simply as "P" and the other as "P2".

¹²⁴ The Atrisco Grant is identified on CX 552 as "AT". The portion east of the "escarpment" is labeled "CP" (for College Park, one of several new developments).

¹²⁵ Estimated from visual inspection of CX 552. Beyond the Rio Puerco for 40 miles lie more Indian Reservations, with a few pockets of fee land but nothing "significant" for development, according to Godfrey (TR 23740).

Atrisco Grant's 64,000 acres (TR 11178).¹²⁶ [The record contains no comparable figure for Pajarito's 27,000 acres¹²⁷ but the tenor of the evidence generally indicates a similar situation there].

149. What we are looking at in the Pajarito and Atrisco Land Grants is obviously nothing like the "constraint" of the Sandia Mountains on Albuquerque's East Side. While clearing an ancient title may take a little time, it seems safe to assume that, if and when there is sufficient real demand to develop Pajarito and Atrisco land, the process of clearing title will be expedited. In such case the "constraint" of confused titles is likely to disappear rather quickly. Be that as it may, even Carruthers, who refused to see development possibilities west of the "escarpment" simply because the City does not want to service that area, estimated there are now available for development lands in the Spanish Grants totaling 12,600 acres.¹²⁸ This leaves about 75,000 acres west of the "escarpment" which we think could be developed if there were really enough demand to justify development but which, out of an abundance of caution, we will not classify as "immediately available".

150. West of the Rio Grande River and north of the Pajarito and Atrisco Grants lie several developments that still have some vacant land. One, called Volcano Cliffs, [142] was estimated by Planner Carruthers to have 2,400 to 3,000 acres of vacant, developable land left when he testified (TR 10834).¹²⁹ Another, the Taylor Ranch (from whose original 12,000 acres Horizon Corporation's Paradise Hills was carved) still has about 1,000 acres available for development (TR 10835, 10911).¹³⁰ Horizon's Paradise Hills, immediately adjoining Respondent's Rio Rancho Estates, is said to have 6,000 acres still undeveloped (TR 10835, 11006-07).¹³¹ All together these represent a total of about 10,000 acres but Carruthers explained that an adjustment should be made for 1,500 acres of Volcano Cliffs and 2,000 acres of Paradise Hills, which require blasting with dynamite to build foundations (because of the nature of the escarpment) (TR 11166-68). Accordingly, we calculate that there are about 6,500 acres of land immediately available for building northwest of Albuquerque but short of Rio Rancho Estates.

¹²⁶ The 5,000 figure presumably refers to 2,400 developable acres in Snow Vista ("SV"), the original Atrisco Village, (TR 10825); 1,200 developable acres along Central Avenue ("BC") (TR 10826); and other, unidentified land.

¹²⁷ The portion denoted "P" on CX 552 contains only 3,000 acres (TR 10825). The portion denoted "P2" contains 24,000 acres (TR 10830).

¹²⁸ The components of this 12,600 figure are: College Park ("CP") and surrounding area, 6,000 acres (TR 10837); the easterly end of the Pajarito Grant ("P") 3,000 acres (TR 10826); Snow Vista ("SV") 2,400 acres (TR 10824-25); and the Central Avenue corridor ("BC") 1,200 acres (TR 10826-27).

¹²⁹ Identified on CX 552 as "VC".

¹³⁰ Identified on CX 552 as "TR".

¹³¹ Identified on CX 552 as "PH".

e. *The inner city*

151. Having reviewed the vacant land available in areas just *outside* Albuquerque's city limits, it should be added that, as in most cities, there is also a certain amount of vacant land left *inside* the city limits, the residue of leap-frogging growth and so-called "urban sprawl". Periodic studies have indicated that there is some, although not much such land.

152. A "Vacant Land Study" published by the Albuquerque/Bernalillo County Planning Department in 1972 found only 14,035 gross usable vacant acres within the City's then-existing (1972) boundaries (CX 547H). Of this 14,035 acres, 9,670 acres were holdovers from a total of 20,059 vacant acres found in 1962 (when the City limits were somewhat smaller), while 4,365 of the vacant acres in 1972 were among the [143] peripheral lands that had been annexed by the City of Albuquerque between 1962 and 1972 (CX 547H). Of the total of 14,035 vacant acres the Planning Department noted, however, that over one third were not zoned residential (CX 547H). Moreover, Complaint Counsel's principal expert on this branch of the case (City Planner Carruthers) agreed that so much of this vacant land was not immediately available for development (*e.g.*, because of utilities problems) (TR 11133-36) that the City could fairly be said to be about "out of land" (TR 11131-39, 11156). A later "Vacant Land" Review in 1977 confirmed that the City's supply of vacant land within its own bounds in 1976 was still about 15,000 acres or 27 percent of the City's 1976 area (57,000 acres) (CX 649Y) and we adopt that figure here.

153. While necessarily accepting the results of the City's "Vacant Land" Surveys, we note the extreme conservatism of these studies with reference to the condition of what is known as "the Valley". This is the low-lying land on both sides of the Rio Grande River, which flows through Albuquerque in a southerly direction. North of Central Avenue it is known as "the North Valley" while south of Central it is called "the South Valley" (CX 547K).¹³² The 1972 study showed only a relatively small amount of vacant land in "the Valley" (1,314 gross acres; 689 residential acres) because most of "the Valley" is now in use for grazing and agriculture (and so was not considered "vacant") (CX 547K). Planner Carruthers explained that it is the considered policy of the Planning Department to keep the Valley that way and prevent conversion of farm land to residential use because there is a very limited amount of irrigated farm land available (TR 1827, 11121).

154. Carruthers made it clear, however, that "big parcels" of land in the South Valley (TR 10827) and "a great deal" of land in the North

¹³² The 1972 Vacant Land Study defined "the Valley" as bounded by the freeway (I-25) on the east, Coors Blvd. on the west, and the City limits on the north and south.

Valley (TR 10815) *could* be developed "residentially" but for the City government's official opposition. Since the conversion of suburban [144] farm land to urban uses (and values) is a very normal phenomenon in American history, it seems quite possible that, if the pressure of population were to become more intense than it has been thus far, Albuquerque's policy might well be changed or overridden in this regard. That, in turn, could add very large supplies to the metropolitan area's stock of developable residential land.

f. *Summary of available vacant land*

155. Our review of the supply of vacant lands fairly available in the near future for new residential construction in Albuquerque and those parts of Bernalillo County immediately adjoining the City yields the following *minimum* availability:

Figure 11

<u>Area</u>	<u>Available land (in acres)</u>
City of Albuquerque	15,000
<u>Northeast suburban areas</u>	
Elena Gallegos (Sims)	3,000
North Albuquerque Acres	1,500
Tijeras Canyon	3,500
<u>Southern suburban areas</u>	
Montessa Park	200
Four Hills	300
University/New Mexico	3,500
<u>Western suburban areas</u>	
(Atrisco/Pajarito Grants)	
College Park area	6,000
East end of Pajarito Grant	3,000
Snow Vista	2,400
Central Ave. corridor	1,200
<u>Northwestern suburban areas</u>	
Volcano Cliffs	1,000
Taylor Ranch	1,000
Paradise Hills	4,000
Total available vacant land:	45,600 acres [145]

156. Assuming continuation of Albuquerque's historic housing density of about five persons per acre (TR 12298), *our review reveals that about 228,000 more people could be absorbed just on the vacant land immediately available in and around Albuquerque* even without taking into consideration 234,000 acres of nearby Pueblo Indian lands to the north and south of the City, 78,400 acres of Spanish Grants to the west, beyond the "escarpment", 6,000 acres in the old North Albuquerque Acres development and "a great deal" of farmland in the

Rio Grande Valley. If metropolitan Albuquerque were to continue to grow at the same rate after 1975 that characterized its growth between 1960 and 1975 (*i.e.*, an increase of 108,000 people during 15 years or 7,200 persons per year), metropolitan Albuquerque would still not be out of buildable vacant land for three decades.¹³³

157. In light of this summary review of the vacant land available for building in and around Albuquerque, it becomes plain that Respondent's main selling point—that the City is surrounded on three sides by various constraints and can therefore expand *only* in the direction of Rio Rancho Estates—is false and misleading. The alleged constraints in fact do not constrain the growth of Albuquerque's population—and *will probably not do so for at least three decades*—because there is enough adjoining land immediately available to take care of the City's likely growth needs during that period, without recourse to one lot at Rio Rancho Estates.

158. Finally, it is by no means clear that what Respondent calls constraints today will really prove to be constraints when it matters, early in the 21st century. [146] To assume that even then there will still be no subdivision of any part of the nearby Indian lands nor any solution of the Spanish Grants' title problems nor any opening up of Valley farm lands to residential construction seems rash and unjustified. Respondent's admittedly plausible "frame" theory may be good for business but it bears little resemblance to the facts of life in Albuquerque.

B. Silver Springs Shores

159. At Silver Springs Shores Respondent has not employed the "frame" theory used so successfully at Rio Rancho to the effect that due to constraints on growth in all other directions, an inevitable overflow population from the nearest city will have no place to go except to Respondent's development. Instead, the promotional theme at Silver Springs Shores seems to have been simply that more and more retirees and others who want a warm climate are moving to Florida, referring particularly to Central Florida, and that Silver Springs Shores and Marion County as part thereof have shared and will continue to share in that growth (CX 58P-S).

160. Any assumption that Marion County will automatically share in the population growth of Central Florida or that Silver Springs Shores will necessarily share in the population growth of Marion

¹³³ Our use of a simple straight-line projection of metropolitan Albuquerque's population increase from 1960 to 1975 for a rough idea of further growth to the year 2007 seems quite conservative. A 1974 projection by the Commerce Department's Bureau of Economic Analysis of which we take official notice anticipated a 1990 population of only 423,000 or 70,000 less than the 493,000 yielded by our straight-line projection based on 1960-75 experience. U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of Economic Analysis, "Area Economic Projections, 1990" (1974), p. 76.

County is plainly unjustified. Respondent has tried to insulate itself from a charge of deception in this respect with a fine print, barely readable disclaimer of such logic tucked away in a corner of the rear cover but not, we think, effectively.¹³⁴

170.* Moreover, Respondent has grossly exaggerated the growth of Ocala, the city nearest to Silver Springs Shores. We do not refer to such mere puffing as "A one-in-a-million location" (CX 58B) but to unambiguous quantitative [147] misstatements in advertising copy prepared for Respondent in 1972 which represented that "Silver Springs Shores is [directly]¹³⁵ in the path of tremendous growth" (CX 73). There follows this statement: "Ocala, the city adjacent to Silver Springs Shores, has grown over 66% from 1960 to 1970" (CX 73A).

171. The fact is that this claim of growth was based *entirely* on a redrawing of Ocala's city limits during the decade; the population of what was Ocala in 1960 actually *declined* during the ensuing decade (CX 476H, P). Respondent's carelessness of the truth enabled it to advertise a growth rate nearly twice what a realistic figure (34 percent for all Marion County) would have dictated (CX 476L).

172. Finally, Respondent's representations of locational advantage have been misleading because they have focused attention solely on the demand for building lots, to the exclusion of the supply factor. The testimony of Withlacoochee Regional Planner Mimms was that there were (as of 1977) at least 94 land developments of more than 100 acres size (each) in Marion County and that in the aggregate they contain over 135,292 acres (TR 6795-96).¹³⁶ Mimms thought it reasonable to assume a density of about two housing units per acre (that being the lower end of a Marion County range from 1.8 to 11) and further to assume a Marion County average of 2.9 persons per household unit (TR 6802-03).¹³⁷ On these very conservative assumptions Mimms estimated that 270,548 units could be placed on the 135,292 acres of land in the 94 subdivisions in Marion County (TR 6802) and from this he further calculated that Marion County currently (1977) had enough subdivided land to accommodate a population of 784,693 persons (TR 6803). [148]

173. Unless the population of Marion County in the future grows at a rate greater than that experienced during the 15 years from 1960 to 1975, there thus already exists enough subdivided land in Marion County to house the growth of its population for 280 years or well into the second half of the 23rd Century A.D. Under such conditions a

¹³⁴ Information obtained in this booklet is general to the central Florida area. Property offered for sale in Silver Springs Shores may or may not be affected by the events or predictions described (here) (CX 58X).

* There are no Findings 161-169.

¹³⁵ The word "directly" was apparently removed before the State of New York approved this copy (CX 73A).

¹³⁶ For a map of these 94 developments see CX 479.

¹³⁷ The witness used 2.8 on page 6802 and 2.9 on page 6803.

representation of keen demand for land without an accompanying explanation of the plenitude of supply can be disastrously deceptive.

C. *Eldorado at Santa Fe*

174. Respondent's promotional literature for Eldorado at Santa Fe owes something to both the Silver Springs Shores and Rio Rancho themes. The former may be seen in Eldorado's effort to tie its own growth to that of the sunbelt generally:

... [W]ith a dramatic increase in population of over 23% in the past decade, Santa Fe has been growing right along with the golden southwest, today the fastest growing region in the U.S.A. (CX 173C)¹³⁸

175. However, it also stresses something very much like Rio Rancho's "frame" theory:

As more and more people move to Santa Fe, the question asks itself: Where will they live? Where will they find land? (CX 83D)

And Respondent answers its own question:

Here the great open spaces are jealously guarded. *Approximately half the land in Santa Fe [County] is reserved . . . federal and state-owned lands . . . lands for parks and recreation, closed to residential living* (CX 83D) (emphasis added).¹³⁹ [149]

Then, in language a Rio Rancho salesman could repeat by heart, this Eldorado brochure continued:

With much of Santa Fe's potential growth blocked on the North, West and East by mountain and reserved lands, the most logical direction for Santa Fe to expand is to the South. The community of Eldorado is located *in the general path* of the Southward expansion . . . only 7 miles from Santa Fe! (CX 83D) (emphasis added).

Such a statement is literally true, but only in the sense that Chicago's expansion might theoretically be limited by the Atlantic Ocean, the Pacific Ocean and the Gulf of Mexico.

176. The record here shows that immediately to the *west-northwest* of the City of Santa Fe—one of the supposedly "blocked" directions—lies the 9,000 acre Weil Ranch, just beginning to be subdivided for sale (TR 10488–89). At the rate that Santa Fe County's population grew between 1960 and 1975 (1,219 persons per year)¹⁴⁰ and assuming

¹³⁸ See also CX 84W ("growing vigorously") and CX 83D ("nothing short of extraordinary").

¹³⁹ See also CX 173H ("More than 44% of all the land in Santa Fe County is either reserved Federal or State land. It is simply not for sale") and CX 84W ("[A]vailable sites [are] sharply limited by Reserved Federal and State lands and by mountains that embrace the town . . .").

¹⁴⁰ U.S. Department of Commerce, Bureau of the Census, *County and City Data Books for 1972 and 1977*, pp. 318; calculations by Administrative Law Judge.

Santa Fe's present urban density rate (4.5 persons per acre) (TR 10481), *it would require approximately 33 years to sell out the Weil Ranch alone.*

177. Even excluding the Weil Ranch and the even vaster (40,000 acres) Jarrett Ranch located just southwest of the City, Santa Fe City Planner Moul found four categories of developable land totaling 14,090 acres, in and around Santa Fe and calculated that at normal Santa Fe density (4.5 persons/acre) the 14,090 acres could support 63,400 or the whole County's probable population growth for the next 51 years (TR 10479-81). Plainly the picture Respondent has been painting of Santa Fe "blocked on the north, west and east" and Eldorado lying "in the general path of the Southward expansion" of Santa Fe (CX 83D) is grossly misleading and unfair. [150]

D. Oakmont Shores

178. During the brief four year tenure as developer of Oakmont Shores on Table Rock Lake in the Missouri Ozarks Respondent did not, so far as this record indicates, employ a sales theme similar to its "frame" theory at Rio Rancho Estates but stressed the great demand and limited supply of "recreational land" in general (CX 102C)¹⁴¹ and zeroed in on the drawing power of the Ozark mountain country in particular:

In the first place, it is in the unspoiled and unpolluted Ozarks. In fact, a panel of experts from the U.S. Dept. of Interior recently chose the Ozarks as one of the seven best places to live in the entire country. This was the only location they chose between the Rockies and Eastern Virginia (CX 102C).

179. In particular, Respondent's advertising looked to "the closeness of Oakmont Shores to [Table Rock Lake] the second largest man-made lake in the nation (which) means that the demand-and-prices-can be expected to go only one way—UP!" (CX 102C).¹⁴²

180. In the case of Oakmont Shores this record contains relatively little quantification either of Respondent's optimistic representations or objective reality. It did assert that "there are over 60 million people living within a 600 mile radius of Oakmont Shores" (CX 102C) and that "the Corps of Engineers informs us that the (Table Rock Lake) area draws over six million visitors a year, with the number constantly growing" (CX 102C). [151] In a vague way this does suggest a potential market for building lots.

181. However, as with Respondent's other subdivisions, there is

¹⁴¹ ("land directly associated with water-based recreational opportunity . . . (is in) strong demand . . ."); CX 140F ("no secret that recreation land is becoming increasingly scarce.")

¹⁴² (Being on the shores of Table Rock Lake was said to be important because an "authoritative" Interior Dept. report stated that "lands directly associated with water-based recreational opportunity . . . (are in) strong demand.")

already a great deal of similar land equally available. Table Rock Lake even now boasts 290 subdivisions (ranging from 5 to 1,500 lots each) (TR 9173-74) and 75 percent of the shoreline properties are as yet undivided (TR 9175). On this limited evidence, however, we are unable to make a proper judgment as to the alleged deceptiveness of Respondent's promotional literature during the brief period it operated Oakmont Shores.

II. INVESTMENT REPRESENTATIONS

A. *Special significance of investment representations*

182. The truth or falsity of representations made by Respondent concerning the investment value of its land is of the utmost importance because a heavy preponderance of Respondent's customers have been solely or primarily concerned with reselling their lots at a profit rather than with retiring or for some other reason taking up residence there. That this has been the case is evidenced in several ways.

183. Respondent's land contract, in order to determine whether the Truth-in-Lending Act applies to the transaction in question, requires a buyer to indicate whether he expects to use the property purchased as his "principal residence" (CX 152A, CX 154A, CX 155) or "current or future principal place of residence" (CX 106A). Examination of the 185 such contracts in this record reveals that about 80-85 percent of all buyers say they do *not* intend to use their lots as a "principal residence". While the language quoted does not exclude use of such lots to build second homes, the economics of second homes being what it is, it seems reasonably certain that most purchases are primarily for eventual resale at a profit, *i.e.*, for investment.

184. Such a conclusion is strongly confirmed by the circumstance that most buyers have never, in fact, built on their lots. At Rio Rancho Estates 75,134 lots had been [152] sold by Respondent as of 4/30/76 (CX 459J), yet as late as 1978 there were still only 2,400 residential units built and 800 more a-building (CX 162N; TR 19675, 19680). At Silver Springs Shores 19,426 lots had been sold by Respondent as of 4/30/76 (CX 459K), yet there were still only about 661 homes completed and another 38 under construction (CX 164G).

185. One of Respondent's builder-witnesses expressed his opinion that Rio Rancho's thousands of lot buyers are likely candidates to move to Albuquerque and will look first at their Rio Rancho building lots when they do (TR 19831-32) but Respondent's experience with its oldest subdivision (Rainbow Lakes in Central Florida), which was sold out years ago, has been that no more than 7 percent of the lots there were ever occupied by their buyers (TR 12948-51, 24167). Brochures and movies might feature Spanish patios and championship golf

courses but it has plainly been the possibility of land boom profits that has motivated most of Respondent's customers.

186. That Respondent's management has been thoroughly aware of the investment orientation of most of its prospects—and indeed has actively encouraged it—need not be left to inference. In evidence is a transcription of a tape recording (CX 108) of a 1968 lecture by one of Respondent's top-drawer sales managers (Hollander) to a group of its salesmen, making this point crystal clear:

Don't come up with all these little tidbits of facts that you have learned . . . and take that newspaper article that you have that's very, very beautiful and throw the goddam thing away . . . because you are talking about something that these people couldn't care less (about). All they want to do is eat that damn dinner and get out of there. *They didn't care about Rio Rancho and they don't care about 55,000 acres or 40,000 acres or 90 square miles or sagebrush or beautiful roads. All they care about is money and how can I get some of it. That's all they care about.* So you tell them how they can make money. *You implant in their minds greed. . . .* And then you'll close. And then you'll write business (emphasis added) (CX 108U). [153]

And the same AMREP official put it even more unabashedly when addressing a dinner party for prospective purchasers about the same time:

It is not important that you live there [at Rio Rancho Estates] or that you retire there or even that you visit there. *The only thing that's important is that you want to make money* (CX 110D) (emphasis added).

187. Respondent's investment representations fall generally into three classes. *First* are assurances that the land in question is offered for sale at bargain prices. *Second* (and most important) are assurances that this will be a good investment, *i.e.*, will yield a handsome profit. *Third* are assurances that this is not only a good money-maker but a safe place to put one's money—sometimes called a no-risk investment. We shall now document each of these three facets of Respondent's investment representations.

B. *Three principal investment representations*

1. A bargain buying price

188. Respondent's prospective purchasers have always been assured that Respondent is selling its land at bargain prices, commonly with an explanation that such "low" prices are made possible by alleged efficiencies of its large-scale operations. Thus the 1972 version of one of Respondent's principal promotional brochures ("How To Live - Retire - Invest In The Sunny Southwest") refers to "the wonderful VALUE we are offering" (CX 30Q) and the "low cost made possible

through our large-scale planning and operations" (CX 30H).¹⁴³ An earlier version of the same brochure advertises: [154]

Now comes an opportunity to secure "your place in the sun" at land prices far below market value (CX 393E)

and:

Only our low mark up, large-volume policy makes such an outstanding land bargain possible. . . . (CX 393W)

The 1972 version of Respondent's other principal brochure ("This Is My Land") states simply:

And considering all this development activity (around Albuquerque) it is truly amazing that you can still buy property in Rio Rancho Estates at such low prices and such modest terms. Truly one of the best land offerings in the entire southwest (CX 32N).

2. A profitable investment for the future

189. From the very beginning Respondent's principal selling point has been making money. The record literally overflows with its representations, express or implied, that lots at its subdivisions are a fine investment for the future. More than almost any other evidence these representations give the case its flavor.

190. The oldest promotional brochure in the record is a 1961 pamphlet for Rio Rancho prospects entitled "How To Invest Profitably In Southwest Real Estate, with very little cash outlay" (CX 393). Its frank investment orientation is evident not only from the title but from the text of the front page, which refers to "*booming Albuquerque*" and promises to reveal (1) "why land values at Albuquerque have consistently risen by an average of more than 25 percent per year since 1941—*and are now expected to climb even faster!*" and (2) "How to use the least amount of money to *make the largest possible gains in land investment*" (CX 393A) (emphasis added). [155]

191. Inside, this brochure's investment orientation is confirmed in language reminiscent of old-time blue-sky promotions:

The opportunity of a lifetime for a small investment to grow into a sizeable fortune in an area where land values are constantly doubling, redoubling and then redoubling again . . . often in just a few years (emphasis in original). It is a demonstrable fact that land prices in general at Albuquerque have increased 20, 30, even 50 times or more in the past 20 years. Now with its greatest population boom only just starting—one does

¹⁴³ See also another reference in the same brochure to Respondent's "scale operation" which permits acquisition of property at "prices and terms which, to our knowledge, are below that of any comparable residential acreage in our area" (CX 30M).

not have to be an expert to predict that *land prices here should increase in the future as they have in the past . . . and more likely at an even greater pace* (CX 393E) (emphasis added).

After referring to price rises of 45–50 percent at two other developments with which Respondent was said to be associated, this brochure “confidently and conservatively” predicts:

You won’t be able to touch a piece of property at Rio Rancho Estates for two to three times the current price within the next five years. As a matter of fact, in line with recently increasing values in the area, we have already posted price rises up to \$200 per homesite scheduled to take effect shortly (CX 393R).

192. And after explaining the “leverage” principle (“using the least amount of money to make the largest possible total profit”), Respondent’s imagination finally soars off into the wild blue yonder:

As more and more average investors realize how the dynamic use of small monthly payments in suburban/city real estate *can grow into a substantial fortune* and at the same time assure themselves a choice Southwest retirement spot at prices that will look incredibly low a few years from now, the steady gradual uptrend which has been taking place here for [156] many years *could conceivably break out in a speculative fever that can trigger runaway land prices*.

With inflation on the march, with thousands of people a month now moving into the Albuquerque area, can any reasonable man doubt that price tags for homesites will advance greatly over the next three to five years? *And 10 to 15 years from now may reach astronomical figures . . . may easily be 10 to 20 times what they are today* at Rio Rancho Estates (CX 393W) (emphasis added).

It seems safe to say that these extracts from Respondent’s earliest Rio Rancho brochure fairly evidence a representation that vacant land at Rio Rancho is a good investment.

193. Seven years later Respondent was still emphasizing the investment value of its Rio Rancho land. A standard dinner speaker’s presentation dating from late 1968 makes this clear:

. . . [W]hether you prefer to live there (Albuquerque) or invest in its future, Albuquerque’s growth offers you *an opportunity to make a great deal of money*, and that is what we are going to talk about here, this evening, *making a great deal of money*—because I am assuming *everybody likes to make money* (CX 38D-E) (emphasis added).

* * * * *

The word “investment”, incidentally, brings me to the main reason for being here this evening, because what we are presenting tonight, ladies and gentlemen, is a land investment program. . . . [T]his evening you have the opportunity of participating in a land investment program to help assure yourself of the advantages that you are now just dreaming about . . . an ideal way to assure children or grandchildren a valuable estate that could take care of their college education or provide their many needs (CX 38 I-J) (emphasis added).

You see, ladies and gentlemen, *the entire program and what we make available to you keeps coming back to money*. Money and the uses of it. You don't have to be a financial genius or a sophisticated land investor to participate in this program. All you have to be is what most people are, a person with a sense of responsibility for himself and his loved ones (CX 38W) (emphasis added).

194. As we leave the 1960's and get into the 1970's, Respondent urges us to find a significant change in the tenor of its advertising and relates this to its own systematic efforts to eliminate improper promotional approaches. It calls our attention, for example, to testimony by one Simon, a suave trainer of AMREP's salesmen during the period 1972-74 (TR 16004), that he taught these salesmen *not* to use an investment theme and to limit any assurance of resale to "15, 20 years down the road" (TR 16005). All they ought to say, he thought, was "that based upon the past that this could be a possible potential in the long range" (TR 16005). We also take note that in 1970 an outside attorney, Solomon H. Friend, Esq. (one of Respondent's counsel here), took over as General Counsel and proceeded to organize Respondent's 5-man Legal Department, becoming Senior Vice President in 1973 (TR 7936). This Commission began the investigation which preceded issuance of this Complaint during December 1972 (TR 24491-93).

195. Careful consideration of the tenor of Respondent's promotional materials during the first half of the 1970's convinces us that with good legal advice and the hand of this Commission on its shoulder, Respondent has sophisticated some of its more blatant assurances of pie-in-the-sky by-and-by, particularly in its standard brochures. However, even the sometimes more sophisticated approaches which have characterized the 1970's have not abandoned the old "good investment" theme. The record makes this clear.

196. The 1972 version of "How To Live-Retire-Invest In The Sunny Southwest" announces an "opportunity" [158] to obtain land that has "a reasonable long-term potential" (CX 30E).¹⁴⁴ Mild though this may sound in comparison with the 1961 version's reference to making "a substantial fortune" and price increases of "astronomical figures" (CX 393W), it is nonetheless clear that in this 1972 brochure Respondent is still representing that its lots at Rio Rancho are a good investment.

197. More interesting is the 1972 version of Respondent's other principal Rio Rancho brochure: "This Is My Land". This booklet avoids any express reference to investment at Rio Rancho but one

¹⁴⁴ In the same document see also CX 30Q ("investment potential"); CX 30W ("no better long-term investment"); and CX 30G ("an opportunity to share in future-growth patterns").

section (which also contains the notable "frame" diagram showing Rio Rancho surrounded on three sides by various "constraints" (CX 32H-I) lists a half dozen concrete examples of how land prices *in the Albuquerque area* had "increased at a rapid pace [over 20 years] at an average rate of about 25 percent a year and in many cases as much as 300 to 400 percent in a given year" (CX 32-I).

198. One example from Buena Ventura in Albuquerque's Northeast section erroneously shows six (should be 16)¹⁴⁵ lots bought for \$33,000 in 1958 and sold in 1963 for \$59,200 (CX 32I). Another example from Quaker Heights in Albuquerque's Northwest section (deceptively described as being "within a few blocks of Rio Rancho Estates")¹⁴⁶ shows 15 acres bought in 1942 for \$375, sold in 1955 for \$5,000 and resold in 1960 for \$20,000 (CX 32 I). Four other such examples from various parts of metropolitan Albuquerque are reported (one without a purchase date so that no per year profit can be computed) (CX 32-I). [159]

199. Despite explicit disclaimers by Respondent that "no one can accurately forecast how population, inflation and other factors may affect the price of land" and that the past price increases reported "do not in any way represent or imply a promise or prediction of future land values or prices, which, of course, depend on location, rate of development, marketability, population growth plus other factors" (CX 32-I), *it is perfectly plain that the whole purpose of putting these examples in a sales brochure about Rio Rancho Estates has to be to sell Rio Rancho land and the plain implication is that Respondent's land is a good investment.*

200. Such inference is confirmed by the testimony of one Bondy, a salesman for Respondent during half of 1969 and a sales team captain from late 1969 to early 1973 (TR 7466). A veteran of some 600 sales presentations (TR 7489), his standard script (CX 36) called for him to tell dinner audiences:

You will find that one of the brochures is a very colorful pamphlet entitled "This Is My Land". May I suggest that you take the opportunity [while awaiting dinner] and browse through this brochure and also may I suggest that you do pay particular attention to pages 7, 8 and 9—especially page 9 because on this page you are going to find *the huge profits* that have been made on the sale and resale of real estate in and about the City of Albuquerque over the past several years (CX 36A-B) (emphasis added).

Testifying here Bondy compared price increases at Rio Rancho to the above described price increases in other parts of Albuquerque:

We [Respondent's salesmen] used to carry old prices because usually the property

¹⁴⁵ CX 631Z-9 reveals that there were really 16 lots instead of six (so that the average gain was really \$1,633 instead of \$4,333 per lot).

¹⁴⁶ CX 552 (map of Bernalillo County) shows that Quaker Heights is about six miles from the county line which constitutes Rio Rancho's southern boundary.

within Rio Rancho Estates had an average [list price] increase per year, anywhere from 10% to 15%. So, to bring out what we would . . . refer to as *the greed factors*, [we said] "if you would have bought this property two years ago you would have paid so much less for it." *We made comparisons* [160] *just like we make comparisons in "This Is My Land"* on pages 7, 8 and 9, and we *show how it goes up in value because predominantly in the New York area we treated Rio Rancho Estates as an investment type of factor* [rather] than a relocation type of factor (TR 7503) (emphasis added).

201. By June 6, 1973, Respondent's new General Counsel and reinforced legal department had had some three years to get promotional policy under control (TR 7936). Sales trainer Simon had presumably been hard at work for over a year trying to delete the investment theme from Respondent's promotional materials (TR 16006). And everybody knew that since the end of 1972 this Commission had had its hand or at least its eye on Respondent (TR 24491-93). *Yet a version of Respondent's standard speaker's presentation dated June 6, 1973 (CX 35) reveals Respondent's blythe continuation of the time-tried, successful investment approach on nearly half of the script's twelve pages.*

202. After making the initial selling point—that Albuquerque is surrounded on three sides, leaving *only* one direction for expansion, etc.—the speaker compares an alleged "*real estate boom*" at Rio Rancho Estates with the totally unrelated and largely incomparable boom on Staten Island that followed the opening of the Verrazano Bridge:

I would like to take you back for a moment to the first film ["West Side Story"] which made mention of the Verrazano Narrows Bridge in Staten Island after the completion of this bridge. *Tonight you happen to be in the right place at the right time because you will be given an opportunity to participate in a real estate boom in the fastest growing area of our country* (CX 35D) (emphasis added).

Thereafter the speaker describes various of Rio Rancho's advantages, including its "magnificent" 18-hole championship golf course pointing out the value of a golf course whether or not a purchaser himself plays golf:

because you know as well as I do what inevitably happens in the vicinity of golf courses. *Land values go up rapidly* (CX 35F) (emphasis added). [161]

203. This same theme of rising land values is repeated in reference to Respondent's alleged active "development" of four more areas of Rio Rancho Estates ("again, driving up land values") (CX 35F); completion of a "fabulous" major shopping center ("again adding value to property") (CX 35G); Respondent's industrial park ("nothing drives up real estate values faster than industrial growth") (CX 35G); and the "thousands" of new factory workers who will "most logically look

for a place to live in Rio Rancho," concluding with an express reference to rising land values at Rio Rancho:

You don't have to be a mathematical genius, with all of these facts in front of you to realize *what is going to happen to land values* in this particular area (CX 35H) (emphasis added).

203.1. Subsequently the speaker explains "financial leverage" (\$10,000 worth of "very valuable real estate" controlled for only \$915 down and \$128 per month) (CX 35K) and points out that:

as the value increases, you will control whatever the value may be with that same monthly payment. . . . (CX 35K) (emphasis added).

Finally, the speaker's closing words simply assume a profitable investment and go on to reassure his listeners—as if they were really worried about it—that "[t]here is nothing wrong with your desire to make more and more money. . . ." It seems reasonably clear that in this relatively recent (mid-1973) presentation Respondent is still representing its land to be a good investment. While the documentary evidence just reviewed would certainly be sufficient to support a finding that Respondent's investment theme continues, we note also much confirming testimony by consumers and others with respect to each of Respondent's developments.

204. a. *Rio Rancho Estates*

- (1972) *Consumer Dellacoma*: [T]he property value was *constantly going to be on the increase, just like Mr. Levitt made millions and billions*, so was our chance in buying a parcel of land a good investment (TR 5062) (emphasis added). [162]
- (1972) *Consumer Aschenbach*: We had had no land and we thought it would be a good idea to put some money in land *since it was going to triple and double* and it was *a golden opportunity* (TR 2033) (emphasis added).
- (1972) *Rio Rancho - O.P.C.*¹⁴⁷ *Sales Manager Daugherty* (in response to a question "Did you tell them (prospects) how much money they could expect to make on Rio Rancho land?": *We discussed histories of what had happened at Rio Rancho*; generally I think the figure used was—I can't remember now—I think it was about 15 percent (TR 21157) (emphasis added).

Q. Did you tell them that they should expect 15% in the future?

A. No, no way, because there was no way of knowing what the future would bring.

Judge Teetor: Why did you tell them about what had happened in the past if you weren't thinking about the future?

The Witness: Well, real estate—I guess you can call it blind faith if you like—real

¹⁴⁷ The testimony differs as to whether "OPC" stands for "Outside Procurement Consultant" (TR 968) or "Outside Property Consultant" (TR 21156).

estate had always increased in value, always in excess of the rate of inflation, and that's generally the guideline we use, even in general real estate.

Judge Teetor: *Didn't you have in mind, then, that they would apply this lesson of the past to the future?*

The Witness: *We assumed that that would be the case* (TR 21158) (emphasis added). [163]

- (1972) *Consumer Yuknes*: He [the salesman] said that it was a *very good investment* and we could—would have a *good return on our money* and that it was a valuable property and *improving at all times* (TR 5385) (emphasis added).
- (1973) *Consumer Torres* (inspecting the lots he had previously purchased): [T]hey said they were *good investments* (TR 7906).
- (1973) *Respondent's sales manager Wilson*: We explained to them [dinner guests] that *the average increase in property [values] across the United States was somewhere in the 30%—30 to 33%—[range] and with AMREP it was increasing at a higher rate* (TR 9651) (emphasis added).

205. b. *Silver Springs Shores*

- (1971) *Consumer Yarnall*: Well, he said . . . *[i]t should be a good investment and bring us back our money within 2 or 3 years* (TR 6129) (emphasis added).
- (1971) *Taped presentation*: Good homesite land anywhere in the United States has been appreciating between 18% and 22% a year. Florida property at 25%. *Good Florida property has been doubling every 3 1/2 years. AMREP property, which is property in our own development, has appreciated even more.* For instance in 1964 you could have purchased a homesite in our previous development [Rainbow Lakes] for \$1500. By 1969 the equivalent homesite was selling for in excess of \$6 - 7,000. *That's a whopping \$4,500 increase in a 5-year period* (CX 456G) (emphasis added). [164]
- (1972) *Saleswoman Strully*: Q. *You did not use the word "investment" but you used the concept of increasing price and investment didn't you?* A. *Sure, we all did* (TR 14542-43) (emphasis added).
- (1972) *Consumer Cohen* (in response to a question whether Respondent's salesman had said anything else about land): Land, like I said, *will double and triple your money in a very short time*, especially in Silver Springs Shores. . . .¹⁴⁸ (TR 6239) (emphasis added).
- (1972) *Consumer Irizarry*: [Respondent's salesman said] Trust me. I've been in real estate a long time. *It's a good investment.* It's always going up, people. . . . (TR 7300) (emphasis added).
- (1974) *Consumer Roomey*: [Respondent's saleswoman said] . . . *it would be a good investment.* . . . [T]he real estate, she said, is better than stocks and bonds. *The value of the property would go up, you know, constantly go up*¹⁴⁹ (TR 7163-64) (emphasis added).

¹⁴⁸ The "short time" was said to be "in 2 or 3, 4 years."

¹⁴⁹ See also the same witness' testimony at TR 7164 ("the value of the property always goes up") and TR 7166 ("and the value of the property, always going up").

206. c. *Eldorado at Santa Fe*

- (1973) *Consumer Scirica*: [Respondent's salesman said] *You got a fantastic investment here. You can't go wrong with it.* . . . He said *the investment possibilities were tremendous* because it was only a small, exclusive area, he says, and with the arrangement that AMREP had made up with the Eldorado property, he says, *it was bound to go up*. He said *it had to go up* (TR 5552) (emphasis added). [165]

207. d. *Oakmont Shores*

- (1972) *Consumer Weber*: . . . [T]hey talked about the property down there and what a *good investment* it was and how you could *increase your money* even though (if?) you were just *speculating* on it and did not intend to build a home (TR 8938) (emphasis added).

* * * * *

Q. Did he tell you how fast it would increase in value?

A. Let us see. Like I believe that probably in about seven years that it would double (TR 8943).

- (1973) *Consumer Reynolds*: [Respondent's salesman] went into quite a lot of detail about investment . . . and *within 2 years we would double or triple our money*. *That was one of their basic things, that it was an investment*. It wasn't really a place [to live]—they didn't really encourage to build.

* * * * *

[T]hey said we should resell it; that we should not hang on to it; that we should keep it for a prime period, which he called anywhere from 2 to 5 years.

* * * * *

He also told that *it was a good investment.* . . . (TR 8400) (emphasis added).

208. It will be observed that in a little over half of these testimonial examples Respondent's salesmen were reported to have told the consumer in *haec verba* (as late as 1974) that the land in question was "a good investment" (TR 7163-64). In another example (from 1972) it appears [166] that, as saleswoman Strully testified, the word "investment" may not have been used but the *concept* was there (TR 14542-43). In all cases Respondent's salesmen were representing that Respondent's land was a good investment, either expressly or impliedly by such techniques as quantifying a predicted return (e.g., "will double or triple in 2 to 5 years"); pointing out the profits on land already made in the same or other areas (e.g., Mr. Levitt's "millions and billions"); generalizing about the advantages of land investment in a context where such generalization is likely to be applied to the facts at hand (e.g., "better return than stocks and bonds"); and many other representations whose import cannot be mistaken *under the circumstances*. Perhaps the most effective representation that lots at Respondent's subdivisions are a good investment has been calling attention to the price record itself: the history of constant, huge in-

creases—and no decreases—in Respondent's list prices (*see* Figure 9) [p. 1420] to which Respondent's salesmen have always been able to point (TR 7503).

209. We conclude that Complaint Counsel have proved by a heavy preponderance of the evidence that at least until well after the start of the investigation preceding this Complaint¹⁵⁰ Respondent has affirmatively represented the "homesite" lots in its developments to be good investments.

3. No resale risk

210. Complaint Paragraph 15 charges Respondent with failing to disclose affirmatively to prospective purchasers that its lots are a risky investment because, among other things, the purchaser will probably be unable to sell his lot except by taking a loss on it.

211. The record here contains many loose statements by Respondent's salesmen broadly negating *all* risks of *any* sort:

considered a no-risk investment (TR 9651)

bound to go up (TR 5552) [167]

always going up (TR 7300)

constantly going to be on the increase (TR 5062)

improving at all times (TR 5385)

212. The real thrust of the Complaint, however, is directed as just noted, to the particular "risk", if it can be called that, of inability to resell a lot for as much as the purchaser paid Respondent for it. There is no question but that the ability to resell Respondent's lots has been very much on the minds of most of Respondent's customers—investment minded as they are—and accordingly on the tongues of its salesmen.

(1970) *Consumer Benchoff*: He (the dinner speaker) said yes, there was *definitely a resale* of property (at Silver Springs Shores). . . . [I]f people invested their money they would have no trouble *selling or reselling* the land (TR 4294)¹⁵¹ (emphasis added).

(1971) *Consumer Cameron*: [H]e did say *you could sell it* (land at Rio Rancho) at a later date (TR 5003) (emphasis added).

(1972) *Consumer Martire*: . . . [T]hey said there would always be a resale value. Like, I think they mentioned they wouldn't sell it for you but *you could always sell that property and always find buyers*. I don't remember the exact words but (they) did indicate that (TR 7766) (emphasis added). [168]

(1972) *Salesman Jarrett*: AMREP Corporation is not in the business of resale but

¹⁵⁰ This is not, of course, to be misconstrued as a finding that such representations thereafter ceased.

¹⁵¹ For the same assurance by her salesman, *see* TR 4295; *also* TR 4275.

there are several brokers in Santa Fe. You would have no problem (TR 10341) (emphasis added).

- (1972) *Consumer Torres*: . . . [I]t would be a good investment to buy land in Florida; *you can always sell it afterwards*.

* * * * *

[H]e said it was an investment and *you could always sell the land* a few years from now and get back what you had paid for it and make a profit (TR 7898-99) (emphasis added).

- (1973) *Consumer Pallas*: (referring to the 3,000 acres of Rio Rancho still unsold, his salesman said) As soon as these were sold, then the resale market, then people would have to be buying from other property owners rather than from the company, and that the property value would increase (TR 5737).

- (1973) *Consumer Bongers*: Q. What did he (salesman Williams) say about resale? A. That any time we felt that we wanted to resell it that *it would be very easy to sell* (TR 8453) (emphasis added).

- (1973) *Consumer Odrobina*: Q. Did he tell you anything about resale of land? A. Yes, *he said it was easy to turn a quick profit on it* because of the amount of people that were coming out and purchasing homes and new land was needed to build on (TR 9818) (emphasis added). [169]

- (1973) *Consumer Grimaldi*: [H]e said that *if we wanted to resell, we would be able to do so* through a local Florida real estate [broker] but that they (Respondent) did not handle that (TR 4784) (emphasis added).

- (1974) *Consumer Raimondi*: [W]e would have no problems if we changed our minds and wanted to sell the property. . . . (TR 5129) (emphasis added).

- (1974) *Consumer Roomey*: It was a good investment; *we could sell the property if we decided to*.

* * * * *

She said, about selling the property *it would be easy to sell once you purchased it*. The value of the property always goes up and *it would be easy to sell* (TR 7164).

213. The foregoing leaves no serious doubt that Respondent not only omitted to disclose to prospective purchasers the real risk that they might not be able to get their money out of this investment but affirmatively represented time and again that there was a ready market for such land and no risk of loss whenever the purchaser from Respondent might want to resell it.

214. The Administrative Law Judge does not, however, adopt the further contention of certain of Complaint Counsel's witnesses¹⁵² that Respondent went beyond assurance of [170] resaleability to guarantee of resale (or at least a promise to handle resale efforts for the purchas-

¹⁵² Consumer Muzzillo claimed he was told in 1973: "You're not going to lose. . . . In the event you want to sell we will buy it back" (TR 7243-46); Consumer Freundlich claimed she was told in 1969: "[Y]ou will have no problem in selling it. There will be resale offices opened for people like you" (TR 4183). Consumer Bongers testified: "If we wanted them (Respondent) to handle it (resale) they would be happy to handle it" (TR 8453).

er whenever so requested). In this respect the record shows that during a brief period there may have been a plan to open a company resale office at Rio Rancho but it was quickly abandoned (TR 21302-03). It may be, as Salesman Bondy testified, that some customers were told there would be a company resales office at that development once it was about sold out (TR 7589). However, our considered judgment, after weighing all credibility factors, is that, while Respondent frequently gave assurances that its lots could be resold without difficulty, it did *not* usually give assurances that *it* would do the reselling (or guarantee any particular sale price) and we so find.

C. The facts concerning these three representations

1. Rio Rancho Estates

215. We come at last to the crux of this case. Has Respondent really given its customers the bargain price, the profit potential and the safe investment that it has constantly assured them would be theirs with the purchase of a lot at any of its subdivisions? Or, if not, has it at least given fair warning of known risks, including particularly the unmarketability or illiquidity of such land? Each of these questions turns to a considerable extent on one issue: *What is the real value of Respondent's land (outside the so-called "building areas")?* Once that question is answered, answers to the other questions tend to fall into place.

a. *True market value of lots*

(1) Appraisal evidence

216. With respect to the current market value of land at Rio Rancho Estates (here as always the chief concern of [171] the case) both sides rely heavily on the opinions of their expert appraisers. Testifying for Complaint Counsel was a distinguished Mississippi appraiser named Mann, who has been, among other things, National President of the American Institute of Real Estate Appraisers (TR 3329). Testifying for Respondent was a New Mexico real estate appraiser named Godfrey who has had numerous professional honors and in 1978 was national Chief Examiner for Demonstration Appraisal Reports for the American Institute of Real Estate Appraisers (TR 23491-92). Both are Members of the prestigious Appraisers Institute ("M.A.I.'s")¹⁵³ and both are undoubtedly professionally qualified to express opinions as to the market value of Rio Rancho land.

217. We take this occasion to state, however, that we have relied on such opinions as little as possible, particularly where (as in selecting "comparable" land prices) there is room for wide differences of opinion. It is our experience over many years that the opinions of paid

¹⁵³ TR 3324 (Mann); TR 23488-89 (Godfrey).

forensic experts invariably, support the positions of their forensic employers. This limitation on the credibility of expert testimony applies to the experts on both sides, although we should also add that in this case we were inclined, after hearing both appraisers testify, to give greater credit to Mann than to Godfrey.

218. Mann was asked to give his expert opinion as to the true market value of eight "typical" lots at Rio Rancho Estates (TR 3394). The first two of these "typical" lots (one zoned residential and one commercial) were pre-selected by Complaint Counsel and the remaining lots (all zoned residential) were randomly selected by Mann from pre-selected units chosen by Complaint Counsel to obtain complete geographic distribution of the "typicals" throughout the project (TR 3348-49). All were lots already sold by Respondent and Mann accordingly used the term "resale value" but by this, he explained, he meant nothing more than the general term "market value" (TR 3351). [172]

219. Mann made a careful and intensive investigation of these eight "typical" lots in their distinctive market setting (TR 3356-63, 3373-79) relying for his appraisal of their value primarily on the level of comparable values in the vicinity (TR 3345). His "comparables" consisted largely of two groups of transactions: (1) 16 resales of Rio Rancho lots handled through Albuquerque's Multiple Listing Service ("MLS") between 1970 and 1976 and several dozen resales at public land auctions held in Albuquerque between 1975 and 1976. We deal separately with each.

220. The 16 MLS resales were the *only* sales that MLS brokers were ever able to make out of a total of 878 vacant lots in Rio Rancho listed with it by customers of Respondent for resale. [We deal later with the striking fact that 98 percent of such listings could not be sold at all; at this time we are concerned solely with the prices brought by the two percent which could be sold.] The relevant data for each of these 16 MLS transactions (year of sale, location by unit, lot size, zoning, price and *pro forma* price per acre)¹⁵⁴ are shown in Figure 12.¹⁵⁵ [173]

Figure 12

Sixteen MLS Resales of Rio Rancho Lots (1970-75)

Mann Resale No.	Unit	Lot Size	Zoning	Year	Price	Price/Acre (pro forma)
#1	1	.5 acre	Residential	1970	\$1250	\$2500
#2	2	1 acre	Residential	1973	\$2400	\$2400
#3	3	2 lots	Residential	1972	\$2500	\$1250
		1 acre each				
#4	4	.5 acre	Residential	1972	\$850	\$1700

¹⁵⁴ *Pro forma* price per acre calculated by Administrative Law Judge.

¹⁵⁵ See CX 263, p. 7, Mann's summary of selected data found in CX 200 (MLS Vacant Land Listings). A statistical summary of listings and sales resulting therefrom is found in CX 201.

<u>Mann Resale No.</u>	<u>Unit</u>	<u>Lot Size</u>	<u>Zoning</u>	<u>Year</u>	<u>Price</u>	<u>Price/Acre (pro forma)</u>
#5	4	2 lots - 1 acre each	Residential	1970	\$2900	\$2900
#6	4	.5 acre	Residential	1970	\$1250	\$2500
#7	6	2 lots .31 acres each	Commercial	1971	\$5500	\$8400
#8	7	.5 acre	Rural	1971	\$1200	\$2400
#9	9	2 lots 1.21 acres total	Rural	1971	\$3200	\$2645
#10	10	.53 acre	Residential	1971	\$1700	\$3200
#11	16	.5 acre	Rural	1971	\$2000	\$4000
#12	16	2 lots 1 acre total	Rural	1971	\$3950	\$3950
#13	16	.5 acre	Residential	1970	\$2876	\$5762
#14	16	.5 acre	Residential	1972	\$1500	\$3000
#15	22	.5 acre	Residential	1971	\$2000	\$2000
#16* [174]						

* Data for Mann's Resale #16 is uncertain on this record.

221. It will be observed from Figure 12 that after factoring out the four sales in Unit 16 (which averaged \$4,175) and the so-called "commercial" lot in Unit 6 (\$8,400) the remaining lots, all but one in the hinterland, brought an average of \$2,350/acre on resale. At first glance this might seem a fair basis for an appraisal and Mann did, in fact, give the sixteen MLS resales some weight in forming his opinion of the value of Rio Rancho land.¹⁵⁶ However, when combined with the circumstance that the other 98 percent of all vacant lots listed with MLS could not be sold at all,¹⁵⁷ elementary economics suggests that what we are seeing here is simply the tiny top of the demand curve: the few consumers who for various reasons will pay a good deal more for a given product than will the great majority. This inference is confirmed by the lower level of resale prices revealed by the more recent land auction evidence to which we now turn.

222. These land auctions were held in Albuquerque by a Rocky Mountain Land Auction Co. of Denver, Colorado at various times during 1975 and 1976.¹⁵⁸ Complaint Counsel's expert, Mann, talked with builders who had patronized these auctions and he obtained information on the prices they paid for lots at Rio Rancho Estates (TR 3358, 3374-75) as a basis for his appraisal. The price evidence, itself,

¹⁵⁶ TR 3356, 3361, 3692.

¹⁵⁷ CX 258.

¹⁵⁸ The testimony of Albuquerque broker Heinz concerning his connection with and attendance of a Rocky Mountain auction held on 8/23-24/75 (TR 11346-11353) was stricken by the Administrative Law Judge as not properly noticed during pretrial but he added that if he was wrong the Commission would "know what to do with it" (TR 11355). The ruling was wrong and the testimony is now reinstated and CX 562 and CX 563, which were identified for the record at TR 11349 but never offered in evidence (presumably because the surrounding testimony had been stricken) are now admitted into evidence.

however, came in independently through the mouths of the builders themselves. [175]

223. It appears that a very large number of Rio Rancho lot owners patronized the Rocky Mountain auctions. A list of the lots to be sold at an August 1975 auction contained 1,453 items (CX 562-63). Moreover, Mann, in forming his valuation opinion, relied on what he considered reliable evidence that there were about 3,000 items, mostly located in Rio Rancho, listed for a November 1975 auction; of these only about 65 could be sold (CX 391, p. 2).¹⁵⁹

224. Because the testimony here was couched in aggregates and usually did not identify individual lot items as to unit¹⁶⁰ or lot size¹⁶¹ the auction evidence is more general than the MLS evidence, but for the purposes used here entirely valid. The relevant auction data are shown in Figure 13: [176]

Figure 13

Auction Prices for Undeveloped Rio Rancho Lots (1975-78)

<u>Builder</u>	<u>TR Reference</u>	<u>Year of Sale</u>	<u>Lot Price</u>	<u>Acre/Price (pro forma)</u>	<u>No./lots purchased</u>
Bradley	TR 2163	1975 (Oct.)	\$500	\$1000	17 lots
			\$600	\$1200	4 lots
			\$650	\$1300	1 lot
	TR 2165	1975 (Dec.)	\$500	\$1000	10 lots
			\$600	\$1200	1 lot
Douglass	TR 2166	1976 (Feb.)	\$600-\$800	\$1200-\$1600	7 lots*
	TR 10069-72	At "an auction" From "Uncle's Real Est. Co."** In "open mkt." 1976-77***	\$500-\$800	\$1000-\$1600	5-6 lots
			\$1000	\$2000	3-4 lots
			\$500-\$800	\$1000-\$1600	20-25 lots****
			(most)	\$1000-\$1500	
Huckaby	TR 19822-24, TR 19871	1975-78	\$800-\$2200	\$1600-\$4400	8-9 lots [177]
			(a few)	\$2000-\$3000	

* Excludes one Unit 16 lot at \$1673 (= \$3346/acre).

** Not an auction price.

*** Not an auction price.

**** Excludes one Unit 16 lot at \$3000 (= \$6000/acre) and 1 "commercial" lot at \$10,000 (= \$20,000/acre).

225. On the basis of the foregoing¹⁶² and, of course his expert judg-

¹⁵⁹ The 3,000 lot figure is also found in Mann's written report to Complaint Counsel (CX 263, p. 9) but this portion of the report was not admitted into evidence here.

¹⁶⁰ However, Unit 16 prices were carefully segregated at trial here (TR 2166, 2177, 2196, 10072) and the other units, forming the hinterland, may logically be treated as fungible for present purposes.

¹⁶¹ However, builder-witness Douglass indicated that virtually all the lots he bought were half acres (TR 10072-73) and builder-witness Bradley seems to have said the same (TR 2183, 2205). We have accordingly assumed auction prices are stated for half-acre lots unless full acre size is other indicated.

¹⁶² Mann also collected data as to listing prices at Rio Rancho (CX 263, p. 8) but testified that listings, being mere asking prices, are of negligible value to an appraiser (TR 3361).

ment, in which we concur, Complaint Counsel's expert Mann reached conclusions as to the current (1976) market value of each of the eight "typical" lots he was retained to appraise. His valuations, which we find to be accurate, are shown in Figure 14:

Figure 14
Mann's 1976 Appraisal of Eight
"Typical" Rio Rancho Lots

Mann's "Typical" No.	Unit Location	Lot Size	Mann's Appraisal*	Acre Value (pro forma)**
1	25	2 lots 1/3 acre each	\$250	\$750/acre
2	24	6/10 acre	\$500	\$800/acre
3	3	1 acre	\$1000	\$1000/acre
4	20	1/2 acre	\$1000	\$2000/acre
5	7	1 1/4 acres	\$1000	\$800/acre
6	16	1/2 acre	\$2000	\$4000/acre
7	11	1/2 acre	\$1000	\$2000/acre
8	26	1 2/3 acres	\$1000	\$600/acre [178]

* Data from CX 263, pp. 21-46. For Mann's revision of his original appraisals of Typicals 4 and 8, see TR 3394, 3693.

** Calculated by Administrative Law Judge.

226. With the establishment of a true market value for each of Mann's eight "typicals" as of 1976, we may now compare these true market values with two different evidences of Respondent's actual selling prices: (1) the "first purchaser price" for which Respondent sold the lot to the present owner (or a predecessor in title); and (2) in a limited number of cases where evidence is available, Respondent's list price for the same lot in 1976. All three are compared in Figure 15:

Figure 15
Rio Rancho Prices and Values

Comparison of current market value, current list price and Respondent's price to first purchaser of selected lots
(all price data converted *pro forma* to one acre prices)

"Typical" No.	Unit	Appraised Market Value (1976)*	Respondent's "First Purchaser" Price**	Mo./Yr. Of "First Purchase"	Respondent's Current (12/74) List Price***
1	25	\$750	\$11,300	1/71	NA
2	24	\$800	\$4241	9/70	\$6200
3	3	\$1000	\$2495	3/68	\$6650
4	20	\$2000	\$5800	7/73	NA

"Typical" No.	Unit	Appraised Market Value (1976)*	Respondent's "First Purchaser" Price**	Mo./Yr. Of "First Purchase"	Respondent's Current (12/74) List Price***
5	7	\$800	\$2721	9/69	NA
6	16	\$4000	\$5010	3/69	NA
7	11	\$2000	\$2895	11/67	NA
8	26	\$600	\$3396	11/72	\$6200[179]

* From Figure 14.

** TR 24297-98 (conversion to *pro forma* acre price calculated by Administrative Law Judge).

*** From CTX 34Q.

227. Careful study of Figure 15, which is one of our most important findings of fact, reveals that Respondent has been selling Rio Rancho lots at prices far in excess of their true market value. Omitting Typical #6 (because it is located in the Unit 16 Complex) and Typical #1 (because under Respondent's bootstrap zoning it was sold as a "commercial" rather than a "residential" lot), the first purchasers of the six other "typical" lots paid an average *pro forma* per acre price of \$3,588 for land which even in 1976, several years after such purchases, had an average *pro forma* per acre value of only \$1,200 or 33 percent of the original sale price.

228. Unfortunately, the record evidence permits a comparison of current market values with Respondent's current list prices in only three of the six residential "typicals" outside Unit 16 (Typicals #2, 3 and 8). All three examples, however, point clearly to another important point. Respondent's average per acre list price for similar lots in the same Units has, since 12/24/74, been about \$6,300 as compared with the average 1976 value of \$1,200.

229. With Respondent's customers long paying three times true market value (even as appraised in 1976) and with Respondent's list prices now pegged at five times said true market value, it becomes clear not only that Respondent's customers have not only *not* been getting "a bargain investment" but that they have been getting the worst of a very bad bargain. If Respondent's barren, distant and largely undeveloped lots cannot quite be described as "utterly worthless", it is nonetheless clear that Respondent's sales of those lots at the price charged may fairly be described as "unconscionable" and we so find.

230. It remains to dispose of Respondent's rebuttal evidence concerning price/value comparisons. We noted above that Respondent relied largely on the expert testimony of local appraiser Godfrey concerning comparable market values. As we interpret his evidence, however, most of it was not really "comparable" and in any event the factual bases for his opinions were generally not independently proven, as were the MLS and auction evidence in the case of Mann's

appraisals. Ironically, while Godfrey's "comparables" are naturally higher than Mann's, they still do not reach the level of Respondent's list prices. [180]

231. Respondent first asserted that it intended to have Godfrey testify to some 800 "comparables" but the Administrative Law Judge ordered a limitation of such testimony to Godfrey's best 25 (later expanded to 32) "comparables" (TR 23774-75). Of the 32 only about 25 percent are usable for the following reasons.

232. Eight of the lots¹⁶³ are not even vacant. They are "improved" lots (*i.e.*, land with a house on it). This requires the value of the house to be factored out: an extra judgmental operation which leaves inordinate leeway for the use of a discretion we are not prepared to entrust to that most partisan of all witnesses, the expert—at least as long as vacant lots which do *not* require such treacherous adjustments are available for comparison.

233. Seven others of Godfrey's 32 comparables are not even located in Rio Rancho Estates.¹⁶⁴ All but one of the seven are located in the little "mountain subdivisions" *east* of the Sandia Mountains (some as far as 30 miles away from Rio Rancho), a location which would obviously have a special attraction for skiers, etc. (TR 23720). One of the seven is in Corrales (TR 23759) in the fertile, green Rio Grande River Valley, which may be close to Rio Rancho but is very different in character from Rio Rancho's desert-like land.¹⁶⁵ Again we are not prepared to entrust to an inherently partisan expert the wide discretion needed to make the adjustments required to assess the "comparability" of lots outside Rio Rancho—at least as long as a fair number of "comparables" can be found inside its boundaries.

234. Finally, Godfrey's 32 "comparables" contain eight¹⁶⁶ as to which we find no dollar prices in this record. While it is true that an expert's opinion is admissible in evidence [181] despite the failure of counsel on either side to examine concerning the bases for such opinion,¹⁶⁷ we do not attach much credibility to a value opinion without some indication of the actual figures on which it is based and against which it can be checked.

235. This leaves nine usable Godfrey "comparables". Their dates and resale prices (converted *pro forma* to dollars per acre), together with Respondent's contemporaneous list prices for acre lots in the same unit are shown in Figure 16: [182]

¹⁶³ Godfrey's comparables #1 through #8 (TR 23673-85).

¹⁶⁴ Godfrey's comparables #26 through #32 (TR 23715-22, 23754-59).

¹⁶⁵ See picture of this area in Respondent's sales brochure CX 32F.

¹⁶⁶ Godfrey's comparables #16, #17, #18, #19, #20, #21, #23, #24 (TR 23701-12).

¹⁶⁷ Federal Rules of Evidence, Rule 705.

Figure 16

Respondent's List Prices vs. Godfrey's "Comparable" Resale Prices (\$/acre)*

Godfrey's "Comparable" No.	Unit No.	Date of Resale	Per Acre Resale Price (pro forma)**	Respondent's Latest List Price (12/24/74)***	Resale Price As % of List Price****
9	7	5/28/70	\$3200	NA	—
10	17	6/21/71	\$3990	NA	—
11	13	2/16/72	\$3481	NA	—
12	8	10/ /73	\$3522	\$7100	50%
13	24	10/ /74	\$3833	\$6200	62%
14	1	6/ /75	\$5000	\$6200	81%
15	23	1/20/76	\$7332	\$6200	1.18%
22	3	5/5/76	\$4000	\$6650	.60%
25	4	7/3/74	\$6265	NA	— [183]

* Transcript references to Godfrey "comparables" and data for each include the following: Godfrey #9: TR 23687-89, 23769-70; Godfrey #10: TR 23690-91, 23771; Godfrey #11: TR 23691-93, 23762-65, 23771; Godfrey #12: TR 23692-93, 23771; Godfrey #13: TR 23693-95, 23771; Godfrey #14: TR 23697, 23766, 23771; Godfrey #15: TR 23699, 23768, 23771; Godfrey #22: TR 23710, 23728-29; Godfrey #25: TR 23712-15.

** Pro forma conversion to \$/acre calculated by Administrative Law Judge.

*** CTX 34.

**** Calculation by Administrative Law Judge.

236. We conclude this summary of Godfrey's Rio Rancho appraisal by noting his ultimate opinion that the least value one acre lot at Rio Rancho is now worth \$5,000.¹⁶⁸ In contrast, it appears that ever since the end of 1974 Respondent has been selling acre lots for no less than \$6,200-\$7,100,¹⁶⁹ at least when making sales.¹⁷⁰ In general, therefore, Godfrey's appraisal, even if we were to accept it, would show that Respondent has been selling its Rio Rancho lots at excessive—not at bargain prices.

237. However, we do not accept Godfrey's appraisal. None of the price evidence on which it is based is in the record other than as a basis for Godfrey's opinion and this is not just a technical failure of proof but a substantive deficiency. Indeed, the structure of that opinion is so deficient in probative value that we accord it no weight. Instead, we now accept Mann's opinion from the independently proven MLS and auction evidence of resale prices: that over the years Respondent has not only sold no bargains at Rio Rancho but has sold its land at such a premium over true market value as to amount to positive unconscionability.

(2) Non-price evidence

238. Thus far our effort to appraise the true market value of Re-

¹⁶⁸ He also opined that the least valuable *half-acre* is worth \$3,500, assuming it carries a building exchange privilege.

¹⁶⁹ See price schedule effective 12/24/74. Acre lots in Units 1, 2, 6, 23, 24 and 26 sell for \$6,200. Those in Units 3, 5 and 22 sell for \$6,650. Those in Units 4, 8, 12 and 21 sell for \$7,100 (CTX 34Q).

¹⁷⁰ Respondent's sales operations were "drastically reduced" after bringing of this Complaint (CX 459D).

spondent's undeveloped land has been primarily by comparing Respondent's selling prices with the prices obtained by its customers when they tried to sell comparable land at Rio Rancho. However, comparable sale prices are not the only evidence which can be helpful for this purpose. [184] Indeed, the ultimate in lack of value is a lot nobody wants. It may well never be the subject of a sale and is therefore useless for the kind of price comparison which is the appraiser's usual stock in trade (TR 3356).

239. Here we have already seen indications of a huge imbalance between the supply of land and the demand for it around Albuquerque where there is apparently enough buildable land *other than Rio Rancho* to take care of Albuquerque's probable growth into *the early years of the 21st century* (TR 2629, 2659-60). With such a gigantic imbalance of supply and demand it would not be surprising to find the emergence of surplus lots, lots so relatively undesirable that they simply cannot be sold at existing price levels and perhaps not at all. What we shall now see developing at Rio Rancho Estates looks very much like this.

240. As we have heretofore indicated, the most striking evidence of the growth of surplus lots (those which are for sale but apparently cannot be sold) is found in the records of Albuquerque's Multiple Listing Service. We have studied the (resale) prices obtained for 16 Rio Rancho lots resold through MLS between 1970 and 1975. Far more important, however, as we stated in that connection, is what the broker-members of MLS found they could *not* sell. Exhibits CX 200 and CX 201, with the aid of a tabulation thereof (CX 258A-D), reveal that of 724 MLS listings of vacant lots at Rio Rancho between 1969 and 1973 only the 16 already referred to were sold (at least through MLS or its members). Of 153 additional listings between 1973 and 1975, *none* resulted in a sale through MLS. Combining these statistics, it appears that *between 1969 and 1975 MLS brokers were unable to sell more than about 2 percent of the 877 vacant lots at Rio Rancho listed with MLS* (CX 202 and CX 258).

241. In view of the many sellers' inquiries MLS was receiving about selling vacant Rio Rancho lots (TR 2131), MLS's attorney drafted a form letter,¹⁷¹ approved by the Board of Realtors on 2/13/74, which was thereafter sent out (usually 1-3 per day) in answer to such inquiries (TR 2137). [185] This form letter, *which was prepared over a year before issuance of this Complaint*, explained that MLS was not forwarding to the inquirer the usual list of local realtors from which to choose:

¹⁷¹ The record does not indicate that any of MLS' 877 listings were subsequently sold by anyone else.

For your information, *our records reflect that there is little, if any, local market for resales of tracts in this particular subdivision.*¹⁷² Our Multiple Listing Service records reflect that during the past three years we have received approximately 690 listings of properties within the area and that there have been approximately 20 sales of listed properties¹⁷³ (emphasis added).

If the correspondent was still interested in listing his lot despite this warning, MLS would be glad to furnish its membership roster, the letter concluded.

242. To similar effect was the testimony of Paul Heinz, one-time Rio Rancho salesman turned independent Albuquerque broker in 1971 (TR 11320). Heinz made a special effort to broker Rio Rancho resales and nearly went bankrupt in the process, even though he persuaded 468 would-be sellers to pay him \$25 (later \$50) apiece as an advance on a sale fee (TR 11323-24, 11335). *He estimated that he had probably received a total of 2,500 inquiries about the possibility of listing Rio Rancho lots, yet neither he nor any other MLS broker, to his knowledge, was ever able to negotiate a single sale of any of these listings* (TR 11334). Even before MLS prepared its form letter to discourage listing, Heinz was sending inquirers one of his own, dated July 1, 1973. It included the following statement: [186]

Re: Rio Rancho Estates
Listed 400, Expired 200
Current 200; Sold 0
Since 1 December 1971¹⁷⁴

243. Similar, too, is the story of the Clack & Hill Land Digest, a publication started just before the issuance of this Complaint in early 1975 (CX 308). Some 107 paid-in-full Rio Rancho lot-owners were persuaded to put up \$75 apiece for a listing in the Digest (TR 9980). This listing was then disseminated primarily to *out-of-state brokers* involved in this kind of selling (TR 9985) but the result was no different from the Heinz/MLS experiences. *Not a sale resulted from either the first or second edition of the Clack & Hill Digest* (TR 9986). The Clack & Hill evidence of a sales effort through conventional out-of-state brokers is of special significance, as tending to confirm that the striking contrast between Respondent's overwhelming success in selling lots and its customers' overwhelming failure to resell them must be attributed less to where the prospects lived than to the way they were approached. Such evidence supports our inference that Respondent's high-pressure and deceptive marketing techniques were a decisive factor in its sales success.

¹⁷² (In CX 1L and CX 5L, Respondent states that it expects most sales to be made outside the situs area).

¹⁷³ The sale figure seems reliable, particularly since a listing broker was required to report sales to MLS within 48 hours (TR 2075).

¹⁷⁴ CX 560.

244. It is appropriate to mention certain additional evidence confirming in a general way how few have been the resales of lots at Rio Rancho (and at Respondent's other developments, too). Complaint Counsel obtained from Respondent a print-out of all (32,956) lot-owner changes of name in its computer's memory for any purpose (CX 564). The breakdown by development was as follows:

Rio Rancho Estates	28,322
Silver Springs Shores	4,351
Eldorado at Santa Fe	83
Oakmont Shores	200
Total	32,956 [187]

245. Analysis revealed that the great bulk of these references patently did not involve sale or similar transactions (CX 564). This winnowing left a group of 2,981 name changes which might turn out on investigation to involve resales of Respondent's lots by Respondent's customers (CX 564). Accordingly, Complaint Counsel surveyed these 2,981 names by mail to determine how many resales were, in fact, represented.¹⁷⁵

246. Most surveyees never got the questionnaire or at least never returned it (CX 566) but a substantial number (863) did send in answers, distributed among Respondent's four developments as follows (CX 566):

Rio Rancho Estates	530
Silver Springs Shores	302
Eldorado at Santa Fe	19
Oakmont Shores	12

247. Of the surveys returned, the number of transactions identifiable as "Sales" (based primarily on the surveyee's designation) was as follows (CX 566):

Rio Rancho Estates	106
Silver Springs Shores	86
Eldorado at Santa Fe	0
Oakmont Shores	3

248. However, these figures should be extended by use of appropriate multipliers¹⁷⁶ to take account of the "unreturned/undeliverable"

¹⁷⁵ The mailing was actually to 2,962 names. See CX 566.

¹⁷⁶ The Administrative Law Judge has used the following multipliers (all derived by dividing returns into mailings) to make this adjustment:

Rio Rancho Estates	3.75
Silver Springs Shores	3.16
Eldorado at Santa Fe	1.26
Oakmont Shores	1.25

group, which must be presumed to have had the same percentage of resales as all other surveyees. [188] After making this adjustment, the probable number of resales turned up by Complaint Counsel's survey are as follows:¹⁷⁷

Rio Rancho Estates	398
Silver Springs Shores	272
Eldorado at Santa Fe	0
Oakmont Shores	4

249. Complaint Counsel's mail survey results would perhaps be more significant if they also revealed the numbers of lot-owners at each of Respondent's subdivisions who were actively but unsuccessfully seeking to sell their lots (as did the MLS Heinz and Clack & Hill evidence). The survey does establish clearly, however, that the numbers of resales so turned up (398 at Rio Rancho and 272 at Silver Springs Shores) are pitifully small portions (1 percent and 1 1/3 percent respectively) of the numbers of lots sold by Respondent at each subdivision by 1976: 75,134 lots at Rio Rancho (CX 459-I) and 19,426 at Silver Springs Shores (CX 459K). [The Eldorado and Oakmont Shores experiences are not usable, but not inconsistent, either.]

b. *Probability of loss*

250. Our comparison of Respondent's "first purchaser" and current list prices with true market values leaves no doubt that, despite its "bargain price" advertising, its lots were consistently and significantly over-priced, commonly at three to five times fair value. It is Complaint Counsel's position that buying prices so far out of line limit ultimate resale profit possibilities substantially and that so substantially handicapped an investment should not be promoted as a "good investment". In general this has to be right, although, somewhat surprisingly, the price/profit evidence here is somewhat less striking than the price/value evidence just reviewed. The price/profit evidence here seems to show that *if* you are one of the lucky few who somehow resell an undeveloped vacant lot at [189] Rio Rancho there is at least a chance you may break even or just possibly make a wee profit. Overall, however, the odds are very high that you will not make money on the resale.

251. Thus Complaint Counsel's Lusteck, a real estate planning consultant (TR 2557, 2560), took the 16 MLS resales between 1970 and 1975 (CX 200, CX 201) and found sufficient data for comparison of Respondent's "first purchaser" sale prices with its purchaser's resale prices. Lusteck's first calculation (CASE I) was a gross one, based simply on the difference between the purchaser's buying and selling prices, while a second calculation (CASE II) refined the result by

¹⁷⁷ Calculation by Administrative Law Judge.

deducting 14 percent from the sale price to cover commissions and other selling costs. The second is undoubtedly the correct methodology. Lusteck's results are as follows:

CASE I ¹⁷⁸		CASE II ¹⁷⁹	
High	+6.5%		+4.5%/yr.
Average	+2.4%		0.1%/yr.
Low	-5.6%		-9.9%/yr.

252. Lusteck further testified that such returns were *inadequate* to attract capital to invest in *unimproved* real estate. *Improved* real estate, he explained, typically yields something like 10–12 percent/year and, in view of the greater risk involved, unimproved land ought to return at least 15 percent to attract investors (TR 2700).¹⁸⁰ [190] Neither by this nor any other standard of which we are aware can a break-even result such as Lusteck found at Rio Rancho be thought a "good investment".

253. Lusteck's results are generally confirmed by Complaint Counsel's mail survey just referred to above. The 398 Rio Rancho resellers were further questioned as to whether they had made a profit on their resales. Adjusting the results to compensate not only for "unreturned/undeliverable" questionnaires but for "no answer or unusable" responses, it appears that of the 398 Rio Rancho resales only 30 (or 8 percent) were profitable; about 153 were approximately break-evens; and 190 actually involved losses (CX 567).¹⁸¹

254. Respondent, however, tenders the opinion of its local real estate appraiser, Godfrey, to the effect that resale profits at Rio Rancho have been higher than Lusteck's study and Complaint Counsel's mail survey would seem to indicate. Godfrey testified that his search for "comparable" properties to determine current market values led him to 115 Rio Rancho transactions, which he said yielded an average resale profit of 88 percent (TR 23671–73).¹⁸²

255. However, the record contains no evidence as to the average (or any other) holding period that preceded these allegedly profitable resales. It makes a difference. If we apply Mann's 15 percent/year rate of return rule of thumb (TR 2700), which Respondent does not seem to contest (RRB 143–44), an average holding period of just under six years would have been required to yield a satisfactory return on

¹⁷⁸ TR 2698–99.

¹⁷⁹ TR 2705–06.

¹⁸⁰ Lusteck called 15 percent "really a conservative return for investment in unimproved real estate." Respondent apparently does not contest the 15 percent standard (RRB 143–44).

¹⁸¹ These are not, of course, the figures that appear in CX 567. The adjustment described above was made by the Administrative Law Judge.

¹⁸² It is not entirely clear whether Godfrey considers *selling* costs in determining the profit or loss on a real estate investment. He clearly does not include *holding* costs such as taxes or interest (TR 23690, 23728). If Godfrey did not deduct selling costs, the estimated 88 percent resale profit should be reduced by 14 percentage points to 74 percent.

the investment. But we have no way of knowing [191] what the average holding period was and thus no way of calculating the average annual rate of return or, indeed, much of anything else about Godfrey's methodology (TR 23772).¹⁸³

256. Nor are we helped by the seven specific examples of allegedly profitable resales of Rio Rancho land which Godfrey read into the record as a basis for his price/value opinion (TR 23772-73).¹⁸⁴ Godfrey apparently omitted to deduct *selling cost* or to specify the *holding period* necessary to yield the reported profit. Indeed, he failed even to identify the *location within Rio Rancho* (i.e., the Unit) involved in any of his seven examples (or any others of the 115 transactions, for that matter).

257. Since the case here turns largely on the fundamental distinction between an attractive but small developed core area—what we have called the Unit 16 Complex—and a large, barren, largely undeveloped area around it—what we have called “the hinterland”—failure to specify the Unit in which an “example” is located is fatal. Moreover, there is no independent evidence to which reference can be made to supply these missing facts (the seven “examples” being admitted merely for the limited purpose of illustrating one basis for Godfrey's price/value opinions). Accordingly, we find that Godfrey's effort improve the resale profit picture painted by Mann and Complaint Counsel came to nothing. We give it no credit.

c. Investment risk

258. How much you can make on a resale of property is important only if you can make a resale. It must always be borne in mind that the rate of return studies reviewed [192] above apply to the tiny percentage of lots at Rio Rancho which somebody has been willing to buy, notably the 16 vacant lots resold through Albuquerque's Multiple Listing Service out of the huge number (877) unsuccessfully listed for sale (CX 258A-D). For MLS' other 861 listing owners, for the 2,500 lot-owners who sought help unsuccessfully from broker Heinz (TR 11334), for nearly 1,500 owners who tried to get rid of their lots through the Rocky Mountain auctions, and for others (CX 562-63),¹⁸⁵ the harsh reality has been that they are stuck with something for which there is no market. Whatever they paid was too much; whatever Respondent got for its lots had to be unconscionable.

259. Faced with the massive unmarketability of so many of the

¹⁸³ (“I have no concept of the numbers being used.”)

¹⁸⁴ Godfrey's price example (a purported profit of 515 percent over some period) is an obvious error. See CCPF 117.

¹⁸⁵ There is also hearsay evidence in the record (CX 391, p. 2) that the 65 lots actually sold at auction in November 1975 were part of a total offering of 3,000 lots registered for the auction. This evidence is in the record, however, only to illustrate one basis for Mann's expert opinion as to the value of land at Rio Rancho, see TR 3764. Accordingly, we rely on it only in that indirect way.

75,000 lots sold off by Respondent by 1976 (CX 459-I), Respondent has argued that such unmarketability is nevertheless of a temporary nature and was, in fact, brought on by the adverse publicity attendant on the Commission's issuance of this Complaint on 3/11/75 (RPF 18-19). There is a first-blush plausibility in such an argument but the argument will not withstand scrutiny. As we have seen above, it was as early as 7/1/73—*more than a year and a half before this Complaint issued*—that broker Heinz began sending out the discouraging word that a lot owner's chance of marketing a Rio Rancho lot had been close to nil: *a year before this Commission started its investigation*:

Re: Rio Rancho Estates
Listed 400; Expired 200
Current 200; Sold 0
Since 1 December 1971.¹⁸⁶ [193]

Moreover, it was on 2/13/74, still more than a year before issuance of this Complaint, that the Multiple Listing Service began sending out its warning that "our records reflect that there is little, if any, local market for resales of tracts in [Rio Rancho Estates], etc." (CX 202).

260. It is manifest that the glut of unsaleable lots at Rio Rancho antedated the publicity attendant on issuance of this Complaint (3/11/75 and thus could *not* have been caused by the Complaint. Rather, it is an inherent problem of long standing and likely to last an even longer time. In this conclusion we are strongly supported by Complaint Counsel's real estate planning consultant, Lusteck, whose expert opinion it is that:

Reasonably expectable future economic and market conditions in the Albuquerque SMSA cannot possibly support the ultimate absorption¹⁸⁷ of all of the lots platted at Rio Rancho Estates within a reasonable period of time (*i.e.*, 30 years).¹⁸⁸

* * * * *

[We were] led to the conclusion that a vast oversupply of lots in this type project exists relative to the potential for their ultimate utilization.

* * * * *

Data study and evaluation undertaken indicate that absorption [within the 30 years] could be expected for only about four percent of the lots platted (TR 2659-60) (emphasis added). [194]

261. We have found that the inability of hundreds of purchasers of Respondent's lots outside the Unit 16 complex to resell their lots reflects a massive disequilibrium between supply and demand. Some of those lots may be sold by substantial price-cutting and some may be sold even without price-cutting because some buyers will pay the

¹⁸⁶ CX 560.

¹⁸⁷ Lusteck defined "absorption" as "land in use" (TR 2630).

¹⁸⁸ "A reasonable period of time" was defined for this purpose as being 30 years (TR 2629).

kind of prices that Respondent, with its high-pressure and deceptive marketing techniques has been able to get. There may well be some such potential buyers in any demand curve. However, the glut of lots for sale at Rio Rancho is of such proportions that it is likely to be with us many years. It will continue to give the lie to all those optimistic assurances of Respondent's salesmen and sales brochures that customers are getting a good bargain and a good investment for the future which can be resold at any time desired.

262. This finding, the heart of the case, was challenged by Respondent through so-called expert witness, Charles Elias, on whose testimony we feel bound to comment. Elias is employed by a business economics research center on the Fullerton Campus of the State University of California to promote "a closer relationship between business and the community" and doubles as a part-time associate with a firm which counsels residential developers in the Los Angeles area (TR 23808). In Respondent's employ as an expert witness here, he solemnly concluded that the mere inability of Rio Rancho owners to sell their lots at present does not necessarily indicate any long-run infirmity in the investment (TR 23880-81).

263. Any wise investor, Elias explained, determines before making an investment what his "holding period" is.¹⁸⁹ [195] What happens during that "holding period" such as an unsympathetic attack by a regulatory agency like FTC, may hurt sales temporarily but does not affect the long-run value of the investment, if the owner is willing and holds on (TR 23899, 23940). (He viewed 10-15 years as a reasonable "holding period" for himself and thought even a century might not be too long for some people (TR 23893-94), explaining that "the descendants will realize the gains" (TR 23942).

264. We have already concluded that the massive glut of land at Rio Rancho is no temporary phenomenon. Even if some investors prove hearty enough to survive the glut, a good many investors will want to get their money out sometime before the 21st century. Indeed, as we have just seen, the record reveals hundreds of them who apparently want it right now. Elias' theorizing seems little more than an admixture of nonsense and double talk. We reject it.

265. We reject, too, Elias' ultimate opinion that current prices at Rio Rancho Estates, being "unduly depressed by current regulatory problems" (TR 23940) are lower than true investment values (TR 23860, 23955-56). Elias, who found that "the press of time and the

¹⁸⁹ [T]he investment value of an asset doesn't depend on its immediate market price or marketability. It depends on the estimate by the purchaser of the returns over time that he thinks that asset will throw off (TR 23830).

The estimate of value by the investor depends on his perception of the forces that are going to impact that particular property. And there may not be a market place transaction which squares with the investment value. . . . The investment value calculation is based on the commitment for a period of time. The market value is today's value in a market transaction (TR 23861).

resources available" did not permit him to see much of Rio Rancho or visit impartial local sources of information (TR 23856, 23914-17), made no independent study of the market. His [196] own opinion was *expressly* based on Godfrey's opinion as to market values¹⁹⁰ and his estimate of the overall supply/demand situation was equally expressly based on the opinions of another of Respondent's experts, Fawcett (TR 23856-58).¹⁹¹ The law is crystal clear that an expert may not base an opinion on the opinion of another expert:

It is generally agreed that the opinion of an expert, however qualified to speak, cannot be predicated either in whole or in part upon the opinions, inferences, and conclusions of others, whether expert or lay witnesses.¹⁹²

Accordingly, we give no weight to Elias' opinion as to the investment value of lots at Rio Rancho Estates, built as it is, on improper foundations. We add that our estimate of his credibility and that of his fellow investment expert, Tischler, was not high. [197]

2. Silver Springs Shores

266. Although the profitability evidence is thinner for Respondent's other subdivisions than for Rio Rancho Estates, the general tenor of all the evidence is similar.

267. The results of Complaint Counsel's mail survey at Silver Springs Shores when adjusted for "unreturned/undeliverable" questionnaires¹⁹³ and "unusable" returns, indicate that of 272 resales only six percent were profitable; the remaining 94 percent were split evenly between break-evens and definite losses (CX 567, as adjusted).

268. When we turn from the profit evidence to the supply and demand evidence, the undesirability of investment in Respondent's lots at Silver Springs Shores becomes even more plain. Witness Cepeda, Chairman of the Ocala Multiple Listing Service (MLS) (to which 62 of Ocala's 75 brokers belong), testified that during 1973-74 MLS had 24 listings of lots in Silver Springs Shores and only one sale (CX 250, CX 507; TR 6524, 6537-38). During 1975-76 MLS records did not report the number of listings but reported three resales of vacant lots (CX 504-06; TR 6525-26, 6530-35, 6961-62). This negligible traffic in

¹⁹⁰ TR 23859-60: "Mr. Godfrey indicated that he thought any lot in Rio Rancho could be appraised at \$5,000 and that a half acre with the exchange privilege would carry an appraised value of \$3500.00. . . . Based on the [Godfrey] price information, the rate of growth for prices in residential land in the area and the prospects for growth in Rio Rancho, I came to the conclusion that the purchase of lots in Rio Rancho did represent a good investment." See also TR 23934: "I understood from Mr. Godfrey that there is a good resale market but I have not looked into its characteristics." See also TR 23926-27.

¹⁹¹ ("I accepted his [Fawcett's] conclusions as representative of the facts and that's what I based my opinion of the investment value of the lots at Rio Rancho on.") See also TR 23925-26.

¹⁹² 31 *Am. Jur. 2d*, "Expert and Opinion Evidence" Section 42, citing *Manufacturers' Acc. Indem. Co. v. Dorgan*, 58 F. 945 (6th Cir., 1893).

¹⁹³ Adjustment by the Administrative Law Judge was based on a multiplier of 3.16 because of "unreturned/undeliverable" questionnaires and a multiplier of 1.16 because of failures to answer the profit questions.

resales at Silver Springs Shores is to be contrasted with almost 20,000 lots sold there by Respondent by 4/30/76 (CX 5, p. 1). While the Ocala MLS had no form letter to discourage sellers like that used in Albuquerque, Chairman Cepeda testified that his general response to inquiring sellers of Silver Springs Shores lots is that he cannot be of service, a simple reflection of past lack of success in selling these vacant lots (TR 6536).

269. Similar was the testimony of an Ocala broker named Willis Moutz. Although he never had a single inquiry from a prospective buyer of a lot at Silver Springs Shores, [198] on the average he has received three or four inquiries per month from prospective sellers. In reply he discloses the lack of prospective purchasers and routinely refuses to list such properties (TR 6601-02).

270. Another Ocala realtor, Virginia Kanninen, testified that over a 2 1/2 year period she received some 100 inquiries directly from hopeful resellers of lots at Silver Springs Shores and another 500 to 1,000 inquiries indirectly through the Ocala MLS and Chamber of Commerce (TR 6850-51). Her standard advice to all such would-be resellers is that "there is no particular market for resale lots, because at the present time the developer is still selling there. . . ." (TR 6851).

271. The supply glut evidenced by such difficulty in reselling Silver Springs Shores lots [without the help of Respondent's sophisticated marketing techniques, including high-pressure and deceptive practices], is quite consistent with what we know of the supply and demand situation. As we have previously seen, there are enough building lots in Marion County to house the projected growth of its population at the present rate for 280 years.¹⁹⁴

272. Respondent proffered as "real estate investment experts" one Elias, whom we have already met at Rio Rancho and one Tischler, who confined his testimony to Silver Springs Shores. We are concerned here primarily with Tischler, a young, self-styled "real estate economic consultant" and part-time teacher at Montgomery Community College (in a suburb of Washington, D.C.) (TR 23248, 23251).

273. Unfortunately, young Tischler's excessive dependence on his client for getting the facts and his avoidance of knowledgeable outsiders who might have given him a fair, realistic orientation, make it hard to give much credit to his opinions (CCPF 149-153). For example, Tischler assumed that Silver Springs Shores could count on "capturing" (as residents) a large percentage (perhaps half) of the almost 20,000 people who have invested in a lot there (TR 23331, 23453). He had apparently not been [199] made aware of the fact that Respondent's other Florida subdivision, Rainbow Lakes, had "captured" only

¹⁹⁴ Above, page 148. [p. 1474]

seven percent of its investors over a period of 20 years (TR 12948–57, 24167).

274. The ultimate opinion which Tischler rendered for his client was that a lot in Silver Springs Shores is a “good investment”, apparently without regard to ability or inability to sell such a lot for many years (TR 23314, 23478). He supported this opinion with argument that almost any land is a good investment and that this particular land’s location and growth potential make it an especially likely candidate (TR 23314 *et seq.*).

275. On cross-examination, however, it turned out that Tischler had never himself analyzed a single transaction involving a vacant lot at Silver Springs Shores and he admitted frankly to absolutely no knowledge as to “whether they (investors) made money, lost money or broke even . . . buying and selling the raw lot” at Silver Springs Shores (TR 23441–42). With little of value to contribute on rate of return and with no explanation for the well-documented glut of lots at Silver Springs Shores other than Respondent’s party line (temporary surplus caused by this FTC Complaint) (RPF 18–19), Tischler’s “rebuttal” testimony in our opinion rebuts nothing. Accordingly, we have no occasion to modify our initial conclusion from the Silver Springs evidence that the pattern of Respondent’s activities at Rio Rancho Estates was a fair example of what may be expected of Respondent anywhere.

3. Eldorado at Santa Fe

276. Very little evidence was produced by either side concerning the investment potential of Eldorado at Santa Fe. We have already found that there are no demographic pressures on the Santa Fe area which are bound to force up land values at Eldorado.¹⁹⁵ Complaint Counsel’s mail survey turned [200] up no resales—so, of course, no profit or loss—among 24 resale possibilities (CX 566). (Unfortunately, however, we do not know how many, if any, of the Eldorado land owners have tried to sell out).

4. Oakmont Shores

277. We have heretofore found no record evidence that Oakmont Shores, the Ozark recreational residential development taken over by Respondent and operated by it for four years, has ever been the probable beneficiary of a demographic boom likely to make its lots a good investment.¹⁹⁶ Complaint Counsel’s mail survey results are of a similar character. Twelve answers were returned out of 15 questionnaires mailed and of these 12, three had sold their lots (CX 566). Of the three sellers none made a profit (CX 567). However, without a bigger sample

¹⁹⁵ Above, page 149. [p. 1475]

¹⁹⁶ Above, pages 150–151. [p. 1476]

and evidence as to how many lot-owners wanted to get rid of their lots, the significance of these questionnaire results does not seem great. More significant evidence comes from local brokers and others.

278. Broker Roehrs could sell five to six vacant residential lots a year in other nearby subdivisions but he had no sales nor even *buyer* inquiries about 15-20 Oakmont Shores lots he multi-listed during 1972-73 (TR 8651-52). In contrast, he had a total of some 50 *seller* inquiries from 1972 on (TR 8650).

279. Broker Moore received over 110 *seller* requests to list lots at Oakmont Shores; actually listed 10; and managed to sell only one (TR 8890-95). In contrast, he had never had a *buyer* request to see a vacant lot at Oakmont Shores (TR 8894).

280. During 1973-74 Williams Realty, another local brokerage firm, took on 25-30 listings of lots at Oakmont Shores but made no sales (TR 8331-33). Although Williams Realty no longer lists vacant lots at Oakmont Shores, it continues to get 25-30 *seller* inquiries a year (TR 8332). [201] Its routine response to such inquiries is: "... [W]e do not have a market for the lots. . . ." (TR 8332) (emphasis added).

281. We think the broker evidence of persistent inability to resell lots which only Respondent, with its high-pressure/deceptive practices, can sell, viewed with the demographic evidence and Complaint Counsel's mail survey, establishes the practical worthlessness of Respondent's lots at Oakmont Shores and negates Respondent's assurances to its customers that such lots would prove a good investment and a safe one.

D. Unqualified generalizations about investment

282. From time to time we have observed the employment by Respondent of certain generalizations about investment in land, such as "land always increases in value." Respondent's obvious purpose in reciting these economic aphorisms has been to persuade prospects to invest in Respondent's lots. We might logically have discussed them under representations as to the profitability and/or safety of investment at Respondent's developments. However, such aphorisms have a unique quality in that they assert generalizations which it is up to the hearer to apply to the facts in hand. Because they raise special problems we have chosen to deal with them—both the representations and the facts—under this special heading.

283. A half dozen or more of such economic generalizations are found fairly frequently in this record. In each case the generalization contains a kernel of truth. A deceptive character is imparted to it, however, by expanding it into an unqualified assertion which serves the purposes of Respondent better than the purposes of truth. All this will become quite clear from a few examples. [202]

1. Inevitability of profit

284. *Example:* Land values all over the United States . . . are constantly going up and up and they show no signs of anything but an increase in the value of land. . . . (CX 110J)

Example: [L]and and value all over the country are going up. . . . (TR 10934)

285. It requires no expertise to know that *all* land is not constantly rising in value. There is, of course, a kernel of truth in such an assertion in that recent years have often been good ones for investors in land. However, it is in the very nature of business cycles that 1930's follow 1920's. Certainly no one who lived through the Florida Land Boom of the 1920's and its sad sequel would hazard such unqualified assertions as the two quotations above.

286. Nor is it self-evident that undeveloped desert-like land such as Rio Rancho's Unit 1, for example, is rising in value—constantly, sporadically or any other way—at least without the aid of Respondent's high-pressure/deceptive marketing practices. To say that land in Unit 1 must be rising in value because all land always rises in value is pure bootstrap. Complaint Counsel's expert, Lusteck, found at least nine factors affecting the investment potential of unimproved land (including particularly the purchase price of the lot) (TR 2703), none of which factors seem very necessary if all real estate is always moving up in value. Significantly, even Respondent's expert, Tischler (TR 23304), did not presume to make any such sweeping statement about the inevitability of profitability when laying out the reasons why he thinks real estate "in general" is a "good investment" (TR 23314).¹⁹⁷ Throwing such an unqualified and inherently unverifiable assertion into a sales talk has to be a deceptive practice. [203]

2. "Similar" land booms

287. *Example:* (After referring to *additional* bridges connecting Albuquerque with the west side of the Rio Grande River) Now, speaking of bridges, you are all undoubtedly familiar with a certain bridge and that is the Verrazano-Narrows Bridge between Brooklyn and Staten Island. Now I'm sure I don't have to remind anyone living anywhere around the New York area what land values were in Staten Island just before this bridge was built and what they are today. And in Albuquerque, only a few years ago there were only two bridges across the Rio Grande leading to our area. Today there are five bridges and six more are planned. If tonight I told you nothing more about our program than the documented story of the [Rio Grande] bridges and what they can mean to land values in Albuquerque, just as the Verrazano Bridge has influenced land values in Staten Island, I think this in itself would be sufficient for everyone seated in this room to join our program (CX 38G-H).

Example: But tonight we are going to be talking about land just 4 1/2 miles from a

¹⁹⁷ (" . . . [I]t can appreciate *faster* than *most* any other type of investment") (emphasis added).

major metropolitan area,¹⁹⁸ and in the past few years, land, real estate near a metropolitan area has increased from 80–100%. I don't have to go far to quote an example. Here is a beautiful example right here in Cherry Hill [New Jersey, across the Delaware River from Philadelphia]. You [204] know what you could have bought land here for ten years ago and what it is worth today—and that's only one of many. Bergen County, New Jersey—a square shoulder from the New York metropolitan area—I come from that area originally. I know what's happened there; you could have bought some lots for hundreds of dollars ten or fifteen years ago. Today you're talking tens of thousands. . . . Staten Island, before the Verrazano Bridge, you could have bought land very low, before the bridge, and all at once you have to pay a lot more money. . . . (CX 111D-D)

288. These two examples of Respondent's penchant for mentioning other land booms with the obvious purpose of suggesting to the listener that the same thing will happen at its own developments¹⁹⁹ is quite misleading. Replacing the Staten Island Ferry with a bridge where there had never been a bridge before is very different from adding one or more bridges to two pre-existing ones over the Rio Grande; and, of course, Albuquerque is not New York.

289. No doubt there are some aspects of similarity in the two situations but an accurate delineation of those limited similarities would require a carefulness and precision of which Respondent shows few indications in this record. Be that as it may, Respondent's bold assumption that every land boom is a fair indication of profits to come at its own developments is plainly a deceptive practice. [205]

3. Leverage

290. *Example:* Very often he [the speaker] would get into the subject of leverage, which normally we would then build upon individually, using the analysis or example of: "Ladies and gentlemen, do you know what leverage is?", which was often a foreign term to them. He would say that just as with 20 pounds of pressure with your arm and a jack you can lift up a 2000 pound car, here you can control in real estate. You can control large sums of money by putting a little bit of money down and, for example, if you put \$200 down you could be controlling something like \$2000, and that *as it improves and increases* per year at whatever percent, that would be the return you would be realizing (TR 10293–94) (emphasis added).

Example: That kind of financial leverage [controlling valuable holdings of land with low monthly payments] *does not exist in any other area of savings or investments* (CX 35K) (emphasis added).

291. There is no question that financial leverage is an important advantage of installment sales and, if Respondent limited itself to

¹⁹⁸ The statement that Rio Rancho is only 4 1/2 miles from Albuquerque is extremely misleading. It is technically correct but only as to the distance between the settled southeastern corner of Rio Rancho and Albuquerque's legal city limits. See map CX 552.

¹⁹⁹ In an analogous situation, where Respondent refers to earlier experience at the same location, the Administrative Law Judge asked the salesman's witness: "Didn't you have in mind, then, that they [prospects] would apply this lesson of the past to the future." The reply was: "We assumed that that would be the case" (TR 21158).

saying that, it might not be criticized.²⁰⁰ Its further assertions, however, cause trouble. In the first place it is *not* true that land purchase is the only form of investment where use can be made of the leverage device. In the case of stock purchases such leverage is commonly referred to as trading "on a margin" and is widely employed. [206] For a trader who wants more leverage than the Federal Reserve Board currently permits in the purchase of corporate stocks there is always the Commodities Exchange, where investments are frequently of shoestring size. In short, Respondent's advice to investors that nowhere else can they get the benefits of leverage is simply false.

292. Secondly and equally important is Respondent's one-sided explanation of the merits of leverage. Always the explanation or illustration is one in which a *profit* is multiplied by leverage; never one in which a *loss* is multiplied by leverage. Yet the leverage necessarily works *both* ways. We conclude that Respondent's handling of leverage must be deemed dangerously deceptive.

4. Comparison with other investments

293. *Example:* Well, we showed people various ways, primarily insurance, stocks and bonds, savings accounts, methods of investing money and the types of return they get on that money as opposed to what it can do in real estate . . . and then we invited them to reserve property at Rio Rancho (TR 21157).

Example: Well, they did seem to indicate that investment in real estate, particularly Silver Springs Shores, was much better than any other type of investment. Stocks and bonds certainly have a terribly fluctuating market and they seem to be rather a chancy thing to gamble on, so they indicated that real estate was the best investment and they went on to indicate the properties had been appreciating fantastically every three to six months. . . . (TR 5202-03). [207]

294. The record here is filled with accounts of Respondent's standard blackboard comparison between the relatively low rates of return on savings accounts, insurance policies and stocks and bonds and the relatively high rate of return said to be characteristic of investment in Respondent's land.²⁰¹ However, these comparisons are extremely misleading because they regularly assume a high degree of leverage for the (installment) land purchase and no leverage for any of the other investments. Since they also assume a *profitable* investment, Respondent's land always wins big.²⁰² But the "comparison" is quite unfair. Plainly both or neither of the transactions compared should be leveraged. Only then would a fair comparison be possible.

²⁰⁰ Respondent's young expert, Tischler, when listing the reasons why he thinks real estate "in general" is a "good investment", on this subject said simply that "it allows you to use leverage" (TR 23314-15).

²⁰¹ See, for example, TR 2223.

²⁰² E.g., CX 456G ("Let's recap. In the bank \$429. The stock market \$839. In real estate, AMREP property in excess of \$4500.") And see particularly the detailed description in CX 37F-H of a presentation combining the comparative investment and leverage themes.

295. Even assuming a comparison with no leverage for any kind of investment, it is impossible for anyone to make an unqualified statement that vacant land is always a better investment than stocks, bonds, insurance, savings in the bank or anything else, for that matter. One can, of course, make comparisons limited in time, place and other circumstances but even this is likely to prove meaningless, as is well illustrated by the feeble attempts of Respondent's expert, Tischler, to make some such comparison.

296. Tischler testified that in January 1966, the Dow Jones average of 30 large, old-line industrial stocks was at a record high of about 1,000 and its value in (undefined) "constant dollars" was 306 (TR 23315). A dozen years later, in December 1977, he testified, the (undefined) "constant dollar" value of the same average was only 134 (TR 23315). The significance of this fact, standing alone, seems nil, except to prove that if one picks the right starting and ending dates one can find a stock market trend in any direction desired. Be that as it may, [208] one might reasonably expect Tischler then to come up with comparable data on the rate of return from investments in land over the same period. However, he never attempted any kind of comparison, and the insurmountable problems involved in making any valid comparison seem a good reason for his omission to do so.

297. Tischler further testified that the National Association of Realtors (which he conceded was not entirely unbiased) had compared the changes in value in (undefined) "current dollars" between 1967 and 1977 for five different kinds of investment (TR 23317). It was found that for every dollar spent in 1967, in 1977 you could get \$1.23 in single-family homes, as compared with \$1.18 for corporate bonds; \$.93 for savings accounts; \$.80 for common stock; and \$.55 for cash. There is no occasion to go into the Realtors' methodology because it seems plain that single-family homes, with which the Realtors' study was concerned, are simply not the same thing as the vacant land with which this Complaint is solely concerned. The results are meaningless for present purposes.

298. In sum, Respondent's effort to demonstrate through Tischler that land is a better investment than stocks, bonds, savings account, insurance, etc. was a failure all the way around and Respondent's representations of the unqualified superiority of land as an investment in order to sell its lots must be viewed as a deceptive practice.

5. Hedge against inflation

299. *Example:* But inflation is the big bugaboo. It's ruining, its eating away at the buying power of our dollar bill. Today, we're spending a dollar which is worth considerably less than half of what it was in 1949 and where it's going in the future the Lord only knows. We should take a hedge against inflation. We should have some of our

precious dollars invested into something that will be worth more dollars as time goes along in order to offset the fact that each of these dollars will buy less and less and less (CX 456F). [209]

Example: He said with the way inflation was taking place—there was a map there showing all the dollars being eaten away—and real estate investment is the best thing today because it can double your money within a certain time (TR 7062).

300. It is no doubt generally true that during a period of monetary inflation it is wise to put a substantial part of one's resources into real assets whose value will presumably survive the deteriorating value of the dollar. It is equally obvious, however, that this depends on various circumstances, such as whether the real assets are fairly priced. Where, as here, we have found that Respondent's real estate has commonly been sold to consumers for three times its true market value, it would require a tremendous "eating away" of the dollar to make it worthwhile for a consumer to buy such a "hedge against inflation." Again, Respondent's unqualified generalization is not only inaccurately stated in theory but extremely misleading in the circumstances of this case.

E. Dramatization of rising prices and profits

301. Close study of Respondent's selling methods has convinced the Administrative Law Judge that Respondent's most powerful sales tool has probably been its dramatization of continuing illusory price rises, to which we now give special attention. It is one thing to argue in general language that land is always increasing in value. It is a good deal more effective to be able to point concretely to the specific price history of a particular lot²⁰³ and show that it has been rising constantly and substantially at more or less frequent time intervals—and thus is very likely to continue to do so in the future. [210]

302. The sales value of this reification of rising prices is well illustrated in testimony by former sales captain Bondy:

We used to carry old prices because usually the property within Rio Rancho Estates had an average increase per year, anywhere from ten to fifteen percent. So, to bring out what we would like to refer to as the greed factors, if you would have bought this property two years ago, you would have paid so much less for it. We made comparisons . . . and we show(ed) how it goes up in value.

* * * * *

It was part of our literature. . . . (TR 7503)

* * * * *

Q. You said the company raised its prices by about ten to fifteen percent a year?

A. That was the comparison you could make. It was based on the fact that we had

²⁰³ Examples of Respondent's price lists for each of its subdivisions are found in CTX 21-30 (Silver Springs Shores), CTX 31-33 (Oakmont Shores) and CTX 34-35 (Rio Rancho Estates).

a ten to fifteen percent increase every year over the past several years. You can use that as a springboard for the future (but not with a guarantee) (TR 7504).

Consumer Roomey described the sales line this way:

Q. Did she (the saleswoman) say anything about past prices or future prices?

A. She said the value of the property, if we didn't purchase the property at that particular time, like if we invited let's say six months or a year, that the property would go up like a thousand dollars a year. So, like, in other words, if we put off buying at that time, that it would cost us more at a later date. So we decided to take advantage of it at that time (TR 7165). [211]

Another consumer testified:

Q. Did he (a dinner speaker) mention anything about the investment value of land in Oakmont Shores?

A. These lots would be escalated in price. They had already increased in valuation 10% over the year before that we were there in '73. They had increased the 10% over the year before. They were expected to increase another 10% by Fall (TR 8708).

303. As all of the foregoing quotations suggest, there seems to have been a good deal of practical fungibility between "prices" and "values" in the minds of all concerned. Cross-examination of Consumer Roomey attempted without success to establish that Respondent's agents in making such statements referred to prices rather than values.

Q. You said that the saleslady said that the *value* would constantly go up.

A. Yes.

Q. Remember that?

A. Yes.

Q. Now, what she really said, wasn't it, was that the *prices* at which the lots were offered were constantly going up; didn't she say that?

A. *It was actually both.* Like it was, if we waited to purchase the property, you know, like six months to a year, that we would pay \$4,500 now; in a year's time it may *cost* \$5,500, and that it would also, the *value* would be going up. Maybe that is the reason for the increase in *price*. I don't know (TR 7176) (emphasis added). [212]

304. Most significant was Respondent's practice of regularly advising customers who had already bought a lot whenever Respondent's list price for similar lots in the same unit *thereafter* was raised.²⁰⁴ In such case, the purpose of the communication, by assumption, could not be to sell that particular lot but rather to induce the buyer to

²⁰⁴ It goes without saying that all price changes were price *increases*. "Q. Did that percentage [change] increase or decrease? A. No decrease, increase. Q. And that happened each time you went to the dinners? A. Yes, each time" (TR 7067). And see generally Figure 9 above, at page 67.1 [p. 1420], derived from CTX 34, showing the steady yearly increase in the prices of lots in Units 1 and 2 at Rio Rancho from about \$1,000 in 1962 to about \$6,000 in 1974.

invest in another lot or simply to spread the good news of constantly rising values. Consider the following:

[After the purchase] he (the salesman) called us from time to time telling us that the lot was going up in value and this went up or went on from time to time. I would say he called us every three or four weeks and tell us that the lot had gone up \$300 or \$400 each time. So it finally reached a figure of almost \$1,000 more than we had purchased it for (TR 4786).

And again:

He [the salesman] would just tell us (after signing the contract), as I said, it would be going up in value \$300 at a time, each conversation, until it finally reached over the \$5,000 figure, which was the last, you know, we heard from him (TR 4878). [213]

305. If Respondent's ever-rising list prices had truly and accurately reflected rising land values it could hardly be said that Respondent's pricing was deceptive. However, we have heretofore established that its list prices have been unconscionably inflated, typically as much as three to five times true market value. Thus, Respondent's constant, systematic reference to those list prices to dramatize the investment value of its lots has been deceptive in the highest degree.

306. While the vice of Respondent's pricing system lies primarily in this false front of constantly rising "values", one particular aspect thereof seems especially unfair, not only for that reason but also because it lends itself so well to Respondent's high-pressure sales methods.

307. The practice in question is Respondent's custom of giving existing (and occasionally prospective) (TR 1292, 7245) lot-owners advance notice that a general price revision (always an increase)²⁰⁵ of certain proportions is scheduled for an early (specified) date. The obvious purpose is to entice further purchases by the group of people who will most appreciate the coming increase in "value". There is no question about the truthfulness of the warnings; the predicted increases regularly materialize on schedule and in the amount predicted (TR 7576). The vice of the practice is rather that many customers may be excited by the illustration of a small but quick and certain profit into making a long-term commitment to pay much more for largely valueless land which they would otherwise probably have eschewed.²⁰⁶ [214]

308. Since Respondent was accustomed to raise its prices across the board at least annually (and even semi-annually) in the several years

²⁰⁵ TR 7067. And see Figure 9 above, at page 67.1 [p. 1420], derived from CTX 34, which shows the steady yearly rise in the prices of lots in Units 1 and 2 at Rio Rancho from about \$1,000 in 1962 to about \$6,000 in 1974.

²⁰⁶ TR 7064 ("The price of land went up from the prices that they showed us. It went up so I figured the land was worth some money.")

immediately preceding issuance of this Complaint²⁰⁷ and since it was Respondent's regular practice to announce such price increases a month or more in advance, it will be observed that this practice has characterized Respondent's selling during a considerable part of each year. It may be noted finally that the practice has been employed deliberately and, indeed, enthusiastically by Respondent's top management as part of its "organized offense" against individual lot-buyers.

309. Illustrations in the record here are legion:

Team Captain Lederman

Q. Do you remember anything in particular that was announced to the people at the homesite owners party that were not announced during the regular dinner party?

A. Well primarily, the difference would be at times shortly before a price increase. It would be announced at the homesite owners dinners that a price increase was imminent; whereas during the regular dinners, this was not mentioned. It was not supposed to be mentioned. At least we never did.

Q. Before making such an announcement, did you have something from the company to indicate there would be a price—

A. Yes. We would be notified by the company two or three months prior to a price increase, that there would be. Sometimes you would know how much, but most of the times you didn't know exactly how much but just the date. [215]

Q. Who specifically would give you that information?

A. Well generally, we would get it from Peter Miller, Leonard Geller, and sometimes we got a memo from Dan Friedman announcing it, and they in turn would be turned over to us by Peter Miller or we would just get a memo from Peter Miller on that (TR 767).

Sales Captain Bondy

Q. Did you ever have any information about a proposed prior increase before it went into effect?

A. Yes, the AMREP Corporation always let us know when there was a price increase, and if they said April 1st the prices were going up five or ten percent, you can be sure that on April 1st there was an increase.

Q. Did you ever discuss that with the customer?

A. Yes, right from the podium.

Q. You put that in your presentation?

Judge Teetor: Can you say how much of an advance notice you used to get?

The Witness: You mean on future price increases?

Judge Teetor: Yes.

The Witness: Well, to give us time to make it, and it was legal in terms I would say anywhere from 30 to 60 days and I would say more so 60 then 30, because you had lot of people to reach out to. [216]

Judge Teetor: You contacted people about the proposed increase?

The Witness: Yes, you could only contact your present customers, which were actually people that owned property within a community, to call up somebody and say, "hey,

²⁰⁷ See Figure 9 above, at page 67.1 [p. 1420], derived from CTX 34, showing a steady yearly rise in the prices of lots in Units 1 and 2 at Rio Rancho from about \$1,000 in 1962 to about \$6,000 in 1974.

it's going up ten percent," and if he doesn't know what the product is, it's meaningless (TR 7505).

Area Sales Director Goldman

Q. Did there ever come a time when the price would change?

A. Certainly.

Q. And when did you find out about price changes?

A. We would receive a memo stating that the price would change on such and such a thing, within the attached list of the new prices.

Q. How far in advance of the actual date of the change did you get such a memo?

A. Anywhere between one to six weeks, that I can recall.

Q. And did those, the new prices, actually go into effect?

A. Exactly that date, in my offices (TR 7640-41).

National Sales Director Zaknich

Q. Do you recall any communication with regard to price increases which was directed toward sales offices?

A. Increase in prices? Notification of that came out of the Albuquerque office. [217]

Q. Do you know what form that notification took?

A. Generally, telegrams and correspondence.

Q. Were telegrams similar to the telegrams you previously described that you were aware of when you were Manager and Regional Manager and National Director of Sales?

A. Yes (TR 934).

Same (describing an "HSO" dinner party)

Then I would say: "Oh, yes there is a special announcement we would like to be made. We just received from our office in Rio Rancho Estates that we are having an increase in the Rio Rancho property on whatever date it would be". And then the salesmen would turn to the homesite owner and would say: "Aren't you very happy, whatever length of time you have invested with Rio Rancho, you already made money with us". Then he would turn to the prospective buyer (HSO's guest): "You see. Your friends have made money in such a short time. Why didn't (don't) you get started because you can never buy Rio Rancho land less than what it is today" (TR 1292).

310. Testifying here, Respondent's one-time President, Howard Friedman, insisted that Respondent's salesmen were upset by these price increases because a higher price makes it more difficult to make sales once the increase takes effect (TR 24201). He conceded that sales typically increased just before a new price took effect but "wouldn't know" whether impending price increases were used as a "sales tool" or even whether Respondent's salesmen were instructed to so use them (TR 24202). This testimony would seem to reflect some lack of communication between Friedman and his brother Daniel Friedman, then Respondent's Sales Vice President, who set forth Respondent's

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policy with notable clarity in the following memo to the field in 1972:
[218]

July 14, 1972

To: All Sales Managers
From: Dan Friedman Vice President, Sales
Subject: New PRICE INCREASE Coming

Good news!

Our next price increase will be effective on October 1, 1972. *That gives you approximately 2 1/2 months during which this powerful stimulant can help hypo your sales.*

* * * * *

[Price increase will be approximately 10%]

* * * * *

Everybody knows a price increase is sheer selling dynamite. Start it exploding in your office at once! (CX 51A) (emphasis added).

III. DEVELOPMENT REPRESENTATIONS

311. A third major area of alleged misrepresentations has to do with whether Respondent's land has been developed as promised. Paragraphs 24 through 27 of the Complaint charge Respondent with misrepresentations that its lots are or soon will be "developed" to the extent that all or most will be usable as "homesites", with potable water, septic tanks or central sewage, electricity and telephone service, without extraordinary charges for hook-up to said utilities. We shall examine this charge as applied to each of Respondent's subdivisions, with emphasis, as usual, on the largest: Rio Rancho Estates.

A. Rio Rancho Estates

312. There is apparently no substantial disagreement between the parties as to the actual state of development at Rio Rancho. About 93 percent of its acreage has been [219] platted²⁰⁸ (CX 459-I) and all platted "streets" have actually been laid out (CX 459J), although 1,464 miles are made of dirt/clay/caliche, while only 31 miles are paved (CX 459J). That about exhausts what can be said of project-wide development.

313. All other development has been concentrated on the slowly growing core areas we call the "Unit 16 Complex", which are well serviced by the utilities now commonly thought necessary for a building lot (or "homesite", as Respondent prefers to call it). On the other hand, the vast hinterland remains virtually bereft of utility services because of the slow pace of core development. It would obviously be uneconomical to extend utility lines out into this vast, barren area at

²⁰⁸ Calculation by Administrative Law Judge.

the behest of individual land owners unless and until there are enough intervening home owners to share the expense of extension (RX 160J), yet as long as there are no utility services available, there is little incentive to build homes (CX 459-I). All this is well-documented.

314. In a 1967 property report, Respondent conceded that "it is not economical for individual home owners to drill wells on the property" (RX 17G). Gas, electricity, central water and telephone were conceded to be available *only* in Unit 16 (RX 17G-H).

315. In 1971, Respondent admitted that "costs of drilling a well for domestic purposes and having a tank and pump installed make individual wells impractical" (RX 160J). Gas, telephone, central water and electricity were by then available in a new building area in Unit 11 as well as the old one in Unit 16 (which it adjoins) (RX 160J-K), although it was noted that there was no legal assurance that such utilities would be extended any farther (RX 160J-K). At that time (1971) only 1,800 lots at Rio Rancho (all in Units 16 and 11) had central water and other utilities available and of these 1,200 were reserved for sale only to purchasers prepared to construct homes immediately (in the core area) (RX 160H). [220]

316. A 1974 property report indicated that the cost of drilling a well at Rio Rancho is somewhere between \$4,000 and \$15,300 (CX 163J), while the cost of extending electric service is \$8,448 per mile and telephone service the equivalent of \$2,112 per mile (CX 163J-K). There can therefore be no argument but that the cost of obtaining well water, electricity and phone service would alone cost between \$14,560 and \$25,860 for one owning a home only a mile beyond the current building area (and much more for locations further from the building area).

317. By 1975 (when this Complaint was brought) according to another property report, a building area in Unit 7 (which adjoins Unit 17) had joined the building areas in Units 16 and 17 in having (central) water available while telephone and electric service were now said to be available in the building area of Unit 11 as well as that of Unit 16 (which it adjoins) (CX 162J-K). However, other evidence made it clear that Unit 7 and perhaps even Unit 11 were still not really developed or even developable.²⁰⁹ The same property report also explained new ordinance requirements that prevent use of both a water well and a septic tank on a lot smaller than 3/4 acre (CX 162K) but permit a septic tank to be used on a lot of at least a half acre (common at Rio Rancho) if the owner can somehow get central water out of his lot (CX

²⁰⁹ See the testimony of builders Bradley (TR 2169-70) and Douglass (TR 10077-78). In Bradley's opinion *neither* Unit 7 nor Unit 11 was "desirable", because both were too far out from the developed area, proper facilities like sewers were not available and the roads were in poor condition.

162K). The cost of extending water, electric and telephone lines to the lot *farthest* from development was estimated to approximate \$315,000 (CX 162K), a sum plainly not calculated to encourage settlement of the hinterland.

318. The foregoing facts, coming as they do out of Respondent's own mouth,²¹⁰ indicate that, in general, (1) utilities are now available in the core areas of the [221] Unit 16 Complex (*i.e.*, the building areas in Unit 16 and a few building areas in adjoining units) but that (2) outside the Unit 16 Complex utilities are virtually unavailable except insofar as the building area may expand in the future at a rate greater than so far: 1,800 residential units occupied by 1975 (CX 162N) and 1,400 more built or a-building by 1977 (TR 19675, 19680) vs. a total of 75,134 lots sold as of 1976 (CX 459-I). With this factual background firmly established, we consider now the more complex question: what, if any deceptive representations has Respondent made on this subject?

319. A major issue in this case is whether Respondent has abused the term "homesite". In everything it does it constantly refers to all the building lots at all its developments, whether in core area or hinterland, as "homesites" and purchasers as "HSO's" (homesite owners).²¹¹ Complaint Counsel then argue that as applied to lots in the hinterland, the word "homesite" is improperly and deceptively used, because the word, properly used, implies that all the utilities are in or immediately available. In support they cite a 1973 HUD regulation raising a presumption that the word "homesite" means land with potable water available and an adequate sewage system installed or septic tank approved, etc.²¹² This should always have been a reasonable man's understanding anyway, they argue. [222]

320. While the Commission has made it clear that a dictionary is not a prison, the dictionary meaning of a word ordinarily reflects common usage and for that reason is entitled to some weight.²¹³ Merriam's 2d Edition of Webster's New International Dictionary, pub-

²¹⁰ Complaint Counsel's concurrence is indicated at CCPF 210.

²¹¹ *E.g.*, TR 929 (Sales Vice President Zaknich: "The policy was to invite homesite owners to dinner parties and to request that they also bring guests to dinner parties and make an effort to sell guests and homesite owners along with others who were attending." See also CX 40X (a company training manual for managers): "how we get 'cold turkey' guests, how we use it to get referrals from HSO's. . . .")

²¹² 24 C.F.R. 1715.15(j)(1):

When homesites or building lots are advertised, the inference is that said lots are immediately usable for such purpose without any further improvement or development by the prospective purchaser and that there is an adequate potable water supply available; that the lands have been approved for installation of septic tanks or that an adequate sewage disposal system is installed; that no further major draining, filling, or subsurface improvement is necessary to construct dwellings, except for reasonable preparation for construction; that the individual homesites or building lots are accessible by automobile without additional expense to the purchaser over existing right-of-way; and that no other fact, such as [periodic flooding or long-standing water] or circumstance exists to prohibit the use of the lots as a homesite or building lot.

²¹³ "As for dictionaries, words mean what people understand them to mean and dictionaries are only one source. . . ." *Benton Announcements, Inc. v. F.T.C.*, 130 F.2d 254, 255 (1942), affirming *Benton Announcements, Inc.*, 31 F.T.C. 882 (1940).

lished in 1934, defined "homesite" as "a location suitable for a home" and one meaning of "site" as "land made suitable for building purposes by dividing into lots, laying out streets, and the like." It thus appears that a half century ago a plat and a street were generally thought enough to make land "suitable" for building.

321. When, however, we refer to Merriam's 3d Edition of Webster's New International Dictionary, published in 1976, we find that the perimeters of the word "site" have expanded with nearly half a century of social change to read: "land made suitable for building purposes by dividing into lots, laying out streets and *providing facilities (as water, sewers, power supply)*"[emphasis added]. Clearly, then, people now think of more than a plat and a street when they visualize a "homesite". When [223] both Law and Language reflect an expanded meaning for the word "homesite", this Commission can hardly withhold its concurrence.

322. We further find that Respondent, which has often boasted of its long experience in the development of land,²¹⁴ *must* have had some intimation that many, if not most, of its customers would expect something advertised as a "homesite" to have the usual utilities in or immediately available. Its constant loose use of the word "homesite" to describe its lots generally, whether or not located in a building area, must have some tendency to deceive dinner party guests and other prospective buyers.

323. In fairness to Respondent, however, the record should show that while its promotional literature is full of many unqualified and therefore misleading references to "homesites",²¹⁵ its brochures also contain some carefully worded statements that utilities are available in residential areas "under construction". [224] The following quotations from a typical sales brochure²¹⁶ are illustrative:

Centrally-piped water, piped gas, electric power lines, phones are available *in the residential area now under construction at Rio Rancho Estates . . .* [I]ndividual septic tanks are easily and inexpensively installed and maintained here. . . . The water system here is steadily being expanded to supply water to *the first residential section of 4,000 planned homes*. (Rate of future development, of course, will proceed as demand warrants.) (CX 30N) (emphasis added)

²¹⁴ The principals of Rio Rancho Estates and its related companies enjoy a long and prominent history of successful nationwide community development, home-building and financing, including Florida, the East Coast and Southwest CX 393P (1961).

²¹⁵ See, for example, CX 30E ("Let us see how and why you can buy FINE HOMESITE LAND at Rio Rancho Estates on such easy terms and at such reasonable prices"); CX 30G ("You can become the proud possessor of your very own land—a spacious homesite in the community area of your choice—to meet your present or future needs and desires"); CX 30H ("... magnificent 'picture window' views from each and every homesite . . . an excellent piece of property on level or rolling terrain that is very picturesque, very beautiful, but even more important—well-suited for homesites").

²¹⁶ For similar language in earlier brochures see CX 393N and CX 232B (both 1961). For a later brochure see CX 632P (1974).

... [P]ower, phone lines, piped water and gas available to each home *in residential* sections now under construction. . . . (CX 30G) (emphasis added)

324. Note that these statements do not say that utilities are available "only" in the building areas, a qualification which would seem necessary to cure the deception involved in promiscuous use of the term "homesite" to include hinterland lots as well as core area lots. Moreover, after careful consideration, we have concluded that even a properly worded warning of availability "only" in building areas would probably be inadequate if it appeared—as here—only in occasional spots where it might or might not be read at the same time as or in conjunction with numerous references to "homesites".

325. In addition to Respondent's constant use of the term "homesite" to create the misleading impression that its lots—not excluding lots in the hinterland—are ready for building when sold, Respondent's salesmen have frequently exaggerated the pace of coming development at its subdivisions, as necessary to make sales of hinterland lots. Prognosticating the pace of such [225] development with any real accuracy under the circumstances of this case is practically impossible and Respondent has recognized the recklessness inherent in any attempt to do so by ordering its salesmen *not* to tell customers or prospective customers that the utilities will be in (or development will otherwise be complete) within a short or specific time.²¹⁷

326. Viewed in a vacuum, such action by Respondent might seem meritorious and hardly subject to censure. However, our study of the evidence convinces us that Respondent has not adequately enforced its strictures against predicting the pace of development. There is abundant evidence that a substantial number of its salesmen have bandied such predictions about whenever they thought it would help win or hold a customer—and Respondent apparently does nothing but wink.

327. Follow on plat map CX 263, p. 68 (attached hereto as Appendix C) the testimony of the following witnesses regarding hinterland lots, which it will be recalled were the only kind that could be bought at Respondent's dinner parties up north (TR 903).

Consumer Alper (purchaser of lots in Units 20 and 26): Well, they said that Unit 20 is closer to the area that's being developed and the other one was in Unit 26 where it would take about five years. This would take a shorter time, maybe more like three years, to have utilities brought in that area (TR 5412, 5422) (emphasis added).

Consumer Scirica (purchaser of a lot in Unit 17). [His salesman] said it would be the

²¹⁷ Salesman Levine testified to being told by his superior: "[W]e don't have a crystal ball to tell what is going to be tomorrow" (TR 14616). Salesman Cavallo testified that it was against Respondent's policy to refer to a specific time period for development "because you couldn't tell" (TR 13834-35). See also the testimony of witness Roth, a principal marketer of Respondent (TR 21560).

next unit that would be developed [226] because it was not that far from Panorama Inn. . . . He said within five years it would be developed. . . . He said it would be complete with everything you want and that your utilities and everything else would be there (TR 5524-25).²¹⁸

Saleswoman Pitchford: Way out there [in Units 4 and 5 she told customers, if asked, that she did not know when gas or water or other utilities would come out to their property but did assure customers that Unit 10 (adjoining Unit 16) and Unit 8 would have electricity and utilities in there within about two years. (She herself was assured by her superiors that] there would be facilities in all of Unit 16 and Unit 10 within the next two years, and also Unit 11.) (TR 10252-53)

Salesman Wilson: [Asked what he had told customers about utilities, he testified that] I was told that it was one of the guarantees, that the utilities would be underground so that they would not mar the beauty of the landscape (TR 9656). [And again:] Paved streets, utilities, sewage. We would tell them about our plant and, of course, utilities is (sic) water but I'd put water in there anyway—our own water plant (TR 9656). [Being] more conservative [than most other salesmen, Wilson advised his prospects that it would probably take 6 to 8 years (in contrast to other salesmen's estimates of 3 to 5 years) for this land to be fully developed from a \$4,000 to \$12,000 lot] (TR 9655-56).²¹⁹ [227]

328. Some witnesses did not refer specifically to "utilities" but talked more generally about the pace of "development" of various areas beyond the Unit 16 Complex. Inasmuch as even the hinterland of Rio Rancho already had its lots and streets laid out, installing utilities had to constitute the bulk of the "development" that remained to be done. Accordingly, it seems a fair inference that utilities are what both salesmen and consumers had chiefly in mind in the following testimony. (Again the significance of the testimony is best appreciated by following it on a map such as Appendix C (CX 263, p. 68)).

Consumer Pallas: [He saw no signs of development in Unit 20 but his salesman explained that] the development was not proceeding in a consecutive unit fashion, that there would be some development in some area, some in another area and that that particular area would probably be developed in about five years (TR 5738).

Consumer Cameron: When I bought (in) Unit 2 they told me we (they) were moving toward Unit 2. Now suddenly they used the area of development as now north (TR 4900).

Consumer Simmons: [Her salesman recommended Unit 13.] Well, he said it was very near to where the building was going on at the Lomas and that by the time we were ready to go out (west), which we expected it would be perhaps at that time in about 4 years, that it should be or they should be building there and we would be able to build a house (CX 1787).

²¹⁸ The salesman also assured Scirica there would be a lake in Unit 20 (TR 5538).

²¹⁹ This kind of logic comes from Respondent's "ladder pitch", which assumes that all development cost is automatically reflected in the market value of a lot. For an illustrated example of this "pitch", see CX 513 (admitted to illustrate salesman Wilson's testimony).

Consumer Dellacoma: [Her salesman and his superior both stressed that the pace of development was] rapid [and that Unit 6 would be reached in 3 to 5 years.] He (the salesman) also took out a map . . . and he showed us where the current houses were set up as of '72 already. Then he said: "If you buy near here, this (Unit 6) is closer to where the population is now, so it is choice land" (CX 5063-66). [228]

329. The evidence seems clear that in a large number of cases Respondent's salesmen made a deliberate (and apparently successful) effort to keep disillusioned hinterland purchasers [who were apparently not satisfied with a building exchange privilege] from cancelling out by assuring them dishonestly that development of their barren lots was only a few years or a specified number of years away. In truth and fact the pace of development has been so slow that, as we have seen, after a decade and a half of what Respondent likes to call "the swift pace of development" (CX 30M) Rio Rancho Estates still had no more than 3,200 residential units built or building when Respondent's Manager Bailey testified here in 1977 (CX 162N; TR 19675, 19680), in contrast to over 75,000 lots sold by 1976 (CX 459-I).

330. In answer to all this, Respondent flatly denies that it made any representations about the pace of future development in the non-building areas of its subdivisions and continues to assert that its salesmen generally followed instructions to refrain from making any predictions about when development, including utilities, would reach specific areas or lots (RPF 134). Most people don't really care anyway, it argues, because they are satisfied with their right to exchange a hinterland lot for one in a building area whenever they decide to build. In support of these propositions, it mobilized the testimonial might of a dozen and a half witnesses (RPF 134-36). However, this testimony suffered from serious deficiencies.

331. In only one instance did Respondent's witness purport to deny a specific representation previously attested by Complaint Counsel's witnesses.²²⁰ We have [229] examined this particular testimony with special care, referring to our impressions of the credibility of the witnesses on both sides, and believe that Complaint Counsel's witness was telling the truth. Respondent's rebuttal testimony is not credited. The rest of Respondent's dozen and a half witnesses were mostly present or former salespersons who testified only to their own experience and thus their testimony would not tend to refute testimony that other salesmen had made other (deceptive) representations.

²²⁰ Respondent's saleswoman Gray at TR 14258 denied the testimony of Consumer Alper at TR 5412, 5422, that Gray had told her utilities would be installed in Unit 26 in five years. (She did not deny Alper's testimony at the same pages that she was told utilities would be in Unit 20 in three years.) Respondent also claims (RPF 136) that there was another instance of such direct refutation but we cannot find the alleged refutation. See TR 15364-65 where Saleswoman Tafone denied telling Consumer Benfante when development would reach her lot (in Unit 9). The difficulty is that we find no such statement alleged in the prior testimony of Consumer Benfante at TR 4148.

B. Silver Springs Shores

332. The development of Silver Springs Shores to date has been outlined above.²²¹ We found that as of 1976 only 160 of 450 miles of proposed hard-surface roads have been completed.²²² Neither a central water nor central sewage system exists (CX 164H) and Respondent is under no compulsion by law to install either unless and until a certain population density be reached (CX 164G-H). Absent such central facilities a purchaser must pay about \$1,200 to dig his own water well and install his own septic tank (CX 164H).²²³ Respondent's "arrangements" for electricity and telephone service are strictly limited to ten specified units in "the immediate building area" (CX 164-I).²²³ In the more remote areas of Silver Springs Shores, extension of electric and telephone service is entirely dependent on the power companies' service extension policies and tariffs (CX 164-I). Not too [230] surprisingly, as of early 1976, there are still only 661 homes completed and 38 more a-building compared with 19,426 lots sold or contracted (CX 459K).

333. Against the backdrop of this very limited development of Silver Springs Shores, certain, at least, of Respondent's developmental representations have been quite deceptive. Here as elsewhere there has, of course, been constant reference to "homesites" without excluding from the term the preponderance of land *not* in an immediate building area.²²⁴ Moreover, there has been flat-out deception by Respondent as to the status of streets and utilities at Silver Springs Shores. In metropolitan newspapers in 1973 Respondent was advertising:

Even more important, your land at Silver Springs Shores is an integral part of a thriving, developing community *[w]here streets and utilities are already in. . . .* (emphasis added).²²⁵

It might, perhaps, be argued that if *any* streets and *any* utilities were "in", this statement would be technically correct. It seems, however, that most and certainly many people would take such a statement to mean that substantially *all* streets and substantially *all* utilities "are already in". As applied to Respondent's sadly lagging development at Silver Springs Shores, such a statement had to be terribly misleading.

334. In addition to this misrepresentation straight out of Respondent's headquarters it appears that, as at Rio Rancho, there has been

²²¹ Above, page 70. [p.1422]

²²² Note, moreover, that a switch-over to central facilities would not only require an assessment of lot-owners for that purpose but would deprive them of the value of water wells and septic tanks already constructed.

²²³ The "immediate building area" as of 1/9/76 was made up of Units 1, 2, 3, 4, 11, 15, 40, 43, 47 and 48.

²²⁴ E.g., CX 164D ("The section currently [1976] being developed consists of 25,244 homesites.") No lots being offered were, in fact, in "the immediate building area." Cf., CX 164D and I.

²²⁵ CX 72 (Detroit), CX 78 (Long Island).

a good deal of loose talk by [231] salesmen, not adequately policed by Respondent, encouraging doubtful buyers to believe that full-development is just around the corner. Indeed, one salesman assured Consumer Muzillo at a dinner party in 1973 that a lot in Silver Springs Shores' Unit 36 was even then "a fully developed area" and that "the streets are in, electrical lines, sewers" (TR 7244).

335. The fact was, as we have just seen, that even by 1976 electric service was still limited to "the immediate building area," of which Unit 36 was *not* a part (CX 164-I). There is no central sewage system in the whole subdivision (CX 164G-H). As for roads, their condition left it an open question in one consumer's mind whether they should properly be called "roads".²²⁶ To call this a "fully developed area" was grossly deceptive.

336. Others of Respondent's salesmen did not hesitate to predict completion of development within a certain period, despite the impossibility of doing so accurately, as Respondent has recognized (TR 2156, 13834-35, 14616). In the Spring of 1973 Consumer Rydwels, for example, bought a residential lot in a Unit (31), not part of the immediate building area, then got out of it and bought a commercial lot in another non-building area (Unit 7) (TR 5203-08, 5210, and CX 164-I).

Q. Did they tell you when the community would be fully developed?

A. I don't know if they said that in their (podium) speech openly. I know that our particular sales person and other people we had spoken to more privately had also indicated 3 to 5 years on everything (TR 5203).

* * * * *

Three to five years they anticipated that the area would have the facilities for construction of a house there. . . . There would be electrical wiring, sewage, water (TR 5295).

In the Spring of 1974 on a trip from New York to Silver Springs Shores, Consumer Rydwels found "little development . . . in general" (TR 5231) and was told by Ocala brokers that:

there didn't appear to be any prospects for the development of the property and unless there were sewage, water and electricity in there there was no way anybody would be interested that they knew in picking up lots like that (TR 5232).

* * * * *

Those things (sewage, water and electricity) as far as we know to date (1976) are not on the property (TR 5233).

Such evidence not only tends to disprove Respondent's 1973 newspaper ads that "streets and utilities are already in" at Silver Springs

²²⁶ "Q. Can you tell us the condition of the roads at that time? A. There weren't any. It was just dirt things that you drive through. . . ." (TR 4797)

Shores but demonstrates graphically as of 1976 the irresponsibility of Respondent's salesmen's unpoliced "private" predictions to customers in 1973 that lots would be fully developed within three to five years.

337. Similarly, Consumer Pinto in 1973 bought a lot in Unit 17 (TR 7191-94) (still outside "the immediate building area" in 1976) (CX 164-I). Recognizing that no house could yet be built on the lot because nothing else was "in" and concerned that the lot be resaleable, Pinto asked Respondent's saleswoman whether everything would be "in" if she wanted to sell it in a decade. The saleswoman reassured her that "in five years, the way it was building up, that utilities would be in, sewers would be in, and so forth" (TR 7189). "Once people started buying houses and building," the saleswoman said, "the sewers would go in, the lighting and so forth, all [233] utilities would go in and . . . our property would go up" (TR 7189). Pinto understood that if people did not decide to build their homes, then that would slow down the timetable for sewers but she also understood that *"it was selling so rapidly she (the saleswoman) didn't have much property left"* (TR 7200).

C. Eldorado at Santa Fe

338. The present state of development at Eldorado at Santa Fe, with particular reference to the availability of utilities, is set forth above.²²⁷ We found that of 29 miles of roads installed, only seven were graveled by 1975 (CX 161H).²²⁸ In contrast to the 449 lots sold or deeded by mid-1976 (CX 459L), there are (as of 1975) only 21 occupied homes (CX 161L). Only 121 lots have water available (CX 161H). Sewage disposal is only by septic tank (CX 161K). Line extension policies and tariffs of utility suppliers make the cost of electricity and telephone service prohibitive for individual lot-owners located very far from "the immediate building area" (CX 161 I-J).²²⁹ No doubt development under these conditions will be difficult, expensive and discouraging to many lot-buyers.

339. However, Complaint Counsel tender us little evidence of the deceptive statements which are our target here. Aside from too promiscuous use of the term "homesite"²³⁰ [234] which seems to be Respondent's regular practice here as elsewhere, we find that Complaint Counsel have in this instance added little of significance to their evidence of deceptive tendency.

²²⁷ Above, page 72. [p. 1423]

²²⁸ Lot purchasers may be assessed for the cost of improvement through their Community Association (controlled by Respondent) (CX 459L).

²²⁹ Cost estimates for the farthest possible lot-owner to install service are over \$30,000 for electric service and almost \$8,000 for telephone service.

²³⁰ See, e.g., CX 173D.

D. Oakmont Shores

340. Analysis of the development of Oakmont Shores and the truth or falsity of Respondent's representations on that subject is badly complicated by the fact that (1) this project had really been "developed" by others (as "Ozark Paradise Village") and (2) after three or four years of unsatisfactory experience Respondent gave up trying to revive the project.²³¹ Under such circumstances, it is frequently hard to assess Respondent's responsibility in particular development situations. It is also difficult to assess the extent to which we are seeing dishonest predictions or merely optimistic ones which failed to materialize. Because of these complications, we attach little weight one way or the other to the development evidence at Oakmont Shores but it seems wise to review that evidence carefully for the record.

341. In the first place, the record is clear that here as elsewhere Respondent made constant use of the term "homesite" to describe the lots of land it was promoting and selling.²³² Since, as we shall see, many [235] of these lots seem to have been missing one or more of the utilities which the word "homesite" now commonly connotes, it is fair to say that the Oakmont Shores evidence lends support to our earlier condemnation of too-promiscuous use of the term "homesite", without careful regard for the actual state of development in particular situations.

342. With reference to roads, a 1972 promotional brochure contains this representation:

All homesites face graded roads . . . five and one-half miles of road have already been paved with a macadam surface (TR 521A).²³³

These five and one-half miles of paved road were obviously quite small in comparison with the project's 56 and one-half miles of road *not* paved.²³⁴ This frequently led Respondent's salesmen to assure customers that the rest of the road network would be paved.²³⁵ One, at least, specifically promised blacktop within a year (TR 8404).

343. As a matter of fact, little if anything seems ever to have been

²³¹ See above, page 73. [p. 1424]

²³² See, for example, a 1972 sales brochure:

CX 140A ("resort homesite of your dreams");

CX 140C ("invest in a homesite", "low-cost homesites");

CX 140D ("easy long-term payments for your homesite that almost any budget can afford");

CX 140-I ("lovely lakeview or wooded homesites," "the benefits of a homesite investment");

See also CX 521A; CX 101N, V, DD, CX 102E, L.

²³³ Accord: CX 165G and CX 243D (property reports).

²³⁴ By calculation from a total of 62 miles of roads (CX 1-I).

²³⁵ TR 8709-10 (every "homesite" would be on a macadamized road);

TR9119 (macadam or blacktop);

TR 9002 (would be paved at a later time);

TR 8938 ("the roads would be paved").

done about paving the rest of the network of roads. Several 1973 purchasers testified that 1974 and later years brought nothing of significance in this respect.²³⁶ Meanwhile, according to one saleswoman, [236] it was deliberate practice for salespeople to stay on the (five and one-half miles of) paved roads when showing prospective buyers around the development (TR 8552).²³⁷

344. As for the question of future maintenance responsibility, the property report dutifully disclosed that "[t]he developer is presently maintaining the roads but does not obligate itself to do so" and note was taken that legal liability for maintenance would fall on the Oakmont Community Improvement Association, Inc., until the County should accept such roads (CX 165H; RX 243D). However, this warning that Respondent could put the maintenance burden on lot purchasers (as Association members) was neutralized by one of Respondent's principals, Daniel Friedman. He assured the sales team at Oakmont Shores that as a practical matter Respondent had continued to maintain the roads at other developments and could be expected to do it here, just as a matter of self-interest, even after the development was sold out, to protect the resale market (TR 8567, 8571).

345. Friedman's assurances based on the Rio Rancho experience were passed on to customers by members of the sales team (TR 8600). This was inherently misleading because the road maintenance burden at Rio Rancho had by arrangement with the Sandoval County Commissioners been shifted to the County as soon as Respondent completed the roads there (CX 30J). In any event, according to the same saleswoman's testimony here, her own experience (June 1972–September 1973) was that even before the Oakmont Shores project was abandoned, Respondent did almost nothing to maintain the roads (TR 8568).

346. With reference to water, a 1972 promotional brochure for Oakmont Shores stated simply: "Water is supplied by wells" (CX 521A).

The Federal property report read:

Water facilities consist of individual wells. The present estimated cost to a buyer for installation of a well ranges from \$525.00 to \$1,525.00, depending upon the depth of the well, and an additional \$600.00 for a pump, tank and accessories. [237]

347. The "Declaration of Protective Covenants for Oakmont Shores, Inc.," dated 6/23/71 and signed by Respondent's Vice President and counsel here, Solomon H. Friend, Esq., provided in part:

²³⁶ TR 9010 (found no paved streets in 1974);
TR 8404–11 (grass still growing in the street in 1977);
TR 9090 (in 1974 the roads were "the same").

²³⁷ (She explained euphemistically that this was to "confirm" her assurances to the customer that all streets would be paved.)

If and when a central water and/or sewer system becomes available to serve an individual lot, an individual well, cesspool or septic tank shall no longer be permitted on such lot (CX 528B).

A question arises as to whether a representation that "water is supplied by wells" (or that "water facilities consist of individual wells") fairly implies that such a well is waiting for a purchaser on the lot or must be drilled by him. In this admittedly ambiguous situation, Complaint Counsel argue for the former implication but we think the latter makes more sense. Certainly the cost data in the property report points that way, not only for the writer but for the reader. Consequently, there is no misrepresentation about the availability of well water, even though it appears from the testimony that the vacant lots at Oakmont Shores in fact came without drilled wells.²³⁸

348. It will be noted that neither Respondent's sales brochure nor the property report (both quoted above) even mentioned a central water system, although the possibility was referred to in the Protective Covenants (also quoted). It appears, however, that Respondent's salesmen frequently found it necessary to reassure customers that they would not have to live with well water indefinitely. Consumer Brand [238] for example, quoted his salesman as saying "there was going to be water brought in there; water lines would be brought in on the streets" (TR 9120).

349. While Brand recalled only that his salesman had said water lines would be installed "eventually" (TR 9080),²³⁹ one saleswoman told her customers that Respondent would be putting in central water "in the very near future" (TR 9120) and her less credible husband (TR 8567), also a salesman for Respondent, allegedly promised his customers that:

While they would have to drill their own well if they built today and put in their own sewer system, that they would be able to tie into a central system that the company was going to put in at some future date.

* * * * *

I told people that the future date wasn't very far off because the company's plans were to develop a given piece of property up on the highway and expand from there; leading them to think that they wouldn't be too far from water in the near future.

Q. This is central water that you are talking about?

A. Yes, sir.²⁴⁰

350. Clearly, some of Respondent's customers were given assur-

²³⁸ Witness Bongers denied that there were, in fact, any wells and illustrated with a memory that a nearby lot-owner asked Bongers to put in a well, presumably together (TR 8504). See also the testimony of witness Bristow, who expressly understood that individual lot-owners had to drill for their own water (TR 9280).

²³⁹ Accord: Consumer Weber (TR 8938).

²⁴⁰ The "Reverend" Thomas Pollock was a three-time Federal felon.

ances of central water (and some were assured it would be soon) but there is no record evidence one way [239] or the other bearing on whether or not the company really had such plans, except the provision in the Declaration of Restrictive Covenants that if a central system is initiated, individual wells must be abandoned in favor of the central system (CX 528B). This does seem to imply that Respondent at one time had the possibility of a central system in mind, even though it does not appear ever to have gotten around to doing anything about it before abandoning the whole Oakmont Shores project in 1975.

351. As concerns sewage, a 1972 promotional brochure stated: "Sewage disposal consists of individual septic tanks or other disposal units" (CX 521A).

The Federal property report stated:

Sewage disposal is by individual septic tanks or individual sewage treatment plants, depending upon soil conditions. The present estimated cost to buyer of an installed septic tank or treatment plant varies from \$300 to \$1,200, depending upon the soil conditions in a particular area as well as the type and size of the installation (CX 165G; RX 243D).

352. The property report went on to warn in some detail that there was a dispute between Respondent and the Missouri Water Pollution Board as to whether septic tanks and tile fields function properly in the State of Missouri or constitute a threat to the quality of both surface and subsurface water of the State. It was further explained that if it should prove necessary to give up the septic tanks, the Oakmont Community Development Association was authorized to install an appropriate sewage system and to levy assessments therefor.

353. As with water, a question arises whether a representation that "sewage disposal consists of individual septic tanks or other disposal units" (or that "sewage disposal is by individual septic tanks or individual sewage treatment plants") fairly implies that such a facility is waiting for the purchaser on the lot or must be installed by him. Again, as with water wells, we think common sense [240] points to the latter conclusion (*i.e.*, that a consumer should realize a tank must be installed by him) and we are confirmed in our thinking by the additional language of the property report—which, of course, the consumer may or may not have read²⁴¹—that the "cost to buyer" of installing a septic tank would be \$300 to \$1,200. Reaching this conclusion, it is immaterial that the record seems to be lacking in evidence as to whether any septic tanks were, in fact, installed.

²⁴¹ Witness Beller apparently read this in the property report (TR 8747) but the situation is not clear as to others.

354. Again, as in the case of water, there is some testimony that Respondent's agents assured customers that central sewage disposal would come²⁴² but things got worse instead of better.²⁴³

355. One problem deserves special attention. The small type in the complex "Declaration of Protective Covenants" of Oakmont Shores, Inc., contained a provision which would *require* a landowner to give up his septic tank (and investment therein) if a central sewage system were to be installed (CX 528B).²⁴⁴ This was not referred [241] to either in Respondent's promotional brochure (CX 521A) or its property report (CX 165G; RX 243D). It became the subject of affirmative misrepresentation by Respondent's agent Morrison (saleswoman Pollock's prior husband), who assured Consumer Bristow, at least, that "it would not be necessary [to convert] if we had a proper septic tank" (TR 9281).

356. As for electric power, Respondent's 1972 promotional brochure stated: "Electric power from Carroll Electric Corporation and White River Valley Electric Cooperative Corporation" (CX 521A). The Federal property report stated: "Electricity is furnished by the following companies (identifying Carroll and White) and adds:

All costs for installation of electrical service will be paid by the utility companies, or Oakmont Community Improvement Association, Inc., in accordance with the service extension policies of the utility companies. Utility companies have indicated that they will expand facilities to serve additional lots as and when the demand develops. However, there are no legal assurances that the companies will so expand their facilities. The cost for electrical services by the two companies is as follows: (setting out required deposits and minimum service fees required) (CX 165H; RX 243D-E).

357. It appears from the testimony of one consumer that no electric lines passed his lot, the nearest line being 2-3 city blocks away (TR 9277-78). Even, however, if we assume that many lot purchasers found themselves similarly situated, there is nothing in the record to indicate that Respondent's salesmen's assurances of the immediate or ultimate availability of electric power²⁴⁵ [242] proved wrong or that the costs of hook-up were not borne as indicated in the property report (quoted above).

358. The situation with regard to telephone service seems to have

²⁴² TR 8938 (Witness could not recall time schedule but knew his salesman had "told us that . . . they would put in utilities"). Saleswoman Pollock told customers that "the sewers would be put in by the AMREP Corporation but that would take a little longer [than central water] because they had to blast" (TR 8567).

²⁴³ TR 9148-49: "I have been visiting once a year [since 1974] and nothing has been improving out there as far as I can see."

²⁴⁴ "If and when a central water and/or sewer system becomes available to serve an individual lot, an individual well, cesspool or septic tank shall no longer be permitted on such lot."

²⁴⁵ TR 8567 ("There is a rural co-op down there and they [purchasers] were told they could have power-electric, power-immediately"); TR 9253 ("no problem to hook up utility whenever we were ready"); TR 9117 ("eventually, he says, that there will be water and electricity through here"); TR 8938 ("They told us that . . . they would put in the utilities, such as electricity").

been similar to that concerning electric power and we omit detailed discussion.²⁴⁶ Natural gas was the subject of hardly any evidence.²⁴⁷

359. We have gone into the availability of utilities at Oakmont Shores in detail far beyond the importance of the subject in order to make the highly unsatisfactory state of the evidence clear. We find that Complaint Counsel have not carried their burden to show significant developmental misrepresentations other than too-promiscuous use of the term "homesite" during Respondent's tenure as developer at Oakmont Shores.

IV. EMPLOYMENT REPRESENTATIONS

360. Complaint Counsel ask us to find, in accordance with the allegations of Complaint Paragraphs 32-33, that Respondent has misrepresented the abundance and quality of employment opportunities in the Rio Rancho Estates area as part of its effort to sell Rio Rancho lots to dwellers in the big cities of the North. Our own search of this massive record has turned up nothing more impressive than the handful of incidents which Complaint Counsel cite to us (CCPF 200-02). [243]

361. These examples of misrepresentations are as follows:

1. *Representation*: "... that there were a lot of job opportunities in Albuquerque of comparable salaries." *Reality*: Consumer's salary dropped from \$9,000 to \$6,000 a year and her husband never got back to his \$18,000 east coast salary level (TR 9884-85, 9891-92).

2. *Representation*: "... that job opportunities were astronomical." *Reality*: Consumer could find nothing in his field (delicatessen manager) (TR 4023-25, 4030-44).

3. *Representation*: that a technical or specially qualified person "can easily get work." *Reality*: Consumer, a hearing aid saleswoman, found work but was unable to make nearly as much money as back in New York (TR 1791-92, 1806, 1811-12).

4. *Representation*: "... that they would have no difficulty obtaining teaching jobs in Albuquerque." *Reality*: Consumers were interviewed by Albuquerque Public Schools System but were not offered employment (TR 5728, 5747-48, 5760-67).

5. *Representation*: that "there would be job opportunities," for teachers with a master's degree. *Reality*: Uncertain. Consumer never,

²⁴⁶ See CX 521A (brochure); CX 165-I and RX 243E (property reports); TR 9252 and 9277-78 (testimony of Consumer Bristow).

²⁴⁷ Saleswoman Pollock told her customers it would be "many years" before natural gas would be in and meanwhile they would have to make do with propane tanks (TR 8567). See also CX 521A (brochure) and CX 165H and RX 243D (property reports).

in fact, moved to Rio Rancho but the record does not reveal what, if any, attempts she made to obtain employment. [244]

362. We cannot read such statements as promises or guarantees of employment nor do we think that such would be the interpretation of the ordinary consumers. Indeed, these statements do not even promise "best efforts" by Respondent to get lot-purchasers jobs. Yet the record shows that Respondent did make some kind of effort to help customers find jobs, by arrangement with the Guideline Employment Agency in Albuquerque (TR 20395) and other agencies, both public and private (TR 9423, 13840-41, 14619, 14853, 15356).

363. We have already found that Albuquerque is undoubtedly a fast-growing city.²⁴⁸ Nor is there any doubt about Respondent's very real efforts to lure sundry businesses to its own "industrial park" (TR 24025). In the absence of unemployment statistics to the contrary, it does not seem unreasonable to have told out-of-state prospects that job opportunities were good in Albuquerque. Accordingly, we decline to find a deceptive tendency in the handful of alleged employment misrepresentations advanced by Complaint Counsel.

Unfair Contractual Provisions

I. RESPONDENT'S ADHESION CONTRACT

364. In several respects the form contract signed by Respondent and its customers is as unfair as the parties' substantive agreements. Before analyzing four major facets of Respondent's form contract's unfairness it is important to establish its character as an "adhesion" contract, since the standards of fairness to be applied obviously depend in part on the way the contract was entered into.

365. An "adhesion" contract is a "take-it-or leave-it" contract. Commonly, now, big sellers unilaterally prepare a standardized or form sales contract embodying all the terms they want in it and because of their economic power vis-a-vis most individual buyers, the latter, either "adhere" to the seller's whole contract or don't buy. There is no question but that "adhesion" contracts serve [245] a useful function in a world of mass production and distribution²⁴⁹ but their inherent capacity to oppress consumers has increasingly attracted the attention of jurists and commentators.

²⁴⁸ Above, at page 113. [p. 1451]

²⁴⁹ "Nothing can approach in speed and sanity of readaptation the machinery of standard forms of a trade and for a line of trade. They save trouble in bargaining. They save time in bargaining. They infinitely simplify the task of internal administration of a business unit, of keeping tabs on transactions, of knowing where one is at, of arranging orderly expectation, orderly fulfillment, orderly planning. They ease administration by concentrating the need for discretion and decision in such personnel as can be trusted to be discreet. This reduces human wear and tear, it cheapens administration, it serves the ultimate consumer." Llewellyn, K.N., Book Review, 53 *Harvard L. Rev.*, 700-01 (1939).

366. A leading law review recently summarized the problem as follows:

In recent years the realities of mass production and a consumer economy have undermined the theoretical basis for much of traditional contract law. Today, an active consumer enters scores of contracts every week without in any real sense agreeing to the terms that are imposed upon him. For the very reason that these terms are imposed rather than agreed upon, they are almost universally unfair.²⁵⁰

Another commentator has written:

By virtually eliminating the bargaining element, the standardized form contract invites new manifestations of old sins. Power, greed, and "hog-drafting" are not easily concealed [246] or euphemized in the bargaining process which precedes a negotiated, tailor-made, contract. Nor do their terms operate beyond the confines of the contract in which they appear. By contrast, the unilateral "production" of a printed contract can incorporate the time and talent of experts in manipulating form and content to disguise the one-sided nature of the document. With periodic revisions to prevent the recurrence of adverse experiences in or out of court, the form determines contract relations with countless and faceless adhering parties.²⁵¹

367. The record here contains samples of the form sales contracts used by Respondent at each of its four subdivisions.²⁵² Generally similar, all may fairly be described as "adhesion" contracts. All are printed forms with almost nothing left for individual execution except property descriptions, signatures and dates.²⁵³ Each contains two legal-size pages of fairly small type. A large number of provisions attests the complexity of each contract.

368. Inspection of the 286 signed "Reservation And Purchase Agreements" in this record reveals no alterations of the printed terms to individualize the standard format in any significant respect.²⁵⁴ Nor [247] are we aware even of any testimony of bargaining between Respondent and a customer about changing any contract provision in any respect.

369. As for the parties' relative bargaining power, customers were constantly reminded that Respondent's assets were over \$150 million and that its stock was listed on the prestigious New York Stock Exchange (*e.g.*, TR 9649). On the other hand, almost all customers were

²⁵⁰ Introduction to Slawson, W.D., "Standard Form Contracts and Democratic Control of Lawmaking Power," 84 *Harvard Law Review* 529 (1971).

²⁵¹ Meyer, A.W., "Contracts Of Adhesion And The Doctrine Of Fundamental Breach," 50 *Virginia L. Rev.* 1178, 1180 (1967).

²⁵² See, "Reservation And Purchase Agreement" for Rio Rancho Estates (CX 155), Silver Springs Shores (CX 154), Eldorado at Santa Fe (CX 106), and Oakmont Shores (CX 152).

²⁵³ Buyers are also requested to initial for receipt of documents like property reports and to indicate whether the property will be used as a principal residence but failure to fill out these blanks would not seem to affect the contract's validity.

²⁵⁴ Of three alterations found, two amended the interest rate from 6 percent to 7 percent and another contained a (form) rider changing the payment schedule.

individuals of such modest means that one job of a salesman for Respondent was to try and gauge whether a customer could afford to put up a small sum each month²⁵⁵ to buy a lot (TR 9652-54). To expect such an individual customer, after having been prepared by Respondent's high pressure and deceptive marketing techniques to "sign up", should stop to read over his form contract carefully and proceed to bargain with his salesman concerning such standard provisions as those governing credit terms, forfeiture on default, disclaimer of agents' representations and restraint on alienation seems unrealistic. We turn now to how Respondent's adhesion contract in fact deals with each of these four subjects.

II. CREDIT TERMS

370. Respondent's lots are offered for sale for cash but substantially all lots at all subdivisions have been sold under installment contracts requiring monthly payments over terms ranging from five to eight years (CX 1E, CX 1J, CX 5D, CX 5E). Although commonly called "installment plan sales", Respondent's "Reservation And Purchase Agreements"²⁵⁶ are technically "conditional sales" agreements. All form contracts contain the essential ingredient of a conditional sale: the reservation of a security title. [248]

As set forth in the Purchase Agreement, Buyer will receive a Warranty Deed to the lot(s) when all required payments have been made in full but until all payments have been made, Seller retains title to the lot(s).

So far Respondent's form is not unusual for an installment sale land contract.

371. Respondent goes beyond usual practice, however, in providing that seller retain not only title but possession (and thus use) of the land in question until it is paid for. Whereas a New York State study reported that conditional sale contracts "almost universally" grant immediate possession of the property to a conditional vendee²⁵⁷ and another study found that "under an installment land contract the vendee normally takes possession . . ."²⁵⁸ Respondent retains possession and use of land sold conditionally by the simple device of making no contrary provision in its contract.²⁵⁹ [A Florida offering statement expressly recognizes that Respondent "retains title and possession of

²⁵⁵ \$50 to \$100 per month seems to have been a usual payment (TR 9653).

²⁵⁶ CX 155 (Rio Rancho); CX 154 (Silver Springs Shores); CX 152 (Oakmont Shores); CX 106 (Eldorado at Santa Fe).

²⁵⁷ King, J.W., Comment, "Forfeiture: The Anomaly of the Land Sale Contract", 41 *Albany Law Review* 71, 74 (1977).

²⁵⁸ Nelson, G.S., and Whitman, D.A., "The Installment Land Contract—A National Viewpoint," 3 *Brigham Young University Law Review* 541 (1977).

²⁵⁹ The common law rule is that in the absence of a contrary contractual provision possession follows title and use/occupation follows possession. 92 *Corpus Juris Secundum*, "Vendor and Purchaser", §§ 284-85.

the property until contract is paid in full and the Warranty Deed issued" (emphasis added) (RX 201F).]

372. Plainly the absence of express provisions as to possession and use in any form contracts for Respondent's developments could well be confusing and deceptive to lay buyers who have never had the benefit of a law school course in "Vendor and Purchaser". In any [249] event, Respondent's retention not only of title to its lots but of possession and use as well would seem to represent an unusual provision and a substantial overreaching which consumers endure because this is an adhesion contract and consumers take it or leave it.

373. The significance of depriving a conditional vendee of possession and use as well as title to this land purchased becomes fully apparent only in light of another of Respondent's practices: it charges the consumer a time price which in effect includes interest on the unpaid balance of the price until it is all finally paid (typically seven years from purchase) (CX 162Z-AA). But since the vendee presently gets *nothing* for his money—neither possession/use nor title—there is no reasonable basis for charging him interest or its equivalent on the balance "due" Respondent. Analysis makes this clear.

374. No one would think of trying to charge interest on a loan until it is made. There is no more logic in charging interest or its equivalent on the unpaid purchase price of something the buyer has not yet received. Indeed, it would make more economic sense for the buyer to charge Respondent interest on accumulating payments—but this is an adhesion contract prepared by and for Respondent. Here the vendee will receive nothing—no title, no possession, no use—while payments accumulate over an average of seven years after contract.

375. It seems likely that most of Respondent's customers, if they understand the legal theory at all, confuse a "layaway" type installment sale like this, where the buyer gets nothing for his money until years later, when title finally passes, with the garden variety kind of installment sale in which, as noted above, a buyer gets possession and use all the while he is paying off the purchase price. The latter kind may sometimes seem a hardship to a purchaser but there is a real economic tradeoff between an interest obligation and the benefit of possession and use. Here, by contrast, there is no economic justification for awarding Respondent interest or an interest equivalent for *not* giving its customers possession or use of the land in question. This provision [250] of Respondent's adhesion contract is not only unusual but unfair.

III. FORFEITURE PROVISIONS

376. There can be little doubt that the chief attractiveness of a conditional land sale contract to a seller lies in its provision for quick

and easy termination of the purchaser's interest on default: *the seller gets a complete forfeiture of all the money purchaser has already paid in.* Respondent's Rio Rancho form contract²⁶⁰ contains a fair example:

If Buyer shall be in default for a period of 60 days in the making of any payments exactly as due, Seller shall have the right to terminate this Contract by mailing to Buyer notice in writing of its election to do so, sent by registered or certified mail. If within 14 days after Seller so mails such notice,²⁶¹ Buyer does not pay in full all payments then in default (i) *all rights of Buyer hereunder and in and to the lot(s) described on the first side shall cease and terminate, and (ii) all payments made by Buyer may be retained by the Seller, as liquidated damages and not as a penalty.* An affidavit made by Seller or its agent showing such default and cancellation and recorded in the office of the County Clerk [251] of Sandoval County, New Mexico, shall be conclusive proof, in favor of any subsequent bonafide purchaser or encumbrancer for value, of such default and cancellation; and Buyer hereby irrevocably authorizes Seller or its agent to thus declare and record such default and cancellation, and agrees to be bound by such declarations (emphasis added).

Respondent's Silver Springs Shores form contract²⁶² is substantially similar, although it contains a sliding scale of grace periods geared to the percentage of the price already paid in:

Seller will grant Buyer the following grace periods without penalty if Buyer is unable to make any payments exactly on the due date: 60 days if 10% or less of the principal amount of the purchase price has been paid; 90 days if more than 10% but less than 25% of the principal has been paid; 120 days if 25% but less than 50% of the principal has been paid, and 150 days if 50% or more of the principal has been paid. This provision shall not prohibit the accumulation of interest for the period of time a payment may be overdue. Seller shall notify Buyer in writing by registered or certified mail at least 14 days prior to the expiration of the applicable grace period, of the amount then due under the contract and the exact expiration date of such period and Buyer shall not be deemed in default in the accumulation of interest for the period of time the contract may be in default. It is understood that Seller has undertaken expenses in developing and selling his property and, therefore, that *all prior payments made by Buyer will be retained by Seller, as agreed, as liquidated damages in the event of failure to make any required payment on the purchase [252] of this property within the grace period as set forth herein.* The affidavit of Seller or its agent attesting to the termination of this Agreement, the default of the Buyer or the transfer or exchange of property covered hereunder, recorded in the official records in the office of the County Clerk shall be conclusive proof of the termination, default, transfer or exchange, in favor of any subsequent bona fide purchaser or encumbrancer for value. In such case, the Buyer irrevocably authorizes Seller thus to attest and record such affidavit as though it were the act and deed of the Buyer (emphasis added).

The forfeiture clauses in the form contracts used by Respondent at

²⁶⁰ CX 155B (#11 of "Guarantees and Conditions of Sale").

²⁶¹ Respondent's SEC 10K filed 4/30/75 claims that "the Company's general policy is to cancel contracts in which no payment has been received for approximately four months. Under extenuating circumstances, the company may extend this delinquency period" (CX 5QQ).

²⁶² CX 154B (#12 of "Guarantees and Conditions of Sale").

Eldorado²⁶³ and formerly at Oakmont Shores²⁶⁴ have generally been similar to those used at Rio Rancho.

377. It must be made quite clear that Respondent stands by no means alone in providing for quick and easy forfeiture of the buyer's interest in the event of any default in payment. In many states the installment land contract is "the predominant means of vendor financing of land sales" and a forfeiture clause is found in "virtually every installment contract." Nelson, G.S. and Whitman, D.A., "The Installment Land Contract—A Natural Viewpoint," 3 *Brigham Young University Law Review*, 541-42 (1977). A number of states, including New York, still permit such forfeiture and this, of course, accounts for much of the current popularity of the conditional land sale contract among land developers: [253]

The basic attraction of the land contract to the seller is the ease and economy by which the purchaser's interest may be eliminated in the event of his default. Since the purchaser, unlike the mortgagor, has no right of redemption or sale, the seller may avoid the costly and time-consuming foreclosure proceedings mandated under a mortgage. Instead, he simply retains the installments and terminates the purchaser's interest.²⁶⁵

378. That systematic forfeiture of this kind is still employed as a regular business practice in the United States in the late 20th Century is shocking. Students of legal history tell us that such forfeiture is characteristic of relatively primitive societies where the distinction between ownership of property and security for a debt is not well understood.²⁶⁶ The dawn of such understanding and the growth of judicial protection for a mortgagor's equity of redemption out of Equity's abhorrence of penalties occurred long ago in our Anglo-American legal history.²⁶⁷ By 1675 Lord Nottingham could explain that "in natural justice and equity the principal right of the mortgagee is to the money and his right to the land is only as security for the money."²⁶⁸ In 1687 it was held that a mortgagee in possession of the property was liable to account for any advantages over and above his interest which he got thereby.²⁶⁹ [254]

379. How the right to a forfeiture survived in conditional sale land contracts despite the law's general anti-forfeiture posture and its protection of the mortgagor's equity of redemption in particular is not really clear. However, it has been suggested that when modern in-

²⁶³ CX 152B (#7 of "Guarantees and Conditions of Sale").

²⁶⁴ CX 106B (#9 of "Guarantees and Conditions of Sale").

²⁶⁵ King, J.W., Comment, "Forfeiture: The Anomaly of the Land Sale Contract," 41 *Albany Law Review* 71, 74 (1977).

²⁶⁶ Wigmore, J.A., "The Pledge Idea: A Study In Comparative Legal Ideas," 10 *Harvard Law Review* 321 (1897).

²⁶⁷ See generally Holdsworth, W.S., *History of English Law*, I:457; V:293, 330-32; VI: 663-65.

²⁶⁸ *Thornborough v. Baker*, 3 Swanst., at p. 630 (1675).

²⁶⁹ *Fulthorpe v. Foster*, 1 Vern. 476 (1687).

installment sales of lots by developers began to become common, the image which lawyers and judges kept in mind was the executory land contract²⁷⁰ (which merely holds the lot briefly until title can be checked, financing arranged and a deed prepared) rather than the mortgage (which was, of course, the more appropriate legal analogy).

380. Be that as it may, large-scale land developers like Respondent here have taken as much advantage of this legal archaism as possible and many States have already moved in varying ways and to varying extents to close the loophole. Thus some, like Iowa²⁷¹ and Minnesota²⁷² have by statute guaranteed conditional vendees minimum "grace periods" within which to make late payments. Other states have taken more drastic action. Maryland now flatly prohibits forfeiture in installment land contracts for the sale of residential property to a non-corporate vendee, and the vendor can utilize the land to satisfy the vendee's debt only through a foreclosure sale (from which the vendee is entitled to any surplus) just as in the case of a mortgage.²⁷³ A very recent Oklahoma statute treats all installment contracts entailing a transfer of [255] possession to the vendee²⁷⁴ as mortgages and thus makes the forfeiture remedy unavailable to a vendor.²⁷⁵

381. In some states it has been the judiciary rather than the legislative which has taken action to reform this obvious anachronism. Again, some courts have simply guaranteed "grace periods" for defaulting vendees to make up missed payments, while others have in one way or another created something like an equity of redemption with mortgage-type protection for the defaulting vendee.²⁷⁶ Yet others have awarded the conditional vendee restitution of his payments in excess of the vendor's actual damages (rental value during purchaser's occupancy plus incidental damages such as repairs and resale agent's commission).²⁷⁷

382. In sum, there is widespread feeling throughout the country, embodied in both legislation and judicial opinions, that the conditional sale device employed by Respondent must be brought into line with the judicial wisdom of many years. That this Commission itself has no sympathy with such forfeitures in the analogous case of goods appears from a recent consent order providing that "layaway" customers of a

²⁷⁰ Nelson, G.S. and Whitman, D.A., "The Installment Land Contract—A National Viewpoint," 3 *Brigham Young University Law Review*, 541-43 (1977).

²⁷¹ Iowa Code Ann. Sections 656.1-6 (West, 1950).

²⁷² Minn. Stat. Ann. Section 559.21 (West Supp., 1977).

²⁷³ Md. Real Property Code Ann. Sections 10-101 to 108 (1974); Md. R.P. W79. Md. R.P. W70 to 72, W77.

²⁷⁴ Apparently so phrased to avoid including executory land purchase contracts.

²⁷⁵ Okla. Stat. Ann. tit., 16 Section 11A (West Supp. 1976).

²⁷⁶ See, for example, *Nigh v. Hickman*, 538 S.W. 2d 936 (Mo. App., 1976); and *H & L Land Co. v. Warner*, 258 So. 2d 293 (Fla. App., 1972).

²⁷⁷ *Jacobson v. Swan*, 278 P.2d 294, 3 Utah 2d 59 (1954); and *Venable v. Harmon*, 233 Cal. App. 2d 297, 43 Cal. Rptr. 490 (1965) (based on Cal. Civ. Proc. Code Section 580b (West, 1970)).

merchant should no longer face contract cancellation and forfeiture of all previous payments merely because they could not continue payments on their "layaway" purchases. *S. Klein, Inc.*, File No. 762 3047, 7/13/78. [95 F.T.C. 387 (1980)]. [256]

383. Mr. Justice Holmes once remarked that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."²⁷⁸ Here there is not even *that* defense. For at least three centuries the prevailing rule has been the other way. It is time for trade practice to catch up with Lord Nottingham. We conclude that the forfeiture provisions of Respondent's adhesion contracts are grossly unfair to its installment land purchasers.

IV. INTEGRATIONS/DISCLAIMER CLAUSE

384. A third important respect in which Respondent's adhesion contract is unfair to the consumer who is induced to sign it is its inclusion of integration/disclaimer clauses. These supplant all prior negotiations, including salesmen's representations, true or false, by the final, formal conditional sale contract which, of course, is carefully drafted in advance to resolve all questions to Respondent's advantage. The following language appears in all of Respondent's contracts:

I [We] understand that by signing below I am [we are] offering to purchase the lot(s) on the conditions set forth, and it is agreed that this Purchase Agreement sets forth the entire agreement between the parties, that no agent or representative of the Seller shall have any authority whatsoever to change or modify this Agreement in any manner, or to make any other agreement or representation on behalf of the Seller, and that if Rio Rancho Estates, Inc. signs a copy hereof this will be a binding contract, which may not be modified or amended except in writing, signed by Buyer and Seller (CX 286A). [257]

The Silver Springs Shores and Oakmont Shores versions insert after the word "parties" in line 5 the clause:

... and that no oral representations have been made to induce Buyer(s) to enter into this Agreement (CX 152A, CX 154A).²⁷⁹

385. The first clause is really only a little parole evidence rule, the applicability of which would be presumed at law in the case of a true, bargained contract, even if the contract contained no such provision.

There is . . . a general presumption that a written contract complete on its face integrates the final intentions and embodies the final and entire agreement of the parties. 17 *Am. Jur.* 2d, Contracts, Section 260.

²⁷⁸ Holmes, O.W., "The Path Of The Law," 10 *Harvard Law Review*, 457-478 (1897), reprinted in Lerner, Max, *The Mind And Faith Of Justice Holmes* (1954), at p. 71, 83.

²⁷⁹ The same disclaimer appears in Eldorado's Property Exchange Amendment (CX 105A).

However, in the case of an adhesion contract such as this, where a powerful seller crams all his carefully selected boiler plate down the throat of a little buyer as part of the price of "agreement", it is not reasonable to presume deliberate, bargained assent to the inclusions and exclusions of the contract. Agreements between Respondent's salesmen and their customers in such case are neither more nor less enforceable than if the contract contained no integration clause. [Substantially, similar logic applies to the second clause, warning the buyer that none of Respondent's salesmen have authority to vary the terms of the printed agreement or "to make any other agreement or representation on behalf of the seller."]

386. When we reach the special clause noted above (disclaimer of oral representations at certain locations), a new element of public policy is added. An adherent to Respondent's form contract is here required to agree that "no oral representations have been made to induce Buyer(s) to enter into this agreement." [258] In this situation, even if the contract were a true, bargained one, as Professor Williston points out:

This reason [*i.e.*, presumption that the parties reduced the whole agreement to writing] is obviously inapplicable to a situation where an obligation is imposed by law [*e.g.*, to tell the truth] irrespective of any intention to contract. . . . Therefore if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may, of course, be proved. . . .²⁸⁰

387. It is clear that a purchaser-adherent to Respondent's form contract would not generally²⁸¹ be precluded at law from proving fraud by Respondent or its agents in the inducement of this contract and, indeed, should not be so precluded, even in the absence of fraud, where, as here, an adhesion contract is involved. That being the case, Respondent's inclusion in its adhesion contract of an integration/disclaimer clause purporting to deprive salesmen's representations and promises of operative effect must no doubt have some tendency to mislead purchaser-adherents insufficiently versed in the law to know Respondent cannot really do such things. As stated by the Commission in *Automobile Owners Safety Insurance Co.*, 53 F.T.C. 956, 961 (1957), ". . . [S]uch provisions . . . might discourage in some

²⁸⁰ Williston, S. & Thompson, G. J., *Selections From Williston's Treatise On The Law Of Contracts, Revised Edition* (1938), Section 643.

²⁸¹ While the older cases frequently refused relief to the victim of fraud if he were negligent, the more modern ones hold that negligence is no defense to a fraud charge and a disclaimer of fraud improvidently entered into will not ordinarily bar proof of fraud either in the execution or inducement of a contract. See Calamari, J. D., "Duty To Read—A Changing Concept", in 43 *Fordham Law Review*, 341 at 343 (1974).

instances the making of otherwise valid claims." That is an unfair business practice. [259]

V. RESTRAINT ON ALIENATION

388. Respondent's form "Reservation And Purchase Agreement" for Rio Rancho (CX 155B), Eldorado (CX 106B) contain, and that for Oakmont Shores (CX 152B) did contain, another provision which it is hard to conceive a buyer with anything like equivalent bargaining power would accept. Until all payments have been made and a deed obtained from Respondent, Respondent must approve any transfer of the conditional sale contract:

[T]his Purchase Agreement and any rights or interests hereunder are transferable by Buyer only with written consent of Seller on forms furnished by Seller and upon payment of a transfer fee, provided all payments due under this agreement to the date of transfer shall have been paid.

The attempt to deprive purchasers of Respondent's lots of such an important property right through the mechanism of an adhesion contract is sufficiently oppressive to be deemed an unfair business practice.

CONCLUSIONS OF LAW

I. RESPONDENT

Respondent and its controlled subsidiaries have since 1961 conducted a unitary enterprise to sell largely undeveloped land in interstate commerce. (See Findings 2-13)

Comment: A parent corporation is responsible for its subsidiaries' acts in a unitary enterprise. *P. F. Collier & Son Corp. v. F.T.C.*, 427 F.2d (6th Cir. 1970), *cert. den.*, 400 U.S. 926. While land itself is local, an interstate network for nationwide sales directed from New York headquarters, with [260] advertisements, contracts, payments and other contacts constantly crossing state lines, meets the tests of "commerce" laid down by Supreme Court in *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944). Note also that since 1975 Section 5 of the FTC Act has reached acts "affecting" as well as those "in" interstate commerce. 15 U.S.C. 45.

II. JURISDICTION

This Commission has jurisdiction over the Respondent, which has appeared generally by counsel throughout all proceedings in this matter, and over the subject matter of the complaint, pursuant to statutory authority (15 U.S.C. 45) for proceeding by this Commission

to prevent the use by corporations of unfair methods of competition and/or unfair or deceptive acts or practices in or (since 1975) affecting interstate commerce. (See Chronology of Proceeding)

Comment: We would not ordinarily expect any question about this Commission's jurisdiction over proceedings to prevent unfair business practices, in view of the plain language of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and the history of expansive support which the Supreme Court has given the Commission's efforts to define such unfairness, practice by practice. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

However, the Fourth Affirmative Defense of Respondent's Answer argued that the Office of Interstate Land-Sales Registration (OILSR) of the Department of Housing and Urban Development (HUD) "has primary jurisdiction over interstate land sales and to the extent that the rules thereof are in conflict with the proposed order and/or rules to be adopted [261] in this case by the FTC, the rules of the agency having primary jurisdiction must prevail." In various ways Respondent has made it a principal point throughout its case that this Commission should leave the regulation of practices in the interstate unimproved land business to OILSR where Congress is said to have put it in 1968 by enacting the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.*

We find no authority that gives OILSR "primary jurisdiction" or any other power to prevent this Commission from challenging the fairness of trade practices in the interstate unimproved land business. Congress has never so limited this Commission's jurisdiction, as it has done expressly in the case of certain other businesses, to wit, banks, common carriers and meat packers [15 U.S.C. 45(a)(2)]. Respondent makes some argument that since Congress decided to entrust the enforcement of ILSFDA to a new office in HUD rather than to FTC or SEC, an intent to keep this Commission out of the field is inferable. We do not read the legislative history that way and in any event find no express evidence anywhere of a legislative intent to forbid normal FTC policing of unfair practices in the land business.

In the absence of an express Congressional direction one way or the other, all the rules favor a conclusion of concurrent jurisdiction in both agencies and the Courts will try to give effect to the acts of both. *U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939). ILSFDA is not a pervasive regulatory scheme but provides for OILSR to obtain injunctions against fraud in lot sales, bring criminal prosecution and suspend or refuse registrations (thus halting or preventing lot sales) (15 U.S.C. 1703, 1714, 1717). There is no [262] repugnancy between this kind of "regulation" and the FTC's "regulation" by challenging unfair busi-

ness practices. In the absence of a basic repugnancy or serious interference with a pervasive regulatory scheme, neither agency will be precluded from operating in the other's regulatory area. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

A claim that regulation of a particular business exempts individuals in that business from the general law of unfair practices is understandably popular among respondents but the Commission has rarely been convinced that it should stay its hand for that reason and the courts have usually upheld it. Congress had expressly provided in the Tariff Act of 1950 that every article of foreign origin imported into the United States be marked as to the name of the country of origin and that the Secretary of the Treasury should regulate such marking. Nonetheless, an order requiring that imitation pearls from foreign countries be labeled as to the name of the country of origin was upheld in the Court of Appeals, which found "no language (in the Tariff Act) expressing an intention on the part of Congress to repeal Section 5 of the Federal Trade Commission Act" and "no repugnancy between the two Acts." *L. Heller & Son, Inc.*, 191 F.2d 954, 957 (1951).

In the *Matter of Perpetual Federal Savings and Loan Association*, 90 F.T.C. 608, 662 (1977)²⁸² this Commission's jurisdiction to prevent interlocks between savings and loan associations and competing commercial banks was held not [263] defeated because the Federal Home Loan Bank Board regulates savings and loan associations. The Commission found that:

There is no indication that subjecting S & L's to Section 5 to the extent that it bars interlocking directorates with competing banks will interfere with the Board's supervision over S & L's or subject Perpetual to inconsistent regulation. There being no showing here that Congress intended interlocking directorates of savings and loan associations to be exempt from the antitrust laws nor that such exemption is necessary to make the HOLA work, we hold that the FTC has jurisdiction.

Only recently, in the course of enforcing the Commission's administrative subpoenas for information on the natural gas business, the D.C. Court of Appeals noted that:

we do not reach the merits of the allegations that the FTC has intruded into the FPC's territory of expertise and is attempting to relitigate an issue definitively settled by the Power Commission.

but added:

²⁸² Remanded by 4th Cir. Ct./App. 11/14/78 to consider the effect on this Commission's jurisdiction of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (Pub.L.No. 95-630).

We note, however, that this is an era of overlapping agency jurisdiction under different statutory mandates.

* * * * *

Under the principles of RCA [*United States v. RCA*, 358 U.S. 334, 338-39 (1959)] what the FPC found to be consonant with the public interest [264] could still be viewed by the FTC as an unfair method of competition. It therefore appears that a court should approach gingerly a claim that one agency has consciously determined an issue later analyzed from another perspective by an agency with different substantive jurisdiction. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir., 1977).

III. HIGH-PRESSURE SALES

The high-pressure marketing techniques employed by the Respondent in the course of its efforts to sell building lots in its several subdivisions constitute unfair methods of competition and unfair and deceptive acts and practices in and affecting interstate commerce, in violation of 15 U.S.C. 45. (See Findings 52-95)

Comment: Conclusion #3 deals with a large number of Respondent's marketing techniques which are not deceptive in and of themselves but which tend to contribute to a consumer's ultimate deception by increasing the likelihood that he will accept and act on *other* statements by Respondent which *are* deceptive. Only in this broad sense are these particular practices "deceptive".

The use of the phrase "high pressure selling" to describe this marketing technique leaves something to be desired. We certainly do not mean to suggest anything like harassment, frightening or intimidation, as is not infrequently implied by the term "high pressure sales." *National Housewares, Inc.*, 90 F.T.C. 512 568 (1976). The evil that we see in such practices is the deprivation or reduction of consumer's opportunity to react carefully and rationally to what they are hearing.

For example, a consumer might not otherwise be quite ready to believe and act on Respondent's factual misrepresentations that Rio Rancho [265] lots have constantly risen in value (and so are likely to continue to do so in the future). However, the consumer may be led to accept and act on such misrepresentations by the two ounces of alcohol to which Respondent typically treats its guests or by the excitement deliberately generated by carefully staged calling of "holds" at a dinner party or by the cumulative pressure of relay selling ("T.O.") or by any others of the various practices dealt with here under "high pressure" selling. This phenomenon is clearly an unfair practice, as held by this Commission in *Arthur Murray Studio of Washington, Inc.*, 78 F.T.C. 401, 439-440 (1970) (record supported complaint's charges that respondents there used "intense, emotional

and unrelenting sales pressure" to persuade prospects to sign long term, expensive contracts).

IV. DECEPTIVE PRACTICES

Respondent's misrepresentations to customers and prospective customers concerning the growth of its subdivisions (Findings 96-181), their investment potential (Findings 182-310) and the state of their development (Findings 311-359) all constitute unfair methods of competition and unfair and deceptive acts and practices in and affecting interstate commerce, in violation of 15 U.S.C. 45.

Comment: These conclusions—the heart of the case—are amply supported by our Findings 96-359. Moreover, although we have raised no collateral estoppel from the judgment of conviction in the parallel criminal case (see Appendices A and B hereto), we note that the salient facts cited by the Second Circuit Court of Appeals in that case as supporting Respondent's conviction of mail fraud and interstate land sales fraud there are virtually duplicative of our chief findings and conclusions here. *United States v. AMREP Corporation*, 560 F.2d 539 (1977). [266]

Respondent's main attack on the sufficiency of the evidence to support these particular findings is based on the common law's ancient distinction between representations of fact (generally actionable) and representations of opinion (generally not actionable). It argues that its affirmations as to the present value and predictions as to the future value of the barren land it has been selling at such fancy prices are mere expressions of opinion and hence no basis for a finding of violation here. There has unquestionably been a good deal of time spent on arguments about such a distinction, particularly as between express statements of value such as "is worth" (opinion) and statements of market price of a standard product such as "will bring" (fact), e.g., *U.S. v. Hannigan*, 303 F.Supp. 750, 753 (1969). However, we waste no time on the distinction for two reasons.

We have seen that in actual practice there is a good deal of fungibility between the word "price" and the word "value" as used by Respondent's salesmen and customers. Moreover, Respondent's dramatization of its list price structure and use of it to show constantly rising values no doubt has contributed mightily to such fungibility. The price/value distinction thus becomes very hard to apply in real life.

Even, however, if we assume more careful speech than we think to be customary, Respondent's supporting case, *Marx v. Computer Science Corp.*, 507 F.2d 485 (1974) in fact makes it clear that one must take into consideration any "gross disparity between prediction and

fact" and "other misrepresentations and failures to disclose" (507 F.2d at 489). Here we are talking not about minor differences in value but about differences between Respondent's selling prices and current market value of such [267] magnitude as to merit the description "unconscionable". As compared with such standards as the Roman and Medieval rule of *laesio enormis*, under which a seller of land could get his land back if the value turned out to be less than half the selling price,²⁸³ or with the 200-300 percent price/value discrepancies which courts have been finding "unconscionable" in the selling of goods under Sections 2-302 of the new Uniform Commercial Code,²⁸⁴ the 300-500 percent price/value disparities we have found here leave no doubt that, in the language of *Marx*, this is a case of such "gross disparity between prediction and fact" as to be inherently suspect.

No honest opinion could be so wrong or at least so reckless. As stated by the Second Circuit Court of Appeals on substantially this record:

Declaration of opinion as to future events which the declarant does not in fact hold may be found by a jury to be fraudulent (citation). Declarations made with reckless indifference for the truth may be viewed in the same light (citation).

* * * * *

Opinions given with respect to anticipated profits carry with them the representation that they are honestly held (citations). The expression of an opinion not honestly entertained is a factual misrepresentation (citation). *United States v. AMREP Corporation*, 560 F.2d 539, 543-44 (1977).

V. EMPLOYMENT REPRESENTATIONS

Respondent's representations to customers and prospective customers concerning employment opportunities for them in the vicinity of Rio Rancho Estates have not been unfair or deceptive. (See Findings 360-63)

Comment: As previously explained in making the above findings, we do not infer the deception claimed by Complaint Counsel in connection with Respondent's agents' talk about job possibilities around Rio Rancho.

²⁸³ "The rules of *laesio* as they appeared in the Corpus Juris of Justinian allowed rescission to sellers of land where the price received was less than half of the value of the property sold. Greatly expanded in the Middle Ages, the doctrine retained the purely arithmetical test of a 50 percent discrepancy in value." Dawson, John P., "Economic Duress—An Essay In Perspective," 45 *Mich. L. Rev.* 253, 276 (1947).

²⁸⁴ E.g., *Central Budget Corp. v. Sanchez*, 279 N.Y.S. 2d 391, 1961 (\$400 value vs. \$950 cash price); *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264, 1969 (\$300 value vs. \$900 cash price).

VI. ADHESION CONTRACT

Respondent's form "Reservation And Purchase Agreement" is an adhesion contract whose credit terms, forfeiture provisions and integration/disclaimer clauses all constitute unfair methods of competition and unfair acts and practices in and affecting interstate commerce, in violation of 15 U.S.C. 45. (See Findings 364-387)

Comment: Here the focus is not on deceptive practices but on hard ones. Certain terms of its standard printed land sales agreement are found to be unfair business practices because of their oppressive character. While oppressive practices appear in our cases less frequently than deceptive practices, they nevertheless constitute a well-established head of the Commission's jurisdiction. *Federal Trade Commission v. Klesner*, 280 U.S. 19, 28 (1929) ("circumstances which involve flagrant oppression of the weak by the strong"). [269]

What is perhaps new to Commission practice, at least by name, is the concept of an "adhesion contract". Classical contract law has generally assumed hard bargaining between parties of roughly equivalent strength. That assumption is manifestly absurd in a real world where big businesses now prepare their own form contracts to give them everything they want in the way of enforcement and other consumers take it or leave it", *i.e.*, "adhere" to the whole contract as prepared or forego the deal entirely.

Plainly the same legal consequences should not attach to formation of an "adhesion contract" as to formation of one closely bargained by parties of roughly equivalent strength and the "adhesion" concept has accordingly been welcomed by the commentators²⁸⁵ and now the Supreme Court.²⁸⁶ In a 1972 case involving a contractual waiver of a due process objection to State enforcement of a confession of judgment, a dictum of the Court clearly recognized the doctrine of "adhesion" contracts:

This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a *cognovit*. [270]

And the Court later made the same point again:

Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the *cognovit* provision, other legal consequences may ensue.

²⁸⁵ See generally Meyer, A.W., "Contracts Of Adhesion And The Doctrine Of Fundamental Breach," 50 *Virginia Law Review* 1178 (1964) and Kessler, F., "Contracts Of Adhesion", 43 *Columbia Law Review* 629 (1946).

²⁸⁶ *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186, 188 (1972).

The reality of a consumer's participation in the formation of a contract has to be a matter of the greatest concern to this Commission and the "adhesion contract" concept should facilitate analysis and determination of the extent to which the consequences normally attached to contract formation should, in fact, attach in particular cases. Hammering out the ultimate shape of the "adhesion contract" doctrine will no doubt take a long time but it seems safe to assume that the three situations dealt with here would come within anyone's delimitation of the doctrine.

VII. VIOLATION AND ORDER

Respondent's unfair methods of competition and unfair and deceptive acts and practices in interstate commerce, as set forth above, have violated Section 5 of the Federal Trade Commission Act [15 U.S.C. 45(a)(1)] and the public interest requires the entry of a corrective ORDER.

Comment: Respondent urges upon us that it has abandoned sundry practices here found to be unfair and that a corrective order is therefore unnecessary. We find that Respondent may have become a little more sophisticated in its advertising to investors once the Commission's hand was on its shoulder but that by and large Respondent is doing business about as usual and that no legal abandonment of its unfair business practices has been shown here. [271]

RELIEF

The notice order served on Respondent with the Complaint has been amended by Complaint Counsel in several significant ways and we have therefore attached a copy of Complaint Counsel's proposed order (CCPO) as Appendix E for ease of comparison with the order adopted herein. The differences between Complaint Counsel's proposed order and our own are relatively few.

That is in part because of this Judge's view that an operating bureau of an administrative agency such as this Commission's Bureau of Consumer Protection, being charged with policy-making in its field, must have a large input into shaping the relief appropriate to each case, once a violation has been found. The Judge must, of course, be satisfied that his order is a proper and desirable one, but beyond that he must give the greatest weight to recommendations of the operating bureau responsible for developing a consistent policy necessary to achievement of the agency's statutory mission.

It is important to establish generally before analyzing any particular provisions of the order that the Courts have given this Commission

support for very broad orders to cease and desist from unfair acts and practices, not just the practices actually engaged in but also those similar in nature, *FTC v. Mandel Bros.*, 359 U.S. 385 (1959); not just the product involved in the illegal activity but others, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); not just in the same place but anywhere that Respondent does business, *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). The Supreme Court summed it all up in 1952 by explaining that an order cannot be restricted to the "narrow lane" of the Respondent's past transgressions but must "be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470 (1957). And if this sometimes means prohibiting a Respondent from doing things that are entirely lawful when done by most people, this is in the very nature of effective relief. *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 488 (2d Cir., 1962) ("order may permissibly require one who has violated the law to conform to a somewhat higher standard of future conduct than one who has stayed within it"). [272]

Complaint Counsel's proposed order (hereafter "CCPO") contains seven major sections.

I

Section I is made up of three subsections which would order Respondent to cease and desist respectively from (1) making 14 specified representations; (2) referring to 7 specified subjects; and (3) engaging in 10 specified acts or practices. Many are quite broad, like the prohibitions against representations that land being offered for sale by Respondent is "a good investment (IA1) or that the list price set by Respondent for its land is equivalent to the market value of the land, unless adequate market data on resales of similar land, similarly developed, substantiates the representations (IA5). The broadness of many of these prohibitions is attacked by Respondent but the Administrative Law Judge deems them justifiable in any attempt to "fence in" the activities of a clever and a sophisticated marketer, convicted of criminal fraud, in whom we can place virtually no trust. Accordingly, with only two minor exceptions,²⁸⁷ we adopt all of CCPO Section I as proposed by Complaint Counsel.

II

Section II of CCPO begins the affirmative relief and it is important. The first of two elements of Section II makes Respondent deliver to all its customers at least two days before any in-person sales contact

²⁸⁷ Because we were not convinced that Respondent promised to buy or help sell customers' lots for them, we have excised all but the first clause of CCPO IA3 and because we found against Complaint Counsel on alleged employment representations, we have eliminated CCPO IA-11.

a standard form entitled "Notice to Buyers" which (like HUD's more elaborate "property report") is designed to equip prospects with enough basic factual information (with two days to digest it), so that they can better assess the claims to be thrown at them when the in-person selling starts. [273]

The specific information which must be provided by Respondent in this "Notice to Buyers" includes the following: (1) that the subject is a land sales presentation; (2) the location and average cost of the land being sold; (3) a warning as to the criminal record of the developer vis-a-vis land sales; (4) a warning as to the lack of investment value or resaleability; (5) availability and cost information as to roads, water, sewer, electric service, telephone service and recreational facilities; (6) advice to read the HUD property report and seek professional counsel; and (7) a toll-free complaint/information telephone number. The order then requires physical attachment of the purchaser's copy of the "Notice to Buyers" to the contract.

Complaint Counsel may be overenthusiastic when they call this "Notice to Buyers" "the key protection for future land sales customers" but it is plainly a step in the right direction in that *it insures two days forethought whereas the present HUD rules permit giving a property report to a prospect at the very time the in-person selling is going on*. We adopt this proposal whole-heartedly.

The second element of CCPO Section II is unrelated. In the event that Respondent has failed for six months (plus a 30-day grace period) to provide any contracted-for improvement, utility, recreational facility, etc., its land contract must require it affirmatively to notify any affected purchaser of the failure and of purchaser's right to obtain a refund of all monies paid, unless the purchaser will accept an offer by Respondent to exchange (even) into another lot, meeting all the contract's requirements, including utilities, zoning, recreation, etc. Respondent is also put under order to carry out this new contractual obligation. It seems a healthy thing to make Respondent take affirmative action in this situation and we adopt the proposal. [274]

III

Section III of our order, which tracks CCPO closely, is the longest, most complex and arguably the most important of all the order's mandates. Like the "Notice to Buyers" required by Section II, certain provisions of Section III are designed to make prospects more aware of the economic and other problems *deceptively* minimized by Respondent's advertising and promotion. Other provisions are designed to increase a purchaser's opportunity for an unhurried, thoughtful decision or change of mind in the face of Respondent's *high pressure* selling tactics. Finally, relief is afforded from the most unfair features

of Respondent's *adhesion contract* (to wit, its credit terms, forfeiture provisions integration and alienation clauses).

The first purpose (fuller disclosure of relevant background to counter deception) is implemented by Section III A, which requires Respondent to include "clearly and conspicuously" in all promotional materials and sales presentations the following warning:

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 even on your being able to resell it.

While the record here makes it clear that disclosure of disadvantages may not prevent an improvident purchase by one under the influence of both sophisticated high-pressure sales methods and material deceptions of fact, the foregoing warning can operate only to improve the existing situation at Respondent's subdivisions. We adopt this proposal.

Section III B requires Respondent to use *only* the words "Contract For The Purchase Of Land" at the head of its land sales contract (now labeled "Reservation And Purchase Agreement"). The purpose is to eliminate the unusual and legally unclear term "reservation", which may suggest to prospective buyers that they will not be legally bound, even after signing this instrument. [275]

Subsection III C of CCPO is very important. It orders Respondent to incorporate into its form land contract "clearly and conspicuously" a specified clause giving the purchaser a right to cancel his land purchase contract within ten days after its date and receive back within ten more days any legal documents signed by him, as well as any monies paid under the contract. This proposal for a ten-day cooling off period (without reference to when the purchaser first gets a HUD property report) is a significant advance over HUD's requirement for developers in general: a three-day cooling off period—if but only if—the purchaser has not been given a property report two days before he signs up.²⁸⁸ Now the purchaser is certain to get this time to think over whether he really wanted the land and the time for "cooling-off" is extended well beyond Respondent's current three days.

Since, however, the purpose of giving the purchaser this extra time to "think it over" could be frustrated by contacts, telephonic or otherwise, such as the record shows Respondent has employed to counter "buyer's remorse", we find need to add to the ten-day cancellation option a prohibition on the initiation by Respondent of any communications between a buyer, telephonic or in-person, during the ten-day cooling-off period after a purchaser's signing of a land contract at any

²⁸⁸ The OILSR "cooling-off" period was 48 hours until 1974 when it was extended to 72 hours, 24 C.F.R. 1710.110.

of its developments. [A similar provision for the post-inspection cancellation period in Section III H8 is conformed to this provision of Section III C.]

Other provisions of the order implement the ten-day cooling-off scheme by making Respondent provide each purchaser of its land with a form called a "Notice of Right of Cancellation"; by ordering Respondent to honor such a notice or explain to the purchaser what is wrong [276] with it; and by giving the purchaser three days to cure any deficiency in the notice. The contract and "notice" both urge the purchaser to consult a lawyer or other professional for advice on this subject.

Subsection III H and its dozen subsidiary provisions all relate to a purchaser's right to obtain contract cancellation and refund of payments if for any reason after a personal inspection of his property, he does not like it. In this matter we have an important difference of opinion with Complaint Counsel. They start with an assumption that Respondent may or may not give buyers an option to cancel out after inspecting their property and attempt to regulate only what happens *if* Respondent grants any such option.²⁸⁹ We see no reason for not *requiring* Respondent to grant an inspection/refund option to a buyer who has purchased land *site-unseen*, where the record, as here, reveals the unfair and deceptive practices used by Respondent to effect and retain such site-unseen sales. The purchaser should not, of course, be able to keep such a cancellation option open indefinitely and we therefore will limit an inspection for this purpose to six months after purchase, the same period allowed by Respondent voluntarily. CCPO's proposed Section III H will be amended accordingly.

The most important provision of Section III H would give a purchaser a contract right to request a refund anytime within three days after his inspection. To make sure that the purchaser after inspection is not improperly/improvidently jaw-boned by Respondent into foregoing his cancellation/refund option during those three days, a moratorium on communications between Respondent and purchaser (similar to that provided in Section III C) is now provided in Section III H8. [277]

The proposed order also provides in Section III H6-7 for a form entitled "Notice of Cancellation After Inspection," to insure that a purchaser is fully informed of his inspection/refund rights and knows how to give proper notice as required. With these and all other ancillary provisions of CCPO Section III H, assuming amendment as ordered above, we are in full accord and adopt them for our own order.

Subsection III I provides for compulsory public recording of Respondent's land contracts as well as the deeds ultimately executed for

²⁸⁹ CCPO Section III H reads: "*Whenever* respondent extends a refund privilege which is conditioned upon the buyer making a personal visit to the property", etc. (emphasis added).

those purchasers who complete their payments. Respondent calls this an administrative "disaster" and points particularly to the problems of clearing record title when great numbers of purchasers cancel or default. It is also true that even now any purchaser can have his contract recorded if he wants it on record. On the other hand it is relatively easy for Respondent to record all contracts automatically and thereby afford purchasers maximum protection against any third party creditors. On balance we adopt CCPO Section III H for our own order.

With Subsections J through N of Section III, we reach the very important subject of forfeiture. Subsections J and K reform Respondent's adhesion contract to eliminate forfeiture of payments made by a defaulting purchaser.²⁹⁰ The most that Respondent will be allowed to retain is its actual damages resulting from such default but in any event no more than 40 percent of the land's "cash price" [as defined in Regulation Z of the Truth-In-Lending Act, 12 C.F.R. 226.2(n)]. The 40 percent cap was reasonably derived by Complaint Counsel from testimony by the General Manager of Silver Springs Shores (who was also the Oakmont Shores Manager while that development was operated by Respondent) that sales cost and overhead together ideally represent about 40 percent of Respondent's prices).²⁹¹ [278]

In view of all that has been said here about the evil of forfeiture—a primitive concept that has no place in any civilized legal system—there is no question about the desirability of eliminating the forfeiture clause in Respondent's adhesion contract and we endorse not only the main prohibition but all other provisions ancillary thereto. Subsection K orders Respondent (*in futuro*) to make refunds of payments (including principal, interest, taxes and assessments) in accordance with the contract provisions just referred to. Subsection N forbids efforts by Respondent to defeat the anti-forfeiture rule by such devices as obtaining a waiver of purchaser's rights. Subsection L forbids Respondent to recover or try to recover any sums still due on contracts in effect but not yet fully performed when this Complaint was brought (3/11/75) or since then. Subsection M forbids Respondent to enforce or threaten to enforce or rely in any way on the forfeiture clause in its existing land contracts.

These provisions unquestionably call for substantial reformation of existing contracts, at least insofar as still executory, and Respondent understandably views this as beyond this Commission's power because retroactive in character:

²⁹⁰ "Default" for this purpose is defined as an announced intent of purchaser to default or his failure to make a payment for six months after the due date.

²⁹¹ TR 16444-47.

The notice order . . . requires respondent not only to discontinue alleged false and misleading representations and alleged unfair and deceptive acts and practices but also seeks partial rescission or reformation of existing contracts, refunds or monies in excess of Commission-approved damages, payment of damages and notification concerning unfair or deceptive acts or practices. These mandates, moreover, are not made applicable prospectively, i.e. to future customers, but are directed retrospectively (sic) to past customers presently or previously under contract with respondent. RPF p. 278

To support its position Respondent relies chiefly on (1) *Heater v. F.T.C.*, 503 F.2d 321 (9th Cir., 1974), which held that a Commission order to make monetary restitution [279] went beyond its cease and desist power, and (2) the language of the 1975 Moss-Magnuson Act's provision sending the Commission into the courts to obtain "rescission or reformation of contracts, the refund of money or return of property, the payment of damages and public notification respecting . . . the unfair or deceptive act or practice" (15 U.S.C. 57b(b), Supp. V 1955).

Complaint Counsel, on the other hand, point to the language of Moss-Magnuson that "remedies provided in this section are in addition to and not in lieu of any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law" 15 U.S.C. 57b(e). They also argue (CCRB, pp. 41-42) that *Heater* is "easily distinguishable" because the order here does not seek to remedy past acts but to prohibit future acts here declared unfair or deceptive." It is immaterial that the contract clause may have been created prior to issuance of an order; it is the time of the proscribed act that is important, they reason.

This Commission in *Holiday Magic, Inc.*, 84 F.T.C. 748, 1045 (1974) expressly declined to accept the Ninth Circuit position as embodied in *Heater*²⁹² and it may be that the Supreme Court will eventually see it that way. This Administrative Law Judge believes, however, that the Commission's statutory assignment to "prevent" corporations from "using" unfair business practices [15 U.S.C. 45(a)(2)] cannot reasonably be stretched to include restitution of money or property already lost to deceptive or otherwise unfair practices.

Moreover, we think that the most sensible inference to be drawn from Congress' haste to enact Moss-Magnuson after the *Heater* decision came down was that Congress, too, [280] doubted our restitution power and gave us, instead, a power to go into the District Courts as a *prosecutor* after determining that there has been a violation and seek redress in appropriate cases.

Because of these views we decline to order restitution of money or

²⁹² The restitution provision in *Holiday Magic* was later stricken, however, when the Commission decided not to seek review of *Heater* in the Supreme Court, 85 F.T.C. 90.

property already lost by consumers and have adopted anti-forfeiture provisions operating only *in futuro*, i.e., on contracts not yet made or at least not yet fully executed. This must by no means be interpreted as indicating that we do not believe Respondent's customers are entitled to redress for past payments. They are. We mean only that Congress has told us how to do it and we ought to do it that way. The judicial redress provided in Section 19 of the FTC Act (15 U.S.C. 57b) should be sought by the Commission forthwith.

A second evil of Respondent's adhesion contract, as we have seen, is its integration clause, disclaiming any oral representations of Respondent or its employees, express or implied, which do not appear in the written contract. Subsection M of Section II orders Respondent to forbear from enforcing or threatening to enforce or relying in any way on this integration clause in the agreement of any purchaser who was under contract when this Complaint issued (3/11/75) or who has entered into such a contract since then. In this case, where numerous unfair/deceptive representations have been established on the record, it is plainly important to free purchasers from such artificial limitations of proof as would otherwise be forced upon them by Respondent's adhesion contract. We adopt Complaint Counsel's proposal.

Subsection (O) of CCPO Section III strikes at another one-sided provision of Respondent's adhesion contract. As noted earlier, a buyer at Rio Rancho and Eldorado cannot sell his conditional sale contract or any interest in it without getting Respondent's consent until he is paid up and has his deed. CCPO III's Subsection O would order Respondent to include in all its contracts a provision extending the contractual rights and privileges of the buyer to subsequent purchasers or assignees from buyer. We think this would follow simply from the elimination of the present provision barring alienation without Respondent's consent but to insure normal alienability we will adopt both remedies. Accordingly, we will insert in Subsection O [281] after the words "provision" the phrase "insuring free alienability of the purchaser's interest under the contract."

We are puzzled as to why Complaint Counsel have omitted any proposed relief from a fourth evil of Respondent's adhesion contract: its brazen insistence on charging installment purchasers interest or an interest equivalent on the unpaid balance of the purchase price, even though Respondent retains not merely a security title (as is common and not unreasonable) but the exclusive possession and use of the land while purchaser is accumulating his payments (which is uncommon and unconscionable). Accordingly, we shall add to CCPO Section II a new Subsection P (making old P into Q) as follows:

P. Forbear from charging or collecting from any installment purchaser of land in any of its developments any payment in the nature of "interest" (or providing for such payment in Respondent's land contract) unless and until Respondent gives such purchaser possession and use of the lot of land purchased.

Section III concludes with a proposed authorization by the Commission in Subsection Q (P in CCPO) for Complaint Counsel to send to all of Respondent's land customers, whether deeded or only contracted (so long as they had not defaulted before issuance of this Complaint on 3/11/75) a document attached to CCPO as "Appendix A". This unusual but useful document is basically a letter of explanation for laymen on "all you ought to know about" this lawsuit, the main facts it has established and what options are now open to Respondent's customers. Although we think it likely to require substantial rewriting by the time it is used—appeals to the Commission and the Courts being as common and as lengthy as they are—it seems worthwhile to have such a model under consideration and for that reason we have preserved CCPO's order (III P) and draft letter (Appendix A) in our order (III Q) and draft letter (Appendix A). [282]

IV

Subsection A(1) of CCPO IV forbids Respondent to sell undeveloped land as a "homesite" or "building lot" unless it is immediately usable for such purpose without further development (of specified kinds). Subsection (2) supplements this negative commandment with an affirmative order for Respondent to disclose (in specified form), how much more money (in addition to the purchase price of the land), will be required to make such land "immediately available" for building. This seems a very salutary idea and we adopt both provisions in the corresponding Section of our own order.

Subsections B and C of Section IV of CCPO present an ambitious and innovative plan to relieve consumers who have bought into one of Respondent's developments and want to but cannot get their money out. Complaint Counsel hope it would create a "viable resale market" for the vacant lots they now find it impossible to get rid of. The principal elements of this scheme would be threefold.

(1) Respondent would be ordered to set up a "clearinghouse" for vacant land owners who want to list their lots for resale and would also establish liason with the local multiple-listing service. There is nothing very bad about this idea but there is nothing very good about it, either. If there is one thing this record demonstrates, it is that conventional local multiple-listing services have not been effective sellers of the same lots that Respondent, with its dinner-parties, tours

and other high-pressure and/or deceptive marketing techniques, has been able to sell by the tens of thousands. If only for that reason, we cannot get up much enthusiasm for a bigger and better multiple-listing service.

(2) To avoid any necessity for would-be resellers to compete with Respondent in selling lots at its subdivisions, Complaint Counsel would prohibit Respondent from selling any more vacant land until the number of lots improved or exchanged for building lots²⁹³ (and thus back in Respondent's inventory) equal the number of remaining unimproved lots [283] (by which time, Complaint Counsel feel, they would have established "a viable resale market").

(3) To speed this result at Rio Rancho CCPO IV would simultaneously require that Respondent take back consumer-owned vacant lots which are listed for resale as part-payment (at 1975 list prices) for every building lot sold by it, as long as any undeveloped lots be listed for resale.²⁹⁴ When no more vacant lots are listed for resale this requirement would cease.

It is unnecessary for us to consider Respondent's doubts about whether the Commission's cease and desist power extends to such a complex scheme of affirmative regulation, because we are satisfied that the scheme would never accomplish what its well-meaning sponsors seem to think it would. It rests on an assumption that, if Respondent can be excluded from the market, resellers of its land will become the beneficiaries of the demand for vacant lots involuntarily foregone by Respondent.²⁹⁵

But without Respondent to create its own special brand of demand by dinner-parties, tours, etc. there would be little or no demand to be satisfied—at least not by such conventional sales techniques as consumers or even local multiple-listing services can muster. Since we are not inclined to insist that Respondent's unfair sales techniques be continued by others to create the artificial demand that might enable Respondent's consumer victims to get their money (or some part of it) back by way of resale, [284] we decline to incorporate Subsections B and C of CCPO Section IV into our own order. If most of these consumers are going to get most of their money back, it will not be by way of resale but by way of legal action by this Commission for redress to such consumers under Section 19(b) of the Federal Trade Commission Act, as amended, an action which the Administrative Law Judge again unequivocally recommends.

²⁹³ This would include both lots with houses on them and lots immediately available for building.

²⁹⁴ If a builder or other buyer of a building lot has no undeveloped vacant lot to trade-in he must obtain one from a listed consumer and turn it in. As a last resource Respondent must find one for him.

²⁹⁵ "Paragraph C allows the consumer to share with Respondent in whatever demand there is for Rio Rancho building lots. . . ." CCPE, p. 285.

V

CCPO's proposal (Section V) to work out for Oakmont Shores a resale listing system such as was proposed in Section IV B falls with our decision not to adopt the overall scheme outlined in Subsections IV B and C.

VI and VII

Sections VI and VII of CCPO are merely boiler-plate provisions for the enforcement of Commission orders. Reference is made to their text for details. They seem entirely proper.

The Administrative Law Judge now issues the following ORDER:
[285]

ORDER

As used in this Order, the following definitions shall apply:

Property Report shall include documents entitled "Public Property Report," "Public Offering Statement," "Subdivision Public Report," "Offering Statement," "Prospectives," "Prospectus," "Public Report," and any other document providing information regarding the purchase of land in general or a specific subdivision in particular which is required by federal or state law to be distributed to prospective purchasers or purchasers of land.

Land, property or lot shall mean any real property located in one of respondent's subdivisions, unless otherwise modified herein.

Vacant land, property or lot shall mean any land which is not immediately usable as a homesite, as homesite is defined herein.

Homesite or building lot shall mean any land which is immediately usable for such purpose as set forth in Section IV, paragraphs A1 and 2 of this Order. [286]

Contract shall mean any binding legal instrument for the purchase of an interest in real property.

Purchaser or buyer shall mean any individual who is a potential or actual vendee of the property being offered by respondent.

Resale market shall be as defined in Section IV, Paragraph B herein.

Developed land, property or lot shall mean land which has been improved with the roads and utilities necessary to make it a *homesite* or *building lot*, as those terms are defined herein.

Market value or value shall mean the price expectable when the buyer and seller are typically motivated and not under undue pressure to buy or sell, each is acting in his own best interest, reasonable time is allowed for exposure in the open market, the price represents

a normal consideration unaffected by any outside interests, and the sale is on cash or typical terms. [287]

I

It is ordered, That respondent AMREP 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 real property 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 or sound investment, or that the principal of "leverage" may be employed in the purchase of this land;
2. There is little or no financial risk involved in the purchase of respondent's land;
3. The resale of vacant land purchased from respondent is not difficult;
4. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise; [288]
5. The list 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 with same degree of development) by previous buyers substantiates this representation;
6. The purchase of land from respondent is a way to achieve financial security, to deal with inflation or to make money;
7. The purchase of land in general is a good, profitable or sound investment;
8. The demand for any land, including that offered for sale by respondent, has increased, is increasing, or will increase;
9. 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;
10. Buyers must purchase immediately in order to ensure that a particularly desirable location will be available;
11. The signing of a contract does not immediately create a binding legal obligation on the part of the buyer including, but not limited to, representations that the buyer is only making a deposit, is only re-

serving the land, is only taking the first step, or is not making a final decision, or in any manner [289] whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided*, that respondent may accurately recite the terms and conditions of a refund privilege, if any, or of a cancellation right, if applicable;

12. The Property Report is prepared or approved by the Secretary of HUD, OILSR, the Department of Housing and Urban Development or any other federal government entity, or that the Offering Statement is prepared or approved by the respective state or any state entity, or that either the Property Report (as defined in the definitions section) or the Offering Statement in any way indicate endorsement of the offering or judgment of the merits or value, if any, of the land being offered;

13. Any advertising or promotional material has been produced independent of respondent if in fact such material has been in any way edited, altered or changed by or at the behest of respondent, or if respondent in any way advised, counseled, subsidized in whole or in part, or influenced the content of the material. [290]

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future prices 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;

2. The direction of geographical growth or amount of population increase, past, present or future, of any geographical or political area wherever situated;

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 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); *provided*, that respondent may employ accurate pictorial representations that comport with the requirements of Section I, paragraph C3 herein;

4. Investments of any sort, including any reference to stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment; [291]

5. The purchase, reservation, contracting or consideration by any individual other than the immediate buyer, of any land being offered by respondent, including but not limited to, any reference to anyone else "holding" a piece of property or "deleting" a listing;

6. Respondent's reputation, size, assets or listing on any stock ex-

change; *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.

C. Engaging in the following acts or practices, directly or by implication, through the use of any means:

1. Disparaging or discouraging buyers 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. Not providing any required property report sufficiently in advance of signing a contract so as to permit the buyer to read it completely without interruption or distraction by respondent's representatives or employees; [292]

3. Using any motion pictures, still pictures or other graphical depictions of any type that have been in any way retouched, staged with props, or created through the use of any illusion, artificial embellishment or device, unless each such alteration of reality is clearly and conspicuously noted in conjunction with the depiction;

4. Filling out a contract with the buyer's personal information prior to the buyer signifying, by affirmative statement, that buyer desires to purchase the land being offered;

5. Subjecting a buyer who has evidenced a desire not to purchase to continued sales effort from any sales representative or other employee other than the original salesperson, *i.e.*, any continuation of the "T.O." or "takeover" system;

6. Including in any contract or in any other documents shown or provided to buyers, 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; [293]

7. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any material respect from the rights or obligations of the parties as stated in the contract, the Notice to Buyers (*see* section II of this Order) and the Property Report;

8. Including in any contract language permitting respondent to retain all sums previously paid by buyer upon the failure of buyer to pay any installment due or to otherwise perform any obligation under the contract;

9. Hindering or preventing any independent builder or contractor from freely competing with respondent for house construction work or procurement of building lots at any of respondent's subdivisions;

10. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours. [294]

II

It is further ordered, That respondent AMREP 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 real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, 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 cases where the buyer 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 buyer in the buyer's home, or other location, respondent shall mail the Notice to the buyer allowing sufficient time for the Notice to arrive two days prior to the meeting. (3) In cases where the initial contact with the buyer 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 buyer, request that the buyer read it, and provide ample uninterrupted time for the buyer 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 buyer. [295]

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 Staff of the Commission. The Notice shall be in the following format and content:

NOTICE TO BUYERS

NAME OF SUBDIVISION
NAME OF DEVELOPER
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 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 \$ _____.

WARNING

IN 1977, AMREP CORPORATION, WHICH OWNS (INSERT SUBDIVISION NAME), AND A SUBSIDIARY CORPORATION OF AMREP, THE PRESIDENT OF AMREP, AND THREE OTHER OFFICIALS OF THESE COMPANIES WERE FOUND GUILTY OF MAIL FRAUD AND OTHER CRIMES IN CONNECTION WITH THE SALE OF LAND TO CONSUMERS. THEREFORE, YOU SHOULD USE EXTREME CAUTION BEFORE DECIDING TO BUY A LOT FROM THIS SELLER.

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. [296]

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 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 listing your lot.

[State the number of lots sold in the subdivision by the developer 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 that the developer 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)

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 [297] 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 must state "UNPAVED" and describe the surface.

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 PRO-

DUCING 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 purchaser is to pay any construction costs, one-time connection fees, availability fees, special assessments or deposits for the central system. If so, what are the amounts? If the buyer will be responsible for construction costs of the [298] water mains, state the cost 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.

Provide the following water information:

Unit	Starting date	Percent now complete	Service Available date*
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* 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 method of sewage disposal to be used. If by septic tank or other individual system, what is 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, [299] 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 buyer will pay any construction costs, special assessments, one-time connection fees, availability fees, use fees or deposits. What are 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, will

the buyer be responsible for any construction costs? If so, state the utility company's policy [300] and charges for extension of primary lines. Based on that policy, what would be 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, will the buyer be responsible for any construction costs? If so, what is the utility company's policy and charges for extension of service lines? Based on that policy, what would be the cost to the buyer of extending service lines to the most remote lot in this Notice?

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: [301]

Facility	Percent complete	Date of start of construction	Date Avail-able 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 applicable property owner's association assessment, maintenance assessment or use fee.

At the conclusion of the Notice shall appear 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 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 the following provision: "The representations and statements made by seller in the Notice to Buyers and in the Property Report regarding roads, utilities, [302] improvements and recreational facilities are hereby incorporated into, and made a part of this contract as if set forth fully herein."

C. Attach to the contract a copy of the Notice to Buyers that was given to the buyer when buyer 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 buyer is notified of such refund, the buyer may also be offered the option of selecting, instead of such refund, an exchange of the buyer's lot, at no additional cost to the buyer for another lot to which all contractual obligations of seller have been met, which was or would have been of at least equal price on the date the buyer's contract was signed, which is located in the same [303] 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."

E. Carry out the notification and refund provisions as set forth in Paragraph D above.

III

It is further ordered, That respondent AMREP 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 real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Include clearly and conspicuously in all sales presentations, promotional materials, printed advertisements and radio and television commercials, the following statement: **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.**

B. Set forth on the top of the first page of the contract used to sell respondent's land in 24-point boldface type, "CONTRACT FOR THE PURCHASE OF LAND." No other heading or description of the purpose of the document shall appear. [304]

C. 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 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 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. [305]

During this ten day cooling-off 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 ground 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.

D. Print the following in 12-point boldface type as a separate paragraph of the contract immediately preceding the space provided for the buyer'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.

E. Furnish each buyer, at the time the buyer signs a contract for the sale of land, with two copies of a form, captioned in 12-point 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 [306]

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 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) - [307]

Respondent shall, before furnishing copies of this "Notice of Right of Cancellation" to the buyer, 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 buyer, by which the buyer may give notice of cancellation.

Respondent shall, where the signature of a buyer is solicited during the course of a sales presentation, inform each buyer orally, at the time buyer signs the contract, of buyer's right to cancel as stated in this Paragraph of the Order.

F. 1. Honor any signed and timely notice of cancellation by buyer, 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 buyer;

2. Where 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, immediately notify the buyer by certified mail, return receipt requested, enclosing the notice, informing the buyer of his error and stating clearly and conspicuously that a proper notice [308] signed by the buyer must be mailed by midnight of the third business day following the buyer's receipt of the mailing, if the buyer is to obtain a refund.

G. Whenever respondent extends a privilege or right arrangement whereby the buyer may exchange buyer's undeveloped land for 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 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 [309]

2. State the specific financial terms or formula for exchange of the buyer's equity in the original lot into the building lot, in the same place and manner as the statement in subparagraph 1 above.

H. Whenever respondent sells property site unseen it will extend a refund privilege conditioned upon the buyer making a personal visit to the property within six months after purchase and notifying Respondent within three days after inspection that a refund is desired. Respondent shall:

1. Provide the buyer with a copy of the following "INSPECTION 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:

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

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property and to perhaps purchase additional land or trade for a more expensive parcel. Therefore, you may encounter additional sales presentations. [310]

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 DOES NOT TAKE AWAY YOUR 10-DAY CANCELLATION RIGHT. SEE YOUR CONTRACT.

(END OF NOTICE)

2. Provide the buyer three (3) 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 THIRD 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 [311] CONTACT YOU IN ANY WAY DURING THIS 3-DAY PERIOD;

4. Ensure that every buyer who seeks to make this inspection visit sees the precise lot identified in buyer's contract;

5. Orally inform the buyer of this post-visit 3-day cancellation right at the time the contract is signed and again at the conclusion of the inspection visit; the visit shall be deemed to conclude:

- a) after the buyer has inspected the precise lot contracted for; and,
- b) at the end point in the visit or tour when all contact with the buyer by any employee or representative of respondent terminates;

6. Furnish each purchaser, at the conclusion of the inspection visit (as determined in Paragraph H.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: [312]

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 THIRD BUSINESS DAY AFTER THE ABOVE DATE. NO REPRESENTATIVE OF SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS THREE 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.

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 _____.

I (WE) HEREBY CANCEL THE ABOVE-DESCRIBED CONTRACT(S). (EACH BUYER MUST SIGN THIS NOTICE.)

(Date)

(Buyer's signature)

(Buyer's signature) [313]

7. Before furnishing the buyer copies of the "NOTICE OF CANCELLATION AFTER INSPECTION" set forth in paragraph H.6 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 third business day following the conclusion of the inspection (as determined in Paragraph H.5 above), by which the buyer may cancel buyer's purchase(s);

8. During the post-inspection cancellation period all communications, personal, telephonic or otherwise, between Respondent and purchaser are forbidden and the initiation of any such communication by Respondent shall be ground 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 buyers of contact violating the provisions of paragraphs H.3 or H.8 above, and comply with the requirements of Section VI, paragraphs F and G herein; [314]

10. Honor any signed and timely NOTICE OF CANCELLATION AFTER INSPECTION by a buyer, 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 buyer;

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 buyer by certified mail, return receipt requested,

enclosing the notice, informing the buyer of buyer's error and stating clearly and conspicuously that a proper notice signed by the buyer must be mailed by midnight of the third day following the buyer's receipt of the mailing if the buyer is to obtain a refund.

I. Unless otherwise requested by buyer, 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 [315] addresses of the buyers 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.

J. Include in all contracts for the sale of land a provision limiting the amount of moneys to be forfeited by a buyer in the event of buyer's default under the contract to an amount not greater than respondent's actual damages from such forfeiture; *provided*, that the amount forfeited in no event is to exceed 40 percent of the "cash price" of the lot, as "cash price" is defined in Truth-In-Lending Regulation Z (12 CFR 226.2 (n)).

K. Refund to buyers who are deemed in default, in accordance with the contract provision set forth in paragraph J above, all moneys paid under the contract, including but not limited to principal, interest, taxes, and assessments which in the aggregate exceed (1) respondent's actual damages or (2) 40 percent of the "cash price", whichever is less, within 60 days after the buyer is deemed to have defaulted; *provided*, that this paragraph shall not preclude respondent from offering a defaulting buyer additional alternatives which may be selected at the buyer's option, in lieu of a refund.

For purposes of this section of the Order, a buyer shall be deemed to have defaulted when either of the following occurs:

1. buyer notifies respondent of intent to default; or [316]
2. buyer has failed to make a payment for a period of six months from due date of such payment.

L. Forbear from seeking to recover, or recovering by any means, from buyers who were under contract for purchase of respondent's land as of the date the Commission's complaint in this matter was issued (March 11, 1975) or who entered into such a contract between that date and the date this Order becomes final, who have defaulted or who become in default (as defined in paragraph K above), any sums remaining due on their contracts.

M. Forbear from relying upon or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any buyer who was under contract for the purchase of re-

spondent's land as of the date the Commission's complaint in this matter was issued (March 11, 1975) or who entered into such a contract between that date and the date this Order becomes final, the following contract clauses:

1. Respondent's contract clause which provides that the seller may retain all sums previously paid by buyer in the event that buyer 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 represen[317]tations have been made in connection with the sale other than those appearing in the contract.

N. Not misrepresent, nor solicit or obtain the buyer's assent to or otherwise impose any condition, waiver or limitation upon, the right of a buyer to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation.

O. Include in all contracts a provision insuring free alienability of the purchaser's interest therein and extending the contractual rights and privileges of the buyer to subsequent purchasers or assignees from buyer.

P. Forbear from charging or collecting from any installment purchaser of land in any of its developments any payment in the nature of "interest" (or providing for such payment in Respondent's land contract) unless and until Respondent gives such purchaser possession and use of the land purchased.

Q. Mail to all buyers of respondent's land, both those who are deeded and those who were under contract for the purchase of such land as of the date the Commission's complaint in this matter was issued (March 11, 1975) or who entered into such a contract between that date and the date this Order becomes final, regardless of whether or not they are in default, the Notice attached to this Order as Appendix A. [318]

IV

It is further ordered, That respondent AMREP Corporation, its successors and assigns, shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future salesmen 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 inten-

tion 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. So 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 [319] 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 ten years from the date of the complaint;

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 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 H.6 herein). [320]

V

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 of 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.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this Order to each of its subsidiaries.

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 successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this Order. [321]

It is further ordered, That the respondent herein 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. [322]

APPENDIX A

FEDERAL TRADE COMMISSION

Los Angeles Regional Office
11000 Wilshire Boulevard
Los Angeles, CA 90024

IMPORTANT NOTICE TO LOT BUYERS IN (insert RIO RANCHO, or SILVER SPRINGS SHORES, or ELDORADO AT SANTA FE, or OAKMONT SHORES)

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 1977, AMREP Corporation, Rio Rancho Estates, Inc., the president and three other officials of these companies were found guilty of mail fraud and other crimes in connection with the sale of Rio Rancho lots.

In 1975, the Federal Trade Commission brought a lawsuit against AMREP 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 III. The Commission cannot advise you as to what 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 [323] 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

You should be aware that neither AMREP nor (insert subdivision) will buy back your lot or help you resell it except for providing a resale listing service, as described in II below.

()
 (Insert Respondent's Address)
 ()

III. OPTIONS AVAILABLE TO PURCHASERS

3. You can stop making payments and seek satisfaction against AMREP 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 list your lot as described in Section II above. [326]

5. 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, the development of your specific lot, or the procedures for listing your property, call AMREP 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,

Perry W. Winston
Attorney

APPENDIX A1

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the Matter of AMREP CORPORATION, a corporation.	)))))	DOCKET NO. 9018
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RULING ON EFFECT TO BE GIVEN HERE TO JUDGMENT IN *U.S. V. AMREP CORP. ET AL.*

In the course of argument over other matters, under date of 4/18/77 Respondent submitted copies of the original indictment, a superceding indictment and the Judge's instructions to the jury in *U.S. v. AMREP Corp., et al.*, S. 76 Cr., S.D.N.Y., a criminal mail fraud and interstate land sales fraud case paralleling this one (for the trial of which hearings here were, in fact, enjoined during the last half of 1976 and early months of 1977). Thereupon, under date of 4/25/77 Complaint Counsel moved to have the Court "take official notice that the jury (in *U.S. v. AMREP Corp. et al.*) found Respondent's claims as to the investment value of its land and the direction and extent of growth of Albuquerque to be false," asserting that such a "finding" would support allegations in Complaint Pars. 11, 12, 14, 15, 20, 21 and 54 here. Attaching uncertified copies of the judgments of conviction in *U.S. v. AMREP Corp. et al.*, Complaint Counsel noted that certified copies would be offered into evidence "at the hearings."

Under date of 5/12/77 Respondent submitted a brief objecting to the taking of official

notice here of the instructions and convictions in *U.S. v. AMREP Corp. et al.* on grounds that (1) the criminal case was (and is) still on appeal, and (2) "to make out a [2] case against respondent by simply resting upon a decision in a prior proceeding would do violence to fair play and due process", noting further that official notice is really designed for facts of a generally recognized nature.

On 5/25/77 oral argument was held. During the course of such argument the propriety of official notice as a vehicle for Complaint Counsel's goal was eliminated as an issue, in view of the Administrative Law Judge's opinion that certified copies of relevant portions of the record in *U.S. v. AMREP Corp. et al.* should be offered for the record here and Complaint Counsel's statement of intention to offer such certified copies here in any event. The issue under consideration is thus no longer whether official notice should be taken of the proceedings in *U.S. v. AMREP Corp. et al.* but whether certified copies of portions of the criminal case record should be received in evidence here.

During this same argument Complaint Counsel advised the Court that their motion of 4/25/77 was not intended to seek collateral estoppel effect for the criminal case judgment but merely to permit its use as one "piece of evidence" to be considered along with all other evidence in the case. Counsel cited in support new Federal Rule 803(22) which overcomes any hearsay objection to introduction of a judgment of previous conviction of felony to prove any fact essential to sustain such judgment. The comment of the Judicial Conference's Committee on Rules of Practice and Procedure published in the March 1971 "Revised Draft of Proposed Rules of Evidence for the United States Court and Magistrates" (at p. 122 of West Edition) indicates, however, that the use of such a judgment "in evidence for what it is worth" would normally occur only "when . . . the doctrine of res judicata does not apply to make the judgment either a bar (i.e. claim preclusion) or a collateral estoppel (i.e. issue preclusion)." [3]

Complaint Counsel's proposed limited use of the judgment in *U.S. v. AMREP Corp. et al.* as just another piece of evidence "for what it is worth" is thus most unusual and puzzling. Complaint Counsel explain—and Respondent's Counsel not too surprisingly agree—that they see great difficulties in actually applying the doctrine of collateral estoppel, primarily because a general jury verdict is inherently ambiguous as to the facts on which it is based. The difficulties suggested, however, would seem to apply as much to use of a judgment as a "piece of evidence" as to its use as a "collateral estoppel" and, in any event, such difficulties are by no means insuperable.

A primary difficulty stressed by both parties is that Judge Metzner's instructions to the jury in the criminal case, while recognizing that the indictment alleged two different false claims ["investment value of the purchase of land at Rio Rancho" and "direction and extent of growth of Albuquerque" (Tr. 7814)] went on to tell the jury it could not convict unless it found *either one or the other* of these two allegations was true [Tr. 7818]. Thus, it is argued, it is now impossible to tell which of these two allegations the jury adopted.

A similar predicament faced the court in *Emich Motors Corp. et al. v. General Motors Corp. et al.*, 340 U.S. 558 (1951). There Respondents contended (p. 567) that since the Government did not offer evidence to support all of the 26 different acts charged in a prior criminal case on the same facts and was required to prove only one of them, it was impossible upon a general verdict of guilty to determine on which of the various acts the jury based its verdict and that consequently the judgment had no relevance in a subsequent civil suit.* The Supreme Court [4] recognized the problem but did not think—as some older cases might suggest—that this was fatal. It explained:

* *Emich* was based on the special provision of Sect. 5(a) of the Clayton Act, which made criminal antitrust convictions *prima facie* evidence in a subsequent civil suit even without identity of litigating parties. For present purposes the *Emich* case is nevertheless precisely in point.

What issues were decided by the former Government litigation is, of course, a question of law as to which the court must instruct the jury. It is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit and to limit to those issues the effect of that judgment as evidence in the present action. As to the manner in which such explanation should be made, no mechanical rule can be laid down to control the trial judge who must take into account the circumstances of each case He is not precluded from resorting to such portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial. (pp. 571-2)

In this case it seems to the Administrative Law Judge, who is charged by *Emich* with resolving such ambiguities, that there can be no serious doubt that the jury in the criminal case must at least have adopted Judge Metzner's instruction that they might find a scheme to defraud based on "a false claim as to the investment value of the purchase of land at Rio Rancho" (whereas it is not clear at this juncture whether or not they further adopted his instruction that they might also find "a false claim as to the direction and extent of growth of Albuquerque") This is simple common sense. [5]

The proposition regarding the direction and growth of Albuquerque would not, standing alone, support the ultimate inference of a scheme to defraud; it operates only thru the other proposition (a false claim as to the investment value of Rio Rancho land). It would thus be quite illogical for the jury to have found a scheme to defraud based solely on the Albuquerque-growth misrepresentation. Contrariwise, the investment-value proposition stands on its own legs; from it one may deduce directly—without reference to the Albuquerque-growth proposition—the ultimate proposition asserted: the fraudulent scheme. In summary, if the jury's verdict was not based on adoption of *both* the investment-value and Albuquerque growth propositions—as further study of the criminal record and evidence may well reveal—the jury could logically have adopted the investment-value proposition without the Albuquerque-growth proposition but it could not logically have adopted the Albuquerque-growth proposition without the investment value proposition.

A second difficulty is alleged because the Indictment pleaded a fraudulent scheme devised between 1961 and 1975 and Judge Metzner instructed the Jury that "(t)he Government is not required to prove that the alleged scheme to defraud existed over the whole course of time set forth in the indictment. It is sufficient if you find that at any time within that period all of the elements of the alleged scheme to defraud have been proven to your satisfaction beyond a reasonable doubt" (Tr. 7817). It is not clear why such an instruction would be any less satisfactory as far as Section 5 of the Federal Trade Commission is concerned. With reference to the asserted defense of abandonment, that is an affirmative defense (involving much more than the simple passage of time) which Respondent is free to prove, if it can, [6] whether or not estopped from challenging the fraudulent scheme allegation. Correspondingly, we would certainly permit Complaint Counsel a reasonable leeway to rebut an abandonment charge which seemed to have any substance to it, whether or not the basic fraudulent scheme may be questioned.

Finally, the question of possible consumer redress—previewed in the notice order—is said by Complaint Counsel to require specific findings as to guilty knowledge. Certain it is that new Section 19(a)(2) of the FTC Act requires a showing by this Commission in the subsequent redress action that "the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent . . ." However, the Commission has made it crystal clear that discovery (and thus proof) of matters relevant only to a subsequent redress

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action are not to be litigated in a proceeding like this. *Electronic Computer Programming Institute, Inc.*, D. 8952, Commission Order of 11/11/75. There is thus no real difficulty now as respects matters to be taken up *de novo* in a subsequent redress action.

The Administrative Law Judge is quite aware that our litigation is still geared primarily to an adversary rather than an investigative system, although a trend toward the latter in recent years is manifest. Be that as it may, the Commission has charged us with responsibility not only "to conduct fair and impartial hearings" but "to take all necessary action to avoid delay in the disposition of proceedings." Commission Rule Section 3.42(c). While the case-in-chief here is nearly complete, as things stand, there is a long defense ahead, stretching into 1978. The prospect of materially shortening that period of litigation by judicious use of collateral estoppel leads us to take affirmative action to achieve that goal. We now ORDER Complaint Counsel to abandon their "piece of evidence" approach; to prepare any necessary amendment to the pleadings (*see* 46 Am. Jur. 2d, Judgments, Section 602 et seq.); and to establish as their last proof in the case-in-chief that Respondent is estopped to question such facts [7] relevant to this matter as Complaint Counsel may show have been litigated and decided in *U.S. v. AMREP Corporation, et al.* This order will not take effect, however, until 6/21/77, prior to which time the Administrative Law Judge will hear argument contra by either or both parties at such time as may be requested.

/s/ Paul R. Teetor
Administrative Law Judge

June 10, 1977

APPENDIX A2

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of AMREP CORPORATION, a corporation.	)))))	DOCKET NO. 9018
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FURTHER RULING ON EFFECT TO BE GIVEN
HERE TO JUDGMENT IN *U.S. V. AMREP CORP. ET AL.*

Under date of 6/10/77 we issued a tentative order to Complaint Counsel in order to effect a major economy of time and effort in this matter to prepare any necessary amendment to the Complaint and as the last proof in their case-in-chief here to introduce enough of the record in *U.S. v. AMREP Corp. et al.*, S. 76 Cr., S.D.N.Y., to raise a collateral estoppel as to any issue of fact litigated and determined there which is also an issue here. The effective date of the order was simultaneously stayed until 6/21/77, however, to permit statements of objections by either or both parties.

Argument was, in fact, held on 6/21/77, as will appear in more detail from the transcript of proceedings on that date. Both parties vigorously opposed the Administrative Law Judge's proposed plan.¹ Among [2] other things, Respondent, as earlier,

¹ The leading case cited by the Administrative Law Judge for use of a criminal conviction to raise a collateral estoppel in a subsequent civil suit by the same Government was *Local 167 v. U.S.*, 291 U.S. 293 (1934). That
(footnote cont'd)

stressed the instruction of Judge Metzner to the jury in *U.S. v. AMREP Corp., et al.* that in order to find a fraudulent scheme it must find a misrepresentation either as to the investment value of land purchased at Rio Rancho Estates or as to the trend of Albuquerque's growth, so that, it was argued, it cannot be known from the jury's verdict on which ground or grounds the case was decided. Complaint Counsel, for their part, stressed, inter alia, the practical uselessness of a broad finding of a fraudulent scheme (of any kind) since that would leave a host of specific practices still to be established in order to justify the proposed provisions of the lengthy and complex cease and desist order sought here.² At the close of said argument, in open court we further stayed the effective date of our order of 6/10/77 for reconsideration thereof. As a result of an extensive review of the authorities and an intensive consideration of the special situation here we are now persuaded to ABROGATE the proposed order.

We do not by this action adopt Respondent's argument that a collateral estoppel is foreclosed by Judge Metzner's charge to the jury. It is no doubt good law that as to an "ultimate fact" the existence of an alternative basis for the jury's finding might prevent a collateral estoppel by making it impossible to know on which ground the jury decided the case. *Russell v. Place*, 94 U.S. 606, 608 (1876). But there was no such dilemma as to the "ultimate fact" here. The "ultimate fact" in issue³ (or "ultimate inference", as we called it in our 6/10/77 order) was the [3] existence of a scheme by defendants (including Respondent here) to defraud Rio Rancho purchasers by making false claims. As to that simple finding there can be no ambiguity. There seems, accordingly, little question that it could well be the subject of a collateral estoppel here, regardless of whether, as we intimated in our tentative order, a similar estoppel might also arise as to the "mediate" allegation that such claims were, in general, concerned with the investment value of the land.

Assuming that a collateral estoppel could be raised, Complaint Counsel argue, however, (and Respondent's counsel expressly concur) that a collateral estoppel at this "ultimate fact" level is not worth very much in a case like this which is brought to justify an order to cease and desist from a large number of very specific trade practices.

Insofar as Complaint Counsel's position is based on an assumption that a respondent must be shown to have actually engaged in each practice from which it is ordered to cease and desist, we do not believe this to be the law. The proper test is whether there is a real possibility that an unfair practice may be followed in the future. Past practice is only one indication of such a possibility and not even a necessary one at that.

As explained by the Supreme Court in *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426 (1941) an agency's authority to restrain an unfair practice in which a respondent has been engaged may extend to practices in which he has *not* been engaged if they are reasonably related to the proven unfair practice. Similarly, said the Court, an order restraining violations of the statute other than the one found is justified when those violations bear some resemblance to that which the respondent has committed or when danger of their commission in the future is to be anticipated from the course of conduct in the past. [4]

In *F.T.C. v. Mandel Bros.*, 359 U.S. 385 (1959) the Supreme Court, applying *Express Publishing's* "other like or related unlawful acts" test to this Commission's orders approved one to cease and desist from violating six disclosure requirements of the Fur Products Labeling Act, even though the Commission had *affirmatively found no viola-*

government agencies are in privity with each other he cited *Sunshine Coal Co. v. Adkins, Collector of Internal Revenue*, 310 U.S. 381 (1940).

² The notice order contains this statement: "Specific provisions ordered by the Commission will be based upon the record facts developed in adjudicative proceedings in this matter."

³ For attempted definitions of such terms as "issue", "ultimate fact" and "mediate fact", see *Paine & Williams Co. v. Baldwin Rubber Co.*, 113 F.2d 840 (6th Cir., 1940) and *The Evergreens v. Nunan, Commissioner of Internal Revenue*, 141 F.2d 927 (2d Cir., 1944).

tions of three of the six: "Where the episodes of misbranding have been so extensive and substantial in number as they were here, we think it permissible for the Commission to conclude that like and related acts of misbranding should also be enjoined as a prophylactic and preventive measure." (p. 393).

In *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1951) the Supreme Court approved a Commission order prohibiting *all* price differentials between competing customers, although differentials of no more than 5% had actually been found. Since it was unquestioned that very small differences in price were material factors in competition the Commission was not required to limit its prohibition to the specific differential shown to be adopted in past violations of the statute. In much quoted language the Supreme Court said:

Orders of the Federal Trade Commission are . . . intended to . . . prevent illegal practices in the future. In carrying out this function the commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . (It must be allowed effectively to close all roads to that prohibited goal so that its order may not be by-passed with impunity.

* * * * *

Congress expected the Commission to exercise a special competence in formulating remedies. . . . (and) the Courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist. (p. 473)

One of the most striking examples of an order which extended far beyond the proven violation was *General Transmissions Corporation of Washington et al.*, 73 F.T.C. 399 (1968). There the Examiner had limited his order to prohibit deceptive practices only "in connection with the advertising, offering for sale and sale, repair and servicing of *automobile transmissions and related parts*" (emphasis added) but Commissioner Elman, for a unanimous Commission, wrote:

It is true that the practices giving rise to this proceeding concern the sale and repair of transmissions but it would be relatively easy for respondents to utilize their present illegal tactics in connection with the sale and repair of other automobile parts . . . or in connection with the sale and repair of radios, television sets, home appliances and a number of other products. Nor is it unrealistic to fear that respondents might switch to one of these related fields in an effort to evade the Commission's order. . . . We are therefore modifying the order to give it broader applicability, thus preventing evasion of the order or recurrence in any other guise of the fraudulent activities revealed in this record. (pp. 426-7) [6]

Such authorities make it clear that it is not essential to find the existence of past practices to support an order to cease and desist from similar practices in the future, so long as there is any good reason for such a prohibition. Thus, even a broad finding by collateral estoppel that Respondent has been engaged in a scheme to defraud purchasers of land at Rio Rancho by making false claims might well be enough to support prohibitions of specific practices, whether or not Respondent has heretofore engaged in those specific practices. The logical end of such reasoning would, of course, be a reaffirmation of the order of 6/10/77 directing Complaint Counsel to invoke a collateral estoppel based on the indictment, verdict and judgment in *U.S. v. AMREP Corp. et al.* The reasons why we now abrogate instead of re-affirming that order are as follows.

The fact that in some instances an order to cease and desist from a specific kind of

deceptive practice *may* prohibit conduct never previously engaged in does not, of course, mean that in all or perhaps even most such instances a showing of need for such relief based solely on the jury's finding of a fraudulent scheme would be felt sufficient either by the Administrative Law Judge or the Commission. As a result, such a substantial quantity of evidence might well be required for an intelligent assessment of the need for particular provisions of a proposed order—even if a finding of a scheme to defraud Rio Rancho buyers be assumed by virtue of collateral estoppel—that whether there would be any significant saving of trial time becomes problematical. This consideration is augmented by the fact the result of the criminal case did not become known until well into Complaint Counsel's case here and as a practical matter the case-in-chief, based on *de novo* proof, is now virtually complete.

We note finally the fact that Complaint Counsel and Respondent's Counsel stand shoulder to shoulder in opposition to substituting a collateral estoppel for *de novo* proof on the issue of violation. Under such circumstances we would feel bound to allow an [7] interlocutory appeal which might well consume several months time. Moreover, in an adversary system involvement by the Judge in a normal function of counsel is most unusual.⁴ On mature reflection we have now concluded to abrogate our order of 6/10/77.

Counsel are advised that if and when certified copies of the judgment and other relevant parts of the record in *U.S. v. AMREP Corp. et al.* are actually offered here, counsel will be expected to cite clear and convincing federal authority for the use of such matter other than to establish a collateral estoppel.

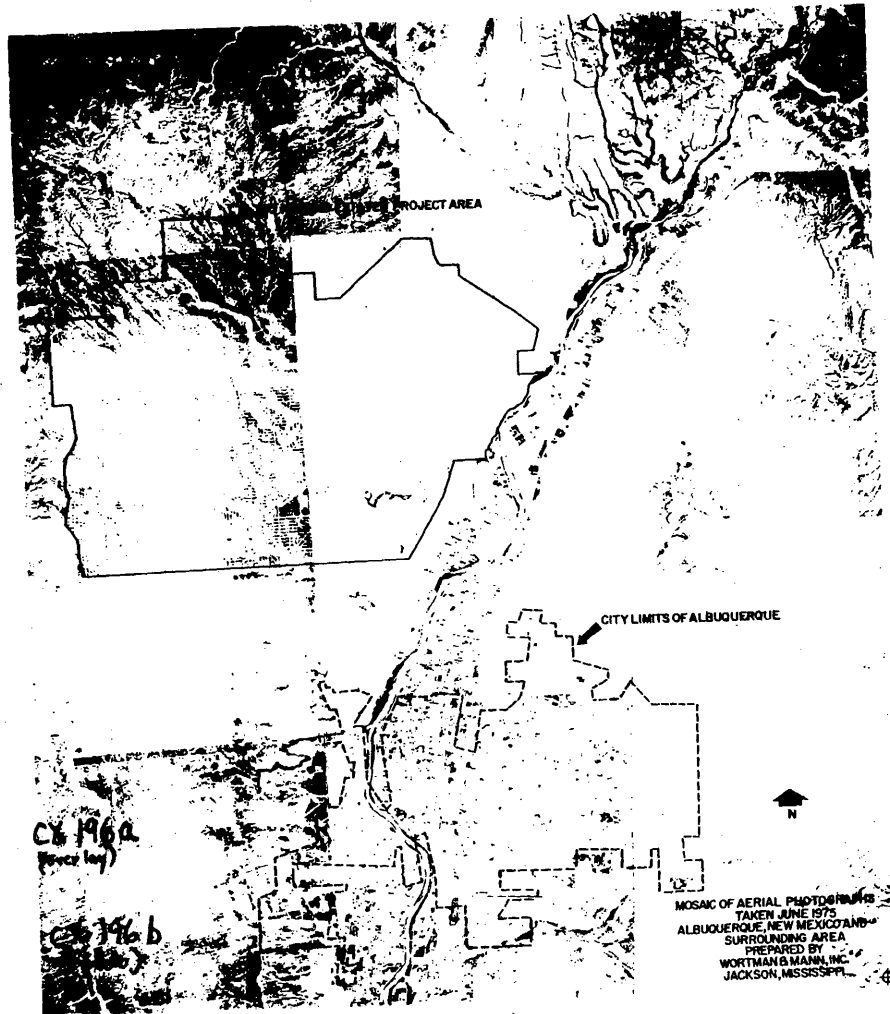
/s/ Paul R. Teetor
Administrative Law Judge

June 30, 1977

⁴ Miller, R.W., "The Premises Of The Judgment As Res Judicata In Continental And Anglo American Law", 39 Mich. L.R. 1, 7-8 (1940).

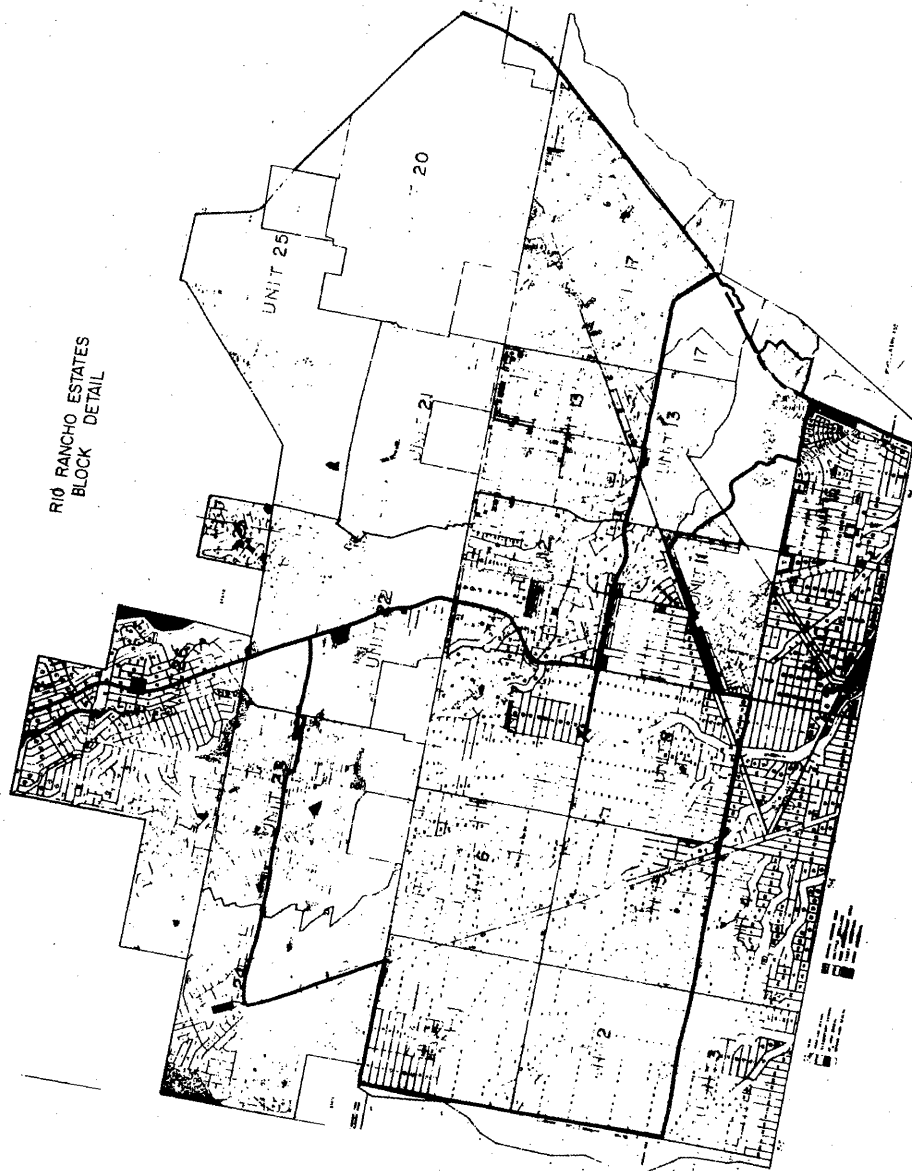
APPENDIX B

(Aerial Map of Rio Rancho)



APPENDIX C

CX 263, p. 68 (See also CX 561)



Initial Decision

102 F.T.C.

APPENDIX D

Excerpts from the testimony of Luciano J. Scirica (TR 5516-41)

LUCIANO SCIRICA, having been duly sworn, took the stand and testified as follows:

JUDGE TEETOR: The witness is sworn.

DIRECT EXAMINATION

BY MR. SCHULMAN:

Q. Would you please state your name and address for the record?

A. I am Luciano J. Scirica. I live at 355 North Long Beach Road, Rockville Center, New York.

Q. That is pronounced Scirica?

A. Scirica, yes.

Q. Mr. Scirica, when did you first come to hear of AMREP Corporation?

A. Oh, we had received a postcard in the mail inviting us to a dinner party.

Q. Do you recall about when that was?

A. Oh, I guess it was some time in February of 1973.

Q. Did you attend that dinner?

A. Yes, I did.

Q. Do you recall when that dinner was?

A. When?

Q. When the dinner was?

A. It was February 13th, 1973.

Q. Do you recall where that dinner was?

A. Not really, because I attended so many. I'm confused at this point exactly which one and where it was at that date.

Q. Do you remember what city or county it was in?

A. Oh, yes. It was in Nassau County.

Q. And that's in New York?

A. Yes.

Q. Did you go with anybody?

A. No. It was just the wife and I.

Q. What happened when you first arrived at the location where the dinner party was?

A. Well, you arrived there and you came in with a card and you tell the receptionist or the door, they have at the door your name. And she calls over a salesman and you are introduced to the salesman and he takes you to a table and you sit down at a table. And he tells you he'll be right with you.

Q. Do you recall the name of the salesman?

A. Yes.

Q. What was his name?

A. Bernie Lombardi.

Q. And how many people were sitting at your table?

A. One other couple.

Q. Do you know how many other tables were there at that dinner party?

A. Oh, I would—I didn't count them but I would say maybe at least 20 tables.

Q. What happened first after you were seated at the table?

A. We were seated at the table. And we were introduced to the people that were there, the couple that were there, and introduced. You have a lot to talk to these people because these people own property and make yourself comfortable. And he says I'll get back to you because he was pretty busy. This was Mr. Lombardi.

Q. Did he return to the table?

A. Later on, yes.

Q. What happened when he returned to the table?

A. He just made small talk until the meeting, so to speak, got started, and we had a little speech and then it started to go on because they said they would give us a little speech or a little talk because Mr. Estrema would get up and give us a little background about the AMREP Corporation and then we would have dinner.

Q. Do you recall what Mr. Estrema said?

A. Yes. He said that—he welcomed us all to the dinner and he was sure we would enjoy ourselves, and he said, giving us a little background about the AMREP Corporation. The AMREP Corporation was an important Company. He says it had—it was listed on the Stock Exchange. They have been in this business a long, long time. Rio Rancho is not only the only area they are developing. They are developing areas throughout the United States. And he says that a little later on they would show us movies about Rio Rancho.

Q. What happened when Mr. Estrema was done with this talk?

A. I think after he was done I think we started to have dinner.

Q. And after dinner what happened?

A. Well, after dinner they started to show this movie about Rio Rancho.

Q. Do you recall what was in the movie?

A. Yes. A good portion of it I believe.

Q. Can you tell us what you saw in the movie?

A. Yes, in the movie it was showing, you know, I think it showed that Albuquerque was located in the golden triangle area of the country, of the United States. I believe it was Albuquerque, Phoenix. All I know it was the shape of a triangle. And told us about the City of Albuquerque, that it was a fast-growing community. There was a great deal of building going on. It was doubling itself.

And it showed us pictures of Rio Rancho, the golf course area.

And it also had people who, I guess they visited people at their homes in Rio Rancho. I believe one was having a picnic there. And each one of these people who were residents of Rio Rancho stated how happy they were in their investment and how happy that they did make the change to come down into Albuquerque.

Q. Do you recall anything else in the film?

A. I believe—you know, so much, it gets a little confusing.

I remember seeing, I believe, how the dollar was broken up, something like that. It's not very clear whether I saw it at that movie or some other time.

Q. Okay. Is there anything else in the film that you saw that you recall?

A. Yes. The most outstanding thing in the film was that I was tremendously impressed with was to see an outstanding political figure praise what AMREP was doing for New Mexico by developing this Rio Rancho area.

Q. And do you recall who that man was?

A. I've seen him. It was either at that time or it was either Senator Montoya or was it the governor of the state? Clark or what is the name? I forget.

But he was, at that time of the year he was quite prominent in the paper, and I was very impressed to hear an outstanding political figure was praising the Rio Rancho development.

A. Right offhand—

Q. Do you remember anything in the film about—excuse me. Go ahead.

A. Go ahead.

Q. Do you remember anything in the film about the direction of the growth of Albuquerque?

A. Oh, yes, definitely.

It explained the direction of the growth of the city of Albuquerque and the city was

growing, that the only direction that the city could grow towards would be to the Rio Rancho development area.

And the reason for that was that I believe to the east was the Sandia Mountains. I believe to the south was either government land and Indian reservation, orientation—I know it was completely boxed in. And the only area that was open as they explained to us was in a north direction, towards the Rio Rancho area.

Q. After the movie, what happened?

A. Well, after the movie, we, I guess, and Mr. Estrema got up again and he said that the salesmen were at each table, he says, and they would talk to people who came and who wanted to know a little bit more about Rio Rancho, and that they did have a limited number of lots for sale and that the sale of the lots was very brisk and they were doing very, very well, and we were fortunate to come in and to talk to the salesmen. The salesmen would surely satisfy anything that you wanted to know or any particular piece of property you think you would be interested in.

Q. Do you recall anything else that Mr. Estrema said?

A. Not really. Not at the moment.

Q. What happened after he was done with his talk?

A. Well, once he got finished with his talk we had, I believe, one of the salesmen—I assume he is a salesman because he came up to the microphone and he said "Parcel so-and-so and so is sold."

And as you are trying to talk to the—I was trying to talk to Mr. Lombardi because I wanted to get more information as to what is the facilities and how soon will the place be developed and all that.

As this goes on, each time a piece of property is sold, that salesman would run up to the microphone and tell them, "Cross out lot so-and-so. It's sold."

And this is going on as you are trying to talk and have a conversation with your salesman.

Q. What did Mr. Lombardi tell you?

A. Mr. Lombardi, he told me, he says to me, "Well, you know, I have something real great for you. Now, we are both Italians and I have something for you that I'm pretty sure you would be very, very happy with."

He says, "Don't forget, we just don't sell any piece. We make sure whatever we sell is good."

He says, "Because we want to treat our customers good because we want them, you know, to remember us with other people and their friends."

And he told me he had this piece of property that he thought would be ideal for me.

Q. Do you recall anything else that he said?

A. Yes. He said, "Just remember, you can never really lose money on the land because at the price we are giving it to you tonight," he says, "next week it goes up 10%. How could you lose with that? You are buying something today and next week it's worth 10% more."

Q. Do you recall anything else that Mr. Lombardi said to you?

A. Right offhand, not at the moment.

Q. OK.

Now, with reference to a speech by Mr. Estrema and the talk that Mr. Lombardi delivered at the table, do you recall anything that was said with regard to investment?

A. Oh, yes. As far as investment was concerned, that they said, No. 1, that it was a tremendous investment, the value of the property was going up continuously. The demand for the land was unbelievable, he said. The demand is surprising them and the values are going up and even into today's market—oh, I think that's where it was. Probably in the movie or something, where it showed that the value of your dollar is decreasing because of inflation. And here you will be buying property at a reasonable price and then as the years go on, as you make payments with this increased inflation,

that you will be buying it all with cheaper dollars and it was a tremendous investment opportunity.

Q. Do you recall anything that Mr. Estrema or Mr. Lombardi said with reference to comparing Rio Rancho to other communities?

A. Well, they did say that the Rio Rancho community was one of the fastest-growing communities in the country, that the AMREP Corporation was doing their utmost to make it one of the best developments they had. They had already established model homes they wanted to build. They were going to put in all the facilities and everything else on the land, into the areas as they were developed.

He told us what areas they were developing at the time and that everything was just big and rosy.

Q. Do you recall where the property was that Mr. Lombardi was talking about to you, what unit it was in?

A. At that time it was unit 17.

Q. Do you recall anything that Mr. Lombardi said with respect to that particular piece of property, or with respect to that particular unit?

A. He said to me at that time, he said that this would be the next unit that would be developed because "you are not that far away from the Panorama Inn." That's their golf course area.

Q. Did he tell you how long it would take before it was developed?

A. He said within five years it would be developed. That was the time limit that I was interested in, five years.

Q. Did he tell you what would be in the unit when it was developed?

A. He says it would be complete with everything you want and that your utilities and everything else would be there.

Q. And that would all be done in that five years?

A. Yes. He said that was their projected plan.

Q. Did he tell you anything more about any of the utilities?

A. I think—yes—well, one thing also impressed me very much. He said that all the utilities would be underground. He says it is not going to be like you see out here on Long Island. You see utility poles all along the streets. They said they don't want that in Rio Rancho. Everything will be underground.

All the properties that would be required for parks and for schools would be—have been already set aside and deeded to the state for the school lands. And he says so this way it is going to save you taxes and what have you.

Q. With respect to utilities, did he tell you anything about water?

A. Well, they did say—and Mr. Estrema, in his speech, told us, he says he knew everybody was concerned about water because since we are going into a semi-arid state of land, he said that Rio Rancho and the city of Albuquerque were more or less sitting right on top of a tremendous reservoir of fresh water. He says that the water that they have tested to see that it is there and everything else, and the quantities that they contemplate would be required; he said that there is hundreds of years of water there because you must have 50 miles of water or something like that, reservoir. There was actually no water problem. It was there.

Q. Now, do you recall anything else that was said by Mr. Estrema or Mr. Lombardi?

A. I don't know. It comes back to me in dribs and drabs.

Q. I would like to show you Commission Exhibit 312 and ask you if you can identify it for us.

A. Yes. This is the original purchase, on February 26, 1973.

Q. Was that the date that appears on the contract?

A. Yes, 1973. You are talking about this date up here?

Q. Yes.

A. Yes, February 26.

Q. And did you sign this document?

A. Yes, I did.

Q. Can you tell us what the unit block and lot number are?

A. Unit 17, block 39, lot No. 18.

Q. Does the contract indicate what size the lot is?

A. Yes. It is 1.75 acres.

Q. Can you tell us what the purchase price is?

A. The purchase price was \$9,855.

Q. Did you pay the entire purchase price at that time?

A. No. I gave them a down payment of \$1,005.

Q. Now, directing your attention to an area that appears just above your signature, it says that "Each buyer must initial where applicable 'I do' - 'I do not expect to use the above property as my principal residence.'"

Do you see that on the exhibit?

A. Yes.

Q. Could you tell me where your initials appear?

A. My initials were "I do not."

Q. Did you intend to use this property as your—

A. Oh, yes.

MR. WILLIAMSON: Objection, your Honor.

JUDGE TEETOR: It is leading. Rephrase it.

By Mr. Schulman:

Q. What was your intention when you purchased this property?

A. I definitely—my intention was not as an investment, that it definitely would be a place where to live because we were preparing to retire in the future and I was looking for a place to retire to. And that was my intention.

Although you do see that I signed it "I do not," and that was only because of the insistence of Mr. Lombardi. He said "Sign it there. Everybody signs it there." He says, "You will find it to your advantage when taxes come around."

So taking his advice, I signed it.

Q. Now, directing your attention again to Commission Exhibit 312, to the last full paragraph in the document.

Receipt for certain documents. Do your initials appear after that paragraph?

A. That's the last paragraph, yes.

Q. Yes.

A. It does.

Q. Did you receive a property report before you signed the contract?

A. I did not.

Q. Do you know what a property report is now?

A. Yes, I do. Now I do.

Q. I would like to direct your attention to Commission Exhibit 312, to the middle of the contract, where it states "Refund Guarantee," and there is a paragraph. Was this paragraph explained to you by the salesman?

A. He did not explain it to us. All he said is that, he says, they have such a good setup, he says, that you really don't have to worry about it because you are not risking anything. You do have six months to visit the property and cancel out and you get all your money back if you want to.

Q. Now, Mr. Scirica, when you signed this contract, did you think that it was a binding obligation on you?

A. Not really, because he impressed upon us, he said, "Look, you are not really buying. All we are doing is reserving." And he showed it to us. He said this is a reservation to reserve your property for you. He says because you go down there and you visit it. He says, "You have a terrific trip." He said, "We have tremendous flights

going out every week. We make a charter flight for you. It's reasonable." You go there, he says, and if you don't like it you get your money back so what do you got to lose?

Q. Now, after that dinner party, Mr. Scirica, what was your next contact with AMREP corporation?

A. Well, after that dinner and I signed up I was called almost every week and invited to the dinners that would be locally within my area and he would always suggest, "Why don't you come out. We don't want to sell you any more land or anything like that," he said. "Bring your wife out. It will be a nice evening out for your wife. Come." So we did go to quite a few of them.

Basically not for the dinner but basically what I wanted to know, to find out whether there is any new developments in what AMREP was doing within the area. And that what he said, "You come to the dinner and keep abreast of what is going on.

Q. How many additional dinners did you go to?

A. Oh, my gosh. I would say anywhere from 8 to 12. We were continuously asked to go.

Q. Was there anything about the additional dinners that you went to that was different from the first one you described for us?

A. Not really. They were held at different places. It was different groups. But each time we went to a dinner they treated us very well, very friendly, especially Mr. Lombardi. And he would bring us to a table and then the next couple that would be there would be another couple that were coming for the first time and be coming down to find out what Rio Rancho was all about.

Q. At any of these dinner parties, did you buy any additional property?

A. Yes, I did. I bought another piece of property because, as it was explained, he told me, "I'm doing you a favor. I have a piece of property that is outstanding." He says, "Buy it. It is very reasonable." He says, and again, he says, "You still have the opportunity if you don't want it when you go down there, you can just say no and they'll give you back your money."

Q. Do you recall when that dinner party was?

A. The exact date I really don't have but it has to be—I think it is in March.

Q. Do you have a copy of a contract for that purchase?

A. To tell you the truth, that's what I'm looking for.

No. It must have been one of the evenings between February and March. It must have been misplaced.

I know I bought another piece of property.

Q. I'm going to show you a copy of Commission Exhibit 310, and ask you if that refreshes your recollection about the location and the price of that property that you purchased?

A. Yes. It was unit 11 and it was supposed to be—it was \$2,800. Here it is.

But this here is—

Q. Does this document refresh your recollection as to the location and the price of the property?

A. Yes, it does.

Q. What is the location of the property?

A. The location is in unit 11, block 8, lot 17.

Q. And what was the purchase price?

A. The purchase price is \$2,825.

MR. SCHULMAN: Now, for the record, Your Honor, the document that I showed him, Commission Exhibit 310, is a Property Exchange Amendment on which that particular piece of property is listed, but it is not a contract for the purchase of that piece of property.

BY MR. SCHULMAN:

Q. Now, Mr. Scirica, with regard to the second purchase of property, did you sign a contract that night for that second piece of property?

A. You are talking about for reservation?

Q. In unit 11.

A. Yes. I must have because I have the listing that I owned at that time when we went down for the visit and the property is listed in there. I don't have a copy right here. It must have been misplaced.

Q. With regard to those two dinner parties, the one that you purchased unit 17 and the one that you purchased in unit 11, do you recall if the salesman or the speaker made any comparison between Rio Rancho Estates and an area in New York?

A. He did say something that, he says, "The Rio Rancho—" the exact words I really don't know. I think I'm trying to say that Rio Rancho was not going to be like Levittown was, something like that. That's the essence of it.

Q. After you purchased that second piece of property—

JUDGE TEETOR: Did I understand you to say that they said it would not be like Levittown?

THE WITNESS: That's right, not be.

BY MR. SCHULMAN:

Q. Can you explain that?

A. The reason they said it was not going to be like Levittown, Levittown, you go through Levittown, it was one particular type of house, block after block after block. And how they explained that Rio Rancho would be developed, it wasn't just one model of a house that you had to buy. You had several models that you could pick from and this way it would give a better appearance to the area.

JUDGE TEETOR: Thank you.

BY MR. SCHULMAN:

Q. After the purchase of the two lots, the one in unit 11 and the one in unit 17, what was your next contact with AMREP Corporation?

A. The next contact with AMREP Corporation was we had at that time we thought it best that we should take a trip down, that here we have two pieces of property and we didn't want the six months to elapse and we figured that we better go take a trip. And we were curious. We wanted to see exactly what it was like and whether we did make a good move or not.

Q. Did you go on a tour?

A. Yes, we went on a tour.

Q. Who did you go with on this tour?

A. My wife and my daughter.

Q. And was this a tour that you arranged yourself?

A. No. We arranged it through AMREP. It's an AMREP charter or Rio Rancho charter.

Q. Do you recall how many people were with you on the charter?

A. Oh, the plane was full. That's for sure. There was quite a few people. I would say, what does an airplane take, 100, 120 people, better.

Q. Okay. Do you recall when this trip was?

A. Yes, in March, 1973.

Q. What happened when you arrived at Albuquerque?

A. Well, the plane was brought down to the end of the runway. There was a bus there to pick us up and brought us over to the Holiday Inn in Albuquerque. They told us the first afternoon would be a rest afternoon and then in the evening they were going to take us out to dinner.

The first night we went to the Stadium, Stadium Club. It's near the ballpark. And had dinner and a little nightclub there.

And then we came back and they brought us back home.

The following day we took a tour of, oh, I think the following day they brought us up to Santa Fe. We spent the whole day in Santa Fe.

The next day which I think was Saturday—Saturday was our day to see the property.

Q. And did you go see your property?

A. Yes. We were brought to the Panorama in the area and they said that we would stay there. We would have lunch. And our names would be called for the tour, to bring us down to the property office.

Q. And were you called to go down to the property office?

A. Yes. We were called in the afternoon to go to the property office because it was our turn to go out and see our property.

Q. And what happened when you got to the property office?

A. When we got to the property office we were introduced to a salesman and he invited us into a car.

Q. Do you recall what the salesman's name was?

A. Not really. The only thing I could do is look at a sheet here.

Q. Well, if you have something that would remind you of what his name was, could you look at it, please?

A. Cy Alpin.

Q. What document are you looking at?

A. I am looking at the record of the property visitation, the 317.

Q. Did Mr. Alpin take you out to see the property?

A. Yes. I think you must understand that my daughter and son-in-law came from Kansas.

Q. So your—I was about to ask you who was there with you when you went to see the property?

A. Yes.

Q. And what is your son-in-law's name?

A. Abraham Pallas. They came down.

Q. They met you at Rio Rancho?

A. No. They came down the night before and they had met us in, at the hotel.

And because they said that if we intended to retire there that they would be interested and they wanted to see it. Possibly they would relocate themselves into the Albuquerque area and would be interested in property also.

Q. Did Mr. Alpin take you out to see your property?

A. Yes, he did.

Q. And which property do you recall seeing first?

A. I believe he took us into I believe 17 must have been first, or 11, one of the two. But when we saw each one we were tremendously disappointed.

Q. What did you see when you saw the property?

Let me ask you, is there a difference between what you saw between the two properties?

A. No. They are basically the same.

Q. Can you tell us what you saw when you saw the property?

A. Actually, just a lot of scrub brush, sand cactus, and just a tremendous expanse of nothing. And the roads were dirt all dirt roads. It had a stake at the corner of each street.

You really had to look hard to find the lot stakes.

And we were very, very, tremendously disappointed.

Q. Did you tell this to Mr. Alpin?

A. Yes. And he says, well, he says, this is it. This is what it is. And he says, "I can't see what else would you want. You have to visualize what it is going to look like once it gets developed."

He says, "You know how things happen in New York. One year it's farms and the next year it's a whole development."

He says, "This is what is going to happen here."

Q. What happened after that?

A. Well, we told him that we are not happy with what we saw but in the meantime, in meetings that we had in New York we were hearing about Unit 20, Unit 20, Unit 20. This is the area that is going to be developed. It's going to have—they are going to build a tremendous lake in the area. It's going to give us water sports, swimming, everything you would want right in the section. And this was going to be the boom spot he says.

So having this in the back of your mind—

Q. Let's go back to that. Where did you hear about Unit 20 in New York?

A. From Mr. Lombardi. And he says to me, when you go down, make sure you take a look at Unit 20.

So we did hear talk from Mr. Lombardi and the other salesmen.

And with this in our mind, we said, "Well, what about Unit 20?", to the salesman.

So the salesman said, "I'll call back. He had a radio in his car. And he went in there and asked what was available in Unit 20. And they told him on the radio and he got in the car and we drove to Unit 20.

Q. What happened when you arrived in Unit 20?

A. It wasn't much different. The lot that they had given him, one right one there, that was in an arroyo actually, big tremendous arroya right there. I don't want any lots near an arroyo. Haven't you got any better?

He said what are you worried about, this place hasn't really developed yet, he says. An arroyo is not going to stay there. As they develop and rework everything, he says that an arroyo will be filled in because on the plot plan here, here it is, there is a lot designated for that. And he said that will be a building lot. He said don't let it bother you because you see an arroyo.

So I believe we just shifted down the street just to get away from that arroyo, and he had lots.

In the meantime we were talking to my son-in-law and his wife. I was talking to my son-in-law and we both agreed it seemed to be a fairly good location. The view was nice and we were much higher.

And I asked the salesman as to what the size of the lots were and he says a hundred by—80 × 300 and some odd feet or something like that. I forget what the exact depth of it was.

I told him, well, if I bought these I would buy two because I didn't want to build a house on 80-foot width. I would rather have 160 width. This way I'd have my home in the center and I would have plenty of side yards so I don't care what anybody build on either side of me, I would have plenty of room. Because if I am going to move down there I want the wide open spaces. That is why I am moving.

Q. Did the salesman tell you anything about that?

A. No, not at all.

Q. Did Mr. Alpin say anything else while you were out there viewing your lot?

A. Yes. I had the sense of feeling that possibly he may have thought we were wasting his time or something. But he did tell us, I don't see why you are so fussy. He says you don't have to be that fussy out here. He said this land will be sold ten times over.

I said not mine. If I'm buying it, I'm not going to give it up because if I'm down here to pick a piece of property, this is what I want.

So he just didn't go any further with it.

Q. And what happened after that?

A. My son-in-law said, well, if you are buying two lots, I'm going to buy two lots. So I said okay, then we'll get two blocks of two lots.

And we came back and the salesman called in on the radio telling them exactly what lots we have accepted and were going to buy.

Q. And where did you go from there?

A. We went right to the property office.

JUDGE TEETOR: I think we'll take a ten-minute recess.

(Ten minutes recess taken.)

APPENDIX E

(Complaint Counsel's Proposed Order and Supplementary Letter)

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the Matter of AMREP Corporation, a corporation.	)))))	DOCKET NO. 9018
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ORDER

As used in this Order, the following definitions shall apply:

Property Report shall include documents entitled "Public Property Report," "Public Offering Statement," "Subdivision Public Report," "Offering Statement," "Prospectives," "Prospectus," "Public Report," and any other document providing information regarding the purchase of land in general or a specific subdivision in particular which is required by federal or state law to be distributed to prospective purchasers or purchasers of land.

Land, property or lot shall mean any real property located in one of respondent's subdivisions, unless otherwise modified herein.

Vacant land, property or lot shall mean any land which is not immediately usable as a homesite, as homesite is defined herein.

Homesite or building lot shall mean any land which is immediately usable for such purpose as set forth in Section IV, paragraphs A1 and 2 of this Order.

Contract shall mean any binding legal instrument for the purchase of an interest in real property.

Purchaser or buyer shall mean any individual who is a potential or actual vendee of the property being offered by respondent.

Resale market shall be as defined in Section IV, Paragraph B herein.

Developed land, property or lot shall mean land which has been improved with the roads and utilities necessary to make it a *homesite* or *building lot*, as those terms are defined herein.

Market value or value shall mean the price expectable when the buyer and seller are typically motivated and not under undue pressure to buy or sell, each is acting in his own best interest, reasonable time is allowed for exposure in the open market, the price represents a normal consideration unaffected by any outside interests, and the sale is on cash or typical terms.

I

It is ordered That respondent AMREP 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 real property 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 or sound investment, or that the principal of "leverage" may be employed in the purchase of this land;

2. There is little or no financial risk involved in the purchase of respondent's land;

3. The resale of vacant land purchased from respondent is not difficult, or that respondent will buy back the land from buyer, or that respondent will resell or assist in reselling the land;

4. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise;

5. The list 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 with same degree of development) by previous buyers substantiates this representation;

6. The purchase of land from respondent is a way to achieve financial security, to deal with inflation or to make money;

7. The purchase of land in general is a good, profitable or sound investment;

8. The demand for any land, including that offered for sale by respondent, has increased, is increasing, or will increase;

9. 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;

10. Buyers must purchase immediately in order to ensure that a particularly desirable location will be available;

11. Jobs will be obtainable for buyers who decide to move to the property being offered; *provided*, that respondent may, after adequate and up to date inquiry, report exactly what specific jobs are currently available that comport with the buyer's qualifications, salary requirements, and resident status;

12. The signing of a contract does not immediately create a binding legal obligation on the part of the buyer including, but not limited to, representations that the buyer 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 a refund privilege, if any, or of a cancellation right, if applicable;

13. The Property Report is prepared or approved by the Secretary of HUD, OILSR, the Department of Housing and Urban Development or any other federal government entity, or that the Offering Statement is prepared or approved by the respective state or any state entity, or that either the Property Report (as defined in the definitions section) or the Offering Statement in any way indicate endorsement of the offering or judgment of the merits or value, if any, of the land being offered;

14. Any advertising or promotional material has been produced independent of respondent if in fact such material has been in any way edited, altered or changed by or at the behest of respondent, or if respondent in any way advised, counseled, subsidized in whole or in part, or influenced the content of the material.

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future prices 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;

2. The direction of geographical growth or amount of population increase, past, present or future, of any geographical or political area wherever situated;

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 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); *provided*, that respondent may employ accurate pictorial representations that comport with the requirements of Section I, paragraph C3 herein;

4. Investments of any sort, including any reference to 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 buyer, of any land being offered by respondent, including but not limited to, any reference to anyone else "holding" a piece of property or "deleting" a listing;

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.

C. Engaging in the following acts or practices, directly or by implication, through the use of any means:

1. Disparaging or discouraging buyers 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. Not providing any required property report sufficiently in advance of signing a contract so as to permit the buyer to read it completely without interruption or distraction by respondent's representatives or employees;

3. Using any motion pictures, still pictures or other graphical depictions of any type that have been in any way retouched, staged with props, or created through the use of any illusion, artificial embellishment or device, unless each such alteration of reality is clearly and conspicuously noted in conjunction with the depiction;

4. Filling out a contract with the buyer's personal information prior to the buyer signifying, by affirmative statement, that buyer desires to purchase the land being offered;

5. Subjecting a buyer who has evidenced a desire not to purchase to continued sales effort from any sales representative or other employee other than the original salesperson, i.e., any continuation of the "T.O." or "takeover" system;

6. Including in any contract or in any other documents shown or provided to buyers, 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;

7. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any material respect from the rights or obligations of the parties as stated in the contract, the Notice to Buyers (*see* section II of this Order) and the Property Report;

8. Including in any contract language permitting respondent to retain all sums

previously paid by buyer upon the failure of buyer to pay any installment due or to otherwise perform any obligation under the contract;

9. Hindering or preventing any independent builder or contractor from freely competing with respondent for house construction work or procurement of building lots at any of respondent's subdivisions.

10. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours.

II

It is further ordered, That respondent AMREP 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 real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, 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 cases where the buyer 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 buyer in the buyer's home, or other location, respondent shall mail the Notice to the buyer allowing sufficient time for the Notice to arrive two days prior to the meeting. (3) In cases where the initial contact with the buyer 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 buyer, request that the buyer read it, and provide ample uninterrupted time for the buyer 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 buyer.

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 Staff of the Commission. The Notice shall be in the following format and content:

NOTICE TO BUYERS

NAME OF SUBDIVISION

NAME OF DEVELOPER

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 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 \$ _____.

WARNING

IN 1977, AMREP CORPORATION, WHICH OWNS (INSERT SUBDIVISION NAME), AND A SUBSIDIARY CORPORATION OF AMREP, THE PRESIDENT OF AMREP, AND THREE OTHER OFFICIALS OF THESE COMPANIES WERE FOUND GUILTY OF MAIL FRAUD AND OTHER CRIMES IN CONNECTION WITH THE SALE OF LAND TO CONSUMERS. THEREFORE, YOU SHOULD USE EXTREME CAUTION BEFORE DECIDING TO BUY A LOT FROM THIS SELLER.

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 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 listing your lot.

[State the number of lots sold in the subdivision by the developer 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 that the developer 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)

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 must state "UNPAVED" and describe the surface.

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 purchaser is to pay any construction costs, one-time connection fees, availability fees, special assessments

or deposits for the central system. If so, what are the amounts? If the buyer will be responsible for construction costs of the water mains, state the cost 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.**

Provide the following water information:

Unit	Starting date	Percent now complete	Service Available date*
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*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 method of sewage disposal to be used. If by septic tank or other individual system, what is 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 buyer will pay any construction costs, special assessments, one-time connection fees, availability fees, use fees or deposits. What are 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, will the buyer be responsible for any construction costs? If so, state the utility company's policy and charges for extension of primary lines. Based on that policy, what

would be 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, will the buyer be responsible for any construction costs? If so, what is the utility company's policy and charges for extension of service lines? Based on that policy, what would be the cost to the buyer of extending service lines to the most remote lot in this Notice?

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:

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 applicable property owner's association assessment, maintenance assessment or use fee.

At the conclusion of the Notice shall appear 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 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 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."

C. Attach to the contract a copy of the Notice to Buyers that was given to the buyer when buyer 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% per annum computed from the date of seller's default; *provided*, however, that at the time the buyer is notified of such refund, the buyer may also be offered the option of selecting, instead of such refund, an exchange of the buyer's lot, at no additional cost to the buyer for another lot to which all contractual obligations of seller have been met, which was or would have been of at least equal price on the date the buyer'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."

E. Carry out the notification and refund provisions as set forth in Paragraph D above.

III

It is further ordered, That respondent AMREP 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 real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Include clearly and conspicuously in all sales presentations, promotional materials, printed advertisements and radio and television commercials, the following statement: **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.**

B. Set forth on the top of the first page of the contract used to sell respondent's land in 24-point boldface type, "CONTRACT FOR THE PURCHASE OF LAND." No other heading or description of the purpose of the document shall appear.

C. 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 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 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.

D. Print the following in 12-point boldface type as a separate paragraph of the contract immediately preceding the space provided for the buyer'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.

E. Furnish each buyer, at the time the buyer signs a contract for the sale of land, with two copies of a form, captioned in 12-point 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 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 buyer, 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 buyer, by which the buyer may give notice of cancellation.

Respondent shall, where the signature of a buyer is solicited during the course of a sales presentation, inform each buyer orally, at the time buyer signs the contract, of buyer's right to cancel as stated in this Paragraph of the Order.

F. 1. Honor any signed and timely notice of cancellation by buyer, 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 buyer;

2. Where 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, immediately notify the buyer by certified mail, return receipt requested, enclosing the notice, informing the buyer of his error and stating clearly and conspicuously that a proper notice signed by the buyer must be mailed by midnight of the third business day following the buyer's receipt of the mailing, if the buyer is to obtain a refund.

G. Whenever respondent extends a privilege or right arrangement whereby the buyer may exchange buyer's undeveloped land for 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 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 buyer's equity in the original lot into the building lot, in the same place and manner as the statement in subparagraph 1 above.

H. Whenever respondent extends a refund privilege which is conditioned upon the buyer making a personal visit to the property, wherein *personal contact* by buyer with any employee or representative of respondent at the property or elsewhere is required in order to exercise the refund privilege:

1. Provide the buyer with a copy of the following "INSPECTION 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:

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 DOES NOT TAKE AWAY YOUR 10-DAY CANCELLATION RIGHT. SEE YOUR CONTRACT.

- (End of Notice) -

2. Provide the buyer three (3) 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 THIRD 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 3-DAY PERIOD;

4. Ensure that every buyer who seeks to make this inspection visit sees the precise lot identified in buyer's contract;

5. Orally inform the buyer of this post-visit 3-day cancellation right at the time the contract is signed and again at the conclusion of the inspection visit; the visit shall be deemed to conclude:

a) after the buyer has inspected the precise lot contracted for; and,
b) at the end point in the visit or tour when all contact with the buyer by any employee or representative of respondent terminates;

6. Furnish each purchaser, at the conclusion of the inspection visit (as determined in Paragraph H.5 above), with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION" which shall contain in bold-face 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 THIRD BUSINESS DAY AFTER THE ABOVE DATE. NO REPRESENTATIVE OF SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS THREE 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.

TO CANCEL YOUR CONTRACT(S), MAIL OR DELIVER A SIGNED COPY OF THIS

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CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: (Name of Respondent), at (*address of respondent's place of business*), POST-MARKED (IF MAILED) OR FILED FOR TRANSMISSION (IF TELEGRAPHED) NOT LATER THAN MIDNIGHT OF _____

I (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 buyer copies of the "NOTICE OF CANCELLATION AFTER INSPECTION" set forth in Paragraph H. 6 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 third business day following the conclusion of the inspection (as determined in Paragraph H.5 above), by which the buyer may cancel buyer's purchase(s);

8. Not initiate any contact with the buyer during the post-inspection cancellation period;

9. Investigate any notification received from buyers of contact violating the provisions of Paragraphs H. 3 or H. 8 above, and comply with the requirements of Section VI, Paragraphs F and G herein;

10. Honor any signed and timely Notice of Cancellation After Inspection by a buyer, 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 buyer;

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 buyer by certified mail, return receipt requested, enclosing the notice, informing the buyer of buyer's error and stating clearly and conspicuously that a proper notice signed by the buyer must be mailed by midnight of the third day following the buyer's receipt of the mailing if the buyer is to obtain a refund;

I. Unless otherwise requested by buyer, 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 buyers 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.

J. Include in all contracts for the sale of land a provision limiting the amount of moneys to be forfeited by a buyer in the event of buyer's default under the contract to an amount not greater than respondent's actual damages from such forfeiture; *provided*, that the amount forfeited in no event is to exceed 40% of the "cash price" of the lot, as "cash price" is defined in Truth-In-Lending Regulation Z (12 CFR 226.2(n)).

K. Refund to buyers who are deemed in default, in accordance with the contract provision set forth in Paragraph J above, all moneys paid under the contract, including but not limited to principal, interest, taxes, and assessments which in the aggregate exceed (1) respondent's actual damages or (2) 40% of the "cash price", whichever is less, within 60 days after the buyer is deemed to have defaulted; *provided*, that this paragraph shall not preclude respondent from offering a defaulting buyer additional alternatives which may be selected at the buyer's option, in lieu of a refund.

For purposes of this section of the Order, a buyer shall be deemed to have defaulted when either of the following occurs:

1. buyer notifies respondent of intent to default; or
2. buyer has failed to make a payment for a period of six months from due date of such payment.

L. Forbear from seeking to recover, or recovering by any means, from buyers who were under contract for purchase of respondent's land as of the date the Commission's complaint in this matter was issued (March 11, 1975) or who entered into such a contract between that date and the date this Order becomes final, who have defaulted or who become in default (as defined in Paragraph K above), any sums remaining due on their contracts.

M. Forbear from relying upon or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any buyer who was under contract for the purchase of respondent's land as of the date the Commission's complaint in this matter was issued (March 11, 1975) or who entered into such a contract between that date and the date this Order becomes final, the following contract clauses:

1. Respondent's contract clause which provides that the seller may retain all sums previously paid by buyer in the event that buyer 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.

N. Not misrepresent, nor solicit or obtain the buyer's assent to or otherwise impose any condition, waiver or limitation upon, the right of a buyer to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation.

O. Include in all contracts a provision extending the contractual rights and privileges of the buyer to subsequent purchasers or assignees from buyer.

P. Mail to all buyers of respondent's land, both those who are deeded and those who were under contract for the purchase of such land as of the date the Commission's complaint in this matter was issued (March 11, 1975) or who entered into such a contract between that date and the date this Order becomes final, 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 AMREP 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 real property in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising for sale, offering for sale, contracting to sell, or selling any interest in:

A. Any land represented in any manner as being usable now or in the future as a homesite or building lot, unless:

1. Said land is immediately usable for such purpose without any further improvement or development by the buyer including, but not limited to, that an adequate potable water supply is available; that the lands have been approved for installation of septic tanks or that an adequate sewage disposal system is installed; that electric power and telephone service are available without line extension fees or aid-in-construction charges; that no further major draining, filling, or sub-surface improvement is necessary to construct dwellings, except for reasonable preparation for construction;

that the individual homesites or building lots are accessible by conventional automobile without additional expense to the buyer, over existing and maintained right-of-way, and that no other fact or circumstance exists to prohibit the use of the lots as a homesite or building lot; *and*

2. Respondent determines, updates quarterly, and discloses in the contract for purchase of such land, the following information:

In addition to the purchase price of your lot, there are other expenditures which must be made. Listed below is a summary of the major items.

ONE-TIME CHARGES

- (i) Water connection fee/installation of private well\$
- (ii) Sewer connection fee/installation of private on-site
sewage system\$
- (iii) Other (identify)\$

MONTHLY/ANNUAL CHARGES

- (i) Taxes (average lot of this size)\$
- (ii) Dues/Assessments (including any required
homeowner's association).....\$
- (iii) Recreational use fees\$
- (iv) Other (identify)\$

B. Any vacant land at Rio Rancho Estates, Silver Springs Shores or Eldorado at Santa Fe before such time as a viable resale market shall have come into existence. A viable resale market shall be deemed to exist at any of the three subdivisions only at such time as one-half of all lots sold by respondent in such subdivision as of the date that this order becomes final, both those deeded and those under contract of sale, are improved with a dwelling or commercial building or have been exchanged for a building lot and returned to respondent's inventory. Building lot shall be as defined in paragraph A above. To facilitate the creation of a viable resale market, respondent shall, at its own expense, and free of charge to sellers, buyers, brokers and builders:

1. Notify buyers of the existence of a resale listing service in the form and manner set forth in Appendix A to this Order;
2. Accept, maintain and provide to inquiring buyers, brokers and builders, listing information (as set forth in Appendix A to this Order) for vacant lots at each of the three projects that are placed for resale by the original buyers from respondent (or any subsequent transferee of the original buyers);
3. Place a block notice listing with the multiple listing services of Albuquerque (for Rio Rancho lots), Ocala (for Silver Springs Shores lots) and Santa Fe (for Eldorado at Santa Fe lots) describing the number of lots available, the range of prices asked and instructions for contacting respondent's resale listing service;
4. Maintain the listings until advised by the listing buyer to cancel the listing or until sold;
5. Annually notify all existing buyers, deeded or under contract, of this listing service, including notification of where to send their listing, that the listing will be maintained free of charge, that they are free to ask any price they desire, and the range of prices received in the past year for lots that were resold (of the most common-sized lot in the subdivision).

Provided, That whenever respondent is permitted under the terms of this Order to sell land for which respondent is required to file a statement of record and issue a property report pursuant to the regulations of the Office of Interstate Land Sales Regulation, respondent shall send a copy of the new property report and any subsequent amend-

ments or revisions to all previous buyers of land in the subdivision covered by the property report, including those who have been deeded and those still under contract; *further provided, however*, that only those amendments or revisions that modify or materially affect the previous buyer's contractual rights or the value of the previous buyer's lots shall be subject to this provision.

C. Any building lot or bulk acreage intended for building purposes at Rio Rancho Estates unless the purchaser of said building lot tenders, and respondent accepts, a Rio Rancho vacant lot in full or partial exchange for the purchase price of each building lot or each 1/2 acre of the bulk acreage. If the buyer does not have a vacant lot to exchange then respondent shall:

1. Direct the buyer to the resale listings as described in Paragraph B above for purchase of a resale lot for use in exchange; or
2. Purchase a lot from the resale listings on buyer's behalf before selling the building lot.

For purposes of this Paragraph C, the value allowed as a credit towards the purchase price of the building lot shall be equal to or greater than the "MKT PRICE" of the vacant land that appears in respondent's master inventory list dated April 30, 1975 (CX 207, Vols I-IV), which is hereby incorporated herein by reference.

If there is no vacant land listed for resale respondent may sell building lots without restriction until such time as vacant land is so listed; *provided*, that respondent may not so sell without restriction until 90 days after establishing the resale listing provisions of Paragraph B above. The provisions of this Paragraph C shall terminate at such time as a resale market, as defined in Paragraph B above, shall exist at the subdivision.

V

It is further ordered, That respondent AMREP 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 real property in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Create and carry out a similar listing and multiple listing arrangement (as set forth in IV B above) with the Branson, MO., area multi-list service, for buyers of lots from respondent in the subdivision which was known as Oakmont Shores; and

B. Notify all of its buyers in the Oakmont Shores subdivision, including those deeded and those under contract, of the resale listing arrangements in the form and manner set forth in Appendix A to this Order.

VI

It is further ordered, That respondent AMREP Corporation, its successors and assigns, shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future salesmen 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. So 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 ten years from the date of the complaint.

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 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 H. 6 herein).

VII

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.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this Order to each of its subsidiaries.

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 successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this Order.

It is further ordered, That the respondent herein 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 TO COMPLAINT COUNSEL'S PROPOSED ORDER

FEDERAL TRADE COMMISSION

Los Angeles Regional Office
11000 Wilshire Boulevard
Los Angeles, CA 90024

IMPORTANT NOTICE TO LOT BUYERS IN

(insert RIO RANCHO, or SILVER SPRINGS SHORES, or ELDORADO AT SANTA
FE, or OAKMONT SHORES)

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 1977, AMREP Corporation, Rio Rancho Estates, Inc., the president and three other officials of these companies were found guilty of mail fraud and other crimes in connection with the sale of Rio Rancho lots.

In 1975, the Federal Trade Commission brought a lawsuit against AMREP 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 III. The Commission cannot advise you as to what 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 amount of such lots at the present time.

You should be aware that neither AMREP nor (insert subdivision) will buy back your lot or help you resell it except for providing a resale listing service, as described in II below.

II. RESALE LISTING SERVICE

In accordance with the provisions of the Commission's Order, AMREP will provide a resale listing service for purchasers of its undeveloped lots in (insert subdivision). AMREP will provide a clearinghouse for all purchasers who desire to resell their property, but is not required to act as a traditional broker in seeking buyers.

AMREP will maintain a list of all property that is placed for resale, with a description of the unit, block and lot number, the size of the lot, the price that you, the owner or contract holder, desire to sell it for, and your name, address and telephone number. You should remember, in determining your price, that you will be competing with other lotowners for buyers.

AMREP will notify the local realtors' multiple listing service (MLS) that lots are for sale, but will not individually list your lot with the MLS. Prospective buyers may then contact AMREP and select a lot from the master list. As the lots are relatively similar

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in characteristics, it is expected that the lowest-priced lots will be sold first, if at all (see I above).

If you desire to list your lot in this manner, write to AMREP at the following address:

(
(Insert Respondent's Address)
()

Include the following listing information: your name, current address, telephone number, contract number, lot identification (unit, block and lot), size of lot and the price at which you want to list your lot.

III. 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 AMREP 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 list your lot as described in Section II above.
5. 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, the development of your specific lot, or the procedures for listing your property, call AMREP 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,

Perry W. Winston
Attorney

OPINION OF THE COMMISSION*

BY PERTSCHUK, *Commissioner*:

I. BACKGROUND

The respondent, AMREP Corporation, is a land sales company incorporated under the laws of the state of Oklahoma. Its principal place of business is New York, New York. AMREP and its 37 wholly-owned subsidiaries in 24 states have acquired and subdivided several large parcels of undeveloped land. Core areas within each subdivision have been developed with residential homes while the vast majority of lots remain undeveloped with the exception of unpaved roads. At the time of the issuance of this complaint, respondent and its subsidiaries were in the business of selling these undeveloped lots to the public, sight unseen, to be held primarily for investment purposes.

The subdivisions involved in this action are: Rio Rancho Estates, near Albuquerque, New Mexico; Silver Springs Shores near Ocala, Florida; Eldorado at Santa Fe, New Mexico; and Oakmont Shores in southwestern Missouri. These subdivisions include a vast amount of territory. Rio Rancho Estates, by far the largest of respondent's subdivisions, contains 91,000 acres of land, approximately 142 square miles, an area nearly twice the [2] size of the City of Albuquerque. (I.D. 15)¹ The other three subdivisions contain respectively: Silver Springs Shores, 18,500 acres (I.D. 33); Eldorado at Santa Fe, 6,000 acres (I.D. 42); and Oakmont Shores, 3,500 acres. (I.D. 47) Respondent had sold approximately 95,000 lots by April, 1976. More than 75,000

* Prior to his resignation on October 14, 1983, Commissioner Clanton recorded his vote in the affirmative for the Commission's Opinion, and issued the following statement:

I completely agree with the result in this case. There is little doubt that respondents have violated the law. On the issue of the proper deception standard, I share the Chairman's view that the better approach to interpreting ad claims is one of reasonableness. The Commission has applied this concept in several recent advertising cases, e.g., *American Home Products*, 98 F.T.C. 136 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers*, D. 8917 (July 5, 1983) [102 F.T.C. 21]; *Sterling Drug, Inc.*, D. 8919 (July 5, 1983) [102 F.T.C. 395], and I believe that concept provides an objective understandable standard for future application.

¹ The following abbreviations will be used in this opinion:

I.D.	- Initial Decision findings number
I.D.p.	- Initial Decision page number
Tr.	- Transcript page number
CX	- Complaint Counsel's exhibit number
RX	- Respondent's exhibit number
CTX	- Court 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 those lots were sold at Rio Rancho Estates alone. (I.D. 18, 35, 43, 48)

Respondent marketed its properties principally in cities and towns far from the sites of its subdivisions, by use of national advertising and dinner parties given for prospective buyers in their home towns. Most purchasers bought their property based on point of sale representations made by respondent in promotional pamphlets, slides, movies, speeches and sales presentations. The complaint alleges that during its marketing presentations respondent engaged in unfair or deceptive acts or practices and unfair methods of competition 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 prospective buyers, by failing to disclose material facts and by using unfair contractual provisions in its land sales contracts. The gravamen of the complaint is contained in paragraphs 11 and 12 which allege that respondent represented directly and by implication that the lots it offered for sale were investments which would realize significant monetary gain and which involved little or no financial risk, when, in fact, the lots were poor investments which involved substantial financial risks to purchasers. The remaining paragraphs of the complaint allege that respondent made numerous specific misrepresentations in marketing its property as a high-yield, low-risk investment, used unfair contractual provisions, and engaged in other unfair and deceptive sales practices. [3]

The complaint was issued on March 11, 1975. Hearings were begun on June 1, 1976, and continued through July 30, 1976, when they were suspended on order of the Second Circuit Court of Appeals pending completion of the criminal trial against respondent and several of its officers in the U.S. District Court for the Southern District of New York. *AMREP Corp. v. United States*, 405 F.Supp. 1053 (S.D.N.Y.), *aff'd*, 535 F.2d 1240 (2d Cir. 1976). On March 10, 1977, following a jury verdict, a judgment of conviction for mail fraud and interstate land sales fraud was entered against respondent and certain of its officers. That judgment was affirmed on appeal. *U.S. v. AMREP Corp.*, 560 F.2d 539 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

Hearings in the Commission proceedings resumed in May 1977 and continued through May 1978. The record was closed on May 31, 1978, after hearings were conducted in Albuquerque, New York City, Los Angeles, Ocala, Florida, and Springfield, Missouri. The record in this proceeding is extensive, including approximately 25,000 pages of testimony and 1500 accepted exhibits. (I.D. p. 20) On July 18, 1979, Administrative Law Judge Paul R. Teetor issued an Initial Decision finding that respondent's misrepresentations concerning the growth,

development and investment potential of its properties were unfair methods of competition and unfair and deceptive acts and practices in violation of Section 5. (I.D. pp. 265-68) In addition, he found that respondent's high pressure sales techniques, employed in the context of respondent's misrepresentations about the value of the property it was marketing, constituted unfair methods of competition and unfair and deceptive acts and practices in violation of Section 5. (I.D. pp. 264-65) Finally, Judge Teetor found that four of the provisions of respondent's standard form sales contract constituted unfair methods of competition and unfair acts and practices in violation of Section 5. (I.D. pp. 268-70)

The ALJ's order provides for broad relief. Among other things, it prohibits respondent from making representations that its land is a good financial investment and from engaging in certain "hard sell" tactics. It requires respondent to make affirmative disclosures prior to any sales presentation warning potential customers that several of its officers were convicted in federal court for mail fraud in connection with the sale of land, and informing them of the existence of future plans, if any, for installation of roads, water, sewer, electric, telephone, and recreational facilities. The order also requires a ten-day cooling-off period after any sale during which no company-initiated contacts are permitted. Finally, the ALJ ordered respondent to stop using and enforcing several clauses in its sales contract which he found to be unfair. [4]

Respondent appealed from the Initial Decision on numerous grounds, including arguments that: the Commission lacked jurisdiction; Judge Teetor had demonstrated personal bias by failing to consider evidence favorable to respondent; the weight of the evidence was insufficient to support a finding of liability; Judge Teetor had made numerous improper procedural and evidentiary rulings; the scope of the order was unduly restrictive and burdensome; and compliance with some of the order's requirements would conflict with respondent's legal duties under the Interstate Land Sales Full Disclosure Act.² Complaint counsel cross appealed, arguing that the Commission should expand the Order to include a conditional ban on respondent's future sales of undeveloped lots and a requirement that respondent establish a resale program for current lot owners.

Having reviewed the record as a whole, the Commission upholds Judge Teetor's finding that respondent has violated Section 5 in several respects. While on some limited points we reverse the ALJ, we generally concur in the Initial Decision.³ In particular, we find the

² Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1700 *et. seq.* (1979).

³ Paragraph 56 of the complaint alleged that all of the various acts and practices enumerated in the complaint injured respondent's competitors and constituted unfair methods of competition in or affecting commerce in violation of Section 5. Without discussion, the ALJ concluded that respondent's misrepresentations, high-pressure

(footnote cont'd)

record evidence sufficient to support his critical holding that respondent marketed its undeveloped lots as excellent, low-risk investments⁴ when in fact those lots were poor investments and represented substantial financial risks to the purchasers. [5]

Below, the Commission rejects respondent's argument that we lack jurisdiction. We then discuss various representations made by respondent that relate to the investment value of its properties,⁵ and explore whether those representations were true. We find that respondent misrepresented the investment value of its properties, engaging in deceptive and unfair practices which violated Section 5. Next, we discuss respondent's "high pressure" sales techniques and find that certain of these techniques constitute deceptive and unfair practices when, as here, they are used in the context of a sales scheme employing deceptive representations. We also address the finding in the Initial Decision that respondent's standard form sales contract was an "adhesion contract" and that four of its provisions were unfair and deceptive. While the Commission finds that respondent's contract has elements of an adhesion contract, it reverses Judge Teetor's finding of liability as to three of the provisions—the interest charging clause, the integration clause and the alienability of land clause. The Commission sustains his finding of unfairness as to the forfeiture clause.

We also consider respondent's substantive defenses and numerous allegations of procedural and evidentiary errors in the administrative proceeding. While the Commission finds for the respondent on some of these assignments of error, none of these rulings individually or collectively bar our finding of liability and entry of an order against respondent.

Finally, the Commission rejects complaint counsel's appeal seeking further order provisions because we find that the suggested provisions are unnecessary to stop present deception or to prevent future deception. We also revise the Judge's proposed order to reduce the compliance burden by making its provisions more consistent with the

tactics, and unfair contractual clauses all constituted unfair methods of competition in violation of Section 5. (I.D. pp. 264-270.)

Neither respondent nor complaint counsel have briefed the issue of how respondent's conduct is alleged to have injured competition. The ALJ's opinion is devoid of any discussion on the issue. In the absence of sufficient evidence in the record and discussion in the briefs, we cannot sustain the ALJ's holding that respondent's conduct also constituted unfair methods of competition and accordingly we dismiss those portions of the complaint.

⁴ While respondent did not, in most cases, use the specific term "excellent" in describing the investment value of its properties, the Commission in the complaint and in this Opinion uses the term "excellent investment" to mean an investment that has the characteristics of high yield, certainty, safety and liquidity.

⁵ While the Initial Decision divided the representations made by respondent into three categories (growth representations, development representations, and investment representations), we have chosen to analyze all of these types of representations together as investment representations. Because the majority of respondent's customers were purchasing their property for investment purposes (I.D. 183), respondent's representations as to growth potential and state of development of its subdivisions were made primarily to convince potential buyers that the lots it was selling would indeed make good investments, and not to convince buyers that its subdivisions would be a good place for them to live.

requirements of the Interstate Land Sales Full Disclosure Act and the implementing regulations of the Department of Housing and Urban Development's Office of Interstate Land Sales.⁶ [6]

II. JURISDICTION

Respondent argues that, in enacting the Interstate Land Sales Full Disclosure Act ("ILSFDA"), Congress intended to bestow exclusive jurisdiction over land sales practices upon the Office of Interstate Land Sales Regulation ("OILSR"). Thus, respondent asserts, we are without jurisdiction to consider this matter.

Respondent's arguments play several variations on this theme. First, respondent asserts that ILSFDA is a pervasive and comprehensive statute directed precisely at the type of practices at issue in this case, and that enactment of ILSFDA consequently "preempted" or "impliedly repealed" the more general provisions of the prior FTC Act.⁷ (RAB at 26-27) Second, it argues that ILSFDA created an implied immunity from, or an implied repeal of, Section 5 with respect to land sales, since application of that Act would conflict with (or be repugnant to) the statutory scheme set out in ILSFDA. (RAB at 27-29)

The argument that Congress somehow intended to exempt land sales practices from FTC scrutiny in enacting ILSFDA was thoroughly explored—and rejected—in the Commission's recent opinion in *Horizon Corporation*.⁸ After an extensive analysis of ILSFDA and its legislative history, including its amendments, as well as the implementing regulations adopted by OILSR, we concluded there that Congress did not intend ILSFDA to be a pervasive statute covering all activities relating to land sales. We also concluded that application of the FTC Act is not in conflict with, or repugnant to, ILSFDA. There, we stated: [7]

[R]egulation 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. *Horizon Corporation*, 97 F.T.C. 464, 864 (1981).

⁶ 24 C.F.R. 1700.1 *et seq.* (1982)

⁷ While respondent raises its "preemption" argument as a separate and additional ground from its "implied repeal" argument, "preemption" (in the sense that respondent is using the term) is not really a distinct theory separate from implied repeal. While the term preemption is used in a number of decisions, the claimed overriding of one statute by later enactment *sub silentio* is a claim of repeal by implication. *Environmental Defense Fund v. EPA*, 598 F.2d 62, 76 (D.C. Cir. 1978).

⁸ *Horizon Corporation*, 97 F.T.C. 464 (1981). While the Commission's opinion in *Horizon* was the product of the Commission's independent review of the record, the terms of the order largely reflected provisions which were agreed to by both complaint counsel and respondent. The Commission expressly noted 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 modification of the ALJ's order, the Commission will not necessarily view this remedial scheme as a model for relief in future land sales cases." *Horizon*, *supra*, at 803.

Therefore, since the repeal of Section 5 as to land sales practices is not necessary for ILSFDA to work as Congress intended, we reject the argument that ILSFDA "impliedly repealed" our jurisdiction or granted an implied immunity to land sellers from Section 5. See *Cantor v. Detroit Edison*, 428 U.S. 579, 597 (1976); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 685 (1975); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

AMREP also claims that we are without jurisdiction under the doctrine of "primary jurisdiction." According to respondent's argument, the Commission must first defer to OILSR as the agency with primary jurisdiction in the land sales area. Since respondent has allegedly complied with all applicable OILSR regulations and requirements, it asserts that the Commission is without power to prosecute it under Section 5. (RAB at 30-32)

The doctrine of "primary jurisdiction," however, is a judicially-created doctrine developed to apply in those situations where both an agency and a court have jurisdiction to decide in the first instance and thus is not applicable here. *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *Sunflower Electric Co. v. Kansas Power & Light Co.*, 603 F.2d 791 (10th Cir. 1979). See also *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981). The purpose of the doctrine is to enable a court to postpone exercising its jurisdiction in order to obtain the benefits of agency expertise in the area being contested and to maintain uniformity. *Id.* at 64. That rationale does not apply where two agencies, each with expertise, share "complementary, but not coterminous" jurisdiction over the challenged practices.⁹ In any event, the doctrine, even if applied here, [8] would not (as respondent argues) pose a jurisdictional bar to our action, since the doctrine stands only for the proposition that a court (or, as respondent argues, one agency with limited expertise) should postpone exercising its jurisdiction until it obtains guidance from the agency with superior expertise. Given the Commission's significant involvement with the land sales industry and its expertise in defining unfair and deceptive trade practices with respect to land sales practices,¹⁰ it is evident that the Commission need not first obtain the

⁹ Since the doctrine is primarily concerned with the proper relationship between a court of general jurisdiction and an agency with specific expertise, much like the "exhaustion of administrative remedies" doctrine, it is doubtful that the doctrine applies at all in the situation where only agencies are involved. The cases cited by respondent, *American Air Lines, Inc. v. Air Line Pilots Association*, 91 F.Supp. 629 (E.D.N.Y. 1950) and *Food Fair Stores, Inc.*, 54 F.T.C. 392 (1957), do not apply the doctrine of primary jurisdiction to a situation where two agencies are regulating the same subject matter. However, that doctrine was cited in *Brown-Forman Distillers Corp. v. Matheus*, 435 F.Supp. 5 (W.D. Ky. 1976), involving the Food and Drug Administration and the Bureau of Alcohol, Tobacco and Firearms. That case is distinguishable, however, because the two agencies involved had entered into a Memo of Understanding which gave one agency the power to regulate.

¹⁰ See, e.g., *Bankers Life and Casualty Co., et al.*, 94 F.T.C. 363 (1979); *Cavanagh Communities Corp., et al.*, 93 F.T.C. 559 (1979); *Australian Land Title, Ltd., et al.*, 92 F.T.C. 362 (1978); *Flagg Industries, Inc.*, 90 F.T.C. 226 (1977); *Las Animas Ranch, Inc., et al.*, 89 F.T.C. 255 (1977); *International Telephone and Telegraph Corp.*, 88 F.T.C. 933 (1976); *Turkey Mountain Estates, Inc., et al.*, 84 F.T.C. 698 (1974); *GAC Corporation, et al.*, 84 F.T.C. 163 (1974); *Harney County Land Development Corp., et al.*, 71 F.T.C. 12 (1967).

guidance of OILSR before resolving the issues in the instant case.

Respondent's argument may also be understood to mean that, as a matter of policy rather than law, the Commission should defer to OILSR in this case. Since OILSR has not suspended respondent's registration, respondent urges that we should defer to OILSR's apparent judgment that respondent's practices are satisfactory. Aside from the observation that OILSR's failure to act does not necessarily mean that OILSR has found AMREP's disclosure statements to be satisfactory, assuming that respondent has complied with OILSR regulations simply does not afford respondent immunity from Section 5 scrutiny.¹¹ As we stated in *Horizon, supra*, at 863: [9]

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 preventative 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 requirements.

At the same time, respondent raises legitimate concerns about a number of provisions in the Judge's proposed order which conflict with OILSR requirements. Such concerns, however, go to the question of the appropriate remedy, and not to our power to act. As discussed in a later section of this decision, we have modified the proposed order in several respects to avoid possible conflicts.

Finally, respondent argues that it is immune from Commission prosecution under the state action immunity defense. *See e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-1 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977); and *Parker v. Brown*, 317 U.S. 341, 350 (1943). The Parker doctrine is inapplicable to the present case. That line of cases deals with an implied exemption from the federal antitrust laws where there is a conflict between the federal policy favoring competition and a state regulatory scheme which deliberately displaces competition. No question of conflict with federal antitrust laws is involved here. Nor do the broader principles of federal preemption and comity between the federal government and state governments which form the basis for the *Parker* doctrine apply here. The states, in enacting their own land sales disclosure and registration statutes, are not evincing an intent *contrary* to the intent of federal consumer protection laws; indeed, such regulations are complementary to federal consumer protection efforts. In the absence

¹¹ *Cf. U.S. v. Pocono International Corp.*, 378 F.Supp. 1265, 1267 (S.D.N.Y. 1974) (compliance with ILSFDA is not a defense to a suit under the mail fraud statute for fraudulent interstate land sales executed through the mails). *See also Reilly v. Pinkus*, 338 U.S. 269, 277 (1949) (Post Office approval of challenged advertisements is no defense to a Section 5 proceeding); *U.S. v. RCA*, 358 U.S. 334, 342 (1959) (FCC approval of a change in radio station ownership is no defense to a Sherman Act violation).

of any clear repugnancy between the state law and the federal law, the question of an implied exemption from federal law does not arise. *Cantor v. Detroit Edison*, 428 U.S. 579, 597 (1976). Federal law therefore applies, and compliance with state law is not a defense either to a federal prosecution, *Cantor, supra*, at 594, *United States v. Sylvanus*, 192 F.2d 96, 106 (7th Cir. 1951), or to a Section 5 proceeding. *Royal Oil Corp. v. FTC* 262 F.2d 741 (4th Cir. 1959), *Speigel, Inc. v. FTC*, 540 F.2d 287, 292 (7th Cir. 1976).

Respondent claims, however, that it was unable to prove its state action immunity defense because Judge Teetor improperly refused to permit numerous state regulators to testify or to admit into evidence documentary materials from state regulators. (RAB at 32) However, as discussed above, the *Parker* defense is inapplicable in this case. Thus, even assuming that respondent [10] could have shown that there was active state regulation of land sales and that respondent complied with applicable state laws, such a showing would have provided no defense to this action. Accordingly, we see no error in the Judge's refusal to admit the evidence for the purpose of demonstrating that the states actively regulated the land sales industry and that AMREP had complied with state laws or had received state approval for its activities.

For the above reasons, we reject respondent's contention that the Commission lacks jurisdiction of this case, and affirm the ALJ's findings on the issue of jurisdiction.

III. RESPONDENT'S INVESTMENT REPRESENTATIONS

A. AMREP's Marketing Strategy

In 1961, respondent purchased a large 54,000 acre tract of land in Sandoval County, New Mexico, northwest of Albuquerque. After the tract was platted, respondent named it Rio Rancho Estates and began selling undeveloped lots to the public through the mail and direct selling to tourists. (I.D. 54) During the second half of the 1960s, however, respondent developed a new marketing plan for selling its undeveloped lots at Rio Rancho. With minor variations, the same marketing strategy and sales presentations were later used in respondent's other three subdivisions involved in this matter.

The heart of the marketing strategy involved inviting consumers who lived far from respondent's projects to a free dinner party, where a carefully staged sales presentation of films, slides, testimonials and enthusiastic speeches generated such excitement that many consumers would sign contracts to buy lots at respondent's subdivisions, sight unseen, before the night was over. To help counter any reluctance, respondent also offered a subsidized "vacation" tour of the subdivi-

sion and the right to cancel the purchase after seeing the purchased lot within six months. (I.D. 54)

While most of the sales presentations were handled by small sales subsidiaries, the unified marketing plan—what the ALJ called “respondent’s organized offense” (I.D. 63)—was thoroughly crafted and controlled by respondent’s headquarters in New York. Respondent’s headquarters produced sales training materials, reviewed or prepared all advertisements, wrote standard dinner scripts, printed glossy brochures, supplied all forms and contracts, and produced the highly effective movies for each subdivision. (I.D. 3; I.D. 56–79) The respondent also set prices for the land to be sold through the sales subsidiaries. It also audited sales practices and dinner party presentations to ensure conformity with its marketing strategy. (I.D. 3) [11]

The basic theme of respondent’s standard sales presentation, used at all four of its subdivisions, was that the purchase of a lot at one of respondent’s subdivisions was an excellent, low-risk investment. Promoting the lots as a present or future homesite, or as a vacation home, was subordinate to the main investment message. Throughout the 1960s, the investment theme was conspicuously trumpeted in respondent’s Rio Rancho brochures (I.D. 190–192), national and regional advertisements (*see, e.g.*, CX 232), dinner presentations (I.D. 193), and training sessions for salesmen (I.D. 186). As one salesman put it quite plainly in a dinner presentation:

It is not important that you live there [at Rio Rancho Estates] or that you retire there or even that you visit there. The only thing that’s important is that you want to make money. (CX 110 D).

In 1972, respondent began to tone down the overt investment promises in prepared brochures and films. (I.D. 194–199) Instead of directly making claims about the handsome profits buyers could expect from future increases of land prices at respondent’s subdivisions, respondent instead stressed examples of appreciation of land located in its subdivisions, in the same geographic area as its subdivisions, or in other areas of the country. (I.D. 178–179; 205; 196–199) At the same time, respondent increased the use of themes promoting its subdivisions as sites for relocation, vacation, or retirement homes. While explicit investment claims in respondent’s brochures and films were somewhat tamed (at least in comparison to the blatant investment promises of the 1960s), there was less change in the dinner speeches and sales presentations made orally at dinner parties during the 1970s. As Judge Teetor found, the sales representatives were adept at making explicit the theme that had now become more implicit in AMREP’s prepared materials—that respondent’s land was an excel-

lent, low-risk investment. (I.D. 200-209) The same investment pitch appeared in sales presentations for Silver Springs Shores (I.D. 205), Eldorado at Santa Fe (I.D. 206), and Oakmont Shores (I.D. 207) throughout the 1970's.

Despite the increased promotion of respondent's land as being suitable for homesites during the 1970's, the evidence strongly suggests that few buyers were in fact buying it for present or future homesite use. About eighty percent of buyers of Rio Rancho lots indicated at the time of sale that they were not buying the lots as homesites for their principal residence. [12] (I.D. 24)¹² While that fact does not exclude the possibility that the lots were bought for future use (*i.e.*, as a vacation or retirement home), respondent's experience with Rio Rancho and other subdivisions, as well as its general knowledge about the land sales industry, gave it reason to know that few buyers would ever actually settle on the land they had bought. In respondent's first development, Rainbow Lakes in Florida, no more than seven percent of the buyers there had ever built on their lots, more than twenty years after all the lots had been sold. (I.D. 185) In Rio Rancho, after more than fourteen years of selling lots, only 2500 lots had been improved out of the more than 75,000 sold. (I.D. 17) Further, a consultant's report prepared for respondent in 1966 warned respondent not to expect more than about five percent of the buyers to actually settle in Rio Rancho. (CX 231, p. 34) The conclusion is evident that the great majority of buyers of respondent's land were indeed buying primarily for investment purposes.

B. Investment Representations

The heart of the Initial Decision is Judge Teetor's finding that respondent sold its land for investment purposes by making representations about the nature of investment in general and the particular attributes of the land it was marketing which were misleading and deceptive. (I.D. pp. 265-268) In the following sections, we first review the general investment representations made by respondent and then turn to the representations made about its properties which were designed to convince potential buyers that AMREP property was one of the best land investments available.

1. General Representations about Land as an Investment

Much of respondent's marketing scheme was designed to convince prospective buyers that, as a general proposition, buying land was an excellent investment. Quotes about the "inevitability" of profit in

¹² This fact is hardly startling, considering (as discussed later) the fact that the vast majority of lots at Rio Rancho had no utilities, and that the cost for an individual to install utilities was prohibitive. Such lots would be suitable for homesites only when (and if) the pace of development justified extension of utilities to those lots.

land investment and testimonials from famous financiers and public figures citing the superiority of land as an investment are liberally sprinkled throughout respondent's sales brochures and films. (*E.g.*, CX 61 L-M) Respondent's sales personnel and promotional literature represented that land values everywhere in the United States were constantly going up. (CX 110 J; CX 8; I.D. 284-286) [13]

Respondent's sales presentations also painted a tantalizing picture of extraordinary profits realized in various land booms. (I.D. 287-289; for example, Staten Island property after the Verrazano-Narrows Bridge was completed between Brooklyn and Staten Island, CX 38 G-H and Cherry Hill, New Jersey across the Delaware River from Philadelphia, CX 111 D.)

After convincing prospective buyers that land in general was a good investment, respondent's sales presentations went on to demonstrate that land was in fact an investment superior to any other available to the average investor. Dinner speakers compared an investment in real estate to investments in savings accounts, bonds, stocks, and insurance. (CX 37 F-H; CX 38 U-V; Salesman Wilson, Tr. 9662; I.D. 293-294) The presentations stressed the low rates of return on savings accounts and insurance and bonds, and the risks associated with stocks, contrasting them with the certain appreciation of land at rates of 10 to 30 percent. (Salesman Wilson, Tr. 9663). In addition, the sales presentations stressed the availability of "leverage" in real estate investment, by which a low down payment could "control" the full appreciation on the property. (I.D. 290-291) Using the principle of leverage, which was represented as being unique to land investment, potential buyers were told that their rate of return on their land investment could easily be 150 percent. (CX 112 J; CX 110 M; CX 37 F-H; consumer Bechoff, Tr. 4274, 4305). As an investment, land was touted as the best means of beating inflation, a theme hammered away at in films, dinner presentations, and brochures. (I.D. 299)

After persuading potential buyers on the superiority of land as an investment vehicle, respondent's sales presentations turned to demonstrating the advantages of its subdivisions as an excellent, risk-free investment. While the land sales generalities discussed above were used in connection with the sale of lots at all of respondent's subdivisions, respondents also made separate investment representations about each of the land projects, discussed below.

2. Investment Representations about Rio Rancho Estates

a) *Representation about Investment Value*

Rio Rancho Estates consists of 91,000 acres of arid rangeland, locat-

ed northwest of Albuquerque, New Mexico, in Sandoval County.¹³ Nearly 85,000 of those acres have been platted into 100,186 lots. As of 1976, respondent had sold 75,134 lots; only 1800 residential units were occupied by 1975. (I.D. 16-18) Beyond the small developed core, utilities were virtually unavailable. (I.D. 313-318) [14]

Respondent's sales presentations for Rio Rancho, including films, brochures, and prepared scripts for dinner presentations, emphasized the theme that buyers were being given a last chance to invest at a low price before Rio Rancho was hit with a "land boom" which would cause a spectacular rise in land prices. Sales presentations compared Rio Rancho to land in other parts of the country which had experienced rapid appreciation due to speculation in a land sales boom. In referring to a number of bridges that had recently been constructed over the Rio Grande leading to Rio Rancho, for example, sales representatives pointed to the explosion in property values in areas such as Staten Island and Cherry Hill, New Jersey, after the opening of bridges to those areas had made them accessible for the first time to urban areas. (I.D. 287; CX 35 D; CX 38 G; CX 111 D; CX 169 G). As one sales representative noted after making the comparison:

If tonight I told you nothing more about our program than the documented story of the bridges and what they can mean to land values in Albuquerque, just as the Verrazano Bridge has influenced land values in Staten Island, I think this in itself would be sufficient for everyone seated in this room to join our program. (CX 38 G)

Respondent's sales presentations also drew comparisons to examples of appreciation in the Albuquerque area, leading potential buyers to believe that they could expect similar appreciation at Rio Rancho. Specific examples were cited in respondent's standard brochure (CX 32 I) and sales scripts (CX 36 A-B) throughout 1973. One illustration noted a profit of \$18,000 in a little more than eight months, while another showed \$2,000 for one year.¹⁴ (CX 32 I)

Respondent's sales presentations also stressed that land at Rio Rancho *itself* had been rapidly increasing in market value. Respondent regularly announced price increases for unsold lots at Rio Rancho, usually annually and sometimes semi-annually, on the order of a 10 to 15 percent increase each year. (I.D. 27-28; CTX 34). The history of price increases was often communicated to prospective buyers (I.D. 302-303) and advance notice of future price increases was routinely

¹³ Albuquerque is located in Bernalillo County.

¹⁴ The examples in the brochure were accompanied by a disclaimer which stated that the examples "do not, in any way, represent or imply a promise or prediction of future land values or prices which, of course, depend on location, rate of development, marketability, population growth, plus other factors." In the context of respondent's total presentation, we find that this disclaimer was ineffective in dispelling the only relevant message such case histories were plainly intended to convey: that respondent's land possessed the same tantalizing potential for quick profits.

communicated to existing lot owners. [15] (I.D. 304, 309) Potential buyers clearly understood this history of price increases to mean that the *market value* of Rio Rancho land had increased, equating AM-REP's selling price with market value,¹⁵ and existing owners were led to believe that the value of their lots had increased. (I.D. 302-303) Such actions had the tendency or capacity to lead consumers to believe that lots at Rio Rancho were appreciating in market value at between 10 to 15 percent per year, and that such appreciation was likely to continue.

Respondent also promoted Rio Rancho as an investment by representing that the sales price for the lots was below fair market value, implying, in turn, that buyers would realize a profit immediately upon buying the land. (I.D. 188) Early versions of Rio Rancho promotional materials flatly asserted that the offering price was below market value. (CX 237 B, CX 393 E) Later versions, used after 1972, made the same representation, albeit in a more guarded way. (CX 30 M, W) The same point is made in brochures, films, and dinner scripts, which compare the selling price of a lot at Rio Rancho with the higher market value of land located near Rio Rancho. (CX 36 L; \$12,000 per acre for community "just across a 50-foot road from Rio Rancho"; CX 30 G; CX 24 I; improved land "1/4 mile from our doors" is \$6,000 per acre.) Such comparisons had the tendency or capacity to lead potential buyers to believe that the sales price of Rio Rancho land was below the fair market value of the land.

Respondent also represented that a land investment in Rio Rancho involved little or no risk. (I.D. 211; "as guaranteed and protected a program as you will find anywhere", CX 37 N; a "safe, sound, sensible, prudent real estate investment", CX 456 H.) Such claims had the tendency or capacity to lead potential buyers to expect, not only that they would not lose their capital invested, but also that there were no significant risks, such as illiquidity, which would prevent them from selling and taking a profit at any time. This impression was significantly heightened by representations made by respondent's sales representatives that a lot at Rio Rancho would not be difficult to resell. (I.D. 212, 213) Respondent did not, however, represent that it would assist buyers in resale or guarantee resale. (I.D. 214) [16]

It is also clear that respondent failed to disclose that land at Rio Rancho might be illiquid or difficult to resell. The company's former president admitted that "company policy was not to discuss resale." (Friedman, Tr. 24208) If potential buyers asked, Friedman testified that the policy was to tell them not to expect a resale market until

¹⁵ Indeed, respondent apparently does not dispute that consumers could reasonably have understood the selling price to be about equal to the fair market value, since it contends that the selling price in fact, represented fair market value. (RAB 55-56; Respondent's Answer to Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, and Order 104-112)

after the company had substantially stopped selling the land. (Friedman, Tr. 24208) However, in many cases, respondent's salesmen indicated that, considering the rapid rate of sales, respondent would soon be out of available land. (CPF 104)

As discussed in detail below, the main theme used to convince prospective buyers that buying land at Rio Rancho would be a profitable investment was that Rio Rancho was destined to become a thriving suburb of Albuquerque in the near future. Respondent pictured Albuquerque as a city "bursting at the seams," with only one direction in which residential growth could go: toward Rio Rancho. With insatiable demand and limited supply, the price of Rio Rancho lots could only go rapidly up.

Respondent represented Albuquerque as an area of explosive growth.¹⁶ In addition to subjective descriptions of the growth (*e.g.*, "bursting at the seams" CX 35 C-D; "growing at an unprecedented pace" CX 81; CX 203; I.D. 98), respondent made specific predictions about Albuquerque's population in the ten to twenty year time frame. During the 1960's, respondent predicted that Albuquerque's population would double in the next ten years, which would result in an increase of about 275,000 people in that time. (I.D. 101, 102, 105)¹⁷ After the 1970 census figures became available, when it became clear that such projections were too optimistic, AMREP revised its predictions for the next 10 [17] year period, projecting various population figures for 1980 which would have resulted in population increases of 70,000, 170,000 and 270,000.¹⁸ (I.D. 110-111)

In conjunction with the representation that there would be very strong demand for residential space to accommodate this anticipated population boom, respondent also represented that, because of constraints to development on three sides of Albuquerque, the great majority of the residential growth would be in the direction of Rio Rancho, and that Rio Rancho was directly in the path of Albuquerque's suburban development. (CX 38 O) The so-called "frame theory," present from respondent's earliest brochures, portrayed the geo-

¹⁶ Judge Teetor treated growth and development representations apart from investment representations. (I.D. 97-158) Here, we treat them together as they were part of the investment equation and part of the overall investment claim. Respondent's growth projections were predictions about the demand for residential land in the Albuquerque region. Combined with the representation that there was only a limited supply of residential land, the growth claims led consumers to believe that residential development around Albuquerque would quickly move towards (and through) Rio Rancho. The development representations further enhanced the implication that Rio Rancho would be a thriving, residential suburb of Albuquerque in the near future. As other available land was rapidly put into residential use, demand for land at Rio Rancho would soar, taking property values with it.

¹⁷ In 1961, respondent predicted that Albuquerque's 1970 population would be 550,000. (CX 393 B) In 1968, it projected the 1975 population as 600,000. (CX 38 O)

¹⁸ These inconsistent projections were all made at the same time. In the 1972 revision of its Rio Rancho brochure, "This is My Land", 1980 populations of over 600,000 and over 500,000 were variously mentioned. (CX 32 G; CX 32 M) The contemporaneous revision of AMREP's other Rio Rancho brochure, however, predicted a 32% increase over Albuquerque's 1970 population, which yields a population projection of 400,000 for 1980. (I.D. 111) Subtracting the actual 1970 population of 330,000 gives the figures cited in the text. (I.D. 99)

graphical and legal constraints on three sides of Albuquerque which respondent said would block development. (I.D. 117–123) As succinctly stated in a 1972 Rio Rancho brochure:

Mountains to the East, and federal, state and reserved lands along the northern, southern and part of her western borders are now virtually “containing” Albuquerque’s future growth. According to experts, *Albuquerque’s future growth pattern is largely determined*. Expansion is destined to take place in the general direction of Rio Rancho Estates. (CX 32 H) (Emphasis in original)

Some of respondent’s earlier representations were stronger, stating that the Northwest was the *only* direction in which development would go. *See, e.g.*, I.D. 123.

With strong demand and limited supply, respondent predicted that the pressures of suburban development would engulf Rio Rancho in under ten years. While respondent’s prepared brochures and prepared sales materials made no predictions as to the timing of development, numerous sales representatives told potential buyers that, because of the expected brisk pace of development, utilities could be expected to reach their lots within three to five years. (Other estimates ranged from a low of two years to a [18] high of eight years.) (I.D. 327–328)¹⁹ While respondent generally did not misrepresent its contractual obligations to develop Rio Rancho,²⁰ and did not mislead buyers as to Rio Rancho’s present state of development or as to the present [19] availability of utilities on their lots,²¹ Judge Teetor found, and we affirm, that consumers were misled as to the pace of residential development and how fast utilities could be expected to reach their lots. By further referring to lots as “homesites”, respondent

¹⁹ Respondent’s attempt to rebut this testimony was unsuccessful. (I.D. 331) Respondent does not defend such statements as being accurate, but rather argues (1) that other sales representatives did not make such predictions and (2) that it instructed sales representatives not to make such promises or predictions. (RPF 134–136; I.D. 326) While some sales personnel may not have made such claims, the record shows that despite the purported company policy, a substantial number of its sales personnel nevertheless made specific time predictions for the arrival of utilities. As we noted in *Horizon, supra*, at 815:

[E]ven if [respondent’s] 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.

Respondent raised this issue in its proposed findings of fact, but does not appear to press it in its appeal brief.

²⁰ AMREP was not obligated under the contract to install any utilities. (CX 155) It was contractually bound to pay for the building of roads to Sandoval County specifications, and to give a buyer a lot of “comparable value” in the building area in exchange for the buyer’s lot if, when the buyer was ready to build, utilities had not yet reached the buyer’s lot. (CX 155 B) (This “exchange privilege” is discussed in more detail later in the opinion.)

Complaint paragraphs 34 and 35 charged, however, that respondent represented that it would build certain facilities in the near future in Rio Rancho. Complaint counsel produced evidence that some consumers were told that there would be a lake and a golf course at Rio Rancho. (CPF 188–189) The ALJ, however, did not discuss this evidence and made no findings on this complaint allegation. We decline to find on the basis of the record before us that respondent represented that it would build any facilities at Rio Rancho.

²¹ There is no dispute that utilities (water, sewer, telephone, and electricity) were all available only in the building areas and in some of the adjoining units (specifically, units 11, 16, 17 and 7, which the ALJ refers to as the “Unit 16 complex”). (I.D. 313) Beyond this small fraction of Rio Rancho lots, utilities were virtually unavailable. (I.D. 318) The cost of having utilities installed was prohibitive for any individual owner to undertake. (I.D. 314–318)

enhanced the image of a subdivision ready to meet the expected influx of population²² over the next several years. [20]

Putting all of these claims together, respondent portrayed Rio Rancho as an excellent short-term²³ investment opportunity. Express comparisons to profits realized annually or in only a few years on other real estate investments, in Albuquerque and in other areas of the country, implied that Rio Rancho had similar potential for rapid development and appreciation. By raising its sales price for Rio Rancho lots frequently, respondent could point to a sustained history of successive price increases on the magnitude of ten to fifteen percent a year, leading potential buyers to believe that the market value of Rio Rancho lots had been rising and would continue to rise substantially every year. (I.D. 200-204) Respondent also represented that its sales price was below fair market value, virtually guaranteeing an immediate return of investment, and further emphasized that the investment involved little or no risk. Most of all, respondent represented that the heavy demand for, and limited supply of, residential land around Albuquerque would inevitably force development towards Rio Rancho, pushing up the market value of Rio Rancho land. Sales representatives assured numerous consumers that the pace of development would bring utilities to their lots within three to five years.

We conclude on the basis of the record that the respondent represented the purchase of vacant land at Rio Rancho as a short-term investment with the characteristics of high yield, certainty, and little or no risk.

²² Judge Teetor found that respondent's references to vacant lots in the non-building areas as "homesites" had the capacity to mislead buyers into believing that their lots already had utilities installed or that utilities could be installed at a reasonable price. (I.D. 319-324) Had AMREP used the term standing alone, we would have agreed that the use of the term was deceptive. That conclusion is fortified by the fact that AMREP's use of the term violates OILSR regulations restricting the use of the term. OILSR's present definition (24 CFR 1715.20), promulgated in 1980, is more generous than the definition in force during the mid-1970's (see I.D. 319, note 212), but would still preclude the use of the term "homesite" in describing Rio Rancho lots because potable water is not available at a reasonable cost at most Rio Rancho lots. According to respondent, the cost of drilling a well and installing a pump made individual wells "impractical." (RX 160 J)

However, AMREP's brochures and property reports made it fairly clear that utilities were not available outside of the building area. (I.D. 323-324; 314-317). Further, no consumers testified that they were misled as to the availability of utilities on their property. While respondent's use of the term was undeniably "loose" (in Judge Teetor's words), we find that the use of the term "homesite" did not mislead consumers as to the present availability of utilities, in light of the additional disclosures made in the brochures and property reports.

²³ As the Commission noted in *Horizon*, we do not intend to rigidly define "short-term" or "long-term" investments. *Horizon*, *supra*, at 804, n.4. There, we accepted for the purposes of the opinion respondent's definition of a "long-term" investment as one that is greater than twenty years. In the present case, neither side produced much evidence as to the period of time that would be appropriately characterized as "short-term" or "long-term."

As discussed in the opinion, however, it is clear that respondent, through a variety of representations, led consumers to expect that they would realize substantial appreciation in a period of ten years or less. Giving the respondents the benefit of the doubt, and for the purposes of ensuring consistency with our opinion in *Horizon*, for the purposes of this opinion we will consider a "short-term" investment as one which would mature in twenty years or less.

b) *The Investment Value of Rio Rancho*

Judge Teetor concluded, after a thorough review of the evidence, that there was sufficient land immediately available for residential development in and around Albuquerque to accommodate expected population growth for the remainder of the century, and that there would be no local demand for Rio Rancho [21] land until well into the next century, if ever. (I.D. 103, 105, 155–56) He also found that, contrary to respondent's representations, the market value of land at Rio Rancho had not been and was not increasing, and that the price set by respondent for Rio Rancho lots was in fact up to five times higher than the fair market value of the property. (I.D. 226–229) He also found respondent's use of comparisons between Rio Rancho land and profitable investments in land located in or near Albuquerque or in other "boom" areas to be deceptive. (I.D. 197–199, 287–289) He also found that, contrary to respondent's representations, there was no resale market for Rio Rancho lots, and as a consequence, that the purchase of Rio Rancho lots involved substantial investment risk. (I.D. 240–265) Judge Teetor concluded that the purchase of Rio Rancho land was, in fact, a poor investment involving significant risk.

On appeal, respondent disputes the ALJ's findings, and contends that the purchase of lots at Rio Rancho was and is a good investment, and that the various claims made by respondents were reasonable in light of what respondents knew at the time the claims were made. (RAB 35, 43)

We affirm the ALJ's findings, although our own analysis differs to some extent from his. For the reasons discussed below, however, we affirm his basic finding that the purchase of Rio Rancho lots is not, as represented, an excellent, low-risk investment, in light of the substantial likelihood that there will be no local demand for Rio Rancho land, and consequently a very limited resale market, until the turn of the century, if ever.

i) *Rate at Which Available Land will be Developed
and Growth Directed towards Rio Rancho*

As we have seen, the central argument in respondent's investment value theme is that Rio Rancho would rapidly become developed because of the heavy demand for, and limited supply of, residential land near Albuquerque. The critical question—how fast such development will occur, if ever—depends on the interplay of a number of factors, including: (1) the rate of population growth; (2) the amount of residential land which is available for development in areas which are likely to be developed before Rio Rancho; and (3) the density at which

the land will be settled.²⁴ [22]

a) *The Basis for Development and Growth Claims in the 1960's*

Respondent asserts that, based on assumptions that were reasonable to make during the 1960's, it was justified in representing that there would be substantial residential development in Rio Rancho. Respondent's main expert witness in this segment of the case, Mr. Arthur Fawcett, testified that during the 1960's respondent would have been reasonable in projecting the population of Rio Rancho to be 170,000 by the year 2000.²⁵ (Tr. 12283; 12287)

The evidence persuades us to disagree. Throughout the 1960's, respondent was making population projection claims which were unreasonably high in light of the projections being made during the same period by the official city agency responsible for planning for expected growth, the Albuquerque City Planning Department, which was the only source of population projections for the Albuquerque area during the 1960's. At the same time that respondent was representing that Albuquerque's population would double between 1960 and 1970, a projected increase of about [23] 275,000 persons, the City Planning Department in 1962 was predicting the most likely increase to be about 100,000.²⁶

Respondent's claim that much of the expected growth between 1960 and 1970 would go toward Rio Rancho was plainly unreasonable in light of the amount of land more suitable for residential development in areas closer to Albuquerque. Respondent's expert witness, Fawcett,

²⁴ This type of analysis is called an absorption study. (Lusteck, Tr. 2630) See *Horizon*, supra, at 816, where we used a similar analysis.

²⁵ Since the complaint in this case did not allege that respondent violated Section 5 by failing to have substantiation demonstrating a reasonable basis at the time the claims were made, neither side produced much evidence concerning what respondent *actually* relied upon (if anything) in making its growth, development and investment claims. Instead, respondent offered the testimony of Mr. Fawcett, which purported to demonstrate that, based on data that would have been available and assumptions that would have been reasonable to make during the 1960's, respondent's claims were reasonable. Both sides and the ALJ apparently agreed that this "reasonableness" standard was the appropriate standard to use in this case. (See, e.g., I.D. 101) Generally, of course, the intent or good faith of a seller is not a defense to a Section 5 cease and desist proceeding. *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977). The Commission has the authority under Section 5 to stop false claims even if the claimant is acting "reasonably" in making the claim. The good faith of the claimant, however, may be relevant to the scope and terms of a cease and desist order.

In any event, as discussed in the opinion, it is evident that respondent did not act reasonably in making the challenged investment claims, and, under any standard, violated Section 5. See discussion under Part III.C.4, regarding respondent's "opinion" defense.

²⁶ The 1962 "AMA X-Ray Report" (CX 251) used population projections prepared for the Albuquerque City Planning Department by Stanley Brasher, an economics and planning consultant. He projected a range of population figures, depending on certain assumptions. For 1970, Brasher projected a "low" figure of 322,944, a "middle" figure at 372,576, and a "high" figure of 420,096—increases of about 47,000, 96,500, and 144,000, respectively, over the city's 1960 population of 276,000. (I.D. 99; CX 251 z 89)

In 1964, the City Planning Department, together with the Albuquerque Transportation Study, released the "1985 Land Use Plan" which contained population projections developed for transportation planning purposes. (CX 546) The 1985 Land Use Plan projected Albuquerque's 1970 population to range from a low of 336,400 to a high of 418,000—the latter figure based on "a more liberal, but not unreasonable, estimate of future immigration." (CX 546 O)

The ALJ found respondent's "puerile theory" that population would simply continue to double to be unreasonable. (I.D. 103-105)

testified that despite constraints on the development of land around Albuquerque,²⁷ there was enough land [24] "reasonably available for development" in and around Albuquerque to accommodate a population of 650,000, and that there would be no need for growth to go out of Bernalillo County and toward Sandoval County and Rio Rancho until that population point was reached. (Tr. 12286) During the 1960's, the City Planning Department did not expect Albuquerque's population to reach 650,000 until at least the mid-1980's, even using the highest reasonable population projections.²⁸ [25]

Further, the City Planning Department believed that future development would occur at slightly higher densities than in the past.²⁹ Consequently, both the 1962 and the 1964 City Planning Department studies saw *no* growth into Sandoval County, in the direction of Rio Rancho, by the turn of the *century*, even using the highest reasonable population projections. The 1985 Land Use Study concluded that "[e]ven the most optimistic growth projections would not utilize this land within the current century." (CX 546 z 14) Indeed, the report noted that "[t]here is sufficient developable vacant land within the study area to accommodate a population of more than two million." (CX 546 z 6)

In addition, it is clear that the very nature of the land at Rio Rancho

²⁷ The evidence shows that during the 1960's and 1970's, there were, in fact, geographical and legal constraints on the future expansion of Albuquerque. To the north of the city lies the 23,000 acre Sandia Indian Reservation. To the east lie the Sandia Mountains. To the south lie the city airport and the Kirkland Air Force Base, while further south lies the 211,000 acre Isleta Indian Reservation. To the west, south of Rio Rancho Estates, lie the 91,000 acre Pajarito and Atrisco land grants which are not currently developable because of title problems stemming from the original Spanish land grants. (I.D. 127-150)

Nevertheless, it is evident that there was a substantial amount of available land *within* that "frame." The ALJ, after a careful review of the record, estimated conservatively that 45,600 acres were immediately available for residential development in and around Albuquerque. (I.D. 155, figure 11) We adopt those findings with one exception: the ALJ should not have included the 15,000 acres of vacant land in the city. (I.D. 152) The preponderance of the evidence shows that the vacant land in the city was not immediately available for development. (Carruthers, Tr. 11131-39) In addition, by using the city's vacant land in his absorption calculation, the ALJ inadvertently changed one of his assumptions, namely, that gross density remained the same.

The remaining 30,000 acres is a highly conservative estimate, a fact apparently conceded by respondent's expert witness, Fawcett, who estimated that a total of 125,000 acres (including the present developed area) in Bernalillo county could readily accommodate population growth. (Fawcett, Tr. 12823)

It is important to note Judge Teeter's conclusion, with which we concur, that some of the constraints may not, in fact, be constraints by the time development reaches the edge of the "frame." (I.D. 158) He notes, for example, that the Sandia and Isleta Indians have already prepared a master plan to develop part of their land, and further notes that with approval from the Interior Department, Indian land can be leased on a long-term basis, or, with approval of Congress, can be conveyed. (I.D. 134-136) Additionally, the ALJ notes that the current title problems currently hindering development of the 91,000 acre Pajarito and Atrisco land grants to the west of Albuquerque can, with time, be cleared. (I.D. 147-149).

²⁸ The 1962 "AMA X-Ray Report" contained a "high" projection of 631,000 in 1980 (CX 251 z 93), and the 1985 Land Use Study contained a high population estimate of 830,000 by 1985 (CX 546 z 14)—the highest projection made by any official study.

²⁹ City Planner Carruthers, complaint counsel's main witness on this segment of the case, testified that density in the Albuquerque area would increase as development "filled in" vacant areas before going further from the city. He also testified that it was the policy of the City Planning Department to encourage such filling in.

Respondent's expert Fawcett, on the other hand, believed that the very low density of the Albuquerque region was likely to remain unchanged.

We find it unnecessary to resolve this dispute, since even using Mr. Fawcett's assumption about density, it is apparent that there would be no growth toward Rio Rancho during the 1960's and most of the 1970's, based on the highest population projections being made during the 1960's.

made it highly unlikely that Rio Rancho would be developed before other available land located close to Albuquerque. Unlike portions of the fertile Rio Grande Valley and the valleys of the Sandia mountains, the land at Rio Rancho was flat, arid rangeland. (I.D. 14; I.D. 233) In addition, Sandoval county was a rural area, poorer than Bernalillo County, making it a less socially desirable area for middle class development. (CX 231 R-S) Finally, the sheer vastness of Rio Rancho precluded individuals from developing their own parcels, since the cost of installing utilities was prohibitive. According to respondent, the cost of installing utilities at Rio Rancho's most remote lot was \$315,000. (CX 162 K) Consequently, it was unreasonable to believe that there would be any demand for Rio Rancho until the land that was more attractive, less costly to develop, and closer to Albuquerque, was fully developed.

Significantly, respondent had actual notice that there would be no local market for Rio Rancho land until at least the mid 1980's, and that there would be no growth toward Rio Rancho during the 1960's and 1970's. A report prepared by an independent [26] planning firm for respondent in May, 1966³⁰ warned that the population projections in the 1985 Land Use Plan were "too optimistic" for Rio Rancho planning purposes. The report reviewed in detail land availability and desirability in the Albuquerque area, noting that the Northeast area of the city was the area of most growth and the most desirable residential areas. (CX 231, R-S). Because Sandoval County and the western areas were relatively rural, poorer areas, the report noted that there had been only "limited success" in attracting new housing, occurring only "in peak building times when home demand was greater than supply." (CX 231 S) The report concluded:

Despite the expected doubling of Albuquerque's population over the next twenty years to over 600,000 residents, ample undeveloped suburban land exists more proximate to the City and its desirable parts than Rio Rancho's land, such that only small and selective market penetration by Rio Rancho is likely over the 20 year period from 1966 to 1985.

(CX 251 VV).

It is evident that, even assuming heavy population increases and continuing patterns of extremely low gross density, the data available during the 1960's showed that there would be no growth toward Rio Rancho until the mid-1980's, after other available land had been developed. Even then, Rio Rancho was so large that there would have been no local demand for the great majority of the lots until the turn of the century. Assuming that all of Rio Rancho was developed at the

³⁰ A preliminary summary report, containing substantially similar findings, was given to respondent in November, 1965. (CX 454)

same gross density as Albuquerque, Rio Rancho could have accommodated 220,000 people—a population nearly as large as that of Albuquerque itself in 1960.³¹ [27]

By the year 2000, however, it is altogether possible that the present day legal restrictions hindering development of large parcels of vacant land around Albuquerque may well be removed, freeing up thousands of acres of land for development. (I.D. 134–136; 147–149) If that occurs, the demand for much of Rio Rancho, particularly for the lots located further away from Albuquerque, is likely to evaporate altogether. While one cannot say for certain whether this will in fact happen, it plainly constitutes a substantial assumption in respondent's representation that such restrictions will operate to drive development toward Rio Rancho.

Consequently, the data available during the 1960's showed that it was highly unlikely that there would be a local market for Rio Rancho land for at least twenty years, and longer—indeed, if at all—for many of the Rio Rancho lots located farther from the city. Even assuming that respondent had some arguable basis for rejecting the official projections made by the City Planning Department—which the record shows it did not—the report by respondent's consultant clearly notified respondent that its claim that Rio Rancho would be substantially developed in the short term (i.e., less than twenty years) was unreasonable. While respondent was not reasonable in making such a claim prior to that report, continuing the use of such claims after the receipt of that report constituted a knowing deception.

b) The Basis for Development and Growth Claims in the 1970's

In June, 1970, the preliminary 1970 census findings showed that the expectations of strong growth which everyone shared in the 1960's were wrong. Due to an unexpected sharp decline in in-migration and the birth rate, even the *lowest* City Planning Department's population projections made during the 1960's turned out to be too optimistic: the 1970 population was 333,000, a ten-year increase of only about 57,000 persons. Rather than growing at the 100% rate represented by respondent, growth from 1960 to 1970 occurred at about a 20% rate. (I.D. 99) Despite the fact that the changes in migration and birth rates meant that Albuquerque would not achieve a population of 600,000 until near the turn of the century—the point at which respondent's expert Fawcett said development of Rio Rancho would only *begin*

³¹ Rio Rancho consisted of 54,000 acres until 1971. Applying the figure of about 5 persons per acre gross density, which represented the gross density within the Albuquerque city limits (Fawcett, Tr. 12286), Rio Rancho as constituted during the 1960's could have accommodated about 220,000 people. An alternative analysis provides an even higher figure. In 1971, our additional purchase expanded Rio Rancho to 91,000 acres, creating the potential for 114,760 dwelling units. (Fawcett, Tr. 12635) Using the average actual household size of Albuquerque in 1960 of 3.64 persons (Fawcett, Tr. 12630), Rio Rancho could have housed 417,726 persons.

—respondent purchased another 37,000 acres to be added to Rio Rancho in 1971.

Nevertheless, respondent asserts that it was justified in selling Rio Rancho as an investment during the 1970's and that it was reasonable to believe that Rio Rancho would be "substantially developed" by the year 2000, with a population of between 78,000 and 96,000 people. (Fawcett, Tr. 12272-12275) [28]

All of the official population studies and projections done during the 1970's, however, project insignificant growth in Sandoval County through the rest of this century. The highest population projection made for all of Sandoval County in the year 2000 estimated the population at 40,000—an increase of only 22,500 from 1970. (Fawcett, Tr. 12606, 616-17) Even if Rio Rancho were to capture *all* of this growth—an unlikely assumption—it would mean the improvement of only 9000 lots from 1975 to 2000, leaving the other 90% of Rio Rancho unimproved.³²

Further, the most recent projection of population for the Albuquerque SMSA referred to in the record puts that figure at a range of 609,000 to about 707,000 in the year 2000. (Fawcett, Tr. 12616) Under Fawcett's own admissions, pressures to develop in the direction of Rio Rancho would thus not even start until the turn of the century, when the present legal restrictions on the development of other more accessible land may well be gone.

Fawcett's stoic projection of a thriving community at Rio Rancho by the year 2000 in the face of those facts is simply explained: he believes that the population projections ignore the "non-local demand" for Rio Rancho. Fawcett admits that there will be a local market for only about 11,000 units through the year 2000, a figure which is reconcilable with official population studies.³³ He asserts, however, that an additional 18,000 units will be built by out-of-state purchasers who have retired or moved to Rio Rancho. This assertion assumes that a [29] full 28 percent of Rio Rancho buyers will actually eventually settle there.³⁴

³² Fawcett testified that it would be appropriate to use the figure of 2.5 persons per household as an average Rio Rancho household size in the year 2000. (Tr. 12628) On the basis of that figure, about 22,500 persons could be accommodated in 9,000 dwelling units, using Fawcett's average household size of 2.5 persons per household. Fawcett also testified that, based on the lots actually platted, Rio Rancho could contain 114,760 dwelling units. (Tr. 12635) Using Fawcett's assumptions, Rio Rancho has the potential to house 275,425 people.

³³ Fawcett agreed that his projections were consistent with the projections of University of New Mexico's Bureau of Business and Economic Research (BBER) that there would be 40,000 people or less in Sandoval County in 2000 if the non-local demand were subtracted. (Tr. 13202-203) Since the 1970 population of Sandoval County was 17,492, the BBER projection predicted an increase of about 22,500 people from 1970 to 2000. Fawcett's projection of 11,000 local units assumes that *all* of the expected increase in growth in Sandoval County would go to Rio Rancho alone.

³⁴ He testified that between 1975 and 2000, an additional 28,584 units would be built, 11,000 of which represented local demand. (Tr. 13202-203) Consequently, about 18,000 units would represent out of state demand. (Tr. 13,202-203) Assuming that most of the 2500 present units are "non-local," there would be a total of about 20,250 non-local units by the year 2000 under Fawcett's assumptions. Fawcett also testified that 71,620 lots had been sold at Rio Rancho. (Tr. 12623) Using those figures, 28.3% of the total lots sold would be "non-local."

Fawcett's prediction that over 28% of all Rio Rancho lot buyers will eventually settle there is unsupported by any factual basis. Respondent's own independent planning consultant warned respondent as early as 1966 that no more than 5% of buyers ever move to developments sold by land-sales developers. (CX 231, p. 34, 454) AMREP's own experience with Rainbow Lakes, an earlier Florida project which had sold out in the 1960's with only 7% of the buyers ever moving there, and indeed with Rio Rancho (only 2500 lots settled after 14 years of selling), confirmed that expectation. (I.D. 273) Fawcett was unable to supply any basis for his assumption. When asked why the Bureau of Business and Economic Research of the University of New Mexico, the official agency responsible for predicting Albuquerque's population growth, apparently failed to give any weight to the argument that Rio Rancho would attract a substantial population from its non-local buyers, all that Fawcett could say was "in my opinion, they don't take into consideration the drawing power and the growth power of Rio Rancho. I simply disagree with them." (Fawcett, Tr. 12826)

Putting the "non-local" demand aside, it is further evident that Fawcett's testimony constitutes a significant admission that there will be *no* local market for the vast majority of Rio Rancho lots even by the turn of the century. Even if it is assumed that there is a local demand for about 11,000 dwelling units at Rio Rancho (which itself assumes that Rio Rancho will capture all of the growth going to Sandoval County by the year 2000), that assumption would result in a total of 13,000 dwelling units by the year 2000, excluding Fawcett's projected "non-local" demand and including present developed lots. (Tr. 13202-203) Yet Fawcett also testified that Rio Rancho had a total capacity of 114,760 dwelling units. (Tr. 12635) Fawcett's projection of 13,000 local dwelling units thus represents a little more than 11% of the total number of dwelling units planned for Rio Rancho. At Fawcett's projection of 2.5 persons per dwelling unit, this would mean that Rio Rancho would attract only 26,720 persons from the expected population increase of 385,000 between 1975 and 2000, or about seven percent of the population increase. [30] (Fawcett, Tr. 12678) A full 93 percent of the population increase, even under Fawcett's assumptions, would live someplace other than Rio Rancho.

ii) Market Value of Rio Rancho Land

An important part of respondent's argument that Rio Rancho was a good investment hinged on whether its market value had increased and whether respondent's selling price was equal (or even below) fair market value. The evidence on the record of the present market value of Rio Rancho land was provided primarily by two expert appraisers,

Jack Mann for complaint counsel and Richard Godfrey for respondent. Both experts were eminently qualified to give appraisals. (I.D. 216) However, Judge Teetor found Mann's testimony to be highly credible, but found much of Godfrey's testimony to be of limited value. (I.D. 217-237)³⁵

Based on a comparison with the Rio Rancho properties sold through the multiple listing service from 1970 to 1976, and sales of Rio Rancho lots at auctions in 1975 and 1976, Mr. Mann [31] determined that the eight typical Rio Rancho lots he analyzed had an average fair market value in 1976 of \$1200 per acre. (I.D. 225-227) At the same time, AMREP was selling its Rio Rancho lots for an average price of \$6300 per acre.³⁶ (I.D. 228) We adopt the ALJ's analysis of the record evidence with respect to the fair market value of Rio Rancho lots outside of the small developed core area. Indeed, even the testimony of respondent's own witness, Godfrey, established that respondent's sale price for Rio Rancho was higher than the fair market value that he had established.³⁷

Perhaps even more importantly, the record shows that there simply is no local resale market for Rio Rancho land outside of the established core area. From the period of 1969 to 1975, out of a total of 878 Rio Rancho lot listings filed with the Albuquerque multiple listings service, only 16 were sold. (I.D. 220) The Albuquerque Multiple Listing Service even prepared a form letter to send out to inquirers which warned, "For your information, our records reflect that there is little,

³⁵ Godfrey based his opinion on 32 sales of "comparable" land. Originally, Godfrey wanted to testify to 800 "comparables", but Judge Teetor ordered that Godfrey limit his testimony to his "best" 25 (later extended to 32) "comparables." (I.D. 231) Out of these 32, only 9 were vacant, unimproved lots located in Rio Rancho which had been resold. (The ALJ rejected 14 of the other 23 "comparables" as being not comparable to the lots at issue. Those lots were either improved or located in parts of Albuquerque very different from Rio Rancho. The ALJ rejected 8 other proffered "comparables" because respondent failed to produce independent evidence of the prices of the sale. (I.D. 232-236)) The ALJ calculated that the "pro forma" per acre resale price for those 9 comparables ranged from \$3200 to \$7332, with a mean price of \$4514. (I.D. 235) However, the ALJ went on to reject Godfrey's ultimate opinion that the least value one-acre lot at Rio Rancho was worth \$5,000, finding that "the structure of [Godfrey's] opinion is so deficient in probative value that we accord it no weight." (I.D. 237)

Respondent argues that the Judge erred in restricting Godfrey's testimony to his 32 "best" comparables. (RAB 10-11) We see no prejudice to respondent and no error on the part of the Judge. Respondent was offered a fair opportunity to pick the "best" evidence; cumulative evidence would not have been helpful, and the ALJ was correct in limiting the testimony to advance the trial. Considering the ALJ's full reasons for rejecting Godfrey's opinion, respondent's inability to present other comparables was not prejudicial.

³⁶ In determining fair market value, the experts apparently did not contend that AMREP's selling price represented the best evidence of the market value, but instead attempted to derive the fair market value from individual resales and from "open market" sales of comparable property. This approach to valuation is undoubtedly correct in this case. As we noted in *Horizon*, *supra*, at 817, the fair market value of land is arrived at through arm's length bargaining, where both parties are knowledgeable, acting in their self-interest, with a reasonable time to complete the purchase, and the transaction is free from any undue stimulus. As in *Horizon*, our conclusion herein that respondent used "high pressure sales tactics," in conjunction with deceptive representations about growth, development, and investment value, negates those conditions and renders the respondent's sales price meaningless as an indicator of fair market value. See *Horizon*, *supra*, at 819.

³⁷ Godfrey testified that, in his opinion, a typical one-acre lot at Rio Rancho was worth a minimum of \$5,000 at the time of his testimony (1976). Since 1974, however, respondent's price for such lots has ranged from \$6,200 to \$7,100. (I.D. 236) While selling land at a price in excess of its fair market value does not, in and of itself, constitute a violation of Section 5, this conclusion is obviously relevant to determining the reasonableness of respondent's claim that its sales prices were below fair market value.

if any, local market for resale of tracts in this particular subdivision.” (Williams, Tr. 2137) The letter was approved by the Board of Realtors on February 13, 1974, nearly a year before the Commission’s complaint was filed. (I.D. 241) It is evident that owners could *not* sell land locally through the usual means [32] of doing so—by listing with a realtor and a multiple listing service.

Paul Heinz, an Albuquerque broker who was formerly a Rio Rancho salesman, testified that he had received a total of approximately 2,500 inquiries about the possibility of listing Rio Rancho lots. However, he was unable to negotiate a single sale for any of the 468 lot owners whom he convinced to pay him \$25 (and later \$50) apiece as an advance on a sales fee. (Heinz, Tr. 11323–24, 11336)

Respondent argues that the inability of owners to sell is due to the unfavorable publicity from the instant suit. The facts do not support this contention, since the experience of both Heinz and the Albuquerque multiple listing service occurred at least a year before the Commission brought suit.

Respondent argues that Judge Teetor ignored evidence in the record of resales by owners of Rio Rancho lots.³⁸ For the most part, such sales were either to local Albuquerque builders, who [33] then used the exchange privilege to “cash in” the vacant lot for a smaller amount of land near the core developed areas,³⁹ or to friends, neighbors, or others who were not part of the Albuquerque local market.

³⁸ For example, respondent cites the results of a survey of Rio Rancho owners conducted by complaint counsel, which showed 106 sales. (CX 564–568; RAB 10) (The ALJ “adjusted” these figures to account for surveys which were undeliverable or unreturned, estimating a total 398 sales from *all* purchasers. (I.D. 248)) However, respondent also argues, somewhat inconsistently, that the ALJ erred in admitting the survey.

We agree with respondent that the survey was flawed in several respects. No one working on the survey had any significant expertise or experience in conducting surveys. (Schulman, Tr. 11537–538; Case, Tr. 11596) No procedures were established for testing validity or reliability. The low response rate (439 usable responses out of 1,976 questionnaires) is also disturbing. Finally, the fact that one of the complaint counsel was compelled to act as both an advocate and a witness in this case created a situation for bias which should have been avoided. These flaws, in our view, go to the weight and not the admissibility of the evidence. The possibility of bias and the lack of the usual survey controls compels us to give no weight to the complaint counsel survey.

We do not believe, however, that this holding affects the validity of the ALJ’s findings on market value or any other finding. Contrary to respondent’s assertions, the ALJ did not rely on complaint counsel’s survey “heavily”, but rather cited it as additional cumulative evidence confirming the lack of any active resale market. There is substantial record evidence to support that finding absent the survey.

³⁹ The record also contains evidence of land auctions held in Albuquerque by Rocky Mountain Land Auction Company of Denver, Colorado, at various times during 1975 and 1976. (I.D. 222–224) Three builders testified as to the prices they paid for Rio Rancho lots at auctions. (I.D. 224) Complaint counsel’s expert appraiser, Mann, also relied to some extent on the auction prices in arriving at his opinion of the value of the eight typical Rio Rancho lots (Mann, Tr. 3358, 3374–75).

The ALJ cites evidence that in the November, 1975, auction, there were about 3000 lots listed, the majority from Rio Rancho; only 65 were sold. (CX 391 p.2; I.D. 223) Respondent argues persuasively that this last evidence is not properly in the record. (RAB 9–10) Mann’s testimony as to the auction is hearsay; see I.D. p. 192, fn. 185. Further, Heinz’s testimony and 2 exhibits, CX 562 and CX 563, were stricken by the ALJ, only to be reinstated in the Initial Decision, without affording respondent an opportunity to cross-examine. I.D. 222, fn. 158; C. Ans. 9. We hereby strike CX 562 and CX 563 and Heinz’s testimony about the auctions from the record.

We do not agree with respondent, however, that this is a reversible error. As the ALJ noted, the prices of the lots bought at the auction are in the record through the builders’ testimony, and Mann was entitled to rely upon the builders’ statements about prices in arriving at his opinion. All that is dropped is evidence that 65 out of something less than 3,000 Rio Rancho lots offered were sold, a fact which is not critical to either the ALJ’s findings or Mann’s findings, given the other evidence about the lack of any resale market.

(See, e.g., Keaveny, Tr. 20744; Estrema, Tr. 15172-73) Moreover, the fact that some few owners were able to sell their land does not diminish the overwhelming evidence that the vast majority of lot owners who wanted to sell their land were simply unable to do so. Indeed, respondent in various SEC filings has admitted since 1969 that buyers may find it difficult to resell homesites. (CX 4 J; CX 1 K; CX 5 E)

Nevertheless, respondent's experts assert that the illiquidity is only temporary, and that eventually owners will be able to sell at a profit. Respondent's expert investment witness, Charles Elias, testified that investors must be willing to wait out a "holding period" to get by temporary conditions that might dampen sales. (Elias, Tr. 23940-42) He viewed a 10-15 year period as reasonable and said that a century might not be too long for some people. [34]

Even assuming that it is likely that there will be sufficient local demand to sustain a viable resale market in the 10-15 year time period, an assumption contrary to the evidence, the fact remains that respondent did not market its land as a long-term investment and did not disclose the significant risk of illiquidity. Indeed, the net impression created by respondent's sales presentations was that profits could be expected quickly, certainly within a ten year period, and the investment was low-risk. In light of those representations, respondent's failure to warn purchasers that an extraordinarily long "holding period"—in the range of twenty years or more—might be required to realize a profit misled consumers into believing that the holding period was reasonably short-term. See *Horizon*, *supra*, at 814.

We affirm the ALJ's conclusion that there is no resale market for Rio Rancho land, either presently or in the foreseeable future. The preponderance of the evidence shows that, contrary to its representations, respondent's selling price for its Rio Rancho lots has always been well in excess of the fair market value. It is further plain that, without a foreseeable resale market, the market value of Rio Rancho land has not increased and bears no relation to the increase in selling prices contrived by respondent. Buyers have not realized any increase in market value for their land.⁴⁰

iii) Conclusions

The preponderance of the evidence shows that respondent, in several ways, misrepresented the likely effect of future growth and development on the prices and market value of Rio Rancho land. First, respondent misrepresented the nature of the "constraints" on Al-

⁴⁰ We find no merit in respondent's argument that they were denied due process since they had no notice of the ALJ's findings that respondent's prices for Rio Rancho land were "unconscionable." (RAB 7; I.D. 237) It is plain from the context of the ALJ's discussion that his conclusion was more descriptive than legally meaningful. The "conscionability" of respondent's prices is not in issue here; whether they were, as represented, close to fair market value is the issue. We see no prejudice from the ALJ's description.

buquerque's future growth which it claimed would funnel most of the residential development toward Rio Rancho. As we have seen, those constraints were, if anything, long-term constraints: even under the most optimistic population projections of the 1960's, there was sufficient land all around and in Albuquerque to ensure that most growth would go elsewhere than Rio Rancho for at least twenty years. As the rate of population increase dropped during the 1970's, that time-frame was pushed further into the next century. By that time, however, many of the legal "constraints" may well be dissolved altogether. [35]

Second, respondent misrepresented the likely *rate* at which Rio Rancho would be developed. During the 1960's respondent grossly exaggerated the predicted population increase. Further, individual sales representatives promised that development could be expected within 3 to 5 years; reference to lots as "homesites" and comparisons to other "boom" towns reinforced that message. As we have seen, however, the only reasonable conclusion that could have been drawn from information available during the 1960's was that it was highly improbable that there would be any development in Rio Rancho until the mid-1980's, and that the bulk of Rio Rancho would remain undeveloped for years after that. Similarly, the only reasonable conclusion that could have been drawn from information available during the 1970's was that it was highly improbable that more than a fraction of Rio Rancho would be developed by the turn of the century.

Respondent represented, both directly and indirectly, that the rapid rate of expected development toward Rio Rancho made it virtually certain that the market value and prices of Rio Rancho land would rise rapidly as well, providing a handsome short-term return on the buyer's investment. Since most buyers were buying for investment purposes, such representations were plainly material to the buyer's consideration of Rio Rancho land as an investment opportunity. As we have seen, however, in fact it was highly unlikely that there would be any significant growth toward Rio Rancho for at least 20 years, and consequently, respondent misrepresented the likelihood that the market value of Rio Rancho land would increase within several years as a result of development pressures.

The preponderance of the evidence also demonstrates that respondent misrepresented the market value of Rio Rancho land. By setting its price well above the fair market value of the land, respondent led consumers to believe that the market value of Rio Rancho land was much higher than it actually was. In addition, respondent affirmatively stated that the price at which Rio Rancho land was offered for sale was *below* fair market value, a statement which the evidence shows is false. Respondent further misrepresented the market value

of Rio Rancho land by making misleading comparisons to the market value of properties located near to Rio Rancho. The properties referred to were developed communities which bore little resemblance to the vacant expanses of Rio Rancho. (I.D. 198)

Further, respondent also misrepresented past appreciation of Rio Rancho's market value. Through annual and sometimes semi-annual price increases, respondent created the impression that the market value of Rio Rancho had similarly increased. In fact, the price changes had no relation to changes in the market value of Rio Rancho land. Because there was and is no demand for or resale market for Rio Rancho land, the market value of Rio Rancho had not increased. [36]

Directly and indirectly, respondent also misrepresented the risks involved in the purchase of Rio Rancho land as an investment. Information about potential risks was plainly material to any investor evaluating an investment opportunity, including buyers and prospective buyers of Rio Rancho. Both through affirmative statements of safety, and the failure to disclose material facts concerning the risks of an investment at Rio Rancho, respondent represented Rio Rancho as a low-risk investment. In fact, however, there were significant risks. Because of the lack of a resale market for the immediate future, lots at Rio Rancho were illiquid and most could not be sold at any price. Further, it was highly probable that there would be little or no appreciation of Rio Rancho land for at least a 20-year period, and there was some risk that there would be none well into the next century, if ever. Despite respondent's knowledge of these risks,⁴¹ it failed to disclose them and led [37] buyers to believe that the investment involved little or no risk.

Through all of these misrepresentations, respondent created the thoroughly misleading impression that Rio Rancho land was an excellent investment opportunity. As we have seen, the reality is quite different: contrary to respondent's representations, (1) the price at

⁴¹ Respondent reported in its SEC filings as early as 1969 that buyers would face difficulty in attempting to resell land. Further evidence of respondent's knowledge that the sale of any land, including Rio Rancho, involved significant risks is demonstrated by the existence of a 10-point pamphlet entitled, "What You Should Know About Real Estate Ownership," prepared by respondent in 1974. (RX 1827) Among other things, the pamphlet warned that any real estate purchase should be for either use or possible long-term appreciation; that real estate lacks liquidity; that not all land will appreciate and that the future value of land is difficult to predict; that a long-term investment means 10, 20, even 40 years; that there should be no expectation of immediate financial return. (RX 1827) In addition, in May 1973, respondent included a rider in some contracts which contained significant disclosures about investment risks. (CX 449) The disclosures warned that the land was being purchased for long-term investment and that it was not presently income producing, and, most significantly, a warning that land may be an illiquid investment and that "customers may find it difficult to resell subdivided land while the Developer is actively selling homesites in the same development. (CX 449 B)

The record shows, however, that respondent made little or no use of the disclosure pamphlet described above. While it was prepared to be included in the contract packets to be sent to new purchasers *after* their purchase (Smith, Tr. 21028), in fact the evidence shows that it was not so used. The sales manager for Eldorado at Santa Fe, for example, testified that the brochure was just on display at the sales office. (Dautherty, Tr. 21165) He testified that it was not given to people who had purchased. (Tr. 21166) As for the contract disclosures, respondent included them only in sales made abroad after May, 1973, and only when the sale exceeded \$30,000. (Tr. 7933; CX 449 B)

which Rio Rancho land was offered for sale was far above fair market value; (2) there were substantial probabilities that Rio Rancho would not appreciate in the short-term; (3) there was a significant risk that buyers would not be able to resell their land; (4) Rio Rancho land had not increased in value; and (5) there were significant risks to long-term appreciation, as well. All of this information was material to an investor considering price, risks, and potential returns on investment. Given these facts, it is evident that the purchase of land at Rio Rancho was, in fact, a poor investment, involving substantial risk and a very low probability of achieving a reasonable return on investment in the short-term. We find that respondent's misrepresentations and failures to disclose material facts are deceptive acts and practices in violation of Section 5 of the FTC Act. See *Horizon*, *supra*, at 814.

Given that conclusion, it is also apparent that respondent's comparisons to land purchases which *were* excellent investments were misleading because Rio Rancho bore no significant relation to the examples cited. Citations to Albuquerque real estate, for example, referred to improved acreage located in totally different sections of the city. (I.D. 198) Such comparisons were misleading and deceptive because they have the capacity to deceive consumers into believing that Rio Rancho shared the same potential for development and profits as the examples cited. As such, these comparisons violated Section 5.

For similar reasons, we sustain the ALJ's finding that some of respondent's general land investment statements, even if generally true, (RAB 55) were deceptive in the context of selling the particular properties involved here. (I.D. 285-300) When stated as principles of general applicability, as they were here, respondent's representations clearly had the tendency to lead consumers to believe (in the absence of any disclosure to the contrary), that those representations also applied to the particular real estate investment opportunity being offered. [38] Thus the references to profits made in real estate investments in other parts of the country are misleading where they bear no relationship to the properties at respondent's subdivisions.⁴² For example, the comparison to "bridges" which launched land booms in other areas had nothing to do with the "bridges" across the Rio Grande, which did not suddenly open new residential areas to a teeming metropolis. (I.D. 202; 287-289) Similarly, respondent's claim that real estate as an investment is always superior to insurance, stocks and bonds and savings accounts is misleading because the particular properties involved here, as discussed below, are *not* good invest-

⁴² It is well-settled that truthful statements may nevertheless be misleading and deceptive if material facts which are necessary to prevent deception are not also disclosed. See, e.g., *Horizon*, *supra*, at 805, n.6; *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950).

ments.⁴³ As a consequence, these misrepresentations are all deceptive acts in violation of Section 5. (I.D. 202)

Misrepresentations of material facts have long been held to be an unfair, as well as a deceptive, practice. *National Trade Publications Service, Inc. v. FTC*, 300 F.2d 790 (8th Cir. 1962). In considering whether a practice is unfair, the Commission focuses primarily on the existence of unjustified, substantial consumer injury. As we stated in *Horizon* at 849-50:

To be legally "unfair," consumer injury must satisfy three 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. [39]

The injury to consumers from respondent's deceptive representations is clearly substantial. As discussed later in the opinion, respondent, using a variety of high-pressure sales tactics, put pressure on consumers to sign the land sales contract before leaving the dinner sales party.⁴⁴ At that time, however, prospective buyers were relying almost exclusively on respondent's claims that the land constituted an excellent, low-risk investment. Since most purchasers bought the land for investment purposes, it is clear that respondent's representations were not only material, but were indeed the direct inducement of the sale.

Respondents sold more than 75,000 lots at Rio Rancho alone. The average price for all of respondent's subdivisions ranged from \$3232 (in 1969) to \$4899 (in 1976). (I.D. 11) The ALJ found that those sales prices were anywhere from three to five times the actual market value of the lots. (I.D. 229) Since, by definition, the fair market value of a parcel is the price a knowledgeable buyer would be willing to pay, and at which a knowledgeable seller would be willing to sell, under conditions free of deception and coercion, the difference between the market value of the land and respondent's selling price affords a rough calculation of the total consumer injury caused by respondent's deceptive representations. Using an average sales price of \$4065, that figure amounts to more than \$200 million at Rio Rancho alone.⁴⁵

The second test of unfairness is whether the consumer injury is outweighed by any countervailing benefits to competition and to con-

⁴³ Judge Teetor also found that the comparisons to other forms of investment were deceptive because the comparisons did not compare rates of return holding all other things equal. (I.D. 294-298) While such comparisons are obviously incomplete and faulty, we do not find them deceptive in the abstract, but only as applied to the particular investments being offered. For the same reason, we disagree with the Judge's finding that respondent's claim that real estate is a good hedge against inflation is deceptive in theory. It is, however, deceptive with respect to the properties here, which are poor investments.

⁴⁴ See Part IV of the opinion, below.

⁴⁵ The figure is calculated by taking two-thirds of the estimated revenue obtained by selling 75,000 lots at an average price of \$4065.

sumers. The record reveals no countervailing benefits stemming from respondent's misrepresentations about Rio Rancho's investment value.

The final test of unfairness is whether the consumer injury could have reasonably been avoided by consumers. The buyers here were not sophisticated, experienced investors. Indeed, one of respondent's main pitches was that AMREP's solid reputation and its substantial experience as a land developer made it possible to offer even average persons an opportunity to invest in land. (CX 456 H; CX 6 D; CX 102 A) As a result, buyers rarely had information or experience to rebut respondent's representations. Nor were buyers likely to have any knowledge about respondent's subdivisions, which were located far away from the northeast U.S. cities where most sales meetings took place. Further, [40] respondent's presentation underscored the theme that, as a solid company listed on the New York Stock Exchange, AMREP could be trusted. (CX 102 A; CX 59) The glossy sales brochures, the slickly-produced films starring well-known political and show business personalities, and the representations that respondent was complying with detailed federal and state regulations and had been approved by state regulators (CX 456 I; CX 110 K), all led consumers to believe that respondent was offering a legitimate and potentially valuable investment opportunity. Respondent further discouraged purchasers from seeking advice from attorneys or other professionals. (Jarrett, Tr. 10340; Wise, Tr. 10939)

In addition to convincing unsophisticated consumers that they could trust respondent, respondent also used a variety of tactics to persuade buyers to sign a contract and keep up payments. To begin with, as discussed later, respondent frequently misrepresented the purpose of the dinner parties in its invitations, making it difficult for consumers to avoid being subjected to respondent's sales pitch, short of refusing to come to the dinner party at all. More importantly, and as discussed in more detail later in the opinion, respondent used a variety of high-pressure sales tactics and deceptive representations to persuade consumers to sign the land sales contract at the dinner sales party, primarily by convincing consumers that they could still cancel the contract afterwards. However, as also detailed later, respondents worked hard to keep buyers from cancelling within the 72-hour cooling off period or after visiting the land. Further, it was plainly costly for consumers to travel to respondent's subdivisions to inspect their land, which was a necessary precondition to the later cancellation right. After those periods had run, consumers were locked into a contract, which provided, among other things, that they would forfeit *all* payments already made if they defaulted. As the ALJ noted, respondent's "organized offense" was intended to make it difficult and

costly for consumers to get an independent evaluation of respondent's claims and to get out of the contract once it was signed in reliance on respondent's deceptive claims. Under these circumstances, we conclude that consumers could not reasonably have avoided the injury caused by respondent's representations.

We conclude that all three tests for unfairness have been met, and that respondent's deceptive representations about Rio Rancho concerning its development, growth, and investment value constitute unfair acts or practices in violation of Section 5. [41]

We find that the preponderance of the evidence supports the complaint allegations set out in paragraphs 11 through 23.

3. Investment Representations about Silver Springs Shores

a) *Representations about Investment Value*

Silver Springs Shores consists of 18,500 acres of land about three miles southeast of Ocala, a small city located in Marion County in the north central part of Florida. (I.D. 31-40) About 88 percent of the acreage has been platted; about 34 percent (5,521 acres) of its platted acreage had been sold or contracted for by 1976. (I.D. 34) While 19,426 lots had been sold, only about 700 homes had been built or were under construction at the time of trial. (I.D. 35) The immediate building area was served by electricity and telephone service, but there was no central water or sewer system, requiring residents to install a well and septic system at their own cost, estimated to be about \$1200. (I.D. 332)⁴⁶

Respondent's sales presentations for Silver Springs Shores emphasized its investment potential. Respondent's films, brochures, and dinner scripts underscored the explosive growth of population in central Florida, and the attendant increase in land prices. (I.D. 159-160, 205; CX 456 B; CX 65 A; CX 76 O) Representations that Florida land prices were "doubling and redoubling again and again" (CX 175 M) made clear the "exciting potential for profit" (CX 456 B) which respondent was offering. Such comparisons to central Florida land had the capacity to lead consumers to believe that Silver Springs Shores had the same [42] potential for growth and quick profits as Florida land in general.⁴⁷

⁴⁶ In February, 1983, the General Development Corporation ("GDC") purchased AMREP Corporation's remaining residential and commercial property in Silver Springs Shores. On September 30, 1982, the Commission entered an order in this matter containing an agreement between the Commission and GDC. In return for the Commission's agreement not to consider GDC a successor or assign to AMREP Corporation as a result of the purchase of Silver Springs Shores, GDC agreed to undertake certain actions for the benefit of the consumer owners of Silver Springs Shores. Among other actions, GDC is obligated under the Order to offer to repurchase approximately 20,000 lots that have been deeded or will be deeded in the next five years.

⁴⁷ Respondent attempted to dispel the plain intent of its reference to profits in central Florida real estate with a small print disclaimer (at least for its main brochure) that: "Information obtained in this booklet is general to the central Florida area. Property offered for sale in Silver Springs Shores may or may not be affected by the events (footnote cont'd)

Respondent's sales presentations also stressed significant growth in Ocala, the town closest to Silver Springs Shores. Noting that Ocala's population had increased an "astounding 66 percent" in ten years, respondent's brochure clearly implied that the population had increased because of net migration into the city. (CX 58 N; CX 73 A; I.D. 170) Respondent's film also created the net impression that Ocala's population was rising rapidly:

... a growth rate 340% greater than Daytona Beach; 300% greater than Miami Beach. Already Ocala, faced by fast-rising population and real estate pressures, has expanded its city limits ... and whenever dynamic growth like this occurs land prices tend to move up and up. (CX 175 D)

Respondent's advertising made express the implied representation made above: that Silver Springs Shores "is in the path of tremendous growth." (I.D. 170; CX 73 A)

Respondent also represented that lots at Silver Springs Shores were like lots located in other AMREP property in Florida which allegedly had appreciated in value by \$4,500 in five years. (I.D. 205)

While the evidence on resale representations is limited, the preponderance of the evidence shows that some of respondent's sales representatives also represented that there was presently an active resale market at Silver Springs Shores or that there would be no difficulty in reselling lots there. (I.D. 212)

Silver Springs Shores sales representatives, like their counterparts at Rio Rancho, referred to lots there as "homesites" and represented to potential buyers that development would occur rapidly, with utilities reaching their property within three to five years. (I.D. 336, 337) At one 1973 dinner party, a salesman went so far as to assure a potential buyer that a lot in an undeveloped area was fully developed, complete with streets, [43] electrical lines, and sewers. (Consumer Muzzillo, Tr. 7244) Indeed, respondent's own national advertising referred to Silver Springs Shores as part of a "thriving developing community where streets and utilities are already in ..." (CX 72, CX 78, I.D. 333)⁴⁸ Moreover, these development claims implied that there was, or would be in the near future, a viable community with an active resale market.⁴⁹

In summary, we find that respondent represented that Silver

or predictions described." (CX 58 X; I.D. 160) We agree with the ALJ's conclusion that this disclaimer was unlikely to be effective in the context of respondent's total sales presentation.

⁴⁸ In light of the actual state of development at Silver Springs Shores, noted previously, such a claim was false and deceptive. (I.D. 333) This instance is the only one in which respondent misrepresented the actual state of development at one of its subdivisions.

⁴⁹ As we noted in *Horizon*, *supra*, at 810:

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.

Springs Shores was an excellent investment; that it would share in the growth in population of central Florida and Ocala, and that such growth would be substantial; that the land would appreciate in price as a consequence of the increased demand for residential land; and that there would be significant appreciation in the short term.

b) *The Investment Value of Silver Springs Shores*

The ALJ found, and we affirm, that respondent deceptively represented the growth of Ocala, the town nearest to respondent's development in Silver Springs Shores. (I.D. 170) Ocala's population increase was due, not to in-migration as represented by respondent, but simply to a redrawing of the city's 1960 boundaries to encompass new areas. The population within Ocala's 1960 city limits actually declined from 1960 to 1970. (I.D. 171, CX 476 H, L) The record shows that the population increase was due almost entirely to capturing pre-existing population in the annexed areas.⁵⁰ While respondent asserts that it disclosed that Ocala's boundaries had been expanded in conjunction with the population growth claims, we find that such disclosure was not always made, and when it was, that it was unlikely to dispel [44] the deceptive message that the Ocala area was experiencing substantial population growth.⁵¹

Respondent's claim that Silver Springs Shores was "in the path of development" is contradicted by the record evidence showing that land available for residential development in Marion County was in abundant supply. Regional Planner James Mims testified that as of 1977 there were at least 94 land developments in Marion County, totaling over 135,292 acres, with the ability to accommodate a population of 784,693.⁵² (Mims, Tr. 6795-6796, 6802; I.D. 172) At the time of trial, it was expected that Marion County would reach a population of 138,300 by 1985. (Mims, Tr. 6793-94) Enough land had been subdivided by the time of the *trial* to house not only that population projection, but an *additional* 646,694 people.⁵³ City planner Richard Lewis

⁵⁰ CX 476, entitled "The Characteristics of the Population" (1970 Census), notes that parts of Belleview, Fort McCoy-Anthony and West-Fellowship divisions were annexed by Ocala. The population of these three areas was 26,717 in 1960, and had increased to only 30,893 by 1970. (CX 476 L, RAB 45)

⁵¹ For example, in the specific advertisement cited by the ALJ, respondent failed to disclose that Ocala had expanded its boundaries. (CX 73 A, I.D. 170) Further, where the disclosure was made, it implied only that the boundaries were expanded *because of* substantial population growth. See, e.g., CX 175 D, a party film script for Silver Springs Shores:

... Ocala has jumped 88% in population in only 7 years ... Already Ocala, faced by fast-rising population and real estate pressures, has expanded its city limits ... as outlying areas quickly became suburbs ... as suburbs quickly became cities ...

The net effect of the claim was to enhance the image of Ocala as an area bursting at the seams with significant population growth caused by in-migration.

⁵² Respondent incorrectly asserts that Mims' population figures pertained to a five-county region, rather than to Marion County alone. (RAB 45; Mims, Tr. 6812)

⁵³ Regional Planner Mims testified that the University of Florida's Bureau of Economic and Business Research placed Marion County's 1975 population at 93,469 and predicted its 1985 population to be 138,300. (Tr. 6793-6794)

(footnote cont'd)

testified that there was more than enough residential acreage in the city limits of Ocala alone to meet the anticipated growth of population through 2000. (Lewis, Tr. 6675-77, 6685) Taking a somewhat different approach, Judge Teetor applied the past rate of growth from 1960 to 1975 and concluded that there already was enough subdivided land in Marion [45] County to last for 280 years. In light of the enormous supply of competing residential land, and the lack of any constraints which would funnel development toward Silver Springs Shores in lieu of the other areas, the only conclusion that could reasonably be drawn from all available information was that the probability of significant development of Silver Springs Shores was very low. Because of the abundant supply of available competing land, local demand for Silver Springs Shores was not likely to be significant until well into the next century, if then.

The evidence is plain that there is in fact no resale market at the present time for Silver Springs Shores. Testimony from several Ocala real estate brokers and the Chairman of the local multiple listing service indicated that while hundreds of Silver Springs Shores lot owners had expressed a desire to sell, only a few were successful in doing so. (Moutz, Tr. 6601-2; Kanninen, Tr. 6850-52, 6855) From April 1973 to December 1976, there were only four sales of vacant Silver Springs Shores lots through the multiple listing service. (Cepe-da, Tr. 6530-5) One broker, Virginia Kanninen, testified that she had made three resales of lots, all at prices below respondent's current list price for lots. (Tr. 6855; I.D. 268-270)⁵⁴ Indeed, respondent's own SEC filings admit that owners find it difficult to resell lots. (CX 5 E; CX 1 K)

Respondent's two expert witnesses, Professor Elias and Mr. Tischler, contend that, while Silver Springs Shores lots may presently be illiquid, the lots may still be a good investment if they are held on to for a longer period of time.⁵⁵ (RAB 55; RPF 85-93; Elias, Tr. 23830; I.D. 273-275) While in the abstract the point may be true, the difficulty with the argument is that the purchase was represented to potential buyers as an investment in which there was little or no risk (because the demand for land was so enormous) and a significant likelihood of profit. Respondent did not disclose that there were substantial risks, particularly in the short term, that the investment might be illiquid, or that the holding period needed to achieve a

Subtracting the projected 1985 figure from the present capacity of existing subdivisions (784,694) yields a figure of 646,694.

⁵⁴ As with Rio Rancho, we give no weight to evidence about resales contained in complaint counsel's survey (CX 566). See discussion, *supra*.

⁵⁵ Respondent's expert witness Tischler also testified that he thought that a substantial percentage—perhaps half—of Silver Springs Shores owners would settle there. (Tr. 23331, 23453; I.D. 273) As discussed above in connection with Rio Rancho, this assumption is unreasonable in light of respondent's actual experience with its own projects and knowledge about the land sales industry generally.

reasonable return on investment would likely be long term, longer than twenty or thirty years. In conjunction with the claims that the purchase of land was a good investment, the failure to [46] disclose such material facts had the capacity to lead consumers to believe that the investment was for the short term and involved little or no risk.

Given the lack of foreseeable demand for land at Silver Springs Shores, the abundance of alternative land available for residential development, and the lack of any active resale market at Silver Springs Shores, we conclude that it was highly unlikely that there would be substantial growth or development in Silver Springs Shores, particularly in the short term period of under 20 years. Consequently, future short-term growth and development was unlikely to have any effect on the market value of lots at Silver Springs Shores. Therefore, we find that respondent misrepresented the likelihood of future development and the effect of such development on prices. Further, the preponderance of the evidence shows that there is little likelihood that the market value of lots at Silver Springs Shores will increase, particularly in the short term, and that there is a substantial probability that buyers will be unable to resell their land. As a result, lots at Silver Springs Shores were not, as represented, excellent, low-risk investments but instead were purchases involving a substantial risk of illiquidity and little or no potential for profit, particularly in the short term. Respondent's misrepresentations of and failure to disclose such facts, which would be material to a buyer weighing the investment value of Silver Springs Shores, were deceptive acts and practices in violation of Section 5. For the reasons discussed previously, we find that such deceptive practices cause substantial, unjustified and unavoidable consumer injury, and accordingly, we also find that these practices are also unfair acts or practices in violation of Section 5.

4. Oakmont Shores

a) *Representations about Investment Value*

Oakmont Shores is a 3,500 acre recreational/resort development adjoining a 56 mile long man-made lake in the Ozark country in southwestern Missouri. Respondent acquired the project from a bankrupt developer and began selling lots there in 1972. Out of a total of 2,300 platted lots, respondent sold 803 lots and deeded 29 more. (I.D. 47-48) Most lots lacked one or more utilities. (I.D. 341-359) In April, 1975, respondent abandoned its plan to develop Oakmont Shores and reconveyed the land to the trustee in bankruptcy for the former owner. (I.D. 51)

Respondent's investment theme for Oakmont Shores, a recreational/resort development, took a slightly different tack than in its other

projects. The main theme is captured in the title of respondent's main promotional film, "A Race for Space." (CX 171) The film claimed that recreational land in general was getting scarcer and the standard dinner script stated that the price of "good lake land" was skyrocketing. (CX 102 C; [47] I.D. 178-179) The script concluded: "The closeness of Oakmont Shores to the second largest man-made lake in the nation means that demand—and prices—can be expected to go only one way—up!" (CX 102 C) The film cites a "government report" which found that the property adjacent to Table Rock Lake had increased in value 535% in seven years. (CX 171 D) Respondent's sales representatives portrayed Oakmont Shores as a good investment, which would double or triple in value in several years. (I.D. 207) The image of a rapidly developing recreational community was fostered by reference to the lots as "homesites." (I.D. 341) The net impression from these representations was that recreational land around Table Rock Lake was in high demand and that therefore the market value of such land, including Oakmont Shores, would continue to increase, making the purchase of a lot a good investment.

b) *The Investment Value of Oakmont Shores*

Contrary to the representations made by respondent, there is no demand for lots at Oakmont Shores, largely because of the abundant supply of recreational/resort land adjoining Table Rock Lake in competition with Oakmont Shores. (I.D. 181) While no surveys or projections were made which would indicate how rapidly the area around Table Rock Lake could be expected to develop, there was substantial capacity for development which made any expectations about an increase in market value at Oakmont Shores speculative, at best, particularly within the short time frame. For example, nearly 75% of the land around Table Rock Lake had not yet even been subdivided. (McGee, Tr. 9175)

Indeed, there was, by the time of trial, virtually no resale market for Oakmont Shores lots. Three different real estate brokers testified that, despite receiving numerous inquiries from land owners about the possibility of selling, only one lot was actually sold. (I.D. 278-280) Again, respondent has recognized the difficulty of resale in its SEC filings. (CX 5 E; CX 1 K)

In view of the abundant supply of competing land and the lack of a resale market for Oakmont Shores, it was highly unlikely that lots at Oakmont Shores would be developed in the foreseeable future or that the market value of such lots would increase as a result of development or the increasing scarcity of land available for recreational development. As a result, lots at Oakmont Shores were not, as represented, excellent investments, but instead were purchases with little

possibility of appreciation in the foreseeable future and with a substantial risk of illiquidity. Respondent's misrepresentations about the investment value of lots at Oakmont Shores were deceptive practices in violation of Section 5. Further, it was a deceptive practice violating Section 5 for respondent to claim that prices had risen 535% over a seven-year period without disclosing that during that seven-year period, Table Rock Lake was being constructed. Any increase in property values during that time was likely to be highly atypical. (*See* McGee, Tr. 9154) [48] The use of atypical data, without disclosure that they are atypical, is misleading, and therefore a deceptive practice under Section 5.⁵⁶ These deceptive practices are also unfair acts or practices in violation of Section 5 because they cause substantial, unjustified, and unavoidable consumer injury.

5. Eldorado at Santa Fe

The smallest of respondent's projects, Eldorado at Santa Fe, consists of about 6,000 acres located 14 miles southwest of Santa Fe, New Mexico. (I.D. 41-42) Respondent started selling lots in January, 1973; by 1976, 351 lots had been contracted and an additional 98 lots had been deeded. However, as of 1975, there were only 21 occupied homes, and few parts of the subdivision had utilities. (I.D. 43; 338-339)

Complaint counsel produced only a limited amount of evidence for the record concerning investment representations made by respondent at Eldorado. On the basis of this limited evidence, we make no findings about specific investment representations.

The ALJ found that there was a plentiful supply of land available for residential development in and around Santa Fe, making respondent's claim that growth was blocked in all directions but to the South false and deceptive. Santa Fe City Planner Moul calculated that enough land existed to support 63,400 people (Tr. 10483), about the size of the County's probable population growth for the next 51 years. (I.D. 177) That calculation excluded two areas, the Weil Ranch and the Jarrett Ranch, which totaled 49,000 acres. (I.D. 176-177)

The ALJ found, however, that the record did not support a conclusion as to the investment value of Eldorado lots. (I.D. 276) While there plainly is no demographic pressure forcing development towards Eldorado in rapid fashion, there is no evidence about the present market value of Eldorado lots or whether there is an active resale market. Thus, we find the record does not support a finding that the respondent has deceptively marketed Eldorado land as an excellent investment. [49]

⁵⁶ See, e.g., *Horizon*, *supra*, at 806; *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); *reconsideration*, 85 F.T.C. 1052, 1053-54 (1975).

C. Respondent's Defenses

1. The "Exchange Privilege"

Respondent asserts that, even if buyers of Rio Rancho land were unable to sell their land, they were not injured because they were able to exchange it for a lot of "comparable value" whenever they were ready to build on it.⁵⁷ Respondent estimates that the exchange privilege alone is worth \$3500. (RAB 52-54)

In reality, the exchange benefit provides very little of worth. In the first instance, as respondent belatedly disclosed in its property reports, respondent is not in a position to honor the exchange privilege if, in fact, a substantial number of buyers want to build on their lots. (CX 162 J, CX 163 H)

More importantly, the exchange privilege is so restricted by conditions that its value is very limited. All that the privilege entitles the buyer to is the right to a lot in the building section which is of "comparable value" to the buyer's vacant lot. Since the market value of a vacant lot is much lower than the market value of a building lot with utilities near the core developed areas (I.D. 221), respondent may give substantially smaller lots in the building area, or charge additional fees, in complete compliance with the exchange [50] provision, and indeed frequently has done so.⁵⁸ (*See, e.g.*, Wise, Tr. 10946-49; Salesman Kimmel, Tr. 3903; Bradley, Tr. 2168; Douglas, Tr. 10076-77; Lobianco, Tr. 4748-49; Sanchez, Tr. 9889-90.) In essence, the phrase "comparable value" gives respondent discretion to determine what to provide in exchange for the owner's vacant lot. In addition, the right applies only to the first half acre lot; there is no exchange privilege for any additional lots owned. (CX 162 J)

But even more fundamentally, the privilege was of no value to someone holding the land simply for investment, rather than for eventual relocation or retirement, since the exchange privilege applied *only* if the *buyer* was "ready to build." A buyer holding the lot

⁵⁷ The provision in the reservation and purchase agreement for Rio Rancho Estates provides:

4. If when Buyer is ready to build a home, utilities have not yet reached his site, Seller will exchange a building lot of comparable value in an area already served by utilities, for a single lot of Buyer. (CX 155)

Earlier contracts provided, in contrast, that the Buyer would be entitled to a lot of equal size in the core area served by utilities. (CX 313 A; CX 266 B; CX 286 B; CX 273 B) This right was watered down over time to a right to a lot of "comparable value," a term which is not defined in the contract. Contrary to some representations (*see, e.g.*, Benfante, Tr. 4312; Hurza, Tr. 2402), buyers were not entitled to an equal size lot in the building area at no additional cost.

Rio Rancho was the only project in which respondent offered the building exchange privilege. In Silver Springs Shores, buyers were given the opportunity only to trade a lot for another within 5 years of the purchase. (CX 323; CX 315; CX 320)

⁵⁸ Indeed, the complaint alleges in paragraphs 44-45 that respondent misrepresented the operation of the exchange privilege provision by failing to disclose that, in practice, respondent attempts to get buyers to accept smaller lots and to make additional payments. The ALJ made no findings on these allegations. Our own review of the record does not demonstrate sufficient evidence that respondent misrepresented the exchange privilege to support a finding of violation of Section 5.

for investment has no interest in building a house, but only in the market value of the vacant lot. It is true, of course, that an investor can sell the vacant lot to a third party who is ready to build. The third party, in turn, can use the exchange privilege to get a lot with utilities.⁵⁹ But the third party will only be willing to pay a price commensurate with the fair market value of the building lot—which, in turn, is set by the fair market value of the *vacant* lot. Ultimately, then, an investor can realize a profit on his vacant lot only if the fair market value of the particular vacant lot he owns increases. The exchange privilege is largely irrelevant to the investor. Indeed, the very fact that there is no local resale market and no demand for vacant land underscores the fundamental worthlessness of Rio Rancho as an investment because it signals that there is no market for lots *even with the exchange privilege*. [51]

2. Disclosures

Respondent strenuously argues that the ALJ's decision ignores the fact that consumers were given "probably the most thorough set of disclosure documents relating to a consumer product that was available in the entire American economic system." (RAB 53)

As permitted by OILSR regulations,⁶⁰ respondent chose to supply property reports at the dinner parties and afford consumers a 72-hour cancellation right rather than provide the report 48 hours before a purchase. (I.D. 80) As a result, although respondent complied with OILSR regulations, it is clear that the tightly organized and smoothly presented sales presentations gave potential buyers very little time to consider the property report disclosures *before* they signed contracts.

Further, the complaint charged that the property reports were distributed in a manner calculated to prevent buyers from making any effective use of the disclosures, and that such practices were unfair and deceptive acts or practices in violation of Section 5. While there was some evidence that property reports were effectively concealed at the dinner parties (for example, by putting them under stacks of documents, Jarrett, Tr. 10337), and that reports were delivered late or not at all, the ALJ did not conclude that respondent failed to provide property reports. (I.D. p. 100, fn. 61) The ALJ did note that respondent's sales presentations did not mention the property report and that, while respondent did not "officially condone" the effective concealment of property reports, "it did nothing about it, either, despite our reasonable certainty that some effective concealment did

⁵⁹ Indeed, most of the few sales of vacant lots at Rio Rancho were made to builders who bought a number of vacant lots and traded them in for a smaller area in the project's building area. (Bradley, Tr. 2168; Douglas, Tr. 10076-77; I.D. 222-224)

⁶⁰ 24 C.F.R. 1710.208(f)(3).

occur." Nevertheless, we do not find the evidence sufficient to support a finding of a Section 5 violation with respect to these practices.

More significantly, even if purchasers had a limited opportunity to look at the property report, it is by no means clear that the disclosures in the property report would have been sufficient to dispel the specific investment value representations being made by respondent. For the most part, the information contained in property reports is concerned with the condition of the land in question, its suitability as a homesite, the present extent of development, the availability and cost of utilities and other amenities, the likely pace of future development, and the developer's contractual obligations (or financial protections) to ensure the promised development. Such information, while certainly helpful to a consumer who is evaluating land as a possible retirement location or primary homesite, is less useful to an investor evaluating the value of respondent's land as an investment. For example, unlike many other land developers, [52] respondent was not contractually obligated to provide *any* development. Instead, it represented that development would occur as a result of market forces, not from its own actions. Thus, there is relatively little in the property report which could assist a potential investor in evaluating the respondent's sales claims that development—and profit—would be rapid based on scarcity of residential land, past increases in property value, and expected population growth. The property reports thus contained little information to challenge the illusion crafted by respondent's carefully designed sales presentation that respondent's subdivisions are the investment opportunity of a lifetime. Consequently, compliance with OILSR disclosure requirements would not be sufficient to disabuse consumers of the impressions created by the deceptive and misleading statements, as well as the deceptive failure to disclose material facts, made by respondent in its sales presentations.⁶¹ We therefore reject respondent's contentions that the property reports provide a defense to this action.

3. The Visitation Privilege

Respondent asserts that it encouraged buyers to visit their lots and afforded them an opportunity to cancel their purchases for any reason after they had an opportunity to visit, as long as that was within six months after signing the contract.⁶² (I.D. 85) While the record does not indicate what percentage of buyers actually visited their land within the six month period, either with the company's tour or on their own, relatively few of those who did come cancelled their contract, while

⁶¹ Cf. *Horizon*, *supra*, 859.

⁶² All of respondent's subdivisions with the exception of Oakmont Shores offered the six-month cancellation privilege. (I.D. 85, fn. 62)

others purchased even more land. (I.D. 88) Respondent asserts that under such circumstances, it is impossible to conclude that buyers were deceived. (RAB 53)

If respondent's claims about the state of development had been deceptive, which we have found that they generally were not, respondent's argument would have greater force. Clearly, if purchasers had been misled about the present state of development, a trip to respondent's subdivisions would quickly reveal the deception. For example, while a visit to Rio Rancho could have been of some help to an investor, particularly if the trip was made individually and not as part of respondent's organized [53] tour,⁶³ it was still unlikely to overcome the main message of respondent's representation: that substantial local demand was just around the corner. While obviously buyers could see the vast amounts of undeveloped land around Albuquerque and the enormous size of Rio Rancho, they had no way to evaluate how quickly that land would become developed or whether it was property that was subject to development constraints. Respondent's tour guides sought to minimize the significance of the vast undeveloped acreage by telling buyers, according to the standard script: "Although it appears that there is a lot of open land in New Mexico, most of it is either owned by the government in the form of military installations, Indian reservations or held by land grants." (RX 268 D) While literally true, the statement reflected the buyers' inability to judge for themselves the validity of respondent's claims about the scarcity of land and the likely pace of development. To calm any additional lingering doubts, respondent's sales personnel reminded buyers of the exchange privilege, which seemed to offer protection if the pace of development was slower than predicted. (I.D. 93-95) Under these circumstances, we do not find persuasive respondent's argument that the visitation privilege cured any possibly deceptive representations.

4. Representations were "Opinion"

Respondent also argues that it cannot be held liable for its representations concerning the expected future growth of Albuquerque toward Rio Rancho and its statements about the future market value of its lots because such representations are merely a matter of "honest"

⁶³ As the ALJ found, respondent's organized tours of Rio Rancho were designed to sell purchasers on the advantages of the Southwest and to reinforce the theme of rapidly rising demand for Rio Rancho land. (I.D. 89-92) Respondent's closely-controlled tours left little time for tour participants to inspect their lots or to do any independent research. The effectiveness of respondent's tour is reflected in the fact that nearly a third of all purchasers who visited their lots on their own cancelled their purchases, compared to only ten percent of those taking respondent's tour.

The complaint charged that the use of the tour to vitiate the six-month refund was unfair. (Par. 43) The ALJ made no findings on this part of the complaint. Our own review of the record does not support a finding of unfairness, and we accordingly decline to find a violation of Section 5 as charged by this paragraph of the complaint.

opinion or prediction which cannot be fraudulent under common law. (I.D. p. 266-267; RAB 43) [54]

Commission cases reflect the common law's standard that certain statements of opinion, such as "puffery," lack the capacity to deceive consumers. *Colgate-Palmolive Co. v. FTC*, 310 F.2d 89 (1st Cir. 1962); *Bristol-Myers v. FTC*, 185 F.2d 58 (4th Cir. 1950); *Kidder Oil Co. v. FTC*, 117 F.2d 892 (7th Cir. 1941).⁶⁴ Statements of value, and predictions of events in the future, can be expressions of opinion which are not actionable under common law. Prosser, *The Law of Torts*, Section 109 (1971).

At the same time, the common law has developed a number of exceptions to this general principle. It is well-settled, for example, that the expression of an opinion carries with it an implied statement of fact that the opinion is honestly held and that the speaker knows of no facts which would preclude holding such an opinion. *Irwin v. United States*, 338 F.2d 770, 773-74 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965); *United States v. Rubinstein*, 166 F.2d 249, 255 (2d Cir. 1948), *cert. denied*, 333 U.S. 868 (1948); *United States v. Grayson*, 166 F.2d 863, 866 (2d Cir. 1948); Prosser, *The Law of Torts*, Section 109 (1971). Further, where a speaker holds himself out or is understood to have special knowledge not possessed by the listener, the speaker's opinion carries with it the implied statement of fact that the speaker knows of facts which support the opinion. *Magnaleasing, Inc. v. Staten Island Mall*, 428 F.Supp. 1039 (S.D.N.Y. 1977), *aff'd*, 563 F.2d 567 (2d Cir. 1977); *Vertes v. G.A.C. Properties, Inc.*, 337 F.Supp. 256, 261 (S.D. Fla. 1972); Prosser, *supra*, Section 109. Both situations involve special circumstances which make it probable or reasonable for the listener to accept and rely upon the speaker's opinion, and in such cases, the "opinion" defense is not available. Prosser, *supra*, Section 109. [55]

The evidence shows clearly that respondent knew facts which would have precluded a reasonable person from expressing the "opinion" about the rate of expected growth to the Northwest and its effect on property values at Rio Rancho.⁶⁵ Most significantly, respondent received actual notice in 1965, from its own planning consultant, that there would be no local demand (and consequently, no increase in

⁶⁴ Since the Commission's cease and desist powers are more in the nature of a common law equitable remedy than a legal remedy for damages, it is appropriate that Section 5 actions, like equity actions at common law, recognize the "opinion" defense only in a very limited set of circumstances. See Prosser, *The Law Of Torts*, Section 109 (1971).

⁶⁵ In addition, it is also clear from the evidence that AMREP, with the exercise of reasonable diligence, should have known of facts inconsistent with its opinion about the rate of growth to the Northwest and its probable effect on property values at Rio Rancho. For example, AMREP should have known that buyers were unable to resell lots through the Albuquerque multiple listing service, and that such fact meant that the purchase of land at Rio Rancho involved a substantial risk of illiquidity. Representing that the purchase of land at Rio Rancho involved no risk was, at best, a negligent statement. Declarations of opinion made with negligence or with reckless disregard for the truth are actionable under common law. *United States v. Love*, 535 F.2d 1152, 1158 (9th Cir. 1976), *cert. denied*, 429 U.S. 847 (1976); *Cameron v. Outdoor Resorts of America*, 608 F.2d 187 (5th Cir. 1979), *reh.* 611 F.2d 105 (5th Cir. 1980).

market value) for Rio Rancho land for at least twenty years. Further, during the 1960's, respondent had actual knowledge of the only official population projections for that area, placing predicted population growth as one-third to one-half of that being predicted by respondent. (I.D. 180) It knew, from those studies, that the official planning agencies responsible for development were of the opinion that there was still enough available land to meet the highest reasonable population growth for at least forty years. Further, it knew some of these "constraints," like the title disputes in the Pajarito and Atrisco land grant areas, were legal ones which could be resolved over time. It was also put on notice in 1970 that population growth had significantly slowed, pushing off any pressure to grow toward Rio Rancho until the turn of the century. Yet in 1971, it purchased an additional 31,000 acres to sell as "investment opportunities."

Given these facts, no reasonable person could have honestly stated that the purchase of land at Rio Rancho was an excellent, low risk investment, particularly in the short term. Accordingly, we find that AMREP's opinion as to the rate of growth to the Northwest and the likely effect on Rio Rancho market values was not honestly held, and was a misrepresentation of its actual beliefs and knowledge. The "opinion" defense does not protect such misrepresentations. [56]

AMREP went even further, however, and represented itself as a real estate investment expert which ordinary, inexperienced consumers could rely upon. Respondent represented itself as a community developer—a big, reliable and financially sound company, listed on the New York stock exchange, with a proven track record of developing award-winning, progressive communities. (CX 102 A; CX 59 H) Its sales materials frequently referred to AMREP's experience in successful real estate ventures, citing the increase in land values in those projects. (CX 456 G; CX 6 D; CX 102 A; CX 109 F) Representations such as these plainly were intended to make potential buyers trust AMREP and put faith in its ability to make safe, excellent investments. By touting its expertise and experience, respondent claimed to have superior knowledge about land values, population trends, and community development. Further, respondent wrapped itself in the protective coloration of state and federal regulation. AMREP's presentations referred to the fact that it had complied with state regulations, and in some instances had the active approval of state regulators. (CX 456 I; CX 110 K; CX 112 E, 112 H) Such representations contributed to the impression that respondent was offering a legitimate investment opportunity and that its claims could be trusted because they were strictly supervised by state and federal regulation.

Respondent's representations about likely rates and directions of

growth and the probable effect of such development on property values were clearly material to potential buyers trying to evaluate the investment value of respondent's land. Buyers were at a distinct disadvantage to AMREP in having access to the information which was relevant to the investment decision. Most sales, for example, occurred in the northeastern United States, far from the sites of the subdivisions involved here. It would not be practical or feasible for buyers to attempt to conduct absorption studies to corroborate AMREP's claims, particularly in the very brief time frame respondent permitted for a decision. Even visiting the land, as we discussed above, was insufficient to give buyers the information they would need to determine whether AMREP's claims were reasonable.

In such a case, where the seller has unique access to critical information, where the buyer cannot reasonably obtain the information, and where the seller has been portrayed as a legitimate, recognized expert with the intention to induce reliance, the seller cannot escape liability for making deceptive statements in the form of an "opinion." It is evident that respondent, contrary to its implied statement, had no reasonable basis for its opinion concerning the rate of growth toward Rio Rancho and the probable effect of such development on market value. As a result, it misrepresented material facts. Such misrepresentation, which would be actionable even under common law, violates Section 5's proscription of deceptive practices. Accordingly, we reject AMREP's "opinion" defense. [57]

IV. MARKETING TECHNIQUES

The complaint also charged that respondent used a number of standard sales practices which, taken together, made it very difficult for buyers to make a considered, informed decision, and that such practices constituted unfair or deceptive acts or practices in violation of Section 5.

The complaint alleged that respondent got buyers to come to its dinner parties by misrepresenting the purpose of the meetings, which was, of course, to sell land at respondent's subdivisions. (Complaint Paragraphs 9-10) In addition, buyers were led to believe that the sales subsidiaries sponsoring the meetings, usually bearing names like ATC Realty Corporation, had no connection with AMREP. (Complaint Paragraph 50)

Other sales practices were designed to put pressure on buyers to sign a contract at the dinner party. To that end, the complaint charged that respondents deceptively represented that buyers must buy lots immediately because lots would soon be unavailable or desirable locations would be gone. (Complaint Paragraphs 28-31) It further charged that respondent engaged in an unfair practice by discourag-

ing buyers from obtaining counsel or outside assistance. (Complaint Paragraph 47) Finally, the complaint alleged that respondents deceptively represented to prospective purchasers that signing the land sales contract, which contained vague and confusing terms, involved no binding obligation since buyers had a right to cancel. (Complaint Paragraphs 38-39)⁶⁶

Numerous invitations in the record show that the dinner meetings were represented to be presentations of "general information" about such topics as life in the Southwest, retirement on a limited income, real estate investments, or vacations in the Southwest, not a sales presentation. (CX 143; CX 22; CX 26; CX 27) Nevertheless, we decline to find that such [58] representations were deceptive in that they failed to disclose that there would be an effort to sell something at such meetings. We think it likely that most consumers, receiving such invitations for a free dinner, were likely to assume that there would be some sales presentation, at least in the absence of a statement that clearly suggested otherwise.

We also find that complaint counsel failed to carry the burden of showing that respondent's failure to disclose that the sales companies were wholly-owned subsidiaries of AMREP had the tendency or capacity to deceive buyers. While one consumer testified that she understood the sales representative to be an "independent" real estate broker, and thus a source of objective information (Gray, Tr. 5418-19), the preponderance of the evidence shows that the sales subsidiaries routinely revealed that they were "representing" particular subdivisions. (CX 109 B, CX 111 A-B, CPF 243) Whether the relationship between AMREP and its sales representatives was one of agency or of ownership seems unlikely to be material to prospective buyers. In either event, buyers should have known that the sales representatives had a clear interest in selling the particular subdivision and that they were representing respondent's interests. We accordingly decline to find a violation of Section 5 on these charges.

One of respondent's selling techniques was to convince prospective buyers that only a few lots were currently available and that those that were left were going fast. Sales representatives told buyers that the land was being sold fast and that buyers would "never have the opportunity again." (Acree, Tr. 8866; Wise, Tr. 10936; Weber, Tr. 8943) In addition, in order to implant this impression in prospective

⁶⁶ The complaint also charged that respondent represented that buyers moving to Rio Rancho would have no difficulty finding jobs of similar nature and pay to those they presently had, and that such claims were false and deceptive. (Complaint Paragraphs 32-33) The ALJ found that complaint counsel had failed to carry their burden of proof on the issue (I.D. 360-363, p. 268) and complaint counsel have not appealed that finding.

The complaint also charged that respondent represented that financing would be easy to obtain when, in fact, some buyers had difficulty in arranging financing. (Complaint Paragraphs 51-52). The ALJ made no findings on this issue and we find no evidence cited which bears on this issue. Accordingly, we make no findings on this complaint allegation.

buyers' minds, respondent used allocation sheets, holds, and deletions. Although respondent had a large number of lots available for sale at each of its subdivisions, the sales representatives were given allocation sheets before each dinner party which listed the small number of lots that would be available for sale at that particular party. (ID 68) If a potential customer demonstrated any interest in a particular lot, the sales representative would jump up, raise his hand and call out a hold on that particular lot. While the purpose of this activity was purportedly to avoid duplicative purchases, respondent's actual reason for mandating its use at dinner parties was to create excitement and to suggest that the available lots were going fast, generating a sense of urgency in [59] the room.⁶⁷ (ID 68-9 fn. 55-56) If a lot was sold, sales representatives were instructed to call a deletion from the allocation sheet. As ex-sales representatives explained, deletions were called for "general motivation in the room" (Kimmel, Tr. 3890) and "to create enthusiasm." (Bondy, Tr. 7512) Not satisfied with the enthusiasm created by holds and deletions after actual sales, one former sales manager testified that occasionally deletions were called even though a lot was not sold. (Bondy, Tr. 7512-13)

Respondent's "holds" technique was carried over to the time when the lot owners visited their lots. All salesmen taking homesite owners to see their lots were instructed to leave their two-way radios on in order to communicate with headquarters and to call holds for homesite owners who wanted to buy or exchange for other lots. The basic purpose of these "site holds" was to create an impression of a bustling trade in lots much the same way holds were used to create excitement at respondent's dinner parties. (ID 92)

The sense of urgency created by affirmative representations and the use of the allocation sheets, holds, and deletions was, however, completely contrived. There has never been a scarcity of unsold lots at any of respondent's four subdivisions.⁶⁸ (CX 222 a-d)

Respondent's sales representatives were also well-versed in the various ways of putting pressure on buyers to "close" the sale at the sales presentations. (I.D. 58-79) Among other tactics, the sales representatives disparaged professional advice and discouraged buyers from taking home copies of the contract to examine. (I.D. 60-61; Jarrett, Tr. 10340; Wise, Tr. 10939; Bondy, Tr. 7470; McCorkle, Tr. 2234) Sales representatives would "assume the sale," filling out contracts with all the required information even if the buyer informed the sales

⁶⁷ Respondent's sales training manual describes the purpose of the allocation sheets and hold calls as follows:

You will be supplied with an allocation sheet for the party. As allocations are sold, they will be called off from the speaker's platform and each man should delete it from his list. This shows activity and will help stimulate people to make up their minds quickly or the allocation under discussion will be gone. (CX 39 V, CX 309 R)

⁶⁸ More than 25% of all Rio Rancho lots, 33% of Silver Springs lots, and 60% of Eldorado and Oakmont Shores lots, remained unsold by the end of 1975. (CX 222 a-d)

representative [60] that he or she was not interested. (I.D. 74) If a sales representative was having difficulty in making a sale, a "takeover" sales representative, often represented as someone with special "expertise," would move in on the stubborn sales prospects. (I.D. 76-79) Questions about the security of the investment were routinely answered with references to AMREP's established reputation, size, and listing on the New York Stock Exchange, or the pervasive regulations and review of land offerings by state and federal governments. (Wise, Tr. 10933-34; Bondy, Tr. 7494) Prospects who continued to balk at signing the contract immediately were assured that signing created no obligation on their part, since they had a right to cancel for any reason within 72 hours or to cancel after inspection within six months, and that signing the contract was only a "reservation" of a particular piece of land. (I.D. 60) Once a buyer signed a contract, sales representatives used a number of techniques to ensure that the contract was not cancelled during the three-day cooling off period, including contacting the buyer the next day and congratulating them and inviting them to another free dinner party. (I.D. 83-84)

The ALJ found that such "high-pressure marketing techniques" were unfair methods of competition and unfair and deceptive acts and practices. (I.D. p. 264) While not finding such tactics to be deceptive in and of themselves, the ALJ found that they were nevertheless deceptive because they tended to "contribute" to the consumer's ultimate deception by increasing the likelihood that the buyer will act on other deceptive statements. In addition, he found them to be unfair practices because they reduced the consumer's ability to "react carefully and rationally to what they are hearing." (I.D. p. 264)

While we are in essential agreement with the ALJ that these practices violated Section 5, our analysis differs to some extent. Some of respondent's express claims were simply false. For example, the practice of announcing a deletion when no lot had in fact been sold was plainly deceptive. Similarly, the description of the contract as a "reservation," rather than as a land sales contract, and the representation that signing the contract imposed no obligations, were misleading since the terms of the contract clearly bind the purchaser to certain obligations unless the purchaser takes affirmative acts to avoid them.⁶⁹ [61] Such misrepresentations of material facts are deceptive under Section 5.

While not deceptive standing by themselves, respondent's use of holds, allocations and deletions, in conjunction with its other affirma-

⁶⁹ While the ALJ apparently found that the portion of Complaint Paragraph 38 charging respondent with "obscuring the legal or practical significance of signing a contract" to be "too obscure for us to comprehend," (I.D. p. 5), he clearly did not dismiss all of paragraph 38 and 39 charging respondent with misrepresenting the legal effect of signing respondent's contracts, as suggested by respondent. (RAB 67-68) Indeed, the ALJ specifically included an order provision addressing the practice. (I.D. p. 274)

tive statements emphasizing limited lot availability and the need for urgent action, reasonably could lead consumers to believe that they were required to purchase respondent's land immediately in order to ensure an opportunity to purchase, contrary to fact. Under such circumstances, respondent's use of holds and deletions was a deceptive practice in violation of Section 5.

The other sales tactics used to pressure buyers into signing a contract immediately—disparaging professional assistance, discouraging buyers from taking home the contract, "assuming the sale," using "takeover" sales representatives and various reinforcement tactics used to keep the buyer contented during the 72-hour cancellation period—may well have amounted to an unpleasant "hard sell," but they are not, without more, legally "unfair." As we stated in *Horizon*, we do not accept "unwarranted pressure" as the test of unfairness under Section 5. *Horizon, supra*, at 841.

Where, however, such marketing tactics occur in a context of pervasive deception as to material facts, such practices can be deceptive acts or practices proscribed by Section 5. *Horizon, supra*, at 841. Here, as discussed above, respondent's land was not, as represented, an excellent, low-risk investment, but instead a poor investment with substantial risk. Further, contrary to respondent's representations, there was no urgency to purchase lots at respondent's subdivisions since there was a substantial supply of lots. Finally, respondent misrepresented the binding nature of the sales contract. The "hard sales" tactics referred to above assisted respondent in making it likely that buyers would legally bind themselves in reliance on those deceptive representations, and to reduce the risk that buyers might obtain outside assistance or other information which might alert them to the deceptive character of the claims. Such tactics facilitated respondent's efforts to mislead consumers and accordingly are in themselves deceptive practices which violate Section 5.

V. CONTRACT PROVISIONS

The complaint charges that AMREP violated Section 5 by including in its standard land sales contract several provisions which were unfair to purchasers. The ALJ agreed, finding that four particular provisions violated the prohibition on unfair practices set out in Section 5: (1) a provision requiring the purchaser to pay interest on the unpaid balance of the purchase price; (2) a provision restraining the alienability of the purchased lot; (3) an integration/disclaimer clause; and [62] (4) a provision requiring the forfeiture of all payments made upon the purchaser's default, as liquidated damages.

For the reasons noted below, we reverse the ALJ with respect to the

first three provisions, and uphold his ruling with respect to the forfeiture provision.

In each of AMREP's four developments, it used a standard form contract, called a "Reservation and Purchase Agreement," as the sales agreement. Under the terms of the agreement, purchasers typically made a down payment of 10 percent of the "delayed payment price," paying off the balance in monthly installments over a period of five to eight years. (I.D. 10) Until all payments were made, AMREP retained title, use and possession of the lot; in the event that the buyer defaulted at any time, AMREP was entitled to retain all payments (including interest, taxes, and assessments) made by the buyer as well as to recover all rights to the lot.

In finding that several of the provisions were unfair, Judge Teetor determined that the sales agreement was a standard form contract, that there was no evidence of any serious bargaining as to any of the material terms of the contract, and that there was an enormous disparity of bargaining power between respondent and the individual consumers. He concluded that the contract was therefore "adhesive" in nature. (I.D. 364-369) The ALJ concluded that "the same legal consequences should not attach to formation of an 'adhesion contract' as to formation of one closely bargained by parties of roughly equivalent strength," (I.D. p. 269) and concluded that all four of the provisions cited above were unfair contract terms.⁷⁰

As the Commission recently noted in *Horizon, supra*, whether a consumer contract is "adhesive" does not determine whether its provisions are unfair or deceptive under Section 5. Rather, a finding that a contract is adhesive simply defines the level of scrutiny that the Commission applies to its analysis of the fairness of the contract's terms. As we stated there at 843: [63]

[I]f 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 . . . [T]he determination whether a term is unfair or deceptive depends on its operation in a specific factual context.

Respondent's sales agreements clearly have characteristics of an adhesive contract. They are pre-printed, standardized forms containing provisions which are not the result of bargaining between two relatively equal parties. Indeed, the disparity of bargaining power between respondent and buyers is manifest. Respondent's sales plan

⁷⁰ Respondent argues that the issue of whether its contracts were adhesive was not properly noticed. (RAB 6-7) While the complaint does not specifically mention "adhesion contracts", it does refer to "standard form contracts" and several of the standard contract provisions (paragraphs 4, 36 and 37, 40, 41, 42, 46 and 47). Those references were adequate to give notice that the fairness of certain of respondent's standard contractual provisions were in issue. Moreover, there is no prejudice to respondent in any event because the ALJ's finding that respondent's contract was adhesive does not necessarily mean that it is unfair or deceptive. See discussion in text, above.

is targeted to ordinary consumers, not to potential investors with prior experience in purchasing land or in making other significant investments. As against the experience of a large, well-known corporation involved in the sale of large developments, these individual consumers had little opportunity or ability to question the claims and representations made by AMREP, to evaluate the risks of investing in unseen land, or to assess the terms of the contract. Respondent's "high pressure" sales tactics further diminished the buyer's ability to consider carefully what was being offered.

As noted above, however, finding that respondent's standard sales contract is adhesive in nature does not end the inquiry. In considering whether a provision in an adhesive contract is legally unfair, the Commission focuses primarily on the existence of unjustified, substantial, and unavoidable consumer injury.⁷¹ In that context, we turn to the specific terms at issue.

A. Charging Interest

Most of the buyers of respondent's lots pay a "deferred payment price," which in effect includes interest on the unpaid balance of the purchase price. Judge Teetor found this practice of charging interest, where the seller retains title and possession of the lot, to be an unfair practice in violation of Section 5. The ALJ reasoned that the buyers were receiving nothing of value which would justify the seller charging interest. (I.D. 370-375) [64]

We reverse the ALJ's finding for several reasons. In the first instance, there is no evidence in the record to show that buyers who sought to use the land were ever denied the privilege of using it by respondent, although the ALJ's conclusion that respondent had the legal right to possession is probably correct.⁷² Therefore, the record does not seem to clearly establish consumer injury flowing from this provision. Secondly, the ALJ's conclusion that buyers get nothing apparently does not take into account the fact that buyers receive the seller's forbearance from demanding payment in full at the time of the sale, in addition to obtaining a fixed price and the conditional right to a specific piece of property.

Whatever reservations we have about the ALJ's decision on this point, it is unnecessary for us to resolve them since we find that the lawfulness of the practice was never challenged or litigated in this

⁷¹ *Horizon*, *supra* at 849-50, citing letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980), outlining the Commission's views on the boundaries of its consumer unfairness jurisdiction.

⁷² The record is not entirely clear with respect to the exact nature of the buyer's right to, or interest in, the land during the payment period. As the ALJ found, the contracts contain no express provision concerning possession, and therefore, under a common law interpretation, the right to possession remains with the party retaining title. (I.D. 371) However, respondent notes that in each of the three states in which its developments are located, the buyer receives an "equitable estate." (RAB 61)

proceeding and therefore is not properly before the Commission. The ALJ believed that paragraph 54 of the complaint put the practice into issue (I.D. at 7), while complaint counsel suggested that it is raised also by paragraph 4. (C. Ans. 64) We disagree. Paragraph 4 simply describes respondent's sales contract; it does not challenge its legality. Paragraph 54 is a broad "catch all" charge that AMREP's continued retention of *any* funds is unlawful because they were obtained through deceptive and unfair practices. The paragraph does not distinguish between interest payments and any other payments made by buyers to respondent. In examining the record, it is clear that neither complaint counsel nor respondents introduced any evidence or arguments concerning the practice of charging interest. We find that the issue was not raised at trial, and therefore is not properly before us at this time. Accordingly, we reverse the ALJ's finding on this point.

B. Alienability of Land

Respondent's standard land sales contract for Rio Rancho, Eldorado, and Oakmont Shores provides that the purchaser can transfer his contract only with the consent of respondent. The Rio Rancho clause, for example, provides that: [65]

[T]his Purchase Agreement and any rights or interests hereunder are transferable by Buyer only with written consent of Seller on forms furnished by the Seller and upon payment of a transfer fee, provided all payments due under this agreement to the date of transfer shall have been made.

(CX 155 B)

The ALJ found that such a clause, appearing in an adhesion contract, was an "oppressive" and "unfair" provision which deprived buyers of their right to transfer their property without restriction. (I.D. 388)

We reverse the ALJ's finding on this point simply because the issue of the fairness of this provision was not raised in the complaint or litigated before the ALJ, as conceded by complaint counsel. (C. Ans. 64) In passing, however, we would note the failure of the record to show any consumer harm, since there is no evidence to suggest that respondent ever withheld permission to transfer or that consumers were discouraged from transferring because of the existence of the clause in the contract. Therefore, we reverse and grant Respondent's appeal on this point.

C. Integration/Disclaimer Clause

Paragraphs 36 and 37 of the complaint charged that it was an unfair practice for respondent to include an integration clause in its

form contract in the face of numerous oral sales claims which differed in material respects from the terms of the contract.

The ALJ found that respondent used a standard integration clause in all of its land sales contracts.⁷³ In addition, respondent also included a disclaimer that "no oral representations have been made to induce Buyer(s) to enter into this [66] agreement" in contracts at Silver Springs Shores and Oakmont Shores. (I.D. 384).

The ALJ found that both clauses were unfair. Although the clauses would not, in fact, have precluded buyers from showing oral representations in a suit against respondent for fraud, Judge Teetor found that the clauses would have the tendency to mislead buyers into believing that they would be so barred. Citing *Automobile Owner's Safety Insurance Co.*, 53 F.T.C. 956, 961 (1957), the ALJ found that "such provisions might discourage in some instances the making of otherwise valid claims."

In *Horizon*, we reversed a similar finding by the ALJ that an integration clause in a standard form land sales contract was unfair in the absence of any record evidence that buyers were, in fact, discouraged from asserting their legal rights against Horizon Corporation. There, we noted:

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 the respondent misrepresented the operation of the clause, we decline to find that respondent's use of such clause constitutes an unfair practice. *Horizon, supra*, at 848.

The record in the instant proceeding is equally devoid of evidence that consumers were discouraged from bringing suit against respondent by the presence of the integration clause in their contracts. Consequently, we reverse the ALJ on this issue.

Respondent's contracts for two developments, Oakmont Shores and Silver Springs Shores, contain the additional disclaimer that no oral representations had been made to induce the purchaser to buy. Considering the substantial evidence concerning respondent's well-organized sales presentation, filled with deceptive oral claims, the contract disclaimer is clearly false. While requiring consumers to sign a contract containing a patently false representation is reprehensible, it is not legally "unfair" under Section 5 in the absence of any showing of unjustified, substantial and unavoidable consumer injury. As with

⁷³ A typical clause appears in the Rio Rancho sales contract, as follows:

I [We] understand that by signing below I am [we are] offering to purchase the lot(s) on the conditions set forth, and it is agreed that this Purchase Agreement sets forth the entire agreement between the parties, that no agent or representative of the Seller shall have any authority whatsoever to change or modify this Agreement in any manner, or to make any other agreement or representation on behalf of the Seller, and that if Rio Rancho Estates, Inc. signs a copy hereof this will be a binding contract, which may not be modified or amended except in writing, signed by Buyer and Seller. (CX 286 A)

the integration clause, the disclaimer would not bar a buyer from showing oral claims in a suit against respondent for fraud. Further, the record does not show that consumers were discouraged from bringing such a suit for fear that evidence of oral claims would not be admitted. Since the record is silent as to consumer injury, we must reverse the ALJ's finding on this point. [67]

D. Forfeiture Clause

Respondent's sales contracts for each of its four developments contain versions of a "forfeiture clause." Under this clause, upon default of the buyer,⁷⁴ respondent recovers all rights to the land and, in addition, retains all payments made by the buyer (including taxes, interest, and assessments) as "liquidated damages." The contracts make no distinction between an early default and a late one.

The complaint charged, and the ALJ found, that respondent's inclusion and enforcement of the forfeiture provision in its standard form contract were unfair practices in violation of Section 5. (Complaint paragraphs 40-41; I.D. 383) In essence, the ALJ believed that the land sales contract should most equitably be considered a mortgage, in which the principal right of the creditor is "to the money and his right to the land is only as security for the money." (I.D. 378) Judge Teetor found it "grossly unfair" that respondent should be entitled to the payments as well as to the land securing the payments.

The Commission considered a similar forfeiture clause in *Horizon*. There, the Commission concluded that a 100% forfeiture clause, appearing in an adhesion contract for the sale of land, signed in an atmosphere of high pressure sales tactics, unequal bargaining power and deceptive misrepresentations, violated Section 5's proscription on unfair practices. *Id.* at 848-852. In determining that the forfeiture clause in *Horizon* was unfair, the Commission found that the clause had caused substantial consumer injury by permitting Horizon to retain sums greatly in [68] excess of any actual damages occasioned by the purchaser's default. Further, the Commission found no evidence of any countervailing benefits to consumers or to competition from the 100% forfeiture clause, and concluded that consumers could not have readily avoided the injury because they were unable to bargain over such clauses, contained in a contract "adhesive in nature

⁷⁴ A typical provision is found in the Rio Rancho contract, Guarantees and Conditions of Sale (CX 155 B):

If Buyer shall be in default for a period of 60 days in the making of any payments exactly as due, Seller shall have the right to terminate this Contract by mailing to Buyer notice in writing of its election to do so, sent by registered or certified mail. If within 14 days after Seller so mails such notice, Buyer does not pay in full all payments then in default (i) all rights of Buyer hereunder and in and to the lot(s) described on the first side shall cease and terminate, and (ii) all payments made by Buyer may be retained by the Seller, as liquidated damages and not as a penalty.

Respondent's contract at Silver Springs Shores contained a sliding scale of grace periods, geared to the percentage of price already paid in.

and signed in an atmosphere of deceptive misrepresentations.” *Horizon, supra*, at 850. While the Commission’s conclusion that the clause caused unavoidable, unjustified and substantial consumer injury would have been sufficient to sustain a finding of legal “unfairness,” additional support for the Commission’s conclusion came from an examination of public policy contained in the common law against unconscionable contracts negotiated in an atmosphere of deception, the Uniform Commercial Code, and the developing trend in state and federal law toward the imposition of limitations on forfeiture clauses in installment land sales contracts. We concluded from these sources that there was a clear public policy against harsh contract terms, such as the 100% forfeiture clause in this case, which are unreasonably favorable to one party when the other party lacks meaningful choice because of deception in the inducement of the contract. *Id.* at 851.

A very similar pattern of practices has been demonstrated here. As noted above, respondent’s contract has elements of an adhesion contract, being offered as a “take-it-or-leave-it,” non-negotiable agreement between two parties of vastly disparate bargaining power. The high pressure sales campaign, combined with serious misrepresentations about the nature and the value of the investment being offered, negate the presumption that such a harsh provision as the 100% forfeiture clause was the product of free bargaining. The forfeiture clause enables respondent to retain sums greatly in excess of any actual damages incurred by the buyer’s breach. The record indicated, and the ALJ found, that respondent’s overhead and sales cost amounted to no more than 40% of respondent’s “cash price.” (I.D. at 277; Larramore, Tr. 16444–16447; Friedman, Tr. 24117; RPF 77) The injury is not theoretical: the record contains specific evidence of substantial consumer injury. (See, e.g., Grimaldi, Tr. 4794–98; Yarnall, Tr. 6154; Reynolds, Tr. 8415.) We find no evidence that the clause provides any countervailing benefit to consumers or competitors. Finally, the authorities cited in *Horizon* establish [69] that such a clause violates established public policy.⁷⁵ Accordingly, applying the rationale developed in *Horizon*, we find that respondent’s 100% forfeiture clause, contained in a contract signed under the pressure of powerful sales tactics, unequal bargaining power, and substantial misrepresentations, causes significant, unjustified and unavoidable consumer injury in violation of Section 5.

⁷⁵ The conclusion that 100% forfeiture clauses cause unjustified consumer injury is bolstered by Congress’ determination in enacting the 1979 amendments to ILSFDA to limit such clauses. (R. Rep. 19–21) Under section 1703(d) of the Act, as amended, any forfeiture provision must provide that the seller can retain, on buyer’s default, no more than the greater of 15% of the purchase price (excluding interest), or actual damages. If a contract fails to contain such a provision, the buyer is entitled to cancel at any time and for any reason within two years from the date of purchase and to receive a full refund of all monies paid. See section 1703(e).

VI. PROCEDURAL ISSUES

Respondent raises a host of procedural and evidentiary errors on the part of the ALJ. (RAB 2-18) Some of those are discussed elsewhere in this opinion. We find no showing of impropriety or a clear abuse of discretion in respondent's allegations of error concerning a variety of discovery and evidentiary rulings. For the most part, the allegations made deal with credibility of witnesses and exhibits, admissibility and relevance of evidence, and scope of discovery, rulings which are within the ALJ's scope of discretion. In this section, we deal with those allegations of errors that merit some discussion. Unless otherwise stated herein, we affirm the ALJ's decision and reject respondent's procedural appeals.

A. Consideration of the Entire Record

Respondent alleges that the Initial Decision is defective because it is not based on a consideration of the whole record, as required by the Commission's Rule of Practice Section 3.51(b)(3). (RAB 2-6) As evidence, it points to the ALJ's failure to give credence to or even mention the testimony of several of its witnesses and documentary exhibits.

The ALJ is not required to discuss the testimony of each of the nearly 250 witnesses or the 1500 exhibits that were presented at the extensive administrative proceeding in this case. Rather, he is required to make findings on those issues of fact, law or discretion which are material and to support those rulings by the record evidence which he finds reliable, [70] probative and substantial. Rules of Practice 3.51(b). *Stauffer Laboratories, Inc. v. FTC*, 343 F.2d 75, 82 (9th Cir. 1965). See also, *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349, 359 (1936). In any event, the Commission has independently reviewed the record in making its determinations of fact and law, and the Commission, not the ALJ, has the ultimate responsibility for finding of facts. Consequently, the failure of the ALJ to refer to parts of the record is not prejudicial to the respondent and does not constitute reversible error. *Standard Distributors, Inc. v. FTC*, 211 F.2d 7 (2d Cir. 1954).

B. Ex Parte Communications

Respondents claim that they were prejudiced by *ex parte* communications between complaint counsel and the Commission. (RAB 12-13) The contacts at issue occurred in 1978 when complaint counsel sought Commission authorization to intervene in certain class action lawsuits pending against AMREP in federal court. After the close of the administrative record, respondent moved to reopen the proceeding

and to have all *ex parte* materials disclosed to it; in July, 1978, all such relevant materials, including complaint counsel's memorandum to the Commission, were placed on the public record. The ALJ denied respondent's motion and refused to certify an interlocutory appeal since the Initial Decision was due shortly. Respondent then filed suit seeking interlocutory review of that decision in United States District Court. *AMREP v. Pertschuk*, No. 79-0491 (D.D.C. Apr. 6, 1979), *aff'd*, No. 79-1592 (D.C. Cir. Apr. 30, 1980). In denying AMREP's requested relief, the district court noted that all "existing *ex parte* communications even remotely related to [AMREP] have been disclosed and are on the public record" and that the proper forum for raising its arguments of prejudice was on appeal before the Commission.

Despite this notice, respondent has failed in its appeal brief to discuss the manner in which the *ex parte* contacts in this case have allegedly deprived it of due process or prejudiced its right to a fair hearing. Instead of presenting its argument on appeal, respondent moved for a hearing to introduce evidence, comment and argument concerning *ex parte* communications, which was denied by the Commission on February 19, 1980.⁷⁶ It is evident that respondent has chosen not to raise this issue on appeal, although it is clear that respondent was well aware that it had the right to do so and had sufficient time in which to do so. Accordingly, we find that respondent has waived its right to raise this issue on appeal. [71]

C. Brady Ruling

Respondent challenges the ALJ's "inconsistent" treatment of certain discovery requests. (RAB 12) While the ALJ granted complaint counsel's request for an expansion of its documents and witness lists, he denied respondent's request that complaint counsel provide all exculpatory materials in complaint counsel's possession or control, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

We see no basis for error. We have previously held that the rulings of *Brady* and its progeny are inapplicable to administrative proceedings. *Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969). The fact that the ALJ found reason to grant complaint counsel's request to expand their witness and document list does not support respondent's conclusion that its *Brady* request should similarly have been granted. The ALJ granted complaint counsel's request, notwithstanding his previous turnover order, because he was entirely satisfied with complaint counsel's explanation for and good faith in not submitting the supplementary nominations earlier, and found that the additions would not

⁷⁶ Order Denying Motion for a Hearing to Introduce Evidence, Comment and Argument Concerning Ex Parte Communications, (February 19, 1980).

result in unfairness to, or an undue burden on, respondent.⁷⁷ We have repeatedly stated our intention to grant ALJs discretion in conducting discovery, and absent a clear abuse of that discretion, we find no reason to disturb the ALJ's determinations.

*D. Reliance by ALJ on Respondent's Conviction
in the Criminal Trial*

Respondent also protests that the ALJ relied on the conviction in *U.S. v. AMREP Corp.*, 560 F.2d 539 (2d Cir. 1977), in arriving at his "heart of the case" finding that respondent misrepresented the growth, development and investment value of its properties. (RAB 18-19) This reliance was improper, respondent asserts, because the ALJ had previously ruled that he would consider the evidence in this proceeding *de novo*. In reliance on this ruling, respondent says it did not introduce evidence in explanation or mitigation of the jury verdict.

We see no error. The ALJ's Initial Decision demonstrates a thorough and independent review of the administrative trial record, and—as he states—his conclusions are based on that record. In referring to the criminal conviction, the ALJ merely notes that his own findings are virtually identical to the facts cited by the Court in *U.S. v. AMREP Corp.*, *supra*. (I.D. p. 265) [72] We see no prejudice to respondent of its right to a full *de novo* proceeding on all the facts at issue, and we do not rely upon respondent's conviction in our findings.

E. The Commission's "Reason to Believe" Determination

Respondent argues that the ALJ erred in striking respondent's affirmative defense that the Commission did not have "reason to believe" that respondent had violated the law when it issued the complaint. (RAB 11) While respondent fails to present any argument in its appeal brief as to why it believes that the Commission did not have "reason to believe" at the time it issued the complaint, it appears from the record that respondent alleges that there had been no investigation of Oakmont Shores and Silver Springs Shores to indicate any law violations at the time the complaint was issued. (C. Ans. 13-14; R. Rep. 8-9)

Respondent is not entitled to litigate this issue during the administrative proceeding, which should be concerned with proving whether the allegations of the complaint are supported by evidence.⁷⁸ Permitting litigation on the sufficiency of the pre-complaint investigation or

⁷⁷ Complaint counsel explained that the delay was due to the unavailability of the information because of its use in the concurrent criminal proceedings against AMREP in federal court in the Southern District of New York.

⁷⁸ If the Commission's "reason to believe" determination is reviewable by a court of appeals, and if the court of appeals finds that the record is inadequate to review the determination, it could order the Commission to take additional evidence under Section 5(c) of the FTC Act. *FTC v. Standard Oil of Calif.*, 449 U.S. 232, 244-245 (1980).

the Commission's determination of "reason to believe" would only invite delay into the hearing process. See *All-State Industries of North Carolina, Inc.*, 74 F.T.C. 1591, 1592 (1968).

VII. COMPLAINT COUNSEL'S APPEAL

Complaint counsel have appealed certain decisions of the ALJ denying proposed relief.

The first ground of the appeal is that the Commission should reinstitute the relief requested in Section IV of complaint counsel's proposed order, which would prohibit AMREP from selling any land as a "homesite" or "building lot" unless the land met certain conditions and respondent makes certain cost disclosures in the contract. It is clear that the ALJ intended to include this provision in his order, but simply overlooked it. (I.D. p. 282) Respondent does not dispute this point.

However, the Commission believes that a simple ban on misrepresenting a lot as a "homesite" or a "building lot," unless it meets certain conditions, is sufficient, and has included such a provision in Part II of the order. The definition of "homesite" has been adopted from current OILSR regulations. The [73] cost disclosures requested by complaint counsel are already required in OILSR regulations to be in the Property Report. Consequently, there is no need to require a separate statement of those costs in the contract.

Complaint counsel's more significant appeal deals with the ALJ's denial of proposed relief which would prevent AMREP from selling any more land at Rio Rancho and the other three subdivisions involved here until such time as a "viable resale market" comes into existence. In addition, AMREP would be required to set up a listing service and help individuals sell their lots. In essence, complaint counsel assert that it is unfair for respondent to continue to sell land in competition with its lot owners who are also trying to sell, particularly considering the vast oversupply of land. Complaint counsel also propose that respondent be required to "buy back" one vacant lot whenever a "building lot" is sold.

There is some justification for complaint counsel's concern that respondent continues to profit from new sales, while buyers who bought in reliance on respondent's deceptive misrepresentations concerning future value cannot resell their lots because of the overwhelming excess of supply of land over the demand. But complaint counsel's proposed relief—an indefinite ban on respondent from making any more sales—is an extremely harsh remedy which could only be justified by a compelling showing that no less intrusive remedy would be sufficient to stop continuing, substantial consumer injury. That showing has not been made here. Complaint counsel's proposed

relief is neither necessary nor likely to result in the stimulation of a resale market. In the first instance, we see no harm in respondent continuing to make sales of land, as long as those sales are made fairly and free from deception. Consumers who are fully cognizant of the risks, who have not been misled as to any short-term investment potential, and who have been able to visit the land to inspect it without harassment from the seller, should have the opportunity to buy respondent's land if they want to. To the extent that respondent can continue making sales, it will add some revenue to the company which may enable it to continue the slow process of development around the core areas. Cutting off revenue to respondent resulting from fair sales may have the unwanted effect of destabilizing whatever market forces there may be for continued development.

VIII. THE ORDER

Complaint counsel has not sought restitution in this Section 5 case. To the extent that buyers are entitled to restitution or redress for past injuries caused by respondent's deceptive and unfair practices, such restitution or redress must be sought in this case in a proceeding under Section 19 of the FTC Act, 15 U.S.C. 57(b). We agree with the ALJ that the record of this case satisfies the statutory requirements of Section 19 for consumer redress. See *FTC v. MacMillan Inc. and [74] LaSalle Extension University*, No. 81 C6053 (N.D. Ill., Aug. 3, 1983); *FTC v. Turner*, CCH 1983-1 Trade Cas. ¶ 65,244 at 69,448 (M.D. Fla. December 29, 1982). At such time as the Commission's order in this case becomes final, the Commission will consider whether to seek consumer redress for the acts and practices discussed herein, in accord with the provisions of Section 19.

We adopt much of the basic order proposed by complaint counsel and adopted, in large part, by the ALJ. While there have been a number of significant changes, as discussed in more detail below, the Commission finds that the basic provisions of the proposed Order are necessary to stop ongoing deceptive and unfair practices of the respondent, and to prevent the use of such practices with respect to other land sales activities the respondent may engage in in the future. The first section, Part I, contains several definitions. Part II limits certain representations with respect to any unimproved land respondent may sell and requires respondent to substantiate future investment value claims. Part III requires respondent to deliver a pre-sale Notice to Buyers which will inform them of the purpose of the sales presentation and provide buyers with important pre-sale information. Part III also requires certain warning disclosures in promotional materials. Part IV requires respondent to include in its land sales contracts a number of important rights for buyers, including an op-

tion to cancel within 7 days after buying. Part IV also requires respondent to contractually bind itself to provide utilities or facilities if it represents that such utilities or facilities will be provided, and to provide certain refunds to buyers who default. Part V contains a number of miscellaneous provisions. It requires respondent to make disclosures about respondent's building exchange lot program, and to provide buyers who have visited their property within 6 months a notice of a right to cancel after inspection. It further bars respondent from enforcing the 100% forfeiture clause in any existing contract, and requires respondent to send a letter to its lot buyers informing them of this Order. Part VI requires respondent to police its sales activities to ensure that its employees or agents are complying with the terms of the Order.

On the whole, the Order is designed to ensure that consumers approach the sophisticated, hard-sell tactics of the respondent forearmed with some knowledge. [75]

A. Part I — Definitions

A number of changes have been made in the Order's definitions proposed by the ALJ. In some instances, the changes have been made to make the definitions clearer and simpler (e.g., the definition of "Property Report") or to avoid the need for repetition within the order (e.g., definition of "AMREP").⁷⁹ Other changes are intended to limit the scope of the order. For example, the order has been limited to apply only to the sale of land which is not improved by commercial or residential building. The record evidence demonstrates abuse only in the sale of unimproved land and complaint counsel urge an order only with respect to such land. The factors involved in the selling of improved property are likely to differ considerably from those involved in the sale of vacant subdivided land to distant purchasers, and the order provisions designed to address the practices demonstrated in this record might not be appropriate in sales involving improved property. Accordingly, we see no reason to extend the order to cover the sale of improved real estate. While not binding on us, we note that complaint counsel and respondent are in agreement that this limitation on the scope of the order is appropriate. (RAB 66; C. Ans. 68) Certain definitions have been dropped in view of the Commission's decision to deny complaint counsel's appeal for further relief (e.g., "resale market" and "development land"). Finally, other definitions were revised so that they would more closely conform with the regula-

⁷⁹ The Order's definition of AMREP makes clear that General Development Corporation, which purchased Silver Springs Shores from AMREP in early 1983, is not bound by the Order. This provision is pursuant to the Commission's Order of September 30, 1982, binding General Development Corporation to certain offers and improvements at Silver Springs Shores in exchange for the Commission's agreement not to hold it liable as a successor or assign to AMREP under any final order.

tions of the Office of Interstate Land Sale Registration (e.g., "home-site").

B. Part II—Misrepresentations

Part II of the Order addresses the use of certain representations typically made by respondent and its sales representatives during the course of selling land at the four subdivisions involved here. While portions of Part II are similar to the proposed Order adopted by the ALJ, we have made substantial revisions in other portions. As proposed, the ALJ's Order was too broad and could have had the effect of precluding [76] respondent from providing potentially helpful—and truthful—information to prospective buyers.⁸⁰

The most important revision relates to the claims which are at the heart of this case: representations that the vacant land offered for sale constitutes an excellent investment opportunity. Rather than simply barring respondent from making such claims in the future, the Order as revised adopts a substantiation standard which will permit respondent to make limited claims with respect to investment potential in the future, provided that it has, at the time the claim is made, adequate substantiation to support the claim. While the complaint alleged simply that respondent's claims were false, and did not charge that respondent failed to have adequate substantiation, a substantiation requirement is justified here as a "fencing-in" provision to prevent respondent from engaging in similar conduct in the future. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). See also *Bristol-Myers Co., et al.*, Docket No. 8917 (Opinion and Order, July 5, 1983) [102 F.T.C. 21]. Further, a substantiation requirement, as opposed to a strict and potentially overbroad ban, serves the public interest by enabling respondent to provide truthful and not misleading information to potential buyers who might be interested in the investment potential of land.

The Order distinguishes between claims concerning past or present facts, which are verifiable and readily substantiated by a variety of objective data, and claims about future investment value, which are inherently forecasts or predictions. Part II(A) requires that, if respondent represents that any land has been a good or safe investment, or that the demand for, or market value of, any land has increased, or that the resale of any land has not been difficult, respondent must substantiate those claims with competent and reliable data. At a minimum, the data must include historical data of sufficient actual individual resales of lots in the same subdivision (and in the same

⁸⁰ The right to engage in truthful and nondeceptive commercial speech is, of course, protected by the First Amendment. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *American Home Products Corp. v. FTC*, 695 F.2d 681, 713-714 (3d Cir. 1982).

condition) to demonstrate that the claim is representative of the typical buyer. In essence, Part II(A) requires respondent to have an actual track record of individual resales before it can make claims as to past or present trends affecting investment value. The scope of this section of the Order applies to any unimproved land, not just land sold by respondent or land at the four subdivisions involved here. Such a broad scope is necessary to prevent future violations of the FTC Act. [77]

Part II(B) of the Order addresses respondent's use of forecasts or projections of future trends that affect investment value. Such statements are, of course, predictions or opinion. While consumers might ordinarily be expected to resist simple expressions of opinion about the probability of future events, where, as here, a seller engages in a course of deceptive misrepresentations and high pressure sales tactics representing itself as an established and reputable community developer, expert in land sales and land valuation, and makes representations about the future value of land which do not honestly represent its own opinion, such representations must be carefully circumscribed to prevent further deception. Consistent with past Commission policy of opting for disclosure over prohibition where feasible, *American Home Products v. FTC*, 695 F.2d 681, 713 (3d Cir. 1982), Part II(B) sets out three requirements.

First, respondent must possess and rely upon all reasonably available competent and reliable evidence at the time it makes such a claim. This provision requires respondent to make a reasonable search for data supporting or refuting its forecast or projection.

Second, the data relied upon by respondent must be sufficient so that it would be generally accepted by the community of experts qualified to make such representations as providing a reasonable basis for the projection or forecast. Obviously, what such data will consist of will vary, depending on the nature of the claim made. A highly specific representation will probably be easier to substantiate under this claim than a broad claim of future investment value. In any event, the Order incorporates an objective standard which will look to the standards of the relevant expert community in determining whether the data relied upon provides a reasonable basis for respondent's opinion.⁸¹ [78]

Third, at the time any such representation is made, the Order requires respondent to provide to the buyer a copy of a written state-

⁸¹ In a strict sense, the term "reasonable basis" is not used in the same sense as it appears in other Commission deceptive advertising cases. See, e.g., *Pfizer, Inc.*, 81 F.T.C. 23 (1972). A reasonable basis usually implies that a claim is backed by sufficient objective data relating to a verifiable performance claim to lead the maker of the claim to believe that the claim is, in fact, true. Such a standard is not appropriate for a statement of opinion about future events, which are by their very nature not objectively verifiable at the time that they are made. For such claims, it is sufficient that the maker of the claim has relied upon the type and quality of data which experts in the field would reasonably rely upon in making such a prediction.

ment containing the material bases and assumptions for the representation, and disclosing the buyer's right to inspect respondent's substantiating data on request, which respondent is required to honor. This provision is intended to give the buyer the opportunity to weigh the probativeness of respondent's data and to make an individual determination about the weight to be given it. Such information may also prove very helpful to any professional assisting the buyer in evaluating the purchase opportunity. This disclosure provision is similar to provisions which the Commission has adopted with respect to projections and forecasts in other contexts.⁸²

Part II(C) of the Order prohibits respondent from misrepresenting certain facts in the future.

Part II(D) prohibits respondent from engaging in certain other sales practices, which, while not necessarily deceptive or unfair in and of themselves, have the capacity to prevent reasoned consideration and to make the buyer more susceptible to deceptive statements and practices. (I.D. pp. 264-265) Provisions variously prohibit discouraging buyers from seeking assistance; failing to give the required property reports; filling out a contract before the buyer says he wants to buy; sending in new sales representatives after the buyer has decided he doesn't want to buy; making any statements about the buyer's rights or duties, or the development of the land, which differ from the contract or the property report; and using contract provisions which allow the seller to retain more than the amounts allowed in Section IV(F) of the Order in the event of the buyer's default.⁸³ [79]

C. Part III - Notice to Buyers and Disclosures in Promotional Materials

Section III of the Order requires respondent to give to buyers, at least two days before any in-person meeting, a "Notice to Buyers" which contains critical information. We are convinced after our study of this record that a post-sales cooling-off period by itself is not sufficient to give consumers an adequate opportunity to evaluate land offered for sale by this respondent. Indeed, respondent's sales representatives frequently told buyers that they need not pay particular attention to signing the contract since they would have sufficient time to cancel the sale later on. A limited cooling-off period appears not to

⁸² See, e.g., Disclosure Requirements and Prohibitions on Franchising and Business Opportunity Ventures, 16 C.F.R. Part 436.1(b) (1983).

⁸³ We have dropped a provision found in the ALJ's Order which prohibited respondent from "artificially enhancing" the appearance of its subdivisions in its promotional films. Complaint counsel failed to produce probative evidence that such "enhancements" were material or that they had any tendency or capacity to deceive consumers. (I.D. 64.1) We have also dropped the ALJ's order provision prohibiting respondent from representing that its promotional materials had been produced independently of respondent when respondent had influenced the materials. The ALJ made only very cursory findings on this issue. (I.D. 64, 64.2) The record does not contain sufficient evidence to support a finding of deception, and a fencing-in prohibition does not seem necessary since such conduct does not appear to be integrally related to respondent's deceptive conduct in this case.

give consumers an adequate chance to shake off the fevered excitement created by the respondent's carefully structured sales presentation. Consequently, we find that a limited pre-meeting disclosure notice, which gives a prospective buyer time to decide whether or not this is an offer he or she wishes to hear more about *before* being subjected to respondent's lulling claims, is necessary to prevent further deceptive sales practices. Warning consumers that they will be subjected to a sales pitch for land enables consumers who know that they are susceptible to such pitches to simply stay away and avoid temptation. However, we have made a number of changes to make the document as brief as possible, to help ensure that buyers will actually read and use the information it contains. Further, we agree to some extent with respondents' arguments that the Notice, as proposed, was unduly prejudicial and would, in fact, have effectively foreclosed any sales. In particular, we have deleted the proposed disclosure of AMREP's criminal conviction.⁸⁴ We believe that strict compliance with this Order will be sufficient to prevent the abuses we have seen in the past and require AMREP to conduct its business operations in a fair and honest manner in the future. [80]

We have also deleted provisions requiring disclosures summarizing plans for development and respondent's responsibility for them. Generally, the record does not contain evidence that respondent misrepresented the present state of development of its subdivisions or its obligation to install utilities and facilities. These required disclosures therefore are unnecessary. In addition, the same disclosures are required to be in the HUD property report, which under the 1979 amendments, must be given to buyers *before* the sales presentation. 15 U.S.C. 1703(a). Including the same disclosures in our pre-sale notice to buyers is likely to cause consumer confusion and could thereafter overwhelm the prospective buyer with too much information. We have also deleted the proposed requirement that respondents establish a toll-free telephone number; we simply fail to see the utility of such a provision.

Paragraph III(B) of the Order requires respondent to include a disclosure in all printed promotional material warning buyers that the future value of land is very uncertain. Part III(C) requires respondent to include in all other promotional materials, including television and radio commercials, a brief disclosure advising buyers to get the property report and read it before buying anything.

⁸⁴ Respondent is already required to disclose the criminal conviction of several of its officers in the federal property report under OILSR regulations. See 24 C.F.R. 1710.116(c). In addition, it would be required to disclose the present administrative action. Several state laws also evidently require the prominent disclosure of criminal convictions, as evidenced by some of the state property reports in the record. See, e.g., RX 1738.

Of course, nothing in the Order will affect any additional disclosure requirements required by state or federal laws or regulations.

Respondent argued that these disclosures are inconsistent with OILSR regulations which only require a reference to the property report in printed materials, and that the Commission should limit itself to such relief. (RAB 70) We disagree for several reasons. Most importantly, we have found that respondent has engaged in an extensive campaign of deception and unfair practices. Under such circumstances, what requirements Congress or HUD might choose to impose on law-abiding companies may be insufficient for the law violator. In such cases, the Commission is permitted to fence in the respondent and go beyond what may be required generally of other companies in order to avoid future law violations. We think that it is clear from the record that respondent has very effectively used slickly produced films and carefully scripted dinner party presentations to market its land as a good, profitable investment. These minimal disclosures are therefore necessary in non-printed material. Further, warnings in written materials about this respondent in addition to those required for other land sellers are altogether warranted.

D. Part IV - Contract Provisions

Part IV provides significant protection for future buyers of land from respondent. It requires certain protections and disclosures to be included in contracts, including requiring respondent to give buyers the right to cancel within seven business days after signing the contract and within seven days after visiting the land (within six months after signing the contract), provided that the land was not seen prior to the [81] sale. However, while the general provisions remain similar to the ALJ's order, we have made a number of important modifications.

Part IV(A) requires respondents to title their contracts for the purchase of land as such and to cease using deceptive and confusing titles, such as "Reservation for the Purchase of Land" which are inaccurate descriptions of the contents of the document and which can easily mislead consumers.

Part IV(B) sets out the significant "cooling-off" provision which enables consumers to cancel their purchase, for any reason, within seven days of the purchase. We have made a number of changes in the Order proposed by the ALJ in order to make the provision more closely conform with the OILSR regulations and with orders in effect against other land sales developers. Some of these changes are discussed below.

First, the language of the disclosure has been modified slightly to eliminate any inconsistency between the language required by the Order and by OILSR regulations. 24 C.F.R. 1710.209(F)(3)(i). While OILSR and the Order each require *additional* disclosures, the disclo-

asures which overlap are now identical so that unnecessary duplication of language is avoided. In addition, the cooling-off period has been shortened from the 10-day period found in the ALJ order to seven days, as contained in the OILSR regulations. Considering the additional protections for AMREP's customers in this order, we see no reason to depart in this instance from the seven day cooling-off period required for all other land sellers.

The ALJ's order would have prevented all communications between the buyer and the seller during the cooling-off period. The record shows that some limitation on the ability of the seller to make further pitches or create additional sales pressure during this time is necessary; however, the ALJ's order goes too far. Respondent may have a valid non-sales reason for contacting the buyer during the time, such as checking (per Section VI) to make certain that the buyer has received all of the documents required by this Order or that no contrary claims have been made. Similarly, the buyer may well have the need to obtain additional information. The ALJ's order is also deficient in that it provides the buyer the right to cancel and receive a full refund at any time prior to the final payment if there is a sales contact during the cooling-off period. Such a penalty goes too far; allowing the buyer to receive a full refund eight years following the alleged contact puts respondent in an impossible position to verify whether a violation of the Order has in fact occurred. A more modest approach has been adopted here, one which is designed to address the particular harm caused by the sales contact. If a contact occurs, the buyer's cooling-off period will be extended to 45 days from the date of purchase, provided that the buyer notifies the seller of the contact.

[82]

The disclosure required in Paragraph D of the ALJ's order has been simplified and incorporated into the single disclosure required in Paragraph B of this Order.

The form of the cancellation notice adopted by the ALJ in his Paragraph E has been deleted entirely. The notice of the cancellation right is prominently announced in the contract, and additional papers might distract the buyer from carefully considering the contract. Further, the federal property report, which now must be given to prospective buyers before a sale, contains a cancellation notice and a cancellation form. We have also dropped the requirement that respondent orally inform the consumer of his or her right to cancel. Such a provision is virtually unenforceable; in addition, the written notice is sufficient to put the buyer on notice of his right to cancel.

Part IV(C) of the order requires AMREP to refund and cancel within 30 days from receipt of a notice of cancellation. We find that the 10 day period specifically required in the ALJ's order is too short and

inflexible, and therefore adopt respondent's suggestion that it be given 30 days. (RAB 71)

Part IV(D) requires respondent to make any representations that it will install utilities or facilities to be included in the contract for the sale of land. This provision is consistent with ILSFDA and OILSR regulations. 24 C.F.R. 1715.19(f). We do not, however, adopt the suggestion by the ALJ and complaint counsel that we go farther and require all representations in the property report and the Notice to Buyers to be included as part of the land sales contract. While a land seller is free to incorporate the property report by reference into the contract under ILSFDA and OILSR regulations, 24 C.F.R. 1715.19(f)(3), we think it is sufficient here to prohibit respondent from making any representations which are materially inconsistent with the contract, Notice to Buyers, or property report. *See* Part II(D)(5).

We also decline to require respondent to give buyers the option to get a full refund or an exchange lot in the event that AMREP fails to complete promised improvements within six months of the promised date. As respondent notes (RAB 70), such a right goes well beyond reimbursing the buyer for any damages which the buyer may suffer as a consequence of respondent's failure to make the promised improvements, and is inconsistent with the regulatory scheme set up by Congress in the 1979 ILSFDA amendments, which would give consumers contract damages only. 15 U.S.C. 1703(a)(2)(D). While we required such a right in *Horizon*, there is little evidence in this case, in contrast to *Horizon*, that AMREP misrepresented the state of development, or its development obligations, or refused to honor such obligations. Indeed, AMREP was not contractually bound to install utilities or build facilities, and consequently the proposed provision would add little protection in any event. [83]

Part IV(E) and (F) of this Order require AMREP to give future buyers of land the right to a limited refund in the event of the buyer's default. As discussed in detail above, we have found that the use of the 100% forfeiture clause as contained in respondent's land sales contract, in conjunction with a sales program laced with deception and misleading statements, is unfair and deceptive. We recognize, as did Congress in enacting the ILSFDA amendments, that an honest seller has a right to keep some of the payments made which represent actual damages suffered by the seller as a consequence of the buyer's default. Accordingly, we have adopted the ILSFDA provision which would enable respondent, in future sales under this Order, to retain the greater of 15% of the purchase price or respondent's "actual damages."

However, we do not adopt the additional restriction proposed by the ALJ to put a 40% maximum cap on the amount of "actual damages."

While the record indicates that 40% may be an appropriate estimate of past sales costs associated with some of the subdivisions here (I.D. p. 277), such sales costs may well vary significantly in the future. In any event, the burden will be on respondent to demonstrate that any payments retained in excess of 15% of the cash sales price are justified. Further, the ALJ's Order would have required respondent to refund all interest, assessments, and taxes paid by the buyer. In our view, it is not unfair in a land sales contract to charge a buyer for costs associated with the buyer's interest in the land during the time the buyer is making payments on the principal. That view is also contained in the statutory scheme adopted by Congress in ILSFDA, which permits the seller to retain interest payments. 15 U.S.C. 1703(d)(3). Of course, buyers who have been defrauded may have the right to a total rescission and refund. To the extent that buyers are entitled to such relief, however, it must be sought in this case under Section 19, and not Section 5.

E. Part V—Miscellaneous Provisions

Part V contains a number of significant provisions. Paragraph A, which requires a disclosure about respondent's "exchange right," has been adopted from the ALJ's order. Paragraph B requires respondent to give a buyer who has not seen the land in person prior to purchasing a right to cancel and receive a full refund if the buyer visits the land and chooses to cancel within six months of the signing of the contract. Given respondent's ability to lull consumers by assuring them that they will have the right to cancel after inspection, it is necessary to go beyond the ILSFDA 7-day cooling-off period which applies to all land sellers and mandate certain procedures to ensure that consumers can use that right effectively. For the most part, the Order tracks the Order proposed by the ALJ. Minor revisions have been made to make the order more closely conform to other Orders in effect against AMREP's competitors. The provisions of the [84] order parallel the provisions concerning the right to cancel during the initial "cooling-off" period.

Paragraph I of the ALJ's order would have required AMREP to record all land sales contracts. We see no basis in the record for requiring such conduct, and accordingly do not adopt this provision.

Paragraphs C and D are based on paragraphs L and M of the ALJ's Order. Paragraph C of the Order bars AMREP from attempting to collect any further payments from defaulting buyers whose contracts were signed before the effective date of the Order. This clause, adopted from the ALJ order, is necessary to prevent AMREP from obtaining future profits by enforcing contracts against defaulting buyers where those buyers entered into them in an atmosphere of fraud and

deception. We have, however, adopted respondent's suggestion to permit such payments at the buyer's option. (RAB 72)

Paragraph D prohibits respondent from enforcing the 100% forfeiture clause in existing contracts. The Commission has, however, deleted provisions proposed by the ALJ which related to the standard integration clause since we did not find that the use of such clauses violated Section 5. Similarly, we have also deleted Paragraphs O and P in the ALJ's Order, which would have required respondent to include a contractual clause insuring the free alienability of the buyer's interest, and the extension of all of the buyer's contractual rights to subsequent purchasers or assignees. As we have previously noted, there is no basis in the record for these provisions. In the same vein, the ALJ's added paragraph prohibiting respondent from collecting "interest" has been deleted since this issue was never litigated.

AMREP urges that Paragraphs C and D seek to reform existing contracts and to provide relief for past buyers, which is beyond the scope of the Commission's powers, citing *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). (RAB 65, 72) We do not believe that the relief contained in these provisions is barred by *Heater*. In *Heater*, the Court rejected the Commission's argument that respondent's continued *retention* of funds obtained through unfair and deceptive means was, in itself, a continuing unfair and deceptive practice which could only be remedied by requiring restitution to bilked consumers. The Court rejected this position on the theory that it would

permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview.

503 F.2d 321, 323. [85]

In contrast, Paragraph D is directed to future acts and future harm only—the enforcement of a contract provision, the forfeiture clause, which the Commission has found in this proceeding to be, in the context of the deceptive sales practices engaged in by respondent, unfair and deceptive and in violation of Section 5 of the FTC Act. Until the respondent enforces that clause, upon default by the consumer, or forces payment by threatening that it will enforce that clause, there is no harm. Those consumers who, prior to the Order, lost all of their payments as a consequence of the forfeiture clause, will not receive refunds. That loss must be redressed, if at all, through a Section 19 action. Similarly, Paragraph C prohibits the *future* enforcement of a contract which respondent induced buyers to enter into through deception and unfair practices. Payments made prior to

the Order will not be refunded through this Order, but must be sought, if at all, in a Section 19 proceeding.

The intent of these provisions is to prevent future harm. If, as a direct consequence of the prospective operation of this order, respondent must forego collecting sums which would be otherwise due it, this effect on past contracts is permissible because the effect is only ancillary or incidental to future compliance with the order.⁸⁵ Such ancillary effects of prospective orders are not barred by *Heater*. The Order does not, therefore, afford private relief for past injuries caused by respondent's acts and practices, but rather only prospective relief for acts and practices which have been found to violate the statute. The order simply requires respondent to refrain from engaging in the future in acts which this Order has found to be unfair and deceptive.

Since, in our view, *Heater* does not bar prospective prohibitions on the enforcement of contract provisions found to be unfair and deceptive, we have modified the ALJ's proposed order to cover all existing contracts, regardless of when they were executed. The date of execution of the contract is [86] irrelevant, since the Order relates only to the *future* enforcement of the contracts.

Paragraph E, which prohibits respondent from obtaining waivers of the rights and privileges afforded by this order, is taken directly from the ALJ's order.

Part VI of the Order requires respondent to institute a program of reasonable surveillance to ensure compliance by its employees and agents and to do business only with those agents and employees who agree to follow the terms of the order. It has been substantially taken from the ALJ's order. We have deleted as unnecessary the requirement that respondents create a toll-free telephone line.

Part VI(K) requires AMREP to mail to its buyers a "truth letter," attached to the Order as Appendix A. The Commission believes that buyers must be put on notice about the facts of their purchases to prevent further injury from respondent's deception. The Appendix has been substantially modified to inform the consumers of this order.

Finally, we dismiss those portions of the complaint as to which complaint counsel failed to carry its burden of proof.

⁸⁵ In other contexts, courts have recognized the distinction between payments which constitute a form of compensation for past practices, and payments which must be spent to cease engaging in prohibited past practices. Even where the former relief has not been in the power of the court to order, courts have held that such lack of power does not bar the courts from ordering prospective relief that may involve the expenditure of funds to comply. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 335 n.6 (1979). (While Eleventh Amendment deprives federal courts of jurisdiction to try cases which would require states to pay compensation to private citizens for past practices, it does not bar injunctive relief which would result in a payment of state funds as a necessary consequence of future compliance; see also, *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977).)

IX. Conclusion

We have found that AMREP Corporation has engaged in a sustained campaign of deception and unfair practices. Representing that the vacant lots it offered for sale were excellent, short term investments with little or no risk, respondent portrayed its subdivisions as being poised for rapid suburban or (in the case of Oakmont Shores) recreational development and substantial annual appreciation. In fact, as investments, respondent's vacant lots were unlikely to appreciate in anything but the very long term—if ever. Generally, in each of its subdivisions, there was sufficient land to absorb even the very highest reasonable predictions of growth. As a result, it was unlikely that there would be any local demand for, and corresponding development and appreciation of, respondent's land until the turn of the century. In reality, respondent's lots were poor investments with substantial risk.

Once respondent had whetted potential buyers' appetites for profit, it used a variety of high pressure sales techniques to get buyers to sign sales contracts. In conjunction with its pervasive misrepresentations, we found that some of those tactics were deceptive.

Finally, once the contract was signed, respondent locked the buyer into the contract by including a provision which permitted respondent to keep all of the money the buyer had paid in, if the buyer defaulted. We found that 100% forfeiture provision to be unfair. [87]

The Order we adopt today will permit AMREP to market its land honestly. It will be required to substantiate investment value claims, and refrain from misrepresentations. A Notice to Buyers will provide prospective buyers with important pre-sale information, and warnings in promotional materials will be required. Required contract provisions include warnings and protections, including a 7-day cooling off period and a right to cancel after a personal inspection of the land. Respondent is banned from using or enforcing a 100% forfeiture clause. Respondent is also required to send a letter to current owners informing them of our decision and their options. Together with the property reports required by state and federal laws, future purchasers will be forearmed in dealing with AMREP.

For the reasons set forth above, the initial decision of the administrative law judge is modified as described. An appropriate order is appended.

*CONCURRING STATEMENT OF CHAIRMAN MILLER**

I concur fully in the result reached by the Commission today. I

* Commissioner George W. Douglas joins this concurring statement.

agree that respondents have engaged in "unfair and deceptive practices" as proscribed by Section 5 of the FTC Act. Further, I support the order and believe that it will prohibit respondents from violating the law, while, at the same time, permitting them to market their properties.

I also concur in the Opinion of the Commission in this matter. However, I do not believe that the standard applied in the analysis of the deception issue was the appropriate one. Throughout the opinion, Commissioner Pertschuk describes various practices of respondents as having the "tendency or capacity" to mislead consumers. I agree that respondents' practices, indeed, have the tendency and capacity to mislead consumers as discussed in the opinion. In my view, however, the Commission's standard in deception cases should be: whether the act or practice is likely to mislead consumers acting reasonably in the circumstances to their detriment.

Any ambiguity regarding the standard to be applied can be dispelled by the Commission protocol on deception. However, despite my fundamental disagreement with the meaning of deception articulated in Commissioner Pertschuk's opinion, I am satisfied that the facts regarding respondents' actions satisfy both the deception standard set forth in the opinion and the deception [2] standard which I believe is appropriate. Accordingly, I concur in the result reached by the Commission in this matter.

Finally, I would note that the Commission has recently adopted procedures to reduce the type of time delays with which this decision has been plagued. In a very real sense, justice delayed is justice denied. It is my sincere hope, one which I know is shared by all of my fellow Commissioners, that in the future the Commission's justice will be swift as well as sure.

FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondent's counsel from the initial decision and upon briefs and oral argument in support of and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted each appeal in part and denied each in part. Therefore,

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission except as otherwise inconsistent with the attached Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist be entered: [2]

ORDER

I.

It is ordered, That for the purposes of this Order the following definitions shall apply:

A. *Property Report* shall mean any and all documents providing information regarding the purchase of land in general or a specific subdivision in particular which are required by federal or state law to be distributed to prospective purchasers or purchasers of land.

B. *AMREP Corporation* or *respondent* shall mean the corporate respondent, its successors and assigns, its officers, directors, agents, representatives and employees, acting directly or through any corporate subsidiary, division, or other device; *provided, however*, that pursuant to the Commission's Order of September 30, 1982, nothing in this Order shall be deemed to apply to General Development Corporation as a result of its purchase of property at Silver Springs Shores from AMREP Corporation.

C. *Land, property* or *lot* shall mean any real property unimproved by a commercial or residential building sold or offered for sale by respondent.

D. *Vacant land, vacant property* and *vacant lot* shall mean any land which is not a *homesite*, as that term is defined in this Order.

E. *Homesite* or *building lot* shall mean any lot in which (1) potable water is available at a reasonable cost; (2) the lot is suitable for a septic tank operation or there is reasonable assurance that the lot can be served by a central sewage system; (3) the lot is legally accessible; and (4) the lot is free from periodic flooding.

F. *Purchaser* or *buyer* shall mean any individual who is a potential or actual vendee of the property being offered for sale or sold by respondent.

G. As used in this Order, a requirement to cease and desist from representing or misrepresenting shall include representing, or misrepresenting, directly or by implication, and by any manner or means.

[3]

II.

It is ordered, That respondent AMREP Corporation, in connection with the advertising, sale, offering for sale, contracting, or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do cease and desist from:

A. Representing that:

1. The purchase of any land has been a good, profitable, safe or sound investment;
2. The demand for, or market value of, any land has increased;
3. The resale of any land has not been or is not difficult;

unless such representation is true and is not misleading, and unless, at the time such representation is made, respondent possesses and relies upon competent and reliable data which substantiates the representation, including, at a minimum, data of individual resales (including all resales and attempts to resell which are either known, or with the exercise or reasonable diligence, should be known, to respondent) of similar land (land with the same characteristics and degree of development) within the particular subdivision which are sufficient to demonstrate that the typical owner of such land is likely to have achieved the results represented.

B. Representing that:

1. The resale of any land is not likely to be difficult;
2. The supply of land available to meet present or future demand is likely to be limited for any reason;
3. The demand for, or market value of, any land is likely to increase;
4. Development (including residential development) of any land is likely to occur within a certain period of time;
5. The price set by respondent for any land is approximately equal to the fair market value of such land; [4]

unless, at the time such representation is made: (1) the competent and reliable evidence reasonably available to respondent would be generally accepted by the community of experts qualified to make such representations as providing a reasonable basis for the projection; (2) respondent possesses and relies upon such data for its representation, which data respondent shall make available for inspection by any buyer on request; and (3) respondent provides the buyer with a copy of a written statement containing the representation and disclosing the material bases and assumptions therefor, and disclosing the buyer's right to inspect respondent's substantiating data on request.

C. Misrepresenting:

1. The legal ramifications of signing a contract, through any means including, but not limited to, making representations that the buyer is only making a deposit, is only reserving the land, is only taking the first step, or is not making a final decision;

2. The market value, or change in market value, of any land;

3. Population data, the direction of population growth, or other geographic or demographic data or trends;

4. Characteristics of investments of any sort, including stocks; the stock, commodity or options market; savings account or certificates; annuities; or land as an investment;

5. The purchase, reservation, contracting or consideration by any individual other than the immediate buyer, of any land, through means including, but not limited to, references to anyone else "holding" a piece of property or "deleting" a listing;

6. Respondent's reputation, size, assets, or listing on any stock exchange;

7. The present, planned, proposed or potential development of any land by anyone other than respondent;

8. The true nature and purpose of any promotional event or activity, including, but not limited to, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sight-seeing tours. [5]

D. Engaging in the following acts or practices:

1. Discouraging buyers 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 property report before the customer signs a contract;

3. Filling out a contract with a purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he or she 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 efforts from any sales representative or other employee other than the original sales person, .e., any institution of a "T.O." or "takeover" system;

5. Making any statement or representation concerning the rights or obligations of respondent or the purchaser, or concerning the present, planned, or potential development, improvement, or facilities of the particular land being offered or of the unit, subdivision or project in which the offered land is located, which differs in any material respect from the contract of sale, the property report or the Notice to buyers;

6. Including in any contract, language permitting the respondent to retain any sums paid by the buyer in excess of the amount permitted to be retained by Section IV(F) of this Order upon the failure of buyer to pay any installment due or to otherwise perform any obligation under the contract.

7. Representing that a lot is a homesite or a building lot if the lot is not a *homesite* as defined in this Order;

III.

[NOTICE TO BUYERS; PROMOTIONAL MATERIALS DISCLOSURES]

It is further ordered, That respondent AMREP Corporation, in connection with the advertising, sale, offering for sale, contracting or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall: [6]

A. Distribute to all purchasers a copy of the following "Notice to Buyers" at least two days prior to any in-person sales contact; *provided, however,* that in cases where the initial contact is in person (as, for example, at a booth located in a public place), respondent shall give the Notice to the buyer at the commencement of any sales presentation, request that the purchaser read it, and not interrupt the reading thereof by any purchaser. Respondent shall also include the Notice with any mailing which invites the purchaser to attend a meeting sponsored by respondent. The Notice shall be on a separate sheet of 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 DEVELOPER:

EFFECTIVE DATE OF NOTICE:

WE ARE OFFERING LAND FOR SALE IN THE STATE OF _____,
MILES FROM THE CITY OF _____. THE AVERAGE LIST PRICE FOR THE LOTS
BEING OFFERED IS \$_____, FOR AN AVERAGE SIZE LOT OF _____
ACRE(S), WHICH IS A COST PER ACRE OF \$_____.

IMPORTANT

DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. THE FUTURE VALUE OF LAND IS UNCERTAIN AND MAY HAVE NO RELATION TO OUR SALES PRICE, WHICH IS SET BY US.

[State the number of lots sold in the subdivision by the developer from the *initial sale* to the date of this Notice, or through the end of the second most recent complete month

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preceding the date of the Notice. State the number of unsold lots currently available for sale. State the number of lots that the developer intends to offer in the future to complete sales in the subdivision.]

PERSONAL INSPECTION OF ANY LAND PURCHASE IS DESIRABLE. WE RECOMMEND THAT YOU VISIT ANY PROPERTY YOU PURCHASE. YOU SHOULD TAKE THE TIME DURING YOUR INSPECTION TO VISIT THE LOCAL AREA AND EXAMINE THE REAL ESTATE MARKET. [7]

[The following warning set off by a box outline:]

IMPORTANT: OBTAIN AND READ THOROUGHLY EACH PROPERTY REPORT AND CONTRACT BEFORE SIGNING ANYTHING. THE PROPERTY REPORT CONTAINS INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE YOU SIGN A CONTRACT TO BUY THIS LAND. IT IS DESIRABLE TO HAVE A QUALIFIED PROFESSIONAL EVALUATE THIS PURCHASE *BEFORE* YOU SIGN ANYTHING.

B. Include clearly and conspicuously in all written promotional materials and advertisements, the following statement:

Do not count on your lot rising in value or your being able to resell it. The future value of land is very uncertain, and may have no relation to the sales price, which is set by the seller.

C. Include clearly and conspicuously in all promotional materials not covered by section III (B) of this Order, including all radio and television commercials, the following statement:

Get the property report required by federal law. Read it carefully before signing anything.

IV.

[SALES CONTRACT]

It is further ordered, That respondent AMREP Corporation, in connection with the advertising, sale, offering for sale, contracting or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall:

A. Set forth on the top of the first page of the contract used to sell respondent's land in 24-point boldface type, **CONTRACT FOR THE PURCHASE OF LAND**. No other heading or description of the purpose of the document shall appear.

B. Include clearly and conspicuously, immediately preceding the space provided for the purchaser's signature in each contract for the sale of land, the following statement in 12-point boldface type: [8]

SEVEN DAY RIGHT TO CANCEL

YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY FOLLOWING THE SIGNING OF THE CONTRACT.

IF YOU CANCEL WITHIN THIS TIME, WE WILL REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT, AND CANCEL AND RETURN THIS CONTRACT, WITHIN THIRTY DAYS AFTER RECEIPT OF YOUR NOTICE.

NO SALES REPRESENTATIVE WILL CONTACT YOU DURING THESE SEVEN DAYS. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN 30 DAYS OF ITS OCCURRENCE, YOU WILL HAVE 45 DAYS FROM THE DATE OF PURCHASE TO CANCEL THIS CONTRACT.

RIGHT TO CANCEL AFTER PROPERTY INSPECTION

IF YOU HAVE NEVER VISITED THE PROPERTY, YOU HAVE AN ADDITIONAL RIGHT TO CANCEL THIS CONTRACT, BUT ONLY IF YOU VISIT THE PROPERTY WITHIN SIX MONTHS. YOU HAVE UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER THE CONCLUSION OF YOUR IN-PERSON INSPECTION IN WHICH TO NOTIFY THE SELLER OF A DECISION TO CANCEL. IF YOU CANCEL WITHIN THIS TIME, WE WILL REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT, AND CANCEL AND RETURN THIS CONTRACT, WITHIN 30 DAYS.

NO SALES REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU DURING THIS SEVEN DAY PERIOD. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN TEN DAYS OF ITS OCCURRENCE, YOU WILL HAVE 30 DAYS FROM THE DATE OF YOUR VISIT TO CANCEL THIS CONTRACT.

IMPORTANT:

WE RECOMMEND THAT *BEFORE* SIGNING, YOU CAREFULLY EXAMINE THIS CONTRACT AND THE PROPERTY REPORT AND HAVE THEM REVIEWED BY A QUALIFIED PROFESSIONAL.

Provided, however, That in the event that any state or federal law or regulation requires that another statement immediately precede the space provided for the buyer's signature, the statement required herein may precede any such statement. [9]

Provided, further, That during this seven day period after the signing of a land purchase contract, respondent shall not initiate any sales-related contact with the purchaser. Any such contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at the purchaser's option, exercisable at any time before the expiration of 45 days from the date of purchase, but only if the customer notifies respondent of the contact within thirty days after its occurrence. Respondent shall investigate any notification received from buyers of contact violating the provisions of Part IV(B) above, and comply with the requirements of Part VI(F) of this Order. This provision shall not preclude respondent from initiating contacts solely for the purpose of determining compliance with this Order.

Provided, That nothing in this Order shall prevent respondent from offering a cancellation period greater than seven days.

C. Honor any signed and timely Notice of Cancellation by Buyer (or its functional equivalent) and, within 30 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 buyer.

D. Include in all contracts of sale, if respondent represents in any manner that it will provide or complete roads or facilities for water, sewer, gas, electric service or recreational amenities, a provision which expressly obligates respondent to provide or complete such roads, facilities, or amenities.

E. Include in all contracts for the sale of land, a provision requiring respondent to refund to the buyer, in the event of the buyer's default under the contract, all monies paid under the contract (excluding interest, taxes and assessments), less either: (1) 15% of the cash sales price of the lot shown on the contract, or (2) the actual damages incurred by respondent resulting from the buyer's default as determined by the law of the jurisdiction governing the contract, whichever is greater.

F. Refund to buyers who purchase after the effective date of this Order and who are deemed in default, within 60 days after the buyer is deemed to have defaulted, all monies paid under the contract (excluding interest, taxes and assessments), less either: (1) 15% of the cash sales price of the lot shown on the contract; or (2) the actual damages incurred by respondent resulting from the buyer's default, as determined by the law of the jurisdiction governing the contract, whichever is greater; *provided, however*, that this paragraph shall not preclude respondent from offering a defaulting buyer additional alternatives which may be selected at the buyer's option, in lieu of a refund. For the purposes of this paragraph, a buyer [10] shall be deemed to have defaulted when either (a) the buyer notifies the respondent of his or her intent to default, or (b) the buyer has failed to make a payment for a period of two months from the due date of such payment; *provided, however*, that this provision shall not prohibit respondent from granting any purchaser an extension of time within which to make payments.

V.

[MISCELLANEOUS PROVISIONS]

It is further ordered, That respondent AMREP Corporation, in con-

nection with the advertising, sale, offering for sale, contracting or other promotion of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall:

A. [EXCHANGE PRIVILEGE] Whenever respondent extends a privilege or right whereby the buyer may exchange buyer's undeveloped land for a building lot of "equal value" or similar terms, include in all materials, including the contract, which discuss the privilege or right, or if such privilege or right is described orally, in a concurrently delivered written notice, the following statement:

BUILDING EXCHANGE LOTS MAY BE SMALLER IN SIZE AND MAY REQUIRE YOU TO PAY MORE MONEY THAN YOU ARE NOW CONTRACTING TO PAY.

[State the specific financial terms or formula for exchange of the buyer's equity in the original lot into the building lot]

B. [VISITATION; CANCELLATION RIGHT] Whenever respondent sells property to a purchaser who has never seen the property before executing a contract for the purchase thereof, respondent shall:

1. Extend a refund privilege conditioned upon the purchaser making a personal visit to the property within 180 days after the purchase and notifying respondent within seven days after inspection that a refund is desired;

2. Provide such purchaser seven days after making the personal inspection within which to request a refund;

3. Ensure that every buyer who seeks to make this inspection visit sees the precise lot identified in buyer's contract; [11]

4. Furnish such purchaser, at the conclusion of the inspection visit, 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:

Name of Customer:

You may cancel your contract without any penalty or obligation, at any time prior to midnight of the seventh day after the above date. No sales representative of the seller should contact you on behalf of the seller during this seven day period. If a sales representative contacts you and you notify us of the contact within ten days of its occurrence, you will have 30 days from the date of your visit to cancel the contract. (This right is in addition to other cancellation rights you have under your contract.)

If you cancel, we will send you a full refund within 30 days.

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To cancel your contract, 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 not later than midnight of _____.

I (WE) HEREBY CANCEL THE ABOVE-DESCRIBED CONTRACT. (EACH BUYER MUST SIGN THIS NOTICE)

(Date)

(Buyer(s)' signature)

The visit shall be deemed to conclude (a) after the buyer has inspected the precise lot contracted for, and (b) at the end point in the visit or tour when all contact with the buyer by any employee or representative of respondent terminates. [12]

5. Before furnishing the buyer copies of the "Notice of Cancellation After Inspection" set forth in Paragraph B(4) 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 name of the customer and the date, not earlier than the seventh day following the conclusion of the inspection, by which the buyer may cancel the purchase.

6. During the post inspection cancellation period, refrain from initiating any sales related contact with the purchaser. Any such initiation of contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at the purchaser's option, exercisable any time before the expiration of thirty days from the date of the conclusion of the visit, but only if the customer notifies respondent of the contact within ten days of its occurrence. This provision shall not preclude respondent from initiating contacts solely for the purpose of determining compliance with this Order.

7. Investigate any notification received from buyers of contact violating the provisions of Part V(B)(6) above, and comply with the requirements of Part VI(F) of this Order.

8. Honor any signed and timely Notice of Cancellation after Inspection (or its functional equivalent) and, within 30 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.

C. [BAR TO RECOVERY FROM BUYERS IN DEFAULT] Forbear from seeking to recover, or recovering by any means, from buyers who were under contract before the date this Order becomes final for the purchase of land at Rio Rancho Estates, Silver Springs Shores, Oakmont Shores,

and Eldorado at Santa Fe, and who have defaulted or who become in default, any sums remaining due on their contracts.

D. [FORFEITURE CLAUSE] Forbear from using or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any purchaser, a contract clause which provides that the seller may retain all sums previously paid by the buyer in the event that the buyer fails to pay any installment due or otherwise to perform any obligation under the contract. [13]

E. [WAIVER OF RIGHT TO CANCEL] Not misrepresent, nor solicit nor obtain the buyer's assent to or otherwise impose any condition, waiver, or limitation upon, the right of a buyer to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation.

VI.

It is further ordered, That respondent AMREP 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;

B. Provide each person so described in paragraph (A) above with a form to be returned to respondent, clearly stating each 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 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 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 reasonable program of continuing surveillance adequate to reveal whether the sales practices of each of said persons

described in paragraph (A) above conform to the requirements of this Order, and promptly investigate and make good faith efforts to resolve any complaints about such persons received by respondent, and maintain records of any such complaint, investigation and disposition for ten years from the date of the complaint; [14]

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 or her 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 paragraph of this Order;

H. Forthwith distribute a copy of this Order to each of its subsidiaries;

I. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, reorganization or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order;

J. 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.

K. Mail to all buyers who were under contract before the final date of this Order for the purchase of land at Silver Springs Shores, Rio Rancho Estates, and Oakmont Shores, regardless of whether or not they are in default, the Notice attached to this Order as Appendix A.

Complaint paragraphs 32-33, 34-35, 36-37, 42-43, 44-45, 46, 47, 50, 51-53, and 56 (to the extent it refers to unfair methods of competition) are hereby dismissed.

APPENDIX A

IMPORTANT NOTICE TO LOT BUYERS IN (insert RIO RANCHO, SILVER SPRINGS SHORES, or OAKMONT SHORES)

Dear Customer:

We are sending this letter to you under an order issued by the Federal Trade Commission. It contains facts you should know about your purchase.

In 1975, the Federal Trade Commission brought a lawsuit against AMREP Corporation, the parent company of (insert subdivision). This letter is part of the order issued when the lawsuit was decided. A copy of that Order is enclosed.

Please read this letter carefully and consider the alternatives suggested in Part II. We cannot advise you as to what decision is best for you.

There is virtually no resale market for 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 amount of such lots at the present time.

II. OPTIONS AVAILABLE TO PURCHASERS

1. You can continue making your payments.

In addition, if you purchased your lot as an investment and not for your own use as a homesite, you might be able to declare any 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 tax advisor or 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.

4. You may be able to relocate to (insert subdivision) and 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 your contract for details.

If you have questions about this letter, please write to us at the following 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.

President
AMREP Corporation

IN THE MATTER OF

FLOWERS INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9148. Complaint, Dec. 12, 1980—Decision, Nov. 3, 1983

This consent order requires a Thomasville, Georgia food processor, among other things, to timely divest to a Commission-approved buyer, its bakery plants located in High Point, North Carolina and Gadsden, Alabama, together with specified assets. Further, under certain conditions, the company must transfer its rights to the Sunbeam, Buttermaid and Hometown tradenames and trademarks to a qualified acquirer or to another qualified baker. Pending divestiture, respondent must keep the bakeries in operation and use reasonable efforts to retain the respective shelf space and position of the Sunbeam, Buttermaid and Hometown tradenames and trademarks.

Appearances

For the Commission: *Arnold C. Celnicker, Chris M. Couillou and Sarah K. Walls.*

For the respondent: *Kent E. Mast, Hansell, Post, Brandon & Dorsey, Atlanta, Ga.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of Section 7 of the amended Clayton Act (15 U.S.C. 18) and Section 5 of the amended Federal Trade Commission Act (15 U.S.C. 45), 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 as follows:

DEFINITIONS

For the purposes of this complaint, the following definitions shall apply:

1. *Flowers* refers to the respondent, Flowers Industries, Inc., and its subsidiaries.
2. *Wholesale bakeries* refers to bakeries which sell at wholesale to other establishments, including grocery stores, restaurants, hotels and institutions. It does not refer to grocery chain bakeries.
3. *Grocery chain bakeries* refers to bakeries operated by grocery