

1998

Harrington Properties, Inc, Robert L. Harrinton and Jane R. Harrington v. Marilyn Hamilton Petersen : Brief of Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HARRINGTON PROPERTIES, INC.,
a Utah corporation; ROBERT L.
HARRINGTON and JANE R.
HARRINGTON,

Plaintiffs/Appellees,

v.

MARILYN HAMILTON PETERSON; and
GLOBAL MOTOR INNS, a Utah
corporation,

Defendants/Appellants.

BRIEF OF APPELLEES

Case No. 970717-CA

Priority No. 15

Appeal from Declaratory Judgment Entered by
the Third Judicial District Court, Salt Lake County,
the Honorable Sandra Peuler

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**UTAH COURT OF APPEALS
BRIEF**

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JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Annotated Section 78-2a-3(2)(j) (1996).

ISSUES

There are only two issues before this Court. Both are straightforward and involve only the interpretation of written agreements:

I. Did the district court correctly grant summary judgment to the plaintiffs on the issue of whether the defendants complied with specific language of a trust deed in order obtain security under that trust deed for additional loans that were made nearly two years after the trust deed was executed? Because this issue involves a grant of summary judgment, the plaintiffs agree that review of this issue is under a "standard of correctness." Stien v. Marriott Ownership Resorts, 944 P.2d 374, 377 (Utah Ct. App. 1997).

II. Did the district court correctly grant summary judgment to the plaintiffs on the issue of whether defendant Peterson was entitled to default interest under the terms of a promissory note whose due date was amended to a later time? This issue is also reviewed on a "standard of correctness." Stien, 944 P.2d at 377.

DETERMINATIVE STATUTES, RULES, AND REGULATIONS

This appeal turns solely on the language of the parties' written agreements. There are no statutes, rules, or regulations whose interpretation is determinative of the appeal or of central importance to the appeal.

STATEMENT OF THE CASE

Nature of the Case.

This appeal involves a dispute between plaintiffs Robert L. Harrington and Harrington Properties, Inc. ("HPI") and defendant Marilyn Hamilton Peterson over their respective rights and remedies arising out of the development and sale of a house built by plaintiffs on an undeveloped lot sold to them by Peterson (the "Sunset Oaks Property"). Mrs. Peterson sold the lot to HPI pursuant to a promissory note (the "Peterson Note") that was secured by a second-position deed of trust on the Sunset Oaks Property (the "Sunset Oaks Trust Deed II").

Course of Proceedings and Disposition in the District Court.

On July 26, 1994, the plaintiffs filed their Complaint seeking, inter alia, declaratory judgment with respect to several issues arising out of the sale of the Sunset Oaks Property. (R. 1.)¹

On July 17, 1996, plaintiffs moved for partial summary judgment on the issue of whether subsequent advances made by defendant Peterson to Harrington in and after February 1993 were secured by the June 21, 1991 Sunset Oaks Trust Deed II as claimed by defendant Peterson. (R. 783.) On December 10, 1996, the court entered an order granting plaintiffs' motion. (R. 1038-1041.) In granting that motion, the district court determined

¹All references to the record are to the page numbers of the original record as paginated by the clerk of the district court pursuant to Rule 11(b)(2) of the Utah Rules of Appellate Procedure.

that certain monies loaned in 1993 by defendant Peterson to plaintiff HPI were not secured by the 1991 Sunset Oaks Trust Deed II.

On March 4, 1997, plaintiffs filed a second motion for partial summary judgment on the issue of whether an agreement between the parties dated December 8, 1992, extended the due date on the Peterson Note so as to preclude default and default interest from accruing prior to February 22, 1994. (R. 1057-1059.) On June 25, 1997, the district court entered an order granting that motion. (R. 1130-34.)

On August 1, 1997, the parties filed a stipulation for an order dismissing all other issues. This stipulation was based upon a settlement that allowed defendants to appeal these two issues and that reserved the issue of attorney fees. (R. 1137-38.) The district court entered a judgment and order of dismissal in accordance with the stipulation on August 7, 1997.² (R. 1139-41.)

²In their factual recitation, defendants set out a number of asserted "facts" that are irrelevant to the issues on appeal and that relate solely to the claims that defendants settled for consideration. Such argument is improper. Carrier v. Pro-Tech Restoration, 909 P.2d 271, 275 (Utah Ct. App. 1995) (parties cannot contest issues on appeal that are conceded below), aff'd, 944 P.2d 346 (Utah 1997). Therefore plaintiffs do not address those facts herein.

Statement of Facts.³

The following facts were undisputed before the district court in connection with the motions for partial summary judgment:

1. In early 1991, Mr. Harrington became aware of a listing for sale by defendant Peterson of the Sunset Oaks Property. (R. 409.)

2. Mr. Harrington contacted Mrs. Peterson and expressed interest in purchasing the Sunset Oaks Property for the purpose of building a house for resale. Mr. Harrington offered to buy the property for \$95,000 if Mrs. Peterson would subordinate her trust deed to the anticipated construction loan trust deed, to which she agreed. (R. 409.)

3. In anticipation of the closing on the Sunset Oaks Property, Mr. Harrington applied for a construction loan with Guardian State Bank, to be secured by a first trust deed on the Sunset Oaks Property. (R. 412.)

4. On June 21, 1991, Mr. Harrington acquired the Sunset Oaks Property from Mrs. Peterson for \$95,000.00, by executing a promissory note in that amount payable to Mrs. Peterson (the "Peterson Note"). (R. at 411.) A copy of the Peterson Note is included in the Addendum hereto at Tab A.

³Defendants do not contend on appeal that the district court erred in granting summary judgment because there were material facts in dispute. Rather, defendants argue only that the district court erred with respect to its legal rulings.

5. In the two places for an interest term to be inserted in the form note, the abbreviation "N/A" was typed in. (R. 428.)

6. Payment of the Peterson Note was secured by a second-position Deed of Trust on the Sunset Oaks Property (the "Sunset Oaks Trust Deed II"). (Id.) A copy of the Sunset Oaks Trust Deed is included in the Addendum hereto at Tab B.

7. The Sunset Oaks Trust Deed II states:

For the Purpose of Securing:

(1) payment of the indebtedness evidenced by a promissory note of even date hereof in the principal sum of \$95,000, made by Trustor, payable to the order of Beneficiary at the time, in the manner and with interest as therein set forth, and any extension and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

(R. at 430 (emphasis added).)

8. Almost immediately after the closing, the project ran into delays.⁴ (R. 414-15.) Because of these delays and increased construction costs, Mr. Harrington informed Mrs. Peterson in September 1992 that the proposed construction could

⁴First, the subdivision's Architectural Design Committee did not approve the proposed design of the house until October 17, 1991, with minor modifications. Then, HPI discovered that the proposed location was solid "fill" to a significant depth, preventing the pouring of foundations as originally designed and requiring excavation to a much deeper level, removing all the fill material and hauling in new dirt. The fill problem also forced HPI to pour large concrete columns and supports as part of the foundation, to use more steel and to change the deck design to larger logs. These and other unexpected problems delayed construction and increased costs.

not be completed without additional funds. Mr. Harrington told Mrs. Peterson that he had no other funds available to finish the project because of his recently filed personal bankruptcy, but that he would work with her in any way to complete it. It was then proposed that Mrs. Peterson advance up to an additional \$75,000 for construction. (R. 417.)

9. As a result, Harrington, HPI, and Peterson entered into a written agreement on December 8, 1992 (the "December 8 Agreement"). A copy of the December 8 Agreement is included in the Addendum hereto at Tab C. That agreement provides in part as follows:

4. Payment Due Date: Payment of the sum owed by Harrington under the terms of the original Trust Deed Note (\$95,000) and payment of the sums advanced by Peterson under the terms of this Agreement (not to exceed an additional \$75,000) shall be due on the date the Property is sold by the Owner or is otherwise transferred, conveyed or assigned.

The parties agree that Peterson's sole recourse to recover the sums of money advanced by her under the terms of this Agreement, plus interest and attorney fees, and to recover the sum of Ninety-Five Thousand Dollars (\$95,000) owed to her under the terms of the original Trust Deed Note, shall be against the Property and/or the proceeds arising from its sale or transfer.

(R. 450 (emphasis added).)

10. In February 1993, the parties reached an understanding in which Mrs. Peterson agreed to provide additional funds to complete construction on the house. Mr. Harrington sent a letter dated February 18, 1993 (the "February 18 Letter Agreement")⁵ to

⁵In paragraph 28 of her Affidavit, Mrs. Peterson states that she loaned "additional" monies "pursuant to a new letter agreement signed by Robert L. Harrington dated February 18, 1993. (R. 178.)

Mrs. Peterson. (R. 178, 890.) A copy of the February 18 Letter Agreement is included in the Addendum hereto at Tab D.

11. Mrs. Peterson received the February 18 Letter Agreement but took no action to respond to it except to advance additional funds. (R. 890.)

12. The February 18 Letter Agreement states:

This letter will confirm that any money advanced by you, above and beyond the \$75,000 (December 8, 1992 Agreement), for the purpose of construction of the home located at 1656 South Sunset Oaks Dr., will be returned to you with interest consistent with the rate of interest in our Agreement dated December 8, 1992, and will be returned to you prior to the distribution of any proceeds to Harrington Properties, Inc. The sale of the house will be the sole source of the return of this money.

(R. at 224.)

13. The February 18 Letter Agreement and the checks provided by Mrs. Peterson are the only written documents relating to an agreement of the parties in February 1993 for Peterson to advance additional monies. (R. 814.)

14. Pursuant to the February 18 Letter Agreement, defendant Peterson "loaned the additional sum of \$69,626.84" (R. 178, 814.)

15. There was no promissory note reflecting the \$69,626.84 loaned pursuant to the February 18 Letter Agreement, nor is there any document reciting that the monies loaned pursuant to that letter agreement are secured by the Sunset Oaks Trust Deed II. (R. 814-15.)

16. At no time did Mr. Harrington ever agree that the funds advanced pursuant to that February 18 Letter Agreement would be secured by the Sunset Oaks Trust Deed II. (R. 815.)

17. On December 5, 1993, Mr. Harrington received an offer to purchase the Sunset Oaks Property for \$472,500. Mr. Harrington accepted the offer, and the sale was closed on February 24, 1994. (R. 422, 882.)

SUMMARY OF ARGUMENT

I. Defendants challenge on several theories the district court's award of partial summary judgment that the Sunset Oaks Trust Deed II did not secure their advances in and after February 1993. First, defendants argue that clause (3) of the trust deed, specifically addressed to "additional loans or advances hereafter . . . made to Trustor," does not control because the loans were not "unrelated." However, neither the word "unrelated" nor its concept can be found in the language of clause (3). Second, defendants argue, on various creative readings, that clauses (1), (2), and (4) of the trust deed also govern this transaction. As discussed below, defendants' position is contrary to the plain language of the trust deed and reads out of the trust deed clause (3)'s specific application to "additional advances." Third, defendants argue that even if clause (3) controls, the February 18 Letter Agreement "meets the requirements of a promissory note, and indicates a grant of a security interest in the Sunset Oaks Property." Brief of Appellants at 14. However, the February 18 Letter Agreement at most only provides that "the sale of the

house will be the sole source of the return of this money" and makes absolutely no mention of being "secured by [the Sunset Oaks Trust Deed II]." Moreover, defendants' argument is further contradicted by the parties' practical interpretation of the trust deed in the December 8 Agreement, drafted by Peterson's counsel, which complies with clause (3) in reciting that the additional advances therein are collateralized by the Sunset Oaks Trust Deed II.

II. Defendants also challenge the district court's grant of partial summary judgment that no default interest accrued on the Peterson Note prior to February 24, 1994, the amended due date of the note. Defendants concede that no interest accrued between June 21, 1991, and March 21, 1992, the original due date of the loan, because "N/A" was typed in the blanks for the applicable interest rate. Brief of Appellants at 14. Defendants argue that they are entitled to default interest from March 21, 1992, forward, even though the December 8 Agreement extended the due date of the Peterson Note to the "date the property is sold," because the December 8 Agreement "neither forgives nor excuses interest on that Note." Id. at 15. However, by that amendment, the Peterson Note was not and could not be in default until the end of its term, i.e., the date the property was sold (February 24, 1994). Moreover, the December 8 Agreement confirms in its other provisions that the amount to be paid on the Peterson Note on the due date was the principal amount of \$95,000 only. The only interest mentioned in that agreement relates exclusively to

the new monies advanced and not to the Peterson Note. Therefore, no interest, default or otherwise, applied to the Peterson Note between June 21, 1991, and February 24, 1994.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE FEBRUARY 1993 ADDITIONAL ADVANCES WERE NOT SECURED BY THE SUNSET OAKS TRUST DEED II.

Granting plaintiffs' motion for partial summary judgment, the district court held that the monies loaned by defendant Peterson pursuant to the February 18 Letter Agreement were not secured by the Sunset Oaks Trust Deed II.⁶ For the reasons set forth below, this Court should affirm the district court's decision.

A. The District Court Properly Held that the Additional Advances are Governed by Clause (3) of the Trust Deed.

1. The plain language of clause (3) applies to the February 1993 advances.

The Sunset Oaks Trust Deed II provides that it is for the purpose of securing four categories of payments, as follows:

For the Purpose of Securing:

(1) payment of the indebtedness evidenced by a promissory note of even date hereof in the principal sum of \$95,000, made by Trustor, payable to the order of Beneficiary at the time, in the manner and with interest as therein set forth, and any extension and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of

⁶Defendants loaned \$69,626.84 pursuant to the February 18 Letter Agreement. Of that amount, summary judgment was granted as to all but \$4,898.81, payment of which to Guardian State Bank by defendants was secured by clause (2) of the trust deed.

Trust; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

Addendum, Tab B.

In interpreting the plain language of this trust deed, the district court held:

The Court finds that the monies advanced by defendant Peterson pursuant to the February 18, 1993 letter were "additional loans or advances" within the meaning of clause (3), and that clause (3) applies to the monies loaned or advanced by Peterson pursuant to the February 18, 1993 letter agreement, except as to the \$4,898.81 paid to Guardian State Bank, which payments were secured under clause (2) of the Sunset Oaks Trust Deed II by reference to paragraph 5 thereof.

(R. 1043-44.) This holding of the district court is correct and should be affirmed by this Court.

The monies advanced by defendant Peterson pursuant to the February 18 Letter Agreement clearly constitute "additional loans or advances." The trust deed itself states that it secures "payment of the indebtedness evidenced by a promissory note of even date hereof in the principal sum of \$95,000.00," i.e., the Peterson Note. The monies advanced pursuant to the February 18 Letter Agreement are thus subsequent and additional to that original June 1991 note amount for purchase of the undeveloped lot, and, as a matter of law, they are therefore "additional loans" within the meaning of clause (3) of the trust deed.

2. Clause (3) of the trust deed is not limited to "unrelated" loans or advances.

In an effort to avoid the plain language of clause (3), defendants argue that clause (3) "address[es] only new, subsequent loans, unrelated in purpose to the amount originally

secured by the Trust Deed." Brief of Appellants at 16 (emphasis added). But there is no such limiting language in clause (3) or elsewhere in the trust deed. Since neither the word "unrelated" nor its concept can be found in clause (3) or in the trust deed, defendants' argument on unrelatedness impermissibly seeks to amend clause (3).⁷

Defendants further argue that "the law is clear that later advances are secured by an earlier trust deed or mortgage if those advances are related to the same transaction as that secured by the original instrument." Brief of Appellants at 16. For this sweeping legal proposition, defendants rely solely on the case of First Security Bank of Utah v. Shiew, 609 P.2d 952 (Utah 1980). Defendants' argument is flawed in multiple ways.

First, the defendants distort and misapply the Shiew case. In Shiew, the Utah Supreme Court considered the "proper interpretation" of a "dragnet clause" in a mortgage. 609 P.2d at 954. The clause in that case was extremely broad and stated that the mortgage was "'to secure any and all claims or demands now due or to become due now or hereafter contracted or incurred which the said mortgagee or the holder hereof, from time to time, may have or hold against the mortgagors.'" Id. at 953. There is no such "dragnet clause" in the Sunset Oaks Trust Deed II. Indeed, the trust deed contains a provision that is directly

⁷Even if defendants' argument were correct, the 1993 advances relate to the construction loan (Guardian State Bank) and not to the Peterson Note for the purchase of the undeveloped lot.

contrary to the one in Shiew. Instead of covering "any and all claims," the trust deed covers only promissory notes that specifically refer to the trust deed and state that they are secured by it. Thus, Shiew has no applicability to this case.

Moreover, even if it were otherwise applicable, the only effect of the Shiew decision is to reject securitization of unrelated loans by a dragnet clause. Shiew in no way suggests that if a loan is related to a prior loan, it is secured despite specific language in the trust deed to the contrary.

Further, not only is the Shiew decision inapplicable, the defendant's own conduct demonstrates a construction of the trust deed at odds with their current position.⁸ In the December 8 Agreement, by which defendant Peterson has previously agreed to advance an additional \$75,000, the parties included a specific paragraph that provides: "This Agreement is secured by a Trust Deed dated June 21, 1991, more particularly referred to in Paragraph 1 [sic] above." December 8 Agreement, ¶ 8; Addendum, Tab C. That agreement was drafted by counsel for defendant Peterson.⁹ The only plausible purpose of that language would have been no need to comply with clause (3) of the trust deed.

⁸Under Utah law the subsequent conduct of the parties may be referenced as a tool of interpretation. See Trucker Sales Corp. v. Potter, 137 P.2d 370, 371-72 (Utah 1943); see also Eie v. St. Benedict's Hosp., 638 P.2d 1190, 1195 (Utah 1981).

⁹Defendants suggest that defendant Peterson was an inexperienced person in business while Mr. Harrington was an attorney. While this point has no legal significance, it is misleading. Mrs. Peterson is the president of her own business and was represented by counsel, Mr. Verhaaren, with respect to that agreement.

If defendants' arguments on clauses (1), (2), and (4) were correct, there was no need for paragraph 8 in the December 8 Agreement. The inclusion of that language by defendants then contradicts their position now.

3. Clauses (1), (2), and (4) of the trust deed do not apply to the February 1993 advances.

Clauses (1), (2), and (4) of the Sunset Oaks Trust Deed II do not apply to the February 1993 advances made by Mrs. Peterson. First, applying any of those clauses necessarily reads clause (3) out of the agreement. Second, by their own terms, clauses (1), (2), and (4) have no application here.

A contract, such as a trust deed,¹⁰ must be construed so as to harmonize and give effect to all its provisions. See, e.g., Nielsen v. O'Reilly, 848 P.2d 664, 665 (Utah 1992); Minshew v. Chevron Oil Co., 575 P.2d 192, 194 (Utah 1978). Defendants' efforts to construe clauses (1), (2), and (4) to encompass an advance that is both subsequent and additional to the original loan impermissibly conflicts with clause (3)'s specific and express applicability to "additional loans or advances hereafter made." Defendants' arguments thus would require a court to read clause (3) out of the trust deed. However, the law requires that all four clauses be read in relation to each other and so as to give effect to each. Id. The language of clause (3) is not only plain and unambiguous, it is specific in its application to

¹⁰Under Utah law, trust deeds are construed and interpreted as contracts. See, e.g., Bank of Ephraim v. Davis, 559 P.2d 538, 540 (Utah 1977); see also 55 AM.JUR. 320, "Mortgages," § 175 (1971).

"additional advances hereafter made." That specific language governs over the generalized interpretation that defendants try to give to the other clauses of the trust deed. See United Cal. Bank v. Prudential Ins. Co., 681 P.2d 390, 425 (Ariz. Ct. App. 1983).

Further, clauses (1), (2), and (4) do not apply on their face to additional advances. Without any explanation or authority, defendants assert that "Mrs. Peterson's later advances are properly viewed as . . . a modification" of the original note under clause (1). Brief of Appellants at 19. But, even without clause (3), such an assertion is clearly erroneous, since "modification" means some "alteration, adjustment or limitation" to the original Note. See AMERICAN HERITAGE DICTIONARY, p. 843 (1950). No such alteration, adjustment, or change ever occurred to the Peterson Note or Sunset Oaks Trust Deed II.

Defendants next assert, citing clause (2) of the trust deed, that the February 1993 advances "relate to the performance of each of the provisions of the Trust Deed which the Trustor, Harrington, agreed to perform." Id. Defendants then reference a later provision of the trust deed, which they contend sets out agreed-upon performance by the Trustor linking back to clause (2). The later provision, cited by defendants, states in part:

To Protect the Security of this Deed of Trust, Trustor Agrees:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; . . . to do all other acts which from the

character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part hereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) to commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) to allow Beneficiary to inspect said property at all times during construction.

Sunset Oaks Trust Deed II, p. 2; Addendum, Tab B. Defendants then argue, without explanation, that "because Mrs. Peterson's advances fulfilled the performance of Harrington's obligations under the Peterson Trust Deed, these advances are also secured by the . . . Trust Deed under this second category." Brief of Appellants at 19-20. However, defendants clearly misread the quoted paragraph. The purpose of the provision is set forth in its title: "To Protect the Security of this Deed of Trust. . . ." It is undisputed that the Sunset Oaks Trust Deed II was given to secure a purchase of raw land and not to secure a construction loan; indeed, defendants repeatedly describe the trust deed as a purchase money deed of trust. Plaintiffs therefore could have no obligation under the trust deed to maintain a structure or complete construction on a structure that did not exist at the time of the purchase.

In addition, paragraph 1 of the quoted language does not apply to this loan because the Peterson Note was not a construction loan. Paragraph 1 states: "if the loan secured hereby or any part hereof is being obtained for the purpose of

financing construction of improvements on said property, Trustor further agrees . . . to commence construction and to pursue same with reasonable diligence to completion" Sunset Oaks Trust Deed II, p. 2 (emphasis added). It is undisputed that the Sunset Oaks Trust Deed II was not obtained "for the purpose of financing construction." Indeed, it was subordinated to the first-position trust deed on the Sunset Oaks Property, which was given to secure the Guardian State Bank construction loan. Therefore, the performances argued for by defendants under clause (2) are inapplicable to the Peterson Note, which was given to purchase raw land and was indisputably not a construction loan.

Finally, defendants contend that clause (4) of the trust deed collateralizes the February 1993 advances because the advances were "sums expended or advanced . . . under or pursuant to the terms" of the trust deed. Citing paragraphs 7 and 8 of the trust deed, defendants argue that defendant Peterson was "apprehensive" about a premature sale of the property before construction was substantially completed and that she therefore "advanced further sums to complete construction" and improve the potential of a maximum sales price. Brief of Appellants at 20-21. Whatever may have been defendant Peterson's reasoning for the advances, her motives do not convert or transform the nature of the February 1993 advances from being an "additional loan or advance" under clause (3) to a "sum advanced under or pursuant to the terms of the Trust Deed" under clause (4).

This can be seen by examining the language of paragraphs 7 and 8, upon which defendants rely, which reads as follows:

To Protect the Security of this Deed of Trust, Trustor Agrees:

* * *

(7) Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or, trustee but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, . . . and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

(8) To pay immediately and without demand all sums expended hereunder by Beneficiary or trustee, with interest from date of expenditure at the rate of _____ percent per annum until paid, and the repayment thereof shall be secured hereby.

Sunset Oaks Trust Deed II, p. 2; Addendum, Tab B (emphasis added). Contrary to defendants' assertion, paragraph 7 is not a carte blanche authorization for the beneficiary to expend monies as the Beneficiary deems necessary to protect the security. Rather, it is expressly limited in its opening clause: "Should Trustor fail to make any payment or to do any act herein provided. . . ." (emphasis added). In the event of such a failure, the Beneficiary then and only then "may: Make or do the same in such manner . . . ," and have the trust deed as collateral therefor. Thus, Peterson was entitled to expend or advance sums, within the meaning of clause (4), only if Harrington failed to make a payment or do an act "herein provided." For example, if the Trustor (Harrington) failed "to

provide and maintain insurance" (§ 2) or "to pay . . . all taxes and assessments" (§ 5), then Peterson could step in and advance those payments. See I SUMMARY OF UTAH PROPERTY LAW § 9.61 (1978). The February 1993 advances to complete construction of the house, however, were clearly not "payments" or an "act" provided for in the trust deed, and defendants point to no specific predicate payment or act "under" the trust deed. The very same analysis applies to paragraph 8, since it relates to "sums expended hereunder."

Thus, even if clause (3) did not specifically cover additional advances and as a consequence control the analysis, on the plain language of clauses (1), (2), and (4), defendants' arguments fail as well.

4. The district court properly rejected Peterson's argument that she intended the advances to be secured by the trust deed.

Defendants assert that Mrs. Peterson's "intent and expectation" was that the February 1993 advances would be secured by the Sunset Oaks Trust Deed II, Brief of Appellants at 21, and that she understood the February 18 Letter Agreement granted a security interest in that trust deed. Id. at 23.

Peterson apparently claims that the parties orally agreed to secure her February 1993 advances with a deed of trust on the Sunset Oaks Property. First, there is no mention of any such agreement or understanding in the February 18 Letter Agreement itself. Second, under Utah law, such oral agreements may not be used to enforce monetary obligations against real property.

Therefore, the only agreement relative to the February 1993 advances properly before this Court is the February 18 Letter Agreement.

Peterson's theoretical alleged oral agreement would contravene the statute of frauds. That statute provides as follows:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Utah Code Ann. § 25-5-1 (1995). It is well settled that the statute of frauds requires that "an agreement to secure an obligation with real property" must be in writing. Hector, Inc. v. United Sav. & Loan Ass'n, 741 P.2d 542, 546 (Utah 1987).

B. The District Court Correctly Ruled that the February 18 Letter Agreement Does Not Meet the Requirements of Clause (3).

As demonstrated above, the district court correctly held that this case is governed by clause (3) of the trust deed. Turning to the application of clause (3), the district court correctly ruled that the requirements of clause (3) were not met.

The trust deed makes clear in clause (3) that "additional loans or advances" to the trustor are secured by the trust deed only "when evidenced by a promissory note or notes reciting that they are secured by that Deed of Trust." Thus, there are two requirements: 1) there must be a promissory note, and 2) the

promissory note must state that it is secured by the Sunset Oaks Trust Deed II. As shown below, neither requirement is satisfied here.

1. The only document setting forth the parties' agreement regarding the February 1993 advances is the February 18 Letter Agreement.

The district court held:

The Court finds that the February 18, 1993 letter from Robert L. Harrington to Marilyn Hamilton Peterson is the only document which reflects the agreement between the parties with respect to the advances made by defendant Peterson after those covered by the December 8, 1992 Agreement.

(R. 1044.) Defendants do not challenge this finding on appeal. Therefore, the only question is whether the February 18 Letter Agreement constitutes a promissory note that recites that it is secured by the Sunset Oaks Trust Deed II.

2. The February 18 Letter Agreement is not a promissory note.

Although the district court did not decide whether the February 18 Letter Agreement constitutes a promissory note, it is clear that it does not, and this Court may affirm the decision of the district court for any reason.¹¹

As stated above, the only written agreement memorializing or reflecting defendant Peterson's loan of the \$69,626 in February 1993 is the February 18 Letter Agreement. That agreement provides that "the sale of the house will be the sole source of the return of this money." It contains no promise to pay by HPI

¹¹See Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988).

or Harrington. Thus, the letter agreement is not a promissory note, since there is no personal or corporate promise to pay the loan. See, e.g., In re Cochise College Park, Inc., 703 F.2d 1339, 1347 (9th Cir. 1983) ("A 'promissory note' is itself merely 'a promise or engagement, in writing, to pay a specified sum at a time therein limited . . . to a person therein named, or to his order, or bearer.'", citing Black's Law Dictionary 1093); see also Utah Code Ann. § 70A-3-104(5) (1997).

The February 18 Letter Agreement is clear and unambiguous on its face. It reads in its entirety as follows:

This letter will confirm that any money advanced by you, above and beyond the \$75,000 (December 8, 1992 Agreement), for the purpose of construction of the home located at 1656 South Sunset Oaks Dr., will be returned to you with interest consistent with the rate of interest in our Agreement dated December 8, 1992, and will be returned to you prior to the distribution of any proceeds to Harrington Properties, Inc. The sale of the house will be the sole source of the return of this money.

Tab 4. Significantly, defendants did not ever request preparation of a promissory note for the monies advanced in 1993 or of any document reciting that the additional loans were secured by the Sunset Oaks Trust Deed II. The reason for that failure is obvious--the February 18 Letter Agreement did not contemplate or provide for it.

3. **The February 18 Letter Agreement does not recite that it is secured by the Sunset Oaks Trust Deed II.**

Finally, the February 18 Letter Agreement does not recite that the February 1993 advances are secured by the Sunset Oaks Trust Deed II. Thus, whether or not the February 18 Letter

Agreement can be construed to be a promissory note, it is clear, as a matter of law, that it does not comply with the requirements of clause (3) of the trust deed.

Defendants nevertheless argue that the February 18 Letter Agreement "should properly be viewed as the equivalent of both a promissory note and a grant of security interest." Brief of Appellants at 23. For purposes of their security interest argument, defendants rely solely on the last sentence of the letter agreement's first paragraph, which states: "The sale of the house will be the sole source of the return of this money." Defendants then argue that "any lay person reading that sentence would understand that language to be the equivalent of a grant of a security interest in the property, which is the subject of the Deed of Trust. . . ." Id.

However, defendants completely misread that sentence, since it nowhere references either a security interest or the Sunset Oaks Trust Deed II. Specifically that sentence does not "recite" or otherwise reference in any possible way that the advances "are secured by [the Sunset Oaks Trust Deed II]." Indeed, the last sentence means just what it states, that Peterson may only look to the proceeds from the sale of the house for the return of this money and not to Harrington personally or to the property.¹²

¹²Even if defendants were correct that the last sentence created a security interest in the Sunset Oaks Property, at most it would be an independent security interest with its own priority, and not tied back to the trust deed.

Thus, the February 18 Letter Agreement does not comply in any sense with clause (3) of the Trust Deed.

In a strained effort to satisfy the requirements of clause (3), defendants next argue that the February 1983 Letter Agreement incorporates the December 8 Agreement. Defendants suggest that the December 8 Agreement and the February 18 Letter Agreement jointly "memorialize the parties' understanding and agreement" on later advances. Brief of Appellants at 22. However the February 18 Letter Agreement does not incorporate or join in the December 8 Agreement. The February 18 Letter Agreement specifically references only one portion of the December 8 Agreement, namely, that "any money advanced . . . will be returned to you with interest consistent with the rate of interest in our Agreement dated December 8, 1992" Under principles of construction, "[a] reference in a contract to another document will incorporate the other document only to the extent indicated and for the specific purpose indicated." Prichard v. Clay, 780 P.2d 359, 361-62 (Alaska 1989) ("Parties do not undertake obligations contained in a separate document unless their contract clearly says so."); Accord: United Cal. Bank v. Prudential Ins. Co., 681 P.2d 390, 411 (Ariz. App. 1983). In the February 18 Letter Agreement, the sole reference to the December 8 Agreement is to the interest term. Thus, the December 8 Agreement is incorporated and applicable only to the extent indicated, i.e., the interest term.

This plain reading of the February 18 Letter Agreement is confirmed by the fact that the letter agreement contains two substantive terms that are also found in the December 8 Agreement. As a logical matter, addressing those substantive terms would be unnecessary if the December 8 Agreement were incorporated therein. First, the February 18 Letter Agreement states that any money advanced "will be returned to you prior to the distribution of any proceeds to Harrington Properties, Inc." That provision has a similar objective to paragraph 2 of the December 8 Agreement, which provides: ". . . all funds advanced by Peterson . . . shall only be used to pay for the Work and for no other purpose," i.e., no payments to Harrington. Second, the February 18 Letter Agreement provides that "the sale of the house will be the sole source of the return of this money." By comparison, paragraph 4 of the December 8 Agreement provides: "Peterson's sole recourse to recover the sums of money advanced by her under . . . this Agreement . . . shall be against the Property and/or the proceeds arising from its sale or transfer." If, as defendants suggest, the February 18 Letter Agreement incorporates the December 8 Agreement, inclusion of such terms as well as the interest would be completely superfluous. Thus, the plain language of the February 18 Letter Agreement belies Peterson's contention and demonstrates that there is no general incorporation of the December 8 Agreement.

II. THE DISTRICT COURT CORRECTLY HELD THAT NO INTEREST RAN ON THE PETERSON NOTE PRIOR TO FEBRUARY 24, 1994.

Defendants also challenge the district court's order of partial summary judgment determining that no interest ran on the Peterson Note prior to February 24, 1994, the date on which the Sunset Oaks Property sold. That note was in a principal amount of \$95,000. In the two places for an interest term to be inserted in the form note, the Peterson Note as signed stated "N/A." The district court concluded, and defendants now concede, that language unambiguously provided for no interest to run prior to any default.

The default interest blanks in the Peterson Note were also not filled in.¹³ The Peterson Note provided: "Balance due in nine months from date of execution." The December 8 Agreement between the parties unambiguously amended the due date for payment of the Peterson Note to the date the property was sold (February 24, 1994). Based on that ambiguous amendment, the district court held that the note thus was not in default prior to February 24, 1994. The district court also held that the December 8 Agreement made clear that no interest ran or was to be paid on the note until it was due. As more fully explained below, the district court's decision was correct and should be affirmed.

¹³Defendants argue that the default rate of interest on the note should be the statutory 10% rate because the interest rate was left blank in the default provisions of the note. Plaintiffs did not contest below that the statutory 10% rate would apply to the blank interest term in the default section of the note if that section of the note were to apply.

A. Under Utah Law, the Construction of Unambiguous Contracts is a Matter of Law.

The determination of defendants' issue requires construction of the December 8 Agreement. "The interpretation of a contract is a matter of law for the court to determine unless the contract is ambiguous and evidence of the parties' intent (which is a matter of fact) is necessary to establish the terms of the contract." Saunders v. Sharp, 806 P.2d 198, 200 (Utah 1991). See also Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766, 770 (Utah 1995).¹⁴

B. The Peterson Note Unambiguously Provides That Interest is not Applicable.

The Peterson Note was executed by the parties on July 21, 1991. In the relevant portion of the Peterson Note, which is a form note with blanks to be filled in, there are two blanks relating to interest, one for the amount of interest on the principal balance to be spelled out and another in parenthesis for it to be typed in numerical form. In both places, the abbreviation "N/A" was typed in. "N/A" unambiguously means "not applicable." These two specific entries on the note demonstrate that the parties specifically agreed that interest would not be applicable to the \$95,000 dollar principal balance in the Peterson Note.

¹⁴Defendants themselves cite authority for the same proposition that "the intent of the parties is to be determined from the writing itself" and that a court will not "look beyond the wording of the agreement to determine the parties intent." Brief of Appellants at 29 (citing cases).

Defendants set forth certain alleged facts relating to the history of negotiations leading up to and surrounding the execution of the Peterson Note. Brief of Appellants at 14, 24-26. However, such arguments are improper given the unambiguous statement that interest is not applicable.

Defendants do "not now claim[] interest for the time before the Peterson Note came due in March 1992."¹⁵ Brief of Appellants at 14. However, defendants do claim that on and after March 21, 1992, the original due date, the Peterson Note was in default and that default interest applied from March 21, 1992, forward, even

¹⁵By this position, defendants concede and acknowledge that interest on the principal balance of the note did not apply or accrue between the date of the note's execution and the original due date of March 21, 1992. Defendants necessarily recognize that the "N/A" interest term is clear, unambiguous, and not susceptible to any attack. Even if defendants sought to vary the term of the Peterson Note relating to interest from "N/A" to "10%" by relying on contemporaneous alleged documents or oral discussions, that effort would be barred by the parol evidence rule because the "N/A" term is not ambiguous, an essential condition to avoid the parol evidence rule. E.g., E.A. Strout W. Realty Agency v. Broderick, 522 P.2d 144, 145 (Utah 1974). Defendants cite the case of Union Bank v. Swenson, 707 P.2d 663 (Utah 1985), for the proposition that extrinsic evidence is "admissible on the threshold issue of whether [a] writing was adopted by the parties as an integration of their agreement" Brief of Appellants at 26 n.3. However, defendants do not thereafter assert that the Peterson Note was not an integrated contract. In fact, the Peterson Note was the "final expression" of the parties' agreement on the trust deed note, especially as to the "N/A" interest term. The Peterson Note was executed simultaneously with the Warranty Deed and Deed of Trust, which merged or integrated any prior contracts for conveyance. Dobrusky v. Isbell, 740 P.2d 1325, 1326 (Utah 1987). Accord: Espinoza v. Safeco Title Ins. Co., 598 P.2d 346, 348 (Utah 1979) (extinguishing prior earnest money agreement). No subsequent claim was made by defendant Peterson that the interest term of the Peterson Note was in error or was not a final expression, which precludes their raising it on appeal now. Finally, the Peterson Note was treated as a final expression in the December 8 Agreement.

after the due date amendment in the December 8 Agreement. As discussed below, that position is contradicted by the due date amendment and other terms of the December 8 Agreement.

C. The December 8 Agreement Unambiguously Modifies the Due Date of the Peterson Note Without Modifying the Interest Term.

The December 8 Agreement addressed the delays in the anticipated construction and the need for additional monies to finish construction. The December 8 Agreement provided that defendant Peterson would advance up to \$75,000 in additional monies, subject to certain terms and conditions. The agreement also addressed payment of the \$95,000 Peterson Note, and extended the due date on that note to the time of the sale of the property. In doing so, the December 8 Agreement did not in any way provide for any interest, default or otherwise, to run on the original note.

Paragraph 4 of the December 8 Agreement, which specifically addresses these issues, reads as follows:

Payment of the sum owed by Harrington under the terms of the original Trust Deed Note (\$95,000) and payment of the sums advanced by Peterson under the terms of this Agreement (not to exceed an additional \$75,000) shall be due on the date the property is sold by the Owner or is otherwise transferred, conveyed or assigned.

The parties agree that Peterson's sole recourse to recover the sums of money advanced by her under the terms of this Agreement, plus interest and attorneys' fees, and to recover the sum of Ninety-Five Thousand Dollars (\$95,000) owed to her under the terms of the original Trust Deed Note, shall be against the Property and/or the proceeds arising from its sale or transfer.

December 8 Agreement, ¶ 4, Addendum, Tab C.

The first sentence of paragraph 4 provides that both the original Peterson Note and the new monies advanced under the December 8 Agreement "shall be due on the date the property is sold by Owner." That sentence clearly and unambiguously extends the "due date" for the Peterson Note to the date of closing, an express modification of the nine-month due date in the Peterson Note. Thus, interest on that note was "not applicable" until the due date of the sale of the Sunset Oaks Property, i.e., February 24, 1994.

In addition, the December 8 Agreement does not amend the Peterson Note to bear ongoing interest nor otherwise suggest that interest runs on the note. To the contrary, it affirms there is no interest component. That interest is "not applicable" in the Peterson Note is affirmed by the second part of paragraph 4, which provides that Mrs. Peterson's sole recourse is to recover:

. . . the sums of money advanced by her under the terms of this Agreement, plus interest and attorneys' fees, and to recover the sum of Ninety-Five Thousand Dollars (\$95,000)

. . . (emphasis added). Id. This sentence specifically mentions interest on the monies advanced under the December 8 Agreement but omits any reference to interest on the \$95,000 Peterson Note. The omission of reference to interest on the \$95,000 Note, when interest is specifically referenced with respect to the new monies advanced pursuant to the December 8 Agreement, confirms that no interest on the Peterson Note was contemplated by the parties.

Notwithstanding that the due date for the Peterson Note was amended by the December 8 Agreement to the date of the property sale, defendants argue that default interest from March 21, 1992, to December 8, 1992, continued to be owed by Harrington because the December 8 Agreement did not explicitly forgive or excuse it. Brief of Appellants at 28. Defendants argue that "[a]bsent some sort of express additional language clarifying that merely postponing the payment date was also meant to excuse interest on a long-overdue obligation, such intention should not be read into the clear language of the document."¹⁶ Id. at 28. Defendants' position is wrong on several grounds.

First, the December 8 Agreement amended the "due date" of the Peterson Note. Thus, the note, as amended, was not and could not be in default until the end of its term, namely, the sale of the property. As a logical matter, it is impossible for the Peterson Note to have a due date in the future and also be in default. For that reason, there was no need for the parties to "excuse" any default interest once the note was amended.¹⁷

¹⁶Defendants contended before the district court that default interest applied even after the amendment of the due date in the December 8 Agreement since they asked that court for a declaration that "interest does accrue on the \$95,000 of the original Peterson Note from March 21, 1992 forward." (R. at 1087.)

¹⁷Defendants argue that the December 8 Agreement was silent on the issue of excusing the prior default interest and that such silence should not be presumed to eliminate such interest. Defendants cite no authority for that presumption and are wrong. First, as discussed herein, the December 8 Agreement is not silent on the issue of any prior default interest because it expressly states that the sum payable on the amended due date is \$95,000. Second, even if the December 8 Agreement was "silent",

Second, in amending the due date of the Peterson Note, paragraph 4 of the December 8 Agreement is explicit on the amount to be paid on the amended due date. Paragraph 4 reads: "Payment of the sum owed by Harrington under the terms of the original Trust Deed Note (\$95,000) . . . shall be due on the date the Property is sold" This language is clear and unambiguous that the amount to be paid on the due date was \$95,000, not \$95,000 plus default or other interest.

Third, defendants assert that paragraph 3 of the December 8 Agreement, which contains at the end of the first sentence the phrase, "plus accruing interest," indicates that interest was already then accruing on the Peterson Note. Brief of Appellants at 27. Once again, defendants' argument misreads the language of the referenced paragraph. That paragraph reads:

3. Obligation of Harrington and Owner: In addition to the payment of the sum of Ninety Five Thousand Dollars (\$95,000.00) owed to her on the original Trust Deed Note dated June 21, 1991, Peterson shall be entitled to the payment of all sums advanced by her pursuant to the terms of this Agreement together with attorney fees incurred by her relating in any way to the negotiations for and preparation of this Agreement, plus accruing interest. Interest on the unpaid balance of each sum advanced by Peterson pursuant to paragraph 1 above shall be calculated from the date each sum has been advanced by her until she had been repaid in full at the prime rate then charged by Valley Bank and Trust Company plus four (4) percentage points.

December 8 Agreement, ¶ 3 (emphasis added); Addendum, Tab C. The phrase, "plus accruing interest," can only be read as applying solely to new monies advanced for several reasons. The

the more reasonable inference from such silence is that the amended due date eliminated any default status and interest related thereto.

introductory phrase, "[i]n addition to," clarifies that the new monies being advanced pursuant to the agreement are "in addition" to the original \$95,000. Everything after "June 21, 1991," in that first sentence then addresses the new monies advanced pursuant to the agreement, i.e., the \$75,000. The phrase, "plus accruing interest," applies to the new monies advanced pursuant to the Agreement because it is placed at the end of the sentence in conjunction with the concept of "sums advanced . . . pursuant to the terms of this Agreement." It is simply a strained and unwarranted reading to apply it to the \$95,000 mentioned at the first of the sentence.

Defendants also suggest that the phrase, "plus accruing interest," must be read as "signif[ying] that interest was already then accruing" Id. However, that phrase is better read to refer to interest which accrues in the future on monies advanced under the agreement, which in fact makes more sense in the context of the entire paragraph.

Finally, and most persuasively, the phrase, "plus accruing interest," is further clarified by the second sentence of paragraph 3, which describes the amount of the interest referred to in the preceding sentence and how it shall be calculated as to "the unpaid balance of each sum advanced by Peterson pursuant to paragraph 1 above" Since paragraph 1 of the agreement refers only to the new monies to be advanced not to exceed \$75,000, it confirms that interest does not apply to the Peterson Note.

This reading of the December 8 Agreement is confirmed by the second sentence of paragraph 4, which reads as follows:

The parties agree that Peterson's sole recourse to recover the sums of money advanced by her under the terms of this Agreement, plus interest and attorney fees, and to recover the sum of Ninety Five Thousand Dollars (\$95,000.00) owed to her under the terms of the original Trust Deed Note, shall be against the property and/or the proceeds arising from its sale or transfer.

December 8 Agreement, ¶ 4 (emphasis added); Addendum, Tab C. The placement of the phrase, "plus interest," after the reference to "sums of money advanced by her under the terms of this Agreement" and before the reference to the original trust deed note can only be read as indicating that interest was to run on the sums advanced under the agreement but not on the trust deed note. The word, "and," following the reference to interest makes clear that interest applies only to the sums advanced under the agreement. Thus, the second sentence of paragraph 4 supports the interpretation that no interest ran on the Peterson Note.

The December 8 Agreement clearly and unambiguously amended the due date of the Peterson Note, and that note could not be in default until the amended due date accrued. The December 8 Agreement further recognized that no default or other interest had accrued or would accrue on the Peterson Note.

III. PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES.

Plaintiffs seek an award of their attorneys' fees on appeal. Plaintiffs are entitled to recovery of their attorneys' fees with respect to defendants' wrongful claim that the Sunset Oaks Trust Deed II secured the February 1993 advances and thus was in

default by that amount. Paragraph 19 of the trust deed provides for a "recover[y]" of a "reasonable attorney's fee" in the event of "any default hereunder." Addendum, Tab B. Pursuant to Utah Code Annotated Section 78-27-56.5 (1986), plaintiffs have a reciprocal right of recovery as the prevailing party for disputes under the trust deed.

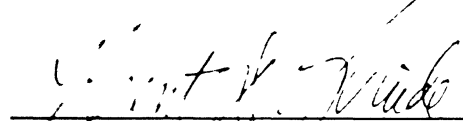
With respect to the interest issue, which involves interpretation of the December 8 Agreement on the amendment of the due date, paragraph 6 of that agreement provides that defendant Peterson "shall be entitled to" recover all costs incurred in enforcing the terms hereof, including reasonable attorneys' fees" Under the statutory principle of reciprocal rights, plaintiffs would be entitled to recover their attorneys' fees if they prevail.

CONCLUSION

For the foregoing reasons, this Court should affirm the declaratory judgment of the district court.

DATED this 27th day of March, 1998.

RAY, QUINNEY & NEBEKER



James S. Jardine

Brent D. Wride

Eric D. Barton

Attorneys for Plaintiffs/Appellees

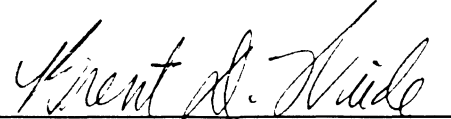
CERTIFICATE OF SERVICE

I certify that on the 27th day of March, 1998, I have caused to be hand-delivered two true and correct copies of the foregoing BRIEF OF APPELLEES to the following:

Harold C. Verhaaren, Esq.
John K. Mangum, Esq.
NIELSEN & SENIOR
60 East South Temple, #1100
Salt Lake City, UT 84111

DATED this 27th day of March, 1998.

RAY, QUINNEY & NEBEKER

A handwritten signature in cursive script, appearing to read "James S. Jardine", written over a horizontal line.

James S. Jardine
Brent D. Wride
Eric D. Barton
Attorneys for Plaintiffs/Appellees

ADDENDUM

- A. Peterson Note, dated June 21, 1991
- B. Sunset Oaks Trust Deed II, dated June 21, 1991
- C. December 8 Agreement.
- D. February 18 Letter Agreement

Tab A

T R U S T D E E D N O T E

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$95,000.00

SALT LAKE CITY,

June 21, 1991

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of

MARILYN HAMILTON PETERSON

NINETY FIVE THOUSAND DOLLARS AND 00 CENTS DOLLARS (\$95,000.00)

together with interest from date at the rate of N/A
per cent (N/A %) per annum on the unpaid principal, said
principal and interest payable as follows:

BALANCE DUE 9 MONTHS FROM DATE OF EXECUTION

A late payment penalty of _____ percent (____ %) of any payment due shall be assessed against the Maker if said payment has not been received by Holder within _____ days of the due date. Each payment shall be credited first to late payments due, then to accrued interest due and the remainder to principal.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable. Maker hereby acknowledges and agrees that the interest rate shall be accelerated to _____ percent (____ %) per annum on the unpaid balance at the time of default.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors, and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of

25

and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.

ROBERT L. HARRINGTON

102415 40

(ATC Rev. 6-87)

Tab B

5088815

WHEN RECORDED, MAIL TO:

Marilyn Hamilton Peterson
3069 East Canyon Canyon Rd
Salt Lake City, UT 84109

1100

5088815
27 JUNE 91 04:55 PM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
ASSOCIATED TITLE
REC BY: KARMA BLANCHARD, DEPUTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE.

102415

(Space Above This Line for Recording Date)

DEED OF TRUST
WITH ASSIGNMENT OF RENTS

THIS DEED OF TRUST, made this 21 day of June, 1991, between

ROBERT L. HARRINGTON

as TRUSTOR, whose address is _____

ASSOCIATED TITLE COMPANY, a Utah corporation, as TRUSTEE, and

MARILYN HAMILTON PETERSON, as BENEFICIARY,

WITNESSES: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described property, situated in: SALT LAKE County, State of Utah:

LOT 17, SUNSET OAKS SUBDIVISION PLAT "B", ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE AND OF RECORD IN THE SALT LAKE COUNTY RECORDER'S OFFICE.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits.

BK 6330 PG 2933

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For the Purpose of Securing:

(1) payment of the indebtedness evidenced by a promissory note of even date hereof in the principal sum of \$95,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

To Protect The Security of This Deed of Trust, Trustor Agrees:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereon; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part hereof is being obtained for the purpose of financing construction of improvements on said property Trustor further agrees:

- (a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and
- (b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary, instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to the reduction of the indebtedness hereby secured or to restoration or repair of the property damaged. In the event that the Trustor shall fail to provide satisfactory hazard insurance, the Beneficiary may procure, on the Trustor's behalf, insurance in favor of the Beneficiary alone. If insurance cannot be secured by the Trustor to provide the required coverage, this will constitute an act of default under the terms of Deed of Trust.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. To pay to Beneficiary monthly in advance, an amount, as estimated by Beneficiary in its discretion, sufficient to pay all taxes and assessments affecting said property, and all premiums on insurance therefor, as and when the same shall become due.

7. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or, Trustee but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

8. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of % per annum until paid, and the repayment thereof shall be secured hereby.

9. To pay to Beneficiary a "late charge" of not to exceed five cents (5) for each One Dollar (\$1.00) of each payment due hereunder or due pursuant to the aforesaid promissory note of even date hereof which is more than fifteen (15) days in arrears. This payment shall be made to cover the extra expense involved in handling delinquent payments.

IT IS MUTUALLY AGREED THAT:

10. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

11. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Deed of Trust and the note for endorsement (in case of full reconveyance, for cancellation and retention) without affecting the liability of any person for the payment of the indebtedness secured hereby, and without releasing the interest of any party joining in this Deed of Trust, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Deed of Trust or the lien or charge thereof; (d) grant any extension or modification of the terms of this loan; (e) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustor agrees to pay reasonable trustee's fees for any of the services mentioned in this paragraph.

12. As additional security, Trustor hereby assigns to Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Deed of Trust and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Deed of Trust to any such tenancy, lease or option.

13. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

14. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

15. The failure on the part of beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

16. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

17. After the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every such case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its deed conveying said property so sold, but without any covenant of warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 8% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

18. Trustor agrees to surrender possession of the hereinabove described Trust property to the Purchaser at the aforesaid sale, immediately after such sale, in the event such possession has not previously been surrendered by Trustor.

19. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

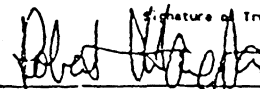
20. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

21. This Deed of Trust shall apply to, issue to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

22. Trustee accepts this Trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

23. This Deed of Trust shall be construed according to the laws of the State of Utah.

24. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor

ROBERT L. HARRINGTON

STATE OF UTAH)
COUNTY OF SALT LAKE)

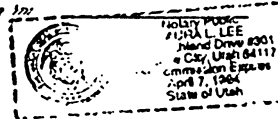
On this 27 day of JUNE 1991, personally appeared before me,
ROBERT T. HARRINGTON the signer(s) of the foregoing instrument, who
duly acknowledged to me that HE executed the same.

My Commission Expires

Notary Public: [Signature]

Residing at:

STATE OF UTAH)
COUNTY OF)



On the ____ day of _____, A.D. 19__ personally appeared before me _____
and _____, who being by me duly sworn did say,
each for himself, that he, the said _____ is the _____ President, and he,
the said _____ is the _____ Secretary
of _____, and that the within and foregoing instrument was signed
in behalf of said corporation by authority of its Board of Directors, and said _____
and _____
each duly acknowledged to me that said corporation executed the same and that the seal affixed
the seal of said corporation.

Notary Public

My Commission Expires

Residing at:

Do Not Record

REQUEST FOR FULL RECONVEYANCE

(To be used only when indebtedness secured hereby has been paid in full)

TO

The undersigned is the legal owner and holder of the note and all other indebtedness secured by the within
Deed of Trust. Said note, together with all other indebtedness secured by said Deed of Trust has been fully paid
and satisfied; and you are hereby requested and directed, on payment to you of any sums owing to you under the terms
of said Deed of Trust, to cancel said note above mentioned, and all other evidences of indebtedness secured by said
Deed of Trust delivered to you herewith, together with the said Deed of Trust, and to reconvey, without warranty, to
the parties designated by the terms of said Deed of Trust all the estate now held by you thereunder.

Dated _____, 19__

Reconveyance to _____

Tab C

AGREEMENT

This Agreement made this 8 day of December, 19992, among MARILYN HAMILTON PETERSON ("Peterson"), ROBERT L. HARRINGTON ("Harrington") and HARRINGTON PROPERTIES, INC.

R E C I T A L S:

A. Harrington executed a Trust Deed Note dated June 21, 1991, made payable to Peterson in the principal amount of Ninety-Five Thousand Dollars (\$95,000) secured by a Deed of Trust dated June 21, 1991. Said Trust Deed was recorded June 27, 1991, as Entry No. 5088815 in Book 6330 at Page 2939 of the official records of the Salt Lake County Recorder (the "Trust Deed") and affects the following described real property located in Salt Lake County, State of Utah:

Lot 17, SUNSET OAKS SUBDIVISION, Plat "B" according to the official plat thereof on file in the Salt Lake County Recorder's office. (the "Property")

B. Harrington Properties, Inc. is currently the owner of the Property ("Owner").

C. Harrington has caused and is causing improvements to be constructed on the Property (the "Work") and has been acting as the general contractor in connection with that construction.

D. Additional funds are needed to complete the construction of the improvements on the Property.

E. Peterson is willing to advance additional funds to be used for that purpose and Harrington and the Owner are willing that said advances be secured by the Trust Deed.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Advance of Additional Funds by Peterson: Peterson agrees to advance funds in an amount not to exceed the total sum of Seventy-Five Thousand Dollars (\$75,000) for the sole purpose of paying necessary costs and expenses incurred by Harrington to construct and make improvements to the Property.

Harrington and the Owner acknowledge that before Peterson shall be obligated to pay any sum or sums under this Agreement, she shall be entitled to receive written verification satisfactory to her of the amount(s) to be paid for the Work and, at her option, may require the delivery of lien waivers and/or releases satisfactory to her. Peterson's payments under this Agreement may be made to or for the benefit of vendors, material men, laborers, subcontractors and contractors who have participated in performing the Work and shall be made within three (3) business days following her receipt of said written verification, lien waivers and/or releases.

2. Warranties of Harrington and the Owner: Harrington and the Owner represent and warrant that all funds advanced by Peterson pursuant to the terms of this Agreement shall only be used to pay for the Work and for no other purpose.

3. Obligation of Harrington and Owner: In addition to the payment of the sum of Ninety-Five Thousand Dollars (\$95,000) owed to her on the original Trust Deed Note dated June 21, 1991, Peterson shall be entitled to the payment of all sums advanced by her pursuant to the terms of this Agreement, together with attorneys fees incurred by her relating in any way to the negotiations for and preparation of this Agreement, plus accruing interest. Interest on the unpaid balance of each sum advanced by Peterson pursuant to Paragraph 1 above shall be calculated from the date each sum has been advanced by her until she has been repaid in full at the prime rate then charged by Valley Bank & Trust Company plus four (4) percentage points.

4. Payment Due Date: Payment of the sum owed by Harrington under the terms of the original Trust Deed Note (\$95,000) and payment of the sums advanced by Peterson under the terms of this Agreement (not to exceed an additional \$75,000) shall be due on the date the Property is sold by the Owner or is otherwise transferred, conveyed or assigned.

The parties agree that Peterson's sole recourse to recover the sums of money advanced by her under the terms of this Agreement, plus interest and attorney fees, and to recover the sum of Ninety-Five Thousand Dollars (\$95,000) owed to her under the terms of the original Trust Deed Note, shall be against the Property and/or the proceeds arising from its sale or transfer.

5. Default: Harrington and the Owner will be in default under the terms of this Agreement if they fail to cause Peterson to be paid at the time of the sale or transfer of the Property; any representation or statement made or furnished to Peterson by Harrington or the Owner pursuant to the terms hereof is false and misleading in any material respect; or the Owner and/or Harrington transfer or assign the Property without the prior written consent of Peterson.

6. Attorney Fees. If Harrington or the Owner defaults under the terms of this Agreement, Peterson shall be entitled to recover all costs incurred by her in enforcing the terms hereof, including reasonable attorney fees, subject to the limitation that her recourse to recover the same shall be against the Property and/or the proceeds arising from its sale or transfer.

7. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah.

8. Collateral. This Agreement is secured by a Trust Deed dated June 21, 1991, more particularly referred to in Paragraph 1 above.

9. Assignment. Harrington may not transfer or assign his rights under this Agreement, without the prior written consent of Peterson, who may withhold that consent for any reason.

10. Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each of the parties to this Agreement.

11. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and together shall constitute one and the same agreement.

12. Binding Effect. All of the terms and conditions of this Agreement shall be binding upon and inure to the benefit of the heirs, assigns, successors, and other legal representatives of the parties.

Tab D

February 18, 1993

Marilyn Peterson
Hamilton Investment Co.
60 So. Temple Suite 1200
Salt Lake City, Utah 84111

RE: Sums advanced in additon to \$75,000.00, (December 8, 1992 Agreement).

Dear Marilyn:

This letter will confirm that any money advanced by you, above and beyond the \$75,000.00 (December 8 1992 Agreement), for the purpose of construction of the home located at 1656 S. Sunset Oaks Dr., will be returned to you with interest consistent with the rate of interest in our Agreement dated December 8, 1992, and will be returned to you prior to the distribution of any proceeds to Harrington Properties Inc. The sale of the house will be the sole source of the return of this money.

Thank you for your help and cooperation.

Sincerely,



Bob Harrington