

2009

Mark Hess and Marilyn Hess v. Canberra
Development Company, LC and David Allen :
Brief of Appellee

Utah Court of Appeals

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Stephen Quesenberry, Charles L. Perschon; Hill, Johnson & Schmutz; attorney for appellee.

Bruce R. Baird; Dallis A. Nordstrom; Young Hoffman; attorneys for appellants.

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IN THE SUPREME COURT OF UTAH

MARK HESS and MARILYN HESS,

Plaintiffs/Appellees,

vs.

CANBERRA DEVELOPMENT
COMPANY, LC and DAVID ALLEN,

Defendants/Appellants.

Case No. 20090266

BRIEF OF APPELLEES

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Fred D. Howard

MR. BRUCE R. BAIRD
BRUCE R. BAIRD, PC
2150 South 1300 East
Suite 500
Salt Lake City, Utah 84106
Telephone (801) 328-1400
Facsimile (801) 328-1444
Attorney for Defendants/Appellants

MS. DALLIS A. NORDSTROM
YOUNG HOFFMAN, LLC
170 South Main Street
Suite 1125
Salt Lake City, Utah 84101-1639
Telephone (801) 708-7019
Facsimile (801) 359-1980
Attorney for Defendants/Appellants

STEPHEN QUESENBERRY (8073)
CHARLES L. PERSCHON (11149)
HILL, JOHNSON & SCHMUTZ
RiverView Plaza, Suite 300
4844 North 300 West
Provo, Utah 84604
Telephone (801) 375-6600
Facsimile (801) 375-3865
Attorneys for Plaintiffs/Appellees

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Telephone (801) 328-1400
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CHARLES L. PERSCHON (11149)
HILL, JOHNSON & SCHMUTZ
RiverView Plaza, Suite 300
4844 North 300 West
Provo, Utah 84604
Telephone (801) 375-6600
Facsimile (801) 375-3865
Attorneys for Plaintiffs/Appellees

MS. DALLIS A. NORDSTROM
YOUNG HOFFMAN, LLC
170 South Main Street
Suite 1125
Salt Lake City, Utah 84101-1639
Telephone (801) 708-7019
Facsimile (801) 359-1980
Attorney for Defendants/Appellants

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STATEMENT OF JURISDICTION

This Court's jurisdiction rests upon Utah Code Ann. sec. 78A-3-102(3)(j).

STATEMENT OF THE ISSUES

ISSUE 1: Whether the jury properly concluded that Defendant/Appellant Canberra Development Company, LC ("Canberra") and Defendant/Appellant David J. Allen ("Allen") are liable for fraudulent nondisclosure to Plaintiffs/Appellees Mark and Marilyn Hess (collectively "the Hesses"). Standard of Review: The "burden on an appellant to establish that the evidence does not support the jury's verdict . . . is quite heavy." *Pratt v. Prodata, Inc* , 885 P.2d 786, 788 (Utah 1994). To "successfully attack the verdict, an appellant must marshal all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is not sufficient to support it." *Id.*

ISSUE 2: Whether the trial court correctly concluded that the Hesses need not provide expert testimony to prove their fraudulent nondisclosure claims against Canberra and Allen. Standard of Review: This is a question of law, which this Court reviews "for correctness." *Downing v Hyland Pharm* , 2008 UT 65, ¶ 5, 194 P.3d 944. 946.

ISSUE 3: Whether the trial court properly denied Canberra and Allen's motion to dismiss Ms. Hess's claims for fraudulent nondisclosure. Standard of Review: A district court's denial of a motion to dismiss is a "legal determination" that this Court "review[s] for correctness." *Mack v Utah State Dep't of Commerce*, 2009 UT 47, ¶ 12, 221 P.3d 194, 198.

ISSUE 4: Whether the trial court rightly denied Canberra and Allen's JNOV.

Standard of Review: This Court will reverse a trial court's denial of a JNOV "only if, viewing the evidence in the light most favorable to the [Hesses]," the Court "concludes that the evidence is insufficient to support the verdict." *Hall v Wal-Mart Stores, Inc* , 959 P.2d 109, 111 (Utah 1998). And "in order to prevail, the appealing party must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *Id*

ISSUE 5: Whether the trial court ruled correctly on Canberra and Allen's jury instruction regarding intervening/superseding cause. Standard of Review: Whether a trial court's refusal to give a "proposed jury instruction constitutes error is a question of law, which [this Court] review[s] for correctness." *Brewer v Denver & Rio Grande W R R* , 2001 UT 77, ¶ 38, 31 P.3d 557, 571. But "it is not error [for a court] to refuse a proposed jury instruction if the point is properly covered in other instructions." *Id* The Court reviews jury instructions "in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case." *Id*

ISSUE 6: Whether the trial court properly denied Canberra and Allen's motion for remittitur. Standard of Review: The Court applies an "abuse of discretion standard in reviewing a trial judge's decision to grant or deny a remittitur on the amount of compensatory damages." *Smith v Fairfax Realty, Inc* . 2003 UT 41, ¶ 25, 82 P.3d 1064, 1070. Under this standard of review, the Court "will reverse only if there is no reasonable basis for the decision." *Id*

STATEMENT OF THE CASE

On or about May 24, 2005, Mark and Marilyn Hess sued Tracy Smith and GTS

Construction, Inc., the contractor who built the Hesses' home. (R. at 1-55.) The Hesses alleged fraudulent concealment, fraudulent nondisclosure, breach of warranty, breach of contract, and breach of the covenant of good faith and fair dealing. (R. at 1-55.) On or about November 4, 2005, the Hesses filed an amended complaint in which they added Defendant Canberra Development to the suit. (R. at 283-343.) Against Canberra, the Hesses alleged fraudulent nondisclosure and fraudulent misrepresentation. (R. at 283-343.) On or about April 20, 2007, the Hesses filed a second amended complaint in which they added Defendant David J. Allen to the claims of fraudulent nondisclosure and fraudulent misrepresentation. (R. at 1711-25.) All parties ultimately settled, except for Canberra and Allen. (R. at 4678:454, 475.)

The Honorable Fred D. Howard presided over the four-day jury trial on September 29, October 1-3, 2008. (R. at 3437-38, 3525-26, 3527-28, 3529-30.) The jury returned its verdict on the evening of October 3, 2008. (R. at 4678:771-90.) As to the Hesses' fraudulent nondisclosure claim, the jury found for the Hesses and against both Canberra and Allen.¹ (R. at 3748.) As to Mr. Hess's fraudulent misrepresentation claim, the jury found for the Hesses and against both Canberra and Allen.² (R. at 3747.) The jury awarded the following damages to the Hesses: \$10,617.68 as damages "for costs relating

¹ The jury also found "from clear and convincing evidence" that both Canberra and Allen's "actions in relation to the Hesses' fraudulent nondisclosure claims were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of the Hesses," which would have supported an award of punitive damages. (R. at 3748.)

² As with the fraudulent nondisclosure claim, the jury found that both Canberra and Allen's conduct rose to the level justifying punitive damages. See footnote 1, *supra*.

to the Hesses discovering the defects in their home and property”; \$319,439.62³ as damages “for repairs to the Hesses’ home that have already been incurred”; \$206,692.70 as damages “for repairs to the Hesses’ home that have yet to be incurred”; and \$2,625,000 as damages “for mental or emotional distress as a result of Defendants Canberra and/or Allen’s fraudulent nondisclosure and/or fraudulent misrepresentation,” (r. at 3746); for a grand total of \$3,172,367.68.

The jury also apportioned the damages: 35% to Allen, 45% to Canberra, 17% to GTS Construction, 0% to DaM Construction, 2% to Earthtec Testing and Engineering, and 1% to the Hesses. (R. at 3745.)

STATEMENT OF FACTS⁴

Canberra and Allen Develop the Last Phase of the Canberra Subdivision, and They Obtain the AGEC Report which Warns of Collapsible Soils in the Development

In early 1997, Canberra and Allen sought to develop the last phase of the Canberra Development in Lindon, Utah. (R. at 4678:610-11.) Before developing the property, they hired Applied Geotechnical Engineering Consultants, Inc. (“AGEC”) to perform a geotechnical analysis⁵ of this last phase, which included lot 41, the lot the Hesses would ultimately purchase. (R. at 4678:610-11.) (Canberra and Allen had previously obtained

³ The jury actually awarded \$330,057.30 for damages already incurred. (R. at 3746.) This was a simple math error on the jury’s part. The jury inadvertently included the \$10,617.68 it had already awarded for costs to discover the defects in the award for repairs already incurred. During a post-trial hearing, the Hesses stipulated to remit the amount awarded for repairs already incurred by \$10,617.68.

⁴ As the appellees, the Hesses “recite the facts in the light most favorable to the jury’s verdict.” *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 794 (Utah 1991).

⁵ A geotechnical analysis is a three to six week study that costs about \$3000 to \$5000. (R. at 4677: 188.) It provides “precautions and details [about the land] for the construction of actual structures that would later be built.” (R. at 4678: 522.)

“[s]even or eight” other subdivision-wide soils reports for other phases of the Canberra development. (R. at 4678:610.))

On April 3, 1997, AGECE provided Canberra and Allen with its report (“AGECE Report”) (copy attached as **Addendum A.**)⁶ The AGECE Report contained warnings and recommendations for future homeowners to be aware of and follow prior to building their homes. On the second page of the AGECE Report, titled “conclusions,” AGECE highlighted the most critical warnings and recommendations. including the following: “[r]ecommendations contained in this report should be *carefully followed*,” and “[m]oisture sensitive soils have been reported in the area. *Precautions with respect to constructing in moisture sensitive soil areas are included in this report.*” (Add. A, p. 2.) (Emphases added.)

The AGECE Report contained a more detailed analysis and expanded on these warnings and recommendations. For example, AGECE forewarned that:

- “With the known erratic occurrence [of bad soils at the site], we suggest that the owners be aware of the potentially moisture sensitive soils in the area and that the excavation observations and drainage precautions contained in the geotechnical recommendations of this report be carefully followed.” (Add. A, p. 10.)
- “The sprinkler lines and sprinkler heads should not be placed within 10 feet of the foundation walls.” (Add. A, p. 13.)
- “If wetting of the foundation soil occurs, footing settlement could be significantly greater [than 1 inch].” (Add. A, p. 13.)

⁶ The trial court received the AGECE Report as Exhibit 2 at trial. (R. at 3641.)

- Test pit 12, which contained collapsible soils, was located on lot 41, which would eventually be the Hesses' lot. (**Add. A, fig. 2.**)

Allen knew about the collapsible soils and other problems in the development because he “read through that report [the AGECE Report]” (R. at 4678: 612.) He also testified that he specifically read the “conclusions” section of the report: “[t]he conclusion page was what I was very interested in.” (R. at 4678: 612.)

Mr. Steven Tanner was Canberra's vice president and exclusive real estate agent for the Canberra development. (R. at 4675:73; 4678:524.) By the time he was selling lots in this last phase, he had received copies of the AGECE Report from Canberra. (R. at 4675:79-80.) Canberra and Allen did not instruct Mr. Tanner to give the AGECE Report to potential buyers: “I did not receive any instructions [on what to do with the AGECE Report].” (R. at 4675:80.) Mr. Tanner testified that unless a potential buyer specifically asked him for a geotechnical report, Mr. Tanner did not disclose the AGECE Report, even though he carried several copies with him. (R. at 4675:79-81.)

Mr. Tanner also testified that he “glanced” at the AGECE Report, but “not being an engineer[, he] wouldn't know what all the terms meant.” (R. at 4675:97.) But upon inquiry whether he understood the AGECE Report's recommendations, such as to grade the surface to drain away from the home and to put downspouts beyond the foundation of the home, Mr. Tanner conceded that “it's not all that complicated” and that he could “follow those [recommendations]” (R. at 4675:98.) He even went a step further and said, “[the recommendations in the AGECE Report are] something that builders need to know about, I suppose.” (R. at 4675:98.)

Canberra and Allen Fail to Disclose the AGECE Report to the Hesses

In early 2004, Mark and Marilyn Hess wanted to build their dream home. They drove through Lindon and saw the Canberra development. (R. at 4677:258-59.) The Hesses took a brochure from the “for sale” sign, and they called Mr. Steven Tanner, Canberra’s vice president and real estate agent. (R. at 4677:259; 4675:73; 4678:524.)

Mr. Tanner and the Hesses subsequently met to discuss lots in the Canberra development. (R. at 4675:83.) Not knowing about the AGECE Report—which showed collapsible soils on lot 41—the Hesses made an offer on lot 41 for \$150,000, Canberra’s asking price. (R. at 4677:259-60.) Canberra accepted, and the Hesses gave Mr. Tanner a \$1,000 check as an earnest money deposit, and Mr. Tanner presented it to Allen. (R. at 4675:82-83.) Mr. Tanner did not disclose the AGECE Report—or the fact that there were collapsible soils in the development—to the Hesses. (R. at 4677:260; 4675:91.)

Mr. Hess signed the real estate purchase contract (“REPC”) and the seller’s property condition disclosure on or about February 21, 2004. (R. at 4677:260-61.) (Copies of the REPC and the seller’s disclosure form are attached as **Addendum B** and **Addendum C**, respectively.)⁷ Defendant David J. Allen initialed and signed those two documents a couple days later, on February 23, 2004. (R. at 4675:78-79.) (**Add. B, C.**)

Apart from simply disclosing the AGECE Report to the Hesses, Canberra and Allen had several opportunities to notify the Hesses of the collapsible soils in the development in the seller’s disclosure form. For example, on the second page of the disclosure form, it

⁷ The trial court received the REPC as Exhibit 6 at trial, and the court received the seller’s disclosure form as Exhibit 7 at trial. (R. at 3641.)

asked Canberra and Allen if there was “anything else which you should disclose to [the Hesses] because it may materially or adversely affect the value or desirability of the Property?” (**Add. C.**) There are several blank lines on which Canberra and Allen could have written in “see AGEC Report” or given the Hesses some similar warning about collapsible soils. *But Canberra and Allen left the lines blank.* (**Add. C.**)

Directly above the signature line for Canberra and Allen, it stated: “SELLER REPRESENTS THAT, TO THE BEST OF SELLER’S KNOWLEDGE, THE INFORMATION SET FORTH IN THE FOREGOING DISCLOSURE STATEMENT IS ACCURATE AND COMPLETE.” (**Add. C.**) Allen signed on the line immediately below this statement.

Mr. Hess read the seller’s disclosure form carefully, and he understood that, he could “cancel the whole transaction” if he discovered something adverse in the seller’s disclosure. (R. at 4677:264.) Because Defendants did not truthfully complete the form, Mr. Hess did not see anything in the disclosure form that worried him. (R. at 4677:264.)

The Hesses eventually paid Canberra/Allen, and Allen signed the warranty deed conveying the property to Mark Hess and Marilyn Hess on April 1, 2004. (R. at 4677:265.) (A copy of the warranty deed is attached hereto as **Addendum D.**)

At no time before closing on the lot did Canberra, Allen, or Mr. Tanner provide the AGEC Report to the Hesses or tell the Hesses that such a geotechnical report existed. (R. at 4677:266.) Moreover, Canberra and Allen did not disclose that there were serious soil problems in the development generally, or specifically on lot 41. (R. at 4677:266.)

The Hesses’ Home Settles Dramatically

The Hesses' home was completed in January 2005. (R. at 4677:295.) Shortly after moving in, there were "some little things with [sticking] doors," but the "major problems were in the end of March [of 2005]." (R. at 4677:295.) These problems got much worse.

The Hesses contacted GTS Construction, their contractor. (R. at 4677:297.) Mr. Tracy Smith, the owner of GTS Construction, came to the Hesses' home with some of his employees and subcontractors but could not solve the problem. (R. at 4677:303-04.) (A photograph of one of the home's exterior doors is attached as **Addendum E**, which was admitted at trial as Exhibit 36L, r. at 3639.)

The Hesses contacted Atlas Piers, which recommended that one hundred piers be installed under the Hesses' home. (R. at 4677:315.) Atlas installed sixteen piers in the most troublesome spots at a cost of \$24,483.00. (R. at 4677:315-16; 3640.)⁸ Later, in the summer of 2008, the Hesses contracted with Atlas Piers to install the rest of the piers Atlas had recommended at a cost of \$158,472.50. (R. at 4677:327-29.) In the process, Atlas had to jackhammer the Hesses' concrete basement slab for an additional \$28,305.00. (R. at 4677:329-30.)

Since 2005, the Hesses and their family have intensely felt the ripple effects of Canberra and Allen failing to disclose the AGEC Report. And the effects are not limited to the home itself. Their failure to disclose the report has had long-lasting effects on the Hesses, their relationship, their family, and their finances. Because Canberra and Allen

⁸ Atlas Piers' invoice for \$24,483.00 was admitted into evidence as Exhibit 20. (R. at 3640.)

did not disclose the AGEK Report, the Hesses could not heed its precautions and warnings. And as a result, the Hesses have endured excruciating stress, emotional and psychological trauma, and a strain on their marriage and their family, not to mention their finances.

In addition, the repair work has taken a toll on the Hesses and their family. Indeed, since first moving into their new home, the Hesses have been forced to dedicate their lives to remedying the major problems in their home. This has caused the Hesses great stress and mental anguish. A non-exhaustive table of what the Hesses have endured, sorted by category, is below.

DISCOMFORT
“[I]t’s been a nightmare to heat. . . . And . . . the bugs, at first it was just insects but this last . . . spring we had mice everywhere. And . . . we couldn’t fill up all the holes, we couldn’t keep them out.” (R. at 4678:561.)
“It was deafening. It was extremely annoying. We had to take all the pictures off the walls [while they were installing the original piers].” (R. at 4677:325.) (See Addendum F , admitted at trial as Exhibit 36KK, r. at 3639.)
“[There was] [d]irt, dust, and jack hammering for three weeks straight while we were living in the house.” (R. at 4677:303.) (Add. F)
“This is the same section only back a few feet [where two outside walls have separated]. This was six, maybe seven inches wide at the top.” (R. at 4677:301.) (A photograph is attached as Addendum G , admitted at trial as Exhibit 36DD, r. at 3639.)
“That’s the other side [of a beam that has separated from the deck]. You’re seeing the bird’s nest. . . . [W]e’ve [also] had mice in the house.” (R. at 4677:301.) (A photograph is attached as Addendum H , admitted at trial as Exhibit 36K, r. at 3639.)
“These cracks are very large. In fact, in the basement, you can feel cool air coming through that so it goes all the way through [from the outside of the house to the inside].” (R. at 4677:299.)
FINANCIAL EFFECTS
“And it got to the point where . . . I sold my wedding ring. And so financially it’s been really hard.” (R. at 4678:560.)
“[Dealing with the problems with my house] has affected us financially . . . in a big way.

We have spent a lot of money in attorney[s'] fees. . . . We've spent a lot of money in having tests done through Terracon and all these things trying to find out what's going on with our home." (R. at 4678:560.)

"Yeah. I put it all [the initial repairs and piers] on my credit cards." (R. at 4677:316.)

"We've . . . had garage sales, . . . sold my kids' air hock[e]y table, their pingpong table, their video equipment, just stuff, we got to that point and just to try to keep going to, to find out where to get help, how to, how to fix our home and just to keep this going." (R. at 4678:560.)

FAMILY EFFECTS

"[Dealing with the problems with my house] have affected every area of our life, . . . I mean every single area. We had never built a home, we started, we were excited. we built it, we were bringing these families together and wanted a place for them and we thought we had that, and then within just a couple months, . . . it turned into a nightmare." (R. at 4678:559-60.)

"Mark has a son in Seattle that's wanted to come live with us and . . . that hasn't been able to happen. I've needed space for my kids and that hasn't been able to happen." (R. at 4678:560-61.)

"[T]hen I get a message from Lind[o]n City that they might evict me because of safety issues. They were talking about red tagging my home so now I'm worried about, okay, now what do we do to fix this?" (R. at 4677:334.) (A photograph is attached as **Addendum I**, admitted at trial as Exhibit 36BB, r. at 3639.)

HEALTH EFFECTS

"[I]t's hard because my husband [Mark] drinks Pepto Bismol all the time, his stomach hurts. It's just affected us every way." (R. at 4678:561.)

"My wife has panic attacks now. She never had those before." (R. at 4677:335.)

MARRIAGE EFFECTS

"[I]t's been hard on our marriage, . . . it's everything we talk about, it's we see it every, every time we wake up it's what we see. . . . And it's just, it's just frustrating. you know." (R. at 4678:561.)

"[T]here was a lot of stress" (R. at 4677:335.)

"I can't remember the last time my wife and I had a full night decent sleep where I haven't woke[n] up three or four times." (R. at 4677:335.)

"[This has impacted my relationship with my wife,] yeah." . . . I haven't really had anything else to talk about for four years." (R. at 4677:335)

FEAR AND PANIC

"[We heard noises in the house] after we got back from . . . vacation [in the spring of 2005]. . . . I remember one time laying in bed in the middle of the night and there was a crack so loud that . . . I thought our house got hit by lightning, and it just scared both of us to death. We realized what it was. And Mark just ran outside on the porch and yelled to stop raining." (R. at 4678:550-51.)

“A lot of emotions. I don’t know if I can describe what it feels like to plan and prepare for something for as much as 20 years and then to be awoke[n] in the middle of the night to terrible sounds of breaking and cracking and wondering if I’m experiencing an earthquake. . . . It was scary. It’s the middle of the night and I’m panicky. (R. at 4677:334.)

“[A]s time went on it just got worse and worse. So we panicked every time it rained.” (R. at 4678:560.)

“[O]ne time I was in my bedroom and the window below my bedroom just shattered and it was, it’s pretty scary. . . . [I]t just scared me to death” (R. at 4678:551.)

The Hesses’ horror story continues today. These experiences speak for themselves, and they exemplify the very definition of mental and emotional distress.

SUMMARY OF ARGUMENT

This case is about the duties that sellers of real property, and developers of real property, owe to their buyers. First, the Hesses argue that Canberra and Allen failed to marshal the evidence, as required under this Court’s precedent.

Next, turning to the merits, Canberra and Allen are liable for fraudulent nondisclosure because, as a seller and developer of real property, they had a legal duty to communicate information—i.e., to disclose the AGECE Report—to the Hesses. Further, Canberra and Allen read and knew about the AGECE Report, and it was material to the transaction. They failed to disclose it to the Hesses, making them liable.

The trial court properly concluded that the Hesses did not need to provide expert testimony to prove their fraud claims. This Court has already clearly established the duty of care that a seller of property and a developer of property owe to a buyer. Therefore, an expert was not necessary to establish those duties as might be the case in a medical malpractice negligence case.

Next, the trial court properly denied Canberra and Allen's motion to dismiss Ms. Hess's fraudulent nondisclosure claim. She and Mr. Hess bought the lot, and the warranty deed clearly reflects that Canberra and Allen conveyed the lot to Marilyn Hess and Mark Hess, and not solely to Mark Hess.

Canberra and Allen failed to preserve their objection to their proposed jury instruction on superseding/intervening cause. In any event, superseding/intervening cause applies to negligence causes of action, but not to fraud.

The trial court also correctly rejected Canberra and Allen's motion for remittitur. Canberra and Allen utterly failed to rebut or contest any of the Hesses' testimony and evidence on their pain and suffering. Further, the jury's damages award was based on sufficient evidence—evidence that Canberra and Allen did not argue against or dispute, even in closing argument.

Finally, the trial court properly affirmed the jury's finding that Canberra and Allen are liable to Mr. Hess for fraudulent misrepresentation. Canberra and Allen's actions satisfy the elements of that cause of action.

ARGUMENT

I. CANBERRA AND ALLEN FAILED TO MARSHAL THE EVIDENCE.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires “[a] party challenging a fact finding [to] first marshal all record evidence that supports the challenged finding.” In the case of a jury verdict, “an appellant must marshal all of the evidence that supports the findings and demonstrate that when viewed in the light most favorable to the verdict, there is insufficient evidence to support it.” *Steenblik v.*

Lichfield, 906 P.2d 872, 875 (Utah 1995).

Indeed, the standard for overcoming a jury verdict is high: “[a]ll reasonable inferences must be drawn in favor of the verdict.” *Id.* (citation omitted). If the evidence “taken in the light most favorable to the verdict supports the verdict, [the Court] will affirm.” *Steenblik v. Lichfield*, 906 P.2d 872, 875 (Utah 1995).

The marshaling requirement is “not intended to gratuitously oppress an appellant; rather it exists to facilitate a structured, realistic, and skeptical appraisal of facts without unduly compromising the adversarial process.” *In the Matter of E.H. v. R.C. and S.C.*, 2006 UT 36, ¶ 64, 137 P.3d 809, 822. At its core, the “duty to marshal evidence contemplates that an appellant present every scrap of competent evidence introduced at trial which supports the very findings the appellant resists and then ferret out a fatal flaw in the evidence, becoming a devil’s advocate.” *Id.* (citation and quotations omitted).

Finally, this Court has “repeatedly . . . warned of the grim consequences parties face when they fail to fulfill the marshaling requirement.” *United Park City Mines Co. v. Stichting Mayflower Mtn. Fonds*, 2006 UT 35, ¶ 27, 140 P.3d 1200, 1207. When an appellant fails to perform this “critical task,” the Court “rel[ies] on that failure to affirm the [jury’s verdict].” *Id.*; see also *In the Matter of E.H.*, 2006 UT 36, ¶ 65; *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 19, 164 P.3d 384, 390 (“[P]arties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court’s factual findings.”).

In this case, Defendants failed to marshal, and they failed to show how the evidence, when viewed in a light most favorable to the jury’s verdict, is insufficient.

Canberra and Allen were required to marshal evidence on several issues. Even where they partially marshaled on a few issues, they failed to show how the partially marshaled evidence was insufficient to support the jury's verdict.⁹ For example, Canberra and Allen argue that the Court should reduce the jury's award of actual damages because they "exceeded the competent evidence by over \$215,000" (Appellants' Br. 47.) Canberra and Allen fail to marshal the evidence (or any evidence) on this issue. In fact, they failed to make anything more than a conclusory argument that the trial court exceeded the evidence, without stating the jury's actual award, how the jury arrived at that award, and why those figures are insufficient.

In addition, in Canberra and Allen's "statement of facts," they repeatedly failed to identify damning testimony and evidence. For example, Canberra and Allen's only statement on whether they read the AGECE Report states that Allen "cursorily reviewed the AGECE Report" (Appellants' Br. 6.) In actuality, Allen testified that he "read through that [AGECE] report" (R. at 4678: 612.) He also testified that he specifically read the "conclusions" section of the report: "[t]he conclusion page was what I was very

⁹ Incomplete marshaling does not satisfy the marshaling requirement. Similarly, if an appellant successfully marshals all the evidence, but fails to analyze it and show how it is insufficient to support the jury's verdict, the Court will decline to address the issue. *E.g.*, *United Park City Mines Co. v. Stichting Mayflower Mtn. Fonds*, 2006 UT 35, ¶ 26, 140 P.3d 1200, 1207 ("[The appellant] ostensibly makes an effort to marshal the evidence on pages 21-22 of its brief But contrary to [the appellant's] wistful assertion, presenting evidence supporting the challenged conclusion does not satisfy the marshaling requirement. Parties cannot discharge their duty by simply provid[ing] an exhaustive review of all evidence presented at trial.").

interested in.”¹⁰ (R. at 4678: 612.) And that “[w]hat was important to me in [19]97 was the conclusions that [AGEC] came to. That’s the part that I liked and read and was paying attention to.” (R. at 4678:522-23.)

Canberra and Allen omitted a significant amount of incriminating information from their brief, instead often painting the facts in a light most favorable to themselves. Therefore, the Court should affirm based on their failure to marshal.

II. THE EVIDENCE SUPPORTS THE JURY’S FINDING THAT CANBERRA AND ALLEN ARE LIABLE FOR FRAUDULENT NONDISCLOSURE.

The law on fraudulent nondisclosure is simple. To prevail on a claim of fraudulent nondisclosure, the plaintiff applies a three-part test (in this order) to show: (1) the defendant had a duty to communicate information, (2) the defendant knew about the information, and (3) the nondisclosed information was material.¹¹ *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 35, 143 P.3d 283, 289.

In this case, the jury found both Canberra and Allen liable for fraudulent nondisclosure¹² because, as sellers of real property and as developers of real property,

¹⁰ In their brief, claim “Allen cursorily reviewed the AGECE Report when [he received it], focusing on the conclusions of the study” (Appellants’ Br. 6.) Even assuming Canberra and Allen read only the “conclusions” section of the report, they would have learned that the “[r]ecommendations contained in th[e] report should be carefully followed” and that “[m]oisture sensitive soils have been reported,” so “[p]recautions with respect to constructing in moisture sensitive soil areas are included in th[e] report.” (Add. A.)

¹¹ The jury was instructed as to these elements in jury instruction number 19. (R. at 3721.)

¹² Canberra and Allen argue that the jury’s verdict against them on fraudulent nondisclosure is a “mixed question[] of fact and law,” which would require this Court to give no “deference to the decision of the district court” (Appellants’ Br. 31.) More importantly, Canberra and Allen, mistakenly believing this to be a mixed question of fact

Canberra and Allen owed a variety of duties to the Hesses, including: (1) a duty to disclose to the Hesses material known defects that cannot be discovered by a reasonable inspection by an ordinary prudent buyer,¹³ *Mitchell v Christensen*, 2001 UT 80, ¶¶ 10-16, 31 P.3d 572, 574-76; and (2) a duty to disclose to the Hesses “any condition which he knows or reasonably ought to know makes . . . subdivided lots unsuitable for . . . residential building.”¹⁴ *Yazd*, 2006 UT 47, ¶ 24.

A. Canberra and Allen’s Conduct Satisfy the Elements of Fraudulent Nondisclosure.

The jury correctly found that Canberra and Allen’s conduct satisfied the three-part test for fraudulent nondisclosure.

1. Canberra and Allen had a “legal duty to communicate information”—to disclose the AGEC Report—to the Hesses.

Canberra and Allen had a “legal duty to communicate information” to the Hesses.

The information that Canberra and Allen had a legal duty to communicate to the Hesses

and law, fail to marshal the evidence in support of the jury’s verdict, then show how that evidence is legally insufficient when viewed in a light most favorable to the verdict.

Canberra and Allen are wrong on all points. Whether Canberra and Allen’s conduct met the three-prong test for fraudulent nondisclosure was a factual jury question and one presented to them both in the stipulated jury instructions on the issue, instruction number 19 (r. at 3721). and on the stipulated *Verdict Form* (r. at 3744-49).

In rendering its verdict, the jury answered purely *factual* questions—not mixed questions of fact and law—thus requiring Canberra and Allen to marshal all the evidence and show how that evidence, when viewed in a light most favorable to the jury’s verdict, is insufficient. By their own admission, Canberra and Allen failed to marshal because they believed this is a “mixed question[] of fact and law [under which] . . . this Court does not grant any deference to the decision of the District Court . . .” (Appellants’ Br. 31.)

¹³ The parties stipulated to this statement of a seller’s duty as jury instruction number 21. (R. at 3719.)

¹⁴ The parties stipulated to this statement of a developer’s duty as jury instruction number 20. (R. at 3720.)

included the existence of a geotechnical report, known as the “AGEC Report,” for the Hesses’ subdivision, as well as the fact that there was bad soil in the development. (**Add. A.**) The jury found that Canberra and Allen failed to meet that duty when they did not disclose the AGEC Report to the Hesses.

The source of this duty is twofold: it arises first because Canberra and Allen were *sellers* of real property, and it arises second because Canberra and Allen were *developers* of real property. And the parties stipulated to include both of these sources of Canberra and Allen’s duty (as a seller and as a developer) as jury instructions numbers 20 and 21. (R. at 3719-20.)

- a. Canberra and Allen were *sellers* of real property, thus owing the Hesses a duty to disclose defects, including collapsible soils, that could not be discovered by a reasonable inspection.

First, Canberra and Allen were sellers of real property. (R. at 4678:508; 3641 (Exhibit 6, attached as **Addendum C**); 3640 (Exhibit 11, attached as **Addendum D**).) As established in *Mitchell* and reiterated in *Hermansen*, as sellers of real property, Canberra and Allen had a duty to disclose the AGEC Report to the Hesses, which they failed to do.

A seller’s duty of disclosure could not be clearer. “[S]ellers of real property owe a duty to disclose material known defects that cannot be discovered by a reasonable inspection by an ordinary prudent buyer.” *Hermansen v. Tasulis*, 2002 UT 52, ¶ 25, 48 P.3d 235, 242.

Therefore, Canberra and Allen—as *sellers* of real property—owed a duty *as a matter of law* to disclose to the Hesses material known defects that could not be

discovered by a reasonable inspection; they had a duty as a matter of law to disclose the AGECE Report.¹⁵ Canberra and Allen knew about the potential for soil problems in the development. Allen testified that he “read through that report [the AGECE Report]” (R. at 4678: 612.) He also testified that he read the “conclusions” section of the report:¹⁶ “[t]he conclusion page was what I was very interested in.” (R. at 4678: 612.) Therefore, he knew about the AGECE Report, he knew about its precautions, and he knew that it was supposed to be “carefully followed.” (**Add. A.**)

It is undisputed that Canberra and Allen, the sellers, already had a geotechnical report on the property at the time the Hesses bought their lot. (R. at 4677:188; 4678:521; **Add. A.**) Canberra and Allen were in the best position to prevent future damage to the buyers’ homes by disclosing the AGECE Report to the Hesses. Then the Hesses could have passed the AGECE Report along to their contractor, who could have “carefully followed” the recommendations in the report. Unfortunately, Canberra and Allen did not alert the Hesses to the toxic lot they purchased, and their dream of building a new home quickly became a nightmare.

- b. Canberra and Allen were *developers* of real property, thus owing the Hesses a duty to disclose any condition they “know[] or reasonably ought to know” makes the lot unsuitable for construction.

¹⁵ Notably, the Utah Supreme Court did not throw out the *Mitchell* case for the plaintiff’s failure to present expert testimony on whether the home seller complied with his duty to disclose material known defects that cannot be discovered by a reasonable inspection by an ordinary prudent buyer. Yet that is what Canberra and Allen argue the Court should do in this case, which the Hesses discuss at Section III *infra*.

¹⁶ The jury was free to believe that Mr. Allen gave the AGECE Report a more in-depth analysis than he testified to. See footnote 19 *infra*.

Canberra and Allen were developers of real property. (R. at 4678:508; 3641 (Exhibit 6, **Add. B**); 3640 (Exhibit 11, **Add. D**.) And as established in *Loveland v. Orem City Corp.*, 746 P.2d 763 (Utah 1987), *Smith v. Frandsen*, 2004 UT 55, 94 P.3d 919, and *Yazd v. Woodside Homes Corp.*, 2006 UT 47, 143 P.3d 283, as developers of real property, Canberra and Allen had a duty to disclose the AGECE Report to the Hesses, which they failed to do.

This Court first promulgated a developer's duties in *Loveland*, and the Court discussed those duties in both *Smith* and *Yazd*. Specifically, the court held that:

where land is subdivided and sold for the purpose of constructing residential dwelling houses, *the developer* has a duty to exercise reasonable care to insure that the subdivided lots are suitable for construction of some type of ordinary, average dwelling house¹⁷ and *he [the developer] must*

¹⁷ At trial and throughout their brief, Canberra and Allen have been laser-focused on this principle: a “developer has a duty to exercise reasonable care to insure that the subdivided lots are suitable for construction of some type of ordinary, average dwelling house” For example, at trial, counsel for Canberra and Allen repeatedly asked Mr. Allen variations on the question of whether there was “anything . . . in [the AGECE Report] that says . . . you can’t build an ordinary average dwelling home in the vicinity of . . . [the Hesses’ lot]?” (R. at 4678: 617, 617.) Counsel for Canberra and Allen made the same query several times of Mr. James Nordquist, the Hesses’ geotechnical expert who possesses a masters degree in civil engineering from Massachusetts Institute of Technology: “Is there anything in the conclusion section of the recommendation sections [of the AGECE Report] that would have raised a red flag . . . that an ordinary foothill home could not be built on [the Hesses’ lot]?” (R. at 4677:172, 204.) And in their brief, Canberra and Allen repetitively argued that the lone standard is whether “an ‘ordinary, average’ home could not be constructed on [the Hesses’ lot].” (Appellants’ Br. 34.)

At trial and in their brief, Canberra and Allen missed the point. They willfully ignore the rest of the Court’s damning holding which explains precisely *how* a developer complies with his duty of ensuring that a lot is suitable for the construction of a home: by “disclos[ing] to his purchaser any condition which he knows or reasonably ought to know makes the subdivided lots unsuitable for such residential building.” Canberra and Allen turn a blind eye to this requirement because it is the nail in their coffin, as they failed to disclose the AGECE Report to the Hesses.

Canberra and Allen argued that there is nothing in the AGECE Report that says an

disclose to his purchaser any condition which he [1] knows or [2] reasonably ought to know makes the subdivided lots unsuitable for such residential building.

Loveland, 746 P.2d at 769 (emphases added) (citation and quotations omitted).

Adding onto that statement, this Court clarified that the duty did not “extend to deficiencies in residential building lots that are easily discernible during an ordinary and reasonable investigation by a purchaser and that are in fact known of by the purchaser.”

Loveland, 746 P.2d at 769. But this exception “does not follow with regard to latent defects, those which a buyer cannot reasonable be expected to discover.” *Id.*

Thus, taking the statements of duty together, and as Canberra and Allen repeatedly concede, they—as the developers—had a duty to ensure that the Hesses’ lot was suitable for the construction of an ordinary, average home. But Canberra and Allen are blind to the rest of this Court’s holding: that Canberra and Allen “*disclose to his purchaser any condition which he [1] knows or [2] reasonably ought to know makes the subdivided*

ordinary, average home cannot be built on the Hesses’ lot. But a geotechnical report would scarcely contain such a sweeping statement and conclude that an entire subdivision cannot be developed due to soil conditions. In fact, the purpose of a geotechnical evaluation is to provide recommendations that the developer can follow that will then render a lot (or a subdivision) buildable without consequences like those suffered by the Hesses. Indeed, that is precisely what the AGECE Report would have done in this case by providing the Hesses recommendations to be “carefully followed.”

The AGECE Report did not permanently preclude construction of homes in the Canberra subdivision, nor did it have to in order for Canberra and Allen to disclose the AGECE Report to the Hesses. The Hesses’ lot was not forever unbuildable. Rather, the AGECE Report identified soil problems, provided warnings, and made recommendations that Canberra and Allen should have disclosed to ensure that the lots were suitable for the construction of ordinary, average homes. And *until* Canberra and Allen disclosed the AGECE Report, the problems with the soil, and the specific recommendations to be “carefully followed,” the lot was unsuitable for the construction of an ordinary, average home.

lots unsuitable for such residential building.”

Stated differently, the developer must disclose any condition which he *knows* makes a lot unsuitable for a home. But he also must disclose any condition which he *reasonably ought to know* makes a lot unsuitable for a home.

In this case, Canberra and Allen breached both requirements. As to the first duty, Allen testified that he “read through that report [the AGECE Report] . . .” (R. at 4678: 612.) He also testified that he read the “conclusions” section of the report: “[t]he conclusion page was what I was very interested in.” (R. at 4678: 612.) By reading the “conclusions” section (the second page) of the AGECE Report, Canberra and Allen would have read all the warnings and recommendations. (These are detailed in **Add. A** and in the “statement of facts,” *supra*.) Thus, Canberra and Allen “kn[ew] [of conditions that] . . . ma[de] the subdivided lots unsuitable for . . . residential building.” Yet Canberra and Allen did not disclose the AGECE Report to the Hesses, which would have allowed the Hesses to mitigate against the collapsible soil on their lot. Instead, the Hesses’ home sunk nearly five inches, which is approximately ten times the normal amount of settling for a new home. (R. at 4677:180-81.)

The second duty—that Canberra and Allen “*ought to know* [of conditions that] . . . make[] the subdivided lots unsuitable for . . . residential building”—was also breached. Canberra and Allen reasonably ought to have known that the Hesses’ lot was unsuitable for a home without “carefully follow[ing]” the precautions in the AGECE Report because Canberra and Allen possessed (and read) the AGECE Report. And the AGECE Report not only detailed soil problems throughout the development, but also revealed that test pit

12—*which was on the Hesses' lot*—contained soils with “moisture sensitivity or collapse potential” about nine feet below the surface (r. at 4677:188), which is approximately where excavation for the Hesses' basement would end (r. at 4677:289).

Whether Canberra and/or Allen read *any* of the AGECE Report is irrelevant; they would still be liable for failing to disclose the *mere existence* Report. In *Yazd*, the defendant, Woodside Homes, not only failed to *read* the geotechnical report known as the “Delta Report”), but Woodside did not even *possess* the Delta Report. *Yazd*, 2006 UT 47, ¶ 5. Rather, Woodside knew about the Delta Report only because of a short written reference to it on a real estate purchase contract. Moreover, *the Delta Report pertained to an adjacent development that did not include the plaintiff's property*, whereas in this case, the AGECE Report not only pertained to Canberra development, but it included the Hesses' lot. (**Add. A, fig. 2.**) In fact, test pit 12 in the AGECE Report was located on the Hesses' lot. (**Add. A, fig. 2.**) Even with the liable party far removed from the dispositive geotechnical report in *Yazd*, in that case, the Court held that the builder-developer was chargeable with the contents of the geotechnical report.

The thrust of *Yazd* is that *all material information* must flow to the buyer, even when a developer obtains its own geotechnical report. Canberra and Allen failed to disclose the *mere existence* of AGECE Report to the Hesses, and therefore, they breached their duties of disclosure.

Canberra and Allen would have this Court adopt a rule that insulates a developer from liability if the developer merely *obtains* a geotechnical report; the developer need not read it, follow it, or disclose it to buyers to satisfy the developer's duty. Putting aside

the fact that this new “rule” would contradict this Court’s precedents from *Loveland*, *Smith*, and *Yazd*, this new “rule” would lead to absurd consequences. Developers would obtain geotechnical reports to satisfy their duty, but the duty would be toothless and meaningless if the developers do not have to pass that information along to the homebuyers.¹⁸ Canberra and Allen’s willful blindness and interpretation of a developer’s duty is contrary to precedent and to common sense.

2. Canberra and Allen, the “part[ies] failing to disclose,” knew about the AGECE Report.

Next, the Hesses must satisfy the second element for fraudulent nondisclosure: that Canberra and Allen, the “part[ies] failing to disclose,” knew about the AGECE Report. The jury unanimously concluded that Canberra and Allen knew about the AGECE Report. (R. at 4678:777). Moreover, Canberra and Allen do not contest this issue: “[i]n 1997, Canberra obtained [a geotechnical soils analysis] for Canberra Heights Phase 1 subdivision [the Hesses’ subdivision], from [AGECE]” (Appellants’ Br. 5.)

Canberra and Allen not only received the AGECE Report, but they also read it and knew about the potential for soil problems in the development. Allen testified that he “read through that [AGECE] report” (R. at 4678: 612.) He also testified that he read

¹⁸ In the criminal context, courts sometimes give juries a “willful blindness” instruction if a “defendant deliberately closed his eyes to what otherwise would have been obvious to him.” *United States v Leahy*, 445 F.3d 634, 652 (3d Cir. 2006). Such an instruction informs jurors “that they may impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take investigatory steps.” *United States v Azubike*, 564 F.3d 59, 66 (1st Cir. 2009).

the “conclusions” section of the report:¹⁹ “[t]he conclusion page was what I was very interested in.”²⁰ (R. at 4678: 612.)

Canberra and Allen cannot dispute that they knew about the AGECE Report—and even more, that they had read the “conclusions” section and the rest of the report as well. Therefore, the Court should affirm the jury’s finding.

3. The “nondisclosed information”—the AGECE Report—was material.

Finally, the jury concluded that the “nondisclosed information,” the AGECE Report, was material. Canberra and Allen do not contest this issue.

This Court in *Yazd* spoke to the “materiality” element. It left to “the trier of fact to determine . . . whether [the] content[s] [of a geotechnical report] was sufficiently important such that its disclosure would have influenced the decisions made by the

¹⁹ The jury was free to believe that Mr. Allen gave the AGECE Report a more in-depth analysis than he testified to. Jury instruction number 13, titled “Believability of Witnesses,” established that the jury was free to “evaluate the believability of [witnesses’ testimony],” that they could “believe all or any part of the testimony of a witness,” and that they could consider personal interest, bias, demeanor, consistency, reasonableness, and other factors in weighing a witness’s testimony. (R. at 3727.) Based on this instruction, the jury could have believed that Mr. Allen read the AGECE Report in greater detail than he testified to.

The jury’s conclusion is buffered by the fact that Defendant Allen testified that he had ordered and received “[s]even or eight” other geotechnical soil reports, similar to the AGECE Report, for other portions of the Canberra subdivision before he received and read the AGECE Report. (R. at 4678: 610.)

²⁰ In their brief, claim “Allen cursorily reviewed the AGECE Report when [he received it], focusing on the conclusions of the study” (Appellants’ Br. 6.) Even assuming Canberra and Allen read only the “conclusions” section of the report, they would have learned that the “[r]ecommendations contained in th[e] report should be carefully followed” and that “[m]oisture sensitive soils have been reported,” so “[p]recautions with respect to constructing in moisture sensitive soil areas are included in th[e] report.” (Add. A.)

buyers with respect to the property.” *Id.*

In clarifying the definition of “materiality,” the Court held that “[t]o be material, the information must be ‘important.’ Importance, in turn, can be gauged by the degree to which the information could be expected to influence the judgment of a person buying property or assenting to a particular purchase price.” *Id.* ¶ 34. In *Yazd*, the Court concluded “that a finder of fact could reasonably find that the contents of the [geotechnical] report meet this definition of materiality.” *Id.*

In this case, the parties stipulated to the instruction on “materiality,” which was this Court’s pronouncement from *Yazd* as Jury Instruction Number 22. (R. at 3718.) And the jury unanimously concluded that the AGECE Report was material. (R. at 4678:777.)

B. The Court of Appeals Misunderstood and Misapplied *Smith* in *Anderson v. Kriser*. A Developer Always Owes a Duty of Disclosure to a Purchaser in Privity.

Canberra and Allen urge this Court to abandon this Court’s precedents in *Loveland*, *Smith*, and *Yazd* and adopt the Utah Court of Appeals’ (incorrect) understanding of a developer’s duty from an unpublished memorandum decision, *Anderson v. Kriser*, 2009 UT App 319,²¹ on which this Court recently granted certiorari.

There are procedural and substantive problems with this argument. First and most importantly, in *Anderson*, the court of appeals erred and misunderstood *Smith* and its holding, mistakenly believing that a developer who sells a lot directly to a homebuyer

²¹ On February 25, 2010, this Court granted the Andersons’ *Petition for Writ of Certiorari* in *Anderson v. Kriser*. For a more thorough discussion of the court of appeals’ error in *Anderson* and why that case is not controlling here, the Hesses urge this Court to review the petition, opposition to the petition, and reply in support of the petition in *Anderson v. Kriser*, case number 20091032.

owes no duties to that homebuyer if the homebuyer hires a separate contractor to build the home. This holding stems from a misunderstanding and misapplication of *Smith v. Frandsen* to the *Anderson* case, and the court of appeals' holding is contrary to *Loveland*, *Smith*, and *Yazd*. A developer in privity with a homebuyer always owes a duty of disclosure to "its immediate transferees," regardless of whether that developer or a separate contractor builds the home. *Smith*, 2004 UT 55, ¶ 28. Second, *Anderson v. Kriser* is an unpublished memorandum decision from the court of appeals, and it holds no precedential value for this Court. And third, the *Anderson* case is currently under certiorari review by this Court.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE HESSES NEED NOT PROVIDE EXPERT TESTIMONY TO PROVE THEIR CLAIMS AGAINST CANBERRA AND ALLEN.

Canberra and Allen erroneously argue that the Hesses were required to present expert testimony on whether Canberra and Allen breached their duty to disclose the AGECE Report. And they argue that, as a result,

[t]he jury was . . . allowed to treat this as a *res ipsa loquitur*/negligence case when the jury was incorrectly allowed to determine the standard of care, instead of being given proper expert testimony to guide the jury in what a developer or owner of a development company should have done.

(Appellants' Br. 39.)

This is not a negligence case,²² and fraudulent nondisclosure and fraudulent

²² Even if the Court were to treat this as a negligence case, Utah law "does not require expert testimony to establish the standard of care in *every* negligence case." *Ortiz v. Geneva Rock Prods.*, 939 P.2d 1213, 1217 n.2 (Utah Ct. App. 1997) (emphasis added). Expert testimony is "*especially considered unnecessary* . . . in cases involving trades or professions that do not require a high degree of specialized knowledge, as opposed to

misrepresentation are not negligence-based causes of action, nor are they strict liability—they are intentional torts.²³ In a negligence case, the plaintiff must first establish the duty of care owed by the defendant, then show that the defendant breached that duty. In contrast, in a fraud case, the issue is whether the defendant committed the intentional tort

trades or professional that do, such as medicine, architecture, and engineering.” *Id.* (emphasis added); see also *Schreiter v. Wasatch Manor, Inc.*, 871 P.2d 570, 574 (Utah Ct. App. 1994) (holding that expert testimony “is needed where the average person has little understanding of the duties owed by particular trades or professions, as in cases involving medical doctors, architects, and engineers. . . . [But] [w]here the propriety of the defendant’s action is within the common knowledge and experience of the layman . . . the guidance provided by expert testimony is unnecessary”).

In this case, the Court has already established the duty owed by sellers and developers to buyers. The duty is clearly laid out in *Loveland, Smith, Mitchell, and Yazd*. It is one of disclosure. And whether Canberra and Allen disclosed the AGECE Report to the Hesses is a simple factual matter with the province and experience of the layperson.

²³ In their brief, Canberra and Allen assert that “[s]trict liability is all the Hesses proved” (Appellants’ Br. 30.)

Canberra and Allen misunderstand and conflate the concepts of negligence and strict liability. Strict liability is liability without fault. In strict liability, the law imposes a duty on certain actors to avoid injury to the plaintiff *entirely*—or pay for any resulting injuries. Where such a duty exists (for example, with ultra-hazardous activities), the defendant is liable regardless of the care that he or she took, or the care with which he or she conducted the activity. The liability flows not from carelessness, but from the very choice to conduct the activity at all. And no matter how much care he or she takes to avoid injury to others, he or she will be held “strictly liable” if such injuries result. See, e.g., *Restatement (Second) of Torts*, § 519(1) (“One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”).

Neither fraudulent nondisclosure nor fraudulent misrepresentation is a strict liability cause of action because it is *not* the case that a seller or developer is strictly liable for the condition of the soil, regardless of the care the seller or developer exercised.

Rather, a seller or developer is liable only to the extent he or she fails to satisfy the duty to “disclose to his purchaser any condition which he knows or reasonably ought to know makes the subdivided lots unsuitable for such residential building.” *Yazd*, 2006 UT 47, ¶ 24. Once the seller or developer satisfies that duty to disclose, his or her liability ceases. If fraudulent nondisclosure and fraudulent misrepresentation were strict liability torts, Canberra and Allen would be liable for the damage to the Hesses’ home regardless of whether Canberra and Allen disclosed the AGECE Report.

of fraud and whether the defendant satisfied the elements of each fraud cause of action.

As to the fraud claims in this case, the Hesses did not have to call an expert to speculate or opine about the duties that Canberra and Allen owed the Hesses because the a seller's and developer's duty of disclosure have been clearly established (and repeated) by this Court in *Loveland*, *Smith*, *Mitchell*, and *Yazd*. Simply, Canberra and Allen, as sellers and developers, had a duty to disclose the AGECE Report to the Hesses. Whether Canberra and Allen breached that duty—i.e., whether they disclosed the AGECE Report—did not require expert testimony under Rule 702 of the Utah Rules of Evidence. Therefore, the trial court correctly concluded that the Hesses did not need to provide expert testimony on whether Canberra and Allen breached their duty to disclose the AGECE Report to the Hesses.

Moreover, Canberra and Allen cite no case—Utah or otherwise—for the novel proposition that the Hesses were required to present expert testimony that Canberra and Allen failed to follow their duties under *Loveland*, *Smith*, *Mitchell*, and *Yazd*. A close examination of Utah case law concerning expert testimony—and a recognition that *no case in the country* requires expert testimony in a case like this, as suggested by Canberra and Allen—show their argument to be flawed.

For example, in a traditional negligence case, like a medical malpractice action, the plaintiff must call an expert to testify what standard of care the defendant-doctor owed the patient and that the defendant-doctor breached that standard. *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980). An expert is required because it is not possible (or wise) for the courts or legislatures to establish the standard of care in every conceivable

scenario. An expert is required because “the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen.” *Id.*

In malpractice actions generally the physician is held to the standard of skill employed by his contemporaries in the same or similar communities. Therefore, *before the plaintiff can prevail in a medical malpractice action, he must establish both the standard of care required of the defendant as a practicing physician in the community and the defendant's failure to employ that standard.*

Id. (emphasis added).

In this case, the Hesses did not have to call an expert to establish the standard of care required of Canberra and Allen because *Loveland, Mitchell, Smith, Hermansen, and Yazd* already established that standard. Those cases establish many duties that Canberra and Allen—as sellers and developers of real property—owed the Hesses *as a matter of law*.

In addition, even if the Utah appellate courts had not already established the standards applicable to sellers and developers of real property, the Utah courts have recognized an exception to the general rule that “expert testimony is required [when] the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen.” *Nixdorf*, 612 P.2d at 352.

Specifically, “expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman.” *Id.* In the medical malpractice context, “the loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies this

type of treatment.” *Id.*

Similarly, the Hesses did not have to establish the standard of care in this case because the “propriety” of Canberra and Allen’s actions—obtaining a geotechnical report, reading it, knowing it contained warnings about the soils in the development, and not disclosing its existence or contents to the Hesses—is within the common knowledge and experience of the layman. Just like a layman can conclude, without expert testimony, that a doctor breached his standard of care by leaving a surgical needle inside a patient, a layman can also conclude, without expert testimony, that a developer who commissions a geotechnical report that warns to mitigate against soil problems, who reads the report, and who does not share the existence or contents of the report with a buyer has breached his standard of care. Therefore, the Hesses did not have to present expert testimony to establish the standard of care applicable to sellers and developers of real property because whether Canberra and Allen should have disclosed the existence and contents of the AGECE Report to Plaintiffs is within the province of a layperson jury.²⁴

Further, the Hesses did not have to call an expert to testify that Canberra and Allen

²⁴ In another case, the issue was “whether the [defendant’s] duty of reasonable care required it to install a fire sprinkler system [in a high-rise apartment building].” *Schreiter*, 871 P.2d at 575. The plaintiff failed to present expert testimony to establish the applicable standard of care or whether the defendant breached the duty. *Id.*

Even so, the Utah Court of Appeals held that the absence of expert testimony was not fatal to the plaintiff’s case because “a jury could reasonably find that [the defendant] was negligent even absent [expert] testimony [on the issue of the defendant’s duty of care regarding installing a fire sprinkler system.]” *Id.* The court reasoned that “[t]his is simply not a situation where the issues or facts appear to be so complex or technical that they would otherwise elude the mental processes of the average citizen.” *Id.*

And in *Schreiter*, just as in our case, the defendant did not “cite to any authority requiring expert testimony to make out a prima facie case in similar cases.” *Id.* (footnote omitted).

failed to meet the standards in this case because a developer is not a profession that “require[s] a high degree of specialized knowledge, as opposed to trades or professions that do, such as medicine, architecture, and engineering.”²⁵ *Ortiz*, 939 P.2d at 1217 n.2. Unlike professions like medicine, architecture, and engineering, a “developer” does not require any special training, education, certification, degrees, or experience. Indeed, an individual “becomes a developer” by self-designation. It is not something an individual earns or achieves. A developer could be anyone from a high school student to an elderly grandmother looking to flip property and make a quick profit.

Therefore, the trial court correctly concluded that the Hesses did not have to present expert testimony concerning whether Canberra and Allen disclosed the AGEC Report to the Hesses.

IV. THE TRIAL COURT PROPERLY DENIED CANBERRA AND ALLEN’S MOTION TO DISMISS MS. HESS’S FRAUDULENT NONDISCLOSURE CLAIM.

Canberra and Allen argue that Ms. Hess’s fraudulent nondisclosure claim should have been dismissed because Canberra and Allen did not commit that tort against Ms. Hess. This argument falls flat.

Canberra and Allen concede that they conveyed the lot not only to Mark Hess, but also to Marilyn Hess. (Appellants’ Br. 42.) The warranty deed—signed by Mr. Allen—

²⁵ For example, expert testimony is typically required in cases involving professions involving a high degree of technical knowledge and expertise, such as for medical doctors, *Chadwick v. Nielsel*, 763 P.2d 817, 821 (Utah Ct. App. 1988), architects, *Nauman v. Harold K. Beecher & Assocs*, 467 P.2d 610, 615 (Utah 1970), and engineers, *Nat’l Housing Indust., Inc. v. E. L. Jones Dev. Co.*, 576 P.2d 1374, 1377 (Ariz. Ct. App. 1978).

reveals as much, showing that Canberra conveyed lot 41 to “Mark Hess and Marilyn Hess.” (Add. D.)

Moreover, Ms. Hess testified that she and Mark both got the loan to purchase lot 41. (R. at 4678 549.) She and Mark paid Canberra \$150,000 in consideration for title to lot 41. As the party paying Canberra and Allen for the lot, Canberra and Allen cannot disclaim its duties to its buyers, which were both Mark Hess and Marilyn Hess.²⁶

V. THE TRIAL COURT CORRECTLY DENIED CANBERRA AND ALLEN’S MOTION FOR JNOV.

Canberra and Allen argue that the trial court should have granted their motion for JNOV.²⁷

Canberra and Allen’s global JNOV argument encompasses each of their other appellate issues. So, consistent with the Hesses’ brief, they contend that jury’s verdict and damages award are based on sufficient and competent evidence, and the Hesses incorporate their individual arguments in response to Canberra and Allen’s general

²⁶ Even Steven Tanner, Canberra’s vice president and broker, testified that “*they* provided us with a check for . . . \$1,000 in earnest money and then I presented it to Mr. Allen for his acceptance.” (R. at 4675:83.) (Emphasis added.)

And repeatedly, upon being questioned about the Hesses’ fraudulent nondisclosure claims and whether he disclosed the AGEC Report to the Hesses, Mr. Tanner referred to the Hesses in the plural form, for example, “I didn’t tell *them* anything,” and “I told *them* everything I knew which was on the recorded plat” (R. at 4675:83.) (Emphases added.) These and other such references drew no objection or clarification on cross examination from Canberra and Allen.

²⁷ This Court will reverse a trial court’s denial of a JNOV “only if, viewing the evidence in the light most favorable to the [Hesses],” the Court “concludes that the evidence is insufficient to support the verdict.” *Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 111 (Utah 1998). And “in order to prevail, the appealing party must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.” *Id.*

allegation that the trial court erred by denying their motion for JNOV.

VI. CANBERRA AND ALLEN DID NOT PRESERVE THEIR OBJECTION TO THEIR PROPOSED JURY INSTRUCTION ON SUPERSEDING/INTERVENING CAUSE, WHICH, REGARDLESS, APPLIES TO NEGLIGENCE CLAIMS—NOT TO FRAUD CLAIMS.

In Section IV of their brief, Canberra and Allen argue that the contractor, GTS Construction, cut off Canberra and Allen’s liability because GTS Construction, not Canberra or Allen, built the home. (Appellants’ Br. 43-45.) In support of this argument, Canberra and Allen provide a block quote and pinpoint cite from the *Smith* case that is not found in *Smith* or any other Utah case. (Appellants’ Br. 44.) In addition, they argue that the Court should have given their proposed jury instruction number 17, which would have instructed the jury that Canberra and Allen were not liable to the Hesses because of the conduct of the builder.

Canberra and Allen failed to object to the trial court’s refusal to give this instruction, therefore, they waived the alleged error and cannot raise it for the first time on appeal. Further, Canberra and Allen’s proposed instruction 17 is a negligence-based instruction, which they concede comes from the “negligence” section of the Model Utah Jury Instructions, Second Edition (“MUJI 2d”). And last, as a matter of public policy, fraud cannot be superseded. Therefore, the Court should not entertain Canberra and Allen’s arguments on this issue.

A. Canberra and Allen’s Fabricated New Law, Supposedly from *Smith*, does not Exist.

On page 44 of their brief, Canberra and Allen provide the Court with a block quote

that purportedly comes from *Smith v. Frandsen*, 2004 UT 55, 94 P.3d 919. The block quote has two paragraphs. The first paragraph is a (somewhat) accurate quote from *Smith*.²⁸

The second paragraph, however, is a cut-from-whole-cloth fabrication of the law. Surely, it is a statement of what Canberra and Allen would *like* the law to be. The manufactured paragraph states that: “A developer can rely upon the eventual builder of the home complying with the builder’s duty of care, including reasonable familiarity with subsurface conditions.” (Appellants’ Br. 44.)

This “quote” is part of the block quote from *Smith* in Canberra and Allen’s brief. They also underlined it for emphasis and went on to state “emphasis added,” indicating that the underlining did not appear in the case.

In reality, the sentence *itself* does not appear in the case. In fact, it does not appear in any Utah case. Equally important, it is not an accurate statement of the law in Utah; a developer is not relieved of its duty of disclosure under *Mitchell* and *Loveland/Smith/Yazd*. Essentially, it is argument masquerading as law, complete with a faux pinpoint citation to *Smith*, stating it appeared on page 924 of that case. The Court should disregard the feigned quote from *Smith*.

B. Canberra and Allen Failed to Object to the Trial Court’s Refusal to Give Their Proposed Instruction on Intervening/Superseding Cause.

²⁸ It is only somewhat accurate because Canberra and Allen altered the first paragraph of the block quote in their brief by using the word “buyer” instead of the phrase “vendee, or his successor,” without putting the word “buyer” in brackets and without using ellipses to indicate an omission from the quote. *Smith*, 2004 UT 55, ¶ 17, 94 P.3d 919, 924.

Rule 51(f) of the Utah Rules of Civil Procedure requires a party to object, with specificity, to preserve the alleged error for appeal:

[u]nless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

Utah appellate law confirms this rule. “No party may assign as error the giving or failure to give an instruction unless he objects thereto.” *R T Nielson Co v Cook*, 2002 UT 11, ¶ 10. 40 P.3d 1119, 1123. Moreover, to “appeal the . . . refusal of a jury instruction, a party must properly object to the instructions in the trial court and explain its grounds, with specificity, for challenging the instructions.” *Id*

If a party claiming error “does not object and articulate the grounds with sufficient specificity such that the issue is presented before the trial court for consideration, *that issue cannot be raised on appeal.*” *Id* (emphasis added).

Here, Canberra and Allen argue that the trial court should have given their proposed instruction on superseding/intervening cause, found in the Record at 3648,²⁹ which they also recited verbatim page 45 of their brief. But Canberra and Allen never objected to the trial court’s refusal to give this instruction. At the end of trial, Canberra and Allen objected to two jury instructions, neither of which was an objection on superseding/intervening cause. (R. at 4678:771.) Therefore, because they did not object in the trial court, they waived their right to claim error on appeal, so the Court should

²⁹ Canberra and Allen cite the incorrect page in the record for this proposed jury instruction, stating it is found at R. 4680. (Appellants’ Br. 45.) This is incorrect. The correct citation is R. at 3648.

disregard Canberra and Allen's claimed error on this issue.

C. Even Disregarding the Hesses' Foregoing Arguments, Canberra and Allen's Proposed Jury Instruction Applies to Negligence, but not Fraud.

Even if the Court ignored the Hesses' foregoing arguments, Canberra and Allen's proposed instruction on superseding/intervening cause applies to negligence-based causes of action, but not to causes of action based in the intentional tort of fraud. In fact, their proposed instruction, 210, comes from the "negligence" section in the new MUJI 2d. The trial court correctly precluded this instruction from being given to the jury.

Moreover, this Court has specifically addressed this issue. In *Berkeley Bank for Cooperatives v. Meibos*, the Court concluded that negligence-based defenses, like superseding cause, were applicable to negligence-based causes of action, like negligent misrepresentation. 607 P.2d 798, 804 (Utah 1980). But the court also held that negligence-based defenses, like superseding cause, are "not a proper defense in the case of an *intentional* misrepresentation." *Id.* (emphasis added). Quoting Prosser, the court restated the universal maxim that "'mere negligence . . . is not a defense to an intentional tort.'" *Id.* (quoting Dean Prosser, *Law of Torts*, § 108 at 716 (4th ed. 1971)). Therefore, Canberra and Allen cannot proffer superseding/intervening cause as a complete defense to fraud, an intentional tort.

D. As a Matter of Public Policy, a Third Party Cannot Supersede a Tortfeasor's Fraud.

Finally, even if superseding/intervening cause were a complete defense to intentional torts like fraud, because the alleged superseding acts of the settled co-

defendants (e.g., GTS Construction) were foreseeable, the defense of superseding/intervening cause does not apply.

In Utah, “[a] person’s negligence is not superseded by the negligence of another if the subsequent negligence of another is foreseeable.” *Harris v. Utah Transit Auth.*, 671 P.2d 217, 219 (Utah 1983).³⁰ Utah has adopted from the Restatement (Second) of Torts section 447, which states that if a subsequent party’s acts are foreseeable to the original tortfeasor, the original tortfeasor is not relieved of liability.³¹

Canberra and Allen qualify for all three conditions (though they need only qualify for one). Thus, the alleged subsequent acts of third parties were foreseeable by Canberra and Allen. As a result, the defense of superseding cause does not apply to immunize Canberra and Allen from liability.

VII. THE TRIAL COURT CORRECTLY DENIED CANBERRA AND ALLEN’S MOTION FOR REMITTITUR.

³⁰ The Court should note that the standard for applying superseding cause states that “[a] person’s *negligence* is not superseded by the negligence of another . . .” (emphasis added). This is merely another indication that superseding cause does not apply to intentional torts like fraud, but rather to negligence, as argued in the previous section.

³¹ The fact that “an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor’s negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor’s conduct and the manner in which it is done is not extraordinarily negligent.

Harris, 671 P.2d at 219 (quoting *Restatement (Second) of Torts* § 447 (1965)).

The Hesses presented meticulous evidence to support the jury's award of actual damages and pain-and-suffering damages. Therefore, the Court should affirm the damages award.

Further, Canberra and Allen failed to disclose to the Court that *they did not contest or rebut the Hesses' pain and suffering testimony or evidence; it was entirely unchallenged*. Therefore, because a "damage assessment is peculiarly a jury function," *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 174 (Utah App. 1993), the Court should leave the jury's award of actual and noneconomic damages undisturbed.

A. Canberra and Allen Failed to Cross-examine, Rebut, or Contradict the Hesses' Evidence and Testimony on Damages for Pain and Suffering.

Canberra and Allen focus solely on Rule 59(a)(5) as the basis to overturn the jury's damages award.³² Rule 59(a)(5) states that "a new trial may be granted for . . .

³² In one paragraph, Canberra and Allen also argue that the pain-and-suffering award is a "due process violation." (Appellants' Br. 46.) In support of this argument, they quote *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Campbell and the selective quotes therefrom are distinguishable from this case. *Campbell* dealt with the excessiveness of *punitive* damages, not compensatory damages, which is what the jury's pain-and-suffering award is in this case. Canberra and Allen's cited language from *Campbell* reveals as much when it states that the due process protection against "grossly excessive or arbitrary punishments on a tortfeasor" applies to *punitive* damage awards. *Id.* at 416. This rule from *Campbell* speaks in terms of "punishments," which is precisely what punitive damages are intended to do: punish a tortfeasor. In contrast, compensatory damages to compensate the injured person for the loss suffered and not to punish a tortfeasor. *Black's Law Dictionary* 170 (2d ed. 2001). Because the law relating to punitive damages is *sui generis*, *Campbell* and its principles on punitive damages are inapplicable here.

Regardless, Canberra and Allen did not properly raise or preserve the issue of whether the jury's pain-and-suffering award is a due process violation.

[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.”

Justice Crockett, in a concurring opinion, spoke sagely to the caution a court should possess before disturbing a jury’s verdict: “courts should exercise great caution and forbearance in disturbing jury verdicts to the end that the important right of trial by jury is preserved.” *Stamp v. Union Pac. R.R. Co.*, 303 P.2d 279, 282-83 (Utah 1956) (Crockett, J., concurring). And after the trial court “has given its approval to the award by refusing to set aside or modify the verdict”—exactly what happened in this case—

that much additional verity is thereby conferred upon it and the appellate court, a fortiori, should be more reluctant to interfere with the jury verdict and the judgment of the court because of their advantaged position in having first-hand view of the proceedings and will do so only when to permit it to stand would work a manifest injustice.

Id. (emphases added). Indeed, the “trial judge is in the best position to ascertain if the

Rule 7(c)(1) of the Utah Rules of Civil Procedure allows a moving party to file a reply memorandum, but it “shall be limited to rebuttal of matters raised in the memorandum in opposition.”

In their omnibus post-trial motion and memorandum in support of a JNOV, remittitur, etc., Canberra and Allen did not raise the due process argument in any form. (R. at 4048-85.) Thus, the Hesses did not address it in their opposition to the omnibus motion. (R. at 4143-90.) Then, for the first time in their reply memorandum, Canberra and Allen raised the argument that the pain-and-suffering award was a “due process violation.” (R. at 4197-99.)

This violated Rule 7(c)(1) because Canberra had not previously raised it, and the Hesses did not have an opportunity to oppose or brief the argument. The Hesses also objected to Canberra and Allen raising this argument for the first time in their reply memorandum. (R. at 4232-35.)

Therefore, Canberra and Allen did not properly raise or preserve the due process argument below, they have waived it on appeal. *Soriano v. Graul*, 2008 UT App 188, ¶¶ 12-13, 186 P.3d 960, 964-65 (refusing to address a constitutional argument on appeal where the movant first raised the argument in his reply memorandum in the trial court: “[w]here a party first raises an issue in his reply memorandum, it is not properly before the trial court and we will not consider it for the first time on appeal”).

jury has exceeded its proper bounds,” and this Court will reverse “*only* if there is no reasonable basis for the decision.” *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 4, 63 P.3d 686, 692 (emphasis added).

A court “cannot grant a new trial merely because it disagrees with the jury’s judgment.” *Crookston*, 817 P.2d at 804. Rather, evidence must exist to support the contention that the jury was unduly influenced by passion or prejudice. *Id.* In fact, the court should “review the propriety of the damages award and grant a new trial *only where it is obvious* that the jury lacked a reasonable basis for its decision, acted with prejudice or passion, or disregarded competent evidence.”³³ *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 174 (Utah App. 1993).

A “jury is allowed great latitude in assessing damages for personal injuries.” *Duffy v. Union Pac. R.R. Co.*, 218 P.2d 1080, 1083 (Utah 1950). Even if an award appears excessive, the “mere excessiveness of a verdict, without more, does not necessarily show that the verdict was arrived at by passion or prejudice.” *Id.* The facts must be “such that the excess can be determined as a matter of law” *Id.*

As the jury heard, both Mark and Marilyn Hess testified about their fire-year

³³ The Supreme Court has also recognized that pain and suffering damages are uniquely suited for determination by a jury. The “presumption is that jurors conscientiously perform their duties in accordance with their oath.” *Weeks v. Zarbock*, 1979 Utah LEXIS 757, *6 (Utah 1979). Further, “no set formula as to the amount of damages that may be awarded” exists in a case that involves “pain and suffering.” *Jorgensen v. Gonzales*, 383 P.2d 934, 333 (Utah 1963). Therefore, this determination “is properly left to the sound judgment of a jury of practical people upon the basis of the evidence and in light of their experience in the affairs of life.” *Id.*; see also *Batty v. Mitchell*, 575 P.2d 1040, 1043 (Utah 1978) (reviewing the damages awarded against a negligent defendant and stating that “the amount of the verdict is a matter exclusively for the jury”).

catastrophic nightmare affected every aspect of their lives. They testified about the mental and emotional damage to themselves, as well as the great strain on their marriage and their family as they all endured their dream home slowly crumbling before their eyes. These experiences exemplify the very definition of mental and emotional distress.

Canberra and Allen failed to challenge this testimony on cross-examination.³⁴ And they asked only two questions of Marilyn Hess, both relating to the repairs to the Hesses' home. (R. at 4678:562.) Moreover, they did not offer any rebuttal evidence or expert testimony to contradict or rebut the Hesses' testimony concerning their pain, suffering, and mental distress as a result of their five-year nightmare. Canberra and Allen utterly failed to even attempt such a rebuttal. They even avoided addressing it in their closing argument.

Further, there is no evidence that the jury did anything but carefully and thoroughly consider all of the relevant testimony and evidence.³⁵ Canberra and Allen's argument is conclusory; they have neither presented nor highlighted any specific evidence that would serve as the basis for the jury's alleged "passion or prejudice" in arriving at its damages award.

The Utah Court of Appeals, in *Price-Orem Invest. Co. v. Rollins, Brown &*

³⁴ In addition, Canberra and Allen did not conduct any discovery on this issue.

³⁵ Counsel for the Hesses also walked the jury through jury instruction number 36, the instruction on noneconomic damages, which instruction was stipulated to by the parties and is an accurate statement of the law, having come from MUJI CV2004. That instruction specifically warned and cautioned the jury not to base its damages award on speculation: "While you may not award damages based upon speculation, the law requires only that the evidence provide a reasonable basis for assessing the damages but does not require a mathematical certainty." (R. at 3704.)

Gunnell, Inc., evaluated whether there was sufficient evidence to support a somewhat speculative damages award to the plaintiff. 784 P.2d 475, 479 (Utah Ct. App. 1989). The court agreed with the trial court that, although the damages award was “imprecise,” “the evidence was not too speculative to support the damage award.” *Id.* The court went on to state that “[t]he evidence presented in this case is not so meager as to invite sheer speculation; imprecise as it is, but counsel’s arguments, the court’s instructions, and the common sense of the jury place the evidence in proper perspective for resolution of the damage issue.” *Id.* at 479 n.4.

Similarly, imprecise as *any* jury’s pain-and-suffering award might be, in light of (1) the volume of testimony and evidence concerning the Hesses’ pain and suffering, (2) Canberra and Allen’s failure to contest that evidence, (3) the Hesses’ counsel’s arguments concerning the evidence, (4) the court’s instruction, and (5) the jury’s common sense, it cannot be said that the jury’s award was based on “sheer speculation.”

Canberra and Allen cannot claim error and ask the Court to do their job for them by stepping into the jury’s shoes and remitting the compensatory damages. The jury had no evidence to offset the Hesses’ pain-and-suffering evidence. For the same reason, the trial court had a basis on which to grant remittitur.³⁶ Therefore, no basis exists for remittitur of any portion of the jury’s damages award for mental or emotional distress,

³⁶ Moreover, Canberra and Allen’s citation to a newspaper article as “evidence” of anything (including whether the Court should grant a remittitur) is inappropriate. (Appellants’ Br. 48.) The article is hearsay, and it is not part of the trial evidence. It is evidence of nothing relevant to the Court’s determination of whether the damages in this case were influenced by passion or prejudice (not to mention the article misquoted the Hesses’ counsel).

and this Court should uphold the pain-and-suffering award.³⁷

B. The Jury's Actual Damages Award was Proper and was Based on Sufficient and Competent Evidence.

Canberra and Allen argue that the Court should reduce the jury's award of actual damages because they "exceeded the competent evidence by over \$215,000" (Appellants' Br. 47.) Canberra and Allen fail to marshal the evidence on this point, and instead, argue the bare conclusion. In reality, the evidence clearly supports the jury's actual damages award. The jury awarded the following actual damages to the Hesses:

- **\$10,617.68** as damages "for costs relating to the Hesses discovering the defects in their home and property." Mr. Hess testified that he received an invoice from Terracon for \$9,752.28 (Exhibit 35, r. at 3639), and Exhibit 17 (r. at 3640), an invoice from Earthtec Testing for \$865.40 (Exhibit 17, r. at 3640; 4677:314), for a total of **\$10,617.68**.
- **\$319,439.62**³⁸ as damages "for repairs to the Hesses' home that have already been

³⁷ In addition, the jury found both Canberra and Allen's conduct warranted an award of punitive damages. (R. at 4678:773-75.)

³⁸ The jury actually awarded \$330,057.30 for damages already incurred. (R. at 3746.) This was a simple math error on the jury's part. The jury inadvertently included the \$10,617.68 it had already awarded for costs to discover the defects in the award for repairs already incurred. During a post-trial hearing, the Hesses stipulated to remit the amount awarded for repairs already incurred by \$10,617.68.

This should not affect the overall jury award. If a jury commits a computation or similar error in arriving at its verdict, reversal is not required. *Morris v Russell*, 236 P.2d 451, 456 (Utah 1951). Rather, the trial court simply determines "what portion of the verdict is sustainable." *Id*; see also *Colovos v Home Life Ins Co*, 28 P.2d 607, 611 (Utah 1934) (holding that a computational defect in a verdict "is not fatal where the amount can be fixed by computation . . . [T]he verdict should be upheld. . . . Strict

incurred.” Mr. Hess testified that he received (1) an invoice from Atlas Piers for \$24,483.00 (Exhibit 20, r. at 3640; 4677:320-21), (2) an invoice from Atlas Piers for \$158,472.50 (Exhibit 22, r. at 3640; 4677:328), (3) an invoice from Atlas Piers for \$28,305.00 (Exhibit 23, r. at 3640; 4677:329), and (4) an estimate for repairs to the home from Zion’s Builders for \$108,179.12 (Exhibit 27, r. at 3640; 4677:314), for a total of **\$319,439.62**.

- **\$206,692.70** as damages “for repairs to the Hesses’ home that have yet to be incurred.”³⁹

The jury likely concluded this was fair and reasonable because the Hesses’ home, as currently constructed, does not include sidewalks, landscaping, or any structures not attached to the home itself. The home was built on a toxic dirt lot. If the Hesses wish to construct anything else on their lot—sidewalks, a swimming pool, a fence, a shed, a rock wall, a patio—they will be required to pay significant amounts of money to install additional piers. And the jury saw evidence of the cost of installing piers.⁴⁰

technical accuracy is not required in the statement of the amount, it being sufficient if it can be ascertained by mere mathematical calculation and the verdict is good, although the amount of recovery is stated by reference to the amount claimed in the petition or can be ascertained by reference thereto”).

³⁹ The jury came up with its award of \$206,692.70 because it is the difference between the amounts it had already awarded for discovering the damage and for repairs already incurred (a combined total of \$330,057.30) and the stipulated fair market value of the home (\$536,750.00), for an award of \$206,692.70. The parties stipulated to jury instruction number 18, which reads in relevant part: “Plaintiffs and Defendants agree that the fair market value of the Hesses’ home, after all settlement-related damages have been fully repaired, would be \$536,750.00. If you decide to award the Plaintiffs damages for the cost of discovering the damage and the actual repairs (structural and cosmetic), the award cannot exceed \$536,750.00.” (R. at 3722.)

⁴⁰ For example, Exhibit 20 documents that the installation of 16 piers cost

The jury awarded the Hesses for likely future expenses directly related to the forever-tarnished lot and home within the parameters established by the stipulated jury instruction, and therefore, the damage award should stand.

C. The Statutory Cap on Noneconomic Damages in Medical Malpractice Actions does not Apply Outside the Medical Malpractice Realm.

Canberra and Allen urge the Court should apply Utah Code Ann. sec. 78B-3-410, the statutory cap on noneconomic damages in medical malpractice cases, to this case. But because this is not a medical malpractice case, and because this case does not invoke the same public policy implications, the statute is inapposite and does not govern.

The medical malpractice cap statute begins with a limiting phrase, stating that it applies “[i]n a malpractice action against a health care provider.” Utah Code Ann. § 78B-3-410(1). This alone precludes its application in this case.

But in addition, the Utah Supreme Court stated that the statute was based upon the

\$24,483.00. Further, Exhibit 22 documents that the installation of 84 piers cost \$158,472.50. Also, the jury saw evidence demonstrating the necessity of additional pier installation on the Hesses’ lot for any future structure that may be built. Therefore, the jury’s forward-looking award for repairs to the Hesses’ home that have yet to be incurred acknowledges and anticipates future issues on the lot associated with soil problems.

Moreover, the home could settle further, and it could also require future repairs. The jury heard testimony from Mr. Hess, Mr. Jim Nordquist (the Hesses’ engineering expert), and even Defendant Allen that the Hesses’ lot had significant soil problems and that future problems could occur. In addition, Mr. David Morley, the Hesses’ general contractor who will repair the home, testified that even after attempting all repairs, there will be some problems that can never be fully remedied or brought back to their original condition. For example, the two exterior walls that have separated seven to eight inches will never be pulled together, but Mr. Morley will merely be able to do “a cosmetic” repair as opposed to “anything structural . . .” (R. at 4677:405.) And some walls will be “permanently” out of square. (R. at 4677:406.) And the structural beam that juts out from the deck will have to be left that way, with it re-stuccoed and re-painted for cosmetic purposes. (R. at 4677:406.)

“legislature’s determination that it needed to respond to the perceived medical malpractice crisis” and that statute was written as an “action designed to control costs.”

Judd v. Drezga, 2004 UT 91, ¶ 16, 103 P.3d 135.

There is no “construction defect crisis” analogous to the medical malpractice crisis, which was the basis for the statutory cap on noneconomic damages against doctors. The Court should not apply the medical malpractice statute to this case.

VIII. THE TRIAL COURT PROPERLY AFFIRMED THE JURY’S FINDING THAT CANBERRA AND ALLEN ARE LIABLE FOR FRAUDULENT MISREPRESENTATION TO MR. HESS.

Canberra and Allen argue Mr. Hess did not prove the elements of fraudulent misrepresentation.⁴¹ (Appellants’ Br. 33.) The evidence and testimony at trial proves otherwise.

Using the elements of fraudulent misrepresentation as the guide, the Court can see that the evidence supports the jury’s finding that Canberra and Allen are liable for fraudulent misrepresentation to Mr. Hess.

1. The jury found that Canberra and Allen made a false or misleading statement. On the Seller’s Property Condition Disclosure Form, *Defendants left the line blank* below the question that read: “Is there anything else which you should disclose to Buyer because it may materially or adversely affect the value or desirability of the Property?” (Add. C.) Immediately below the blank line, it read, in all capital letters: “[DEFENDANT] REPRESENTS THAT, TO THE BEST OF SELLER’S KNOWLEDGE, THE INFORMATION SET FORTH IN THE FOREGOING DISCLOSURE STATEMENT IS ACCURATE AND COMPLETE.” And immediately below that, Defendant Allen signed this form. As jury instruction number 30 states,⁴² a party can commit fraud by silence, so the

⁴¹ The parties stipulated to the jury instructions on fraudulent misrepresentation, which were instructions 23-29. (R. at 3711-17.)

⁴² The parties also stipulated to jury instruction number 30, the “fraud by silence” instruction, which states that “[a] person or entity can commit fraud by silence. (R. at

fact that Canberra and Allen obtained the AGECE Report, read it, and did not disclose it to the Hesses is fraud by silence, thus satisfying the first element.

2. The jury rightly concluded that Canberra and Allen either knew the statement (or absence of the statement) on the seller's disclosure form was false or misleading, or that Canberra and Allen made it with reckless disregard for its truth or falsity. The "fraud by silence" instruction applies to this prong as well.

3. The jury found that the statement was of material fact. This was a fact question for the jury, and they clearly felt the AGECE Report was material because it related to the transaction in question and was relevant to the Hesses' decision to enter into the transaction. Moreover, that Canberra and Allen knew there were soil problems in the development would "materially or adversely affect the value or desirability of [lot 41]," so they should have disclosed the AGECE Report in the Seller's Disclosure.

4. The jury concluded that Canberra and Allen made the statement (or failed to make the statement, as with fraud by silence) with the intent that Mr. Hess would rely on the false or misleading representation by purchasing lot 41.

5. The jury found that Mr. Hess reasonably relied on the false or misleading representation. Indeed, Mr. Hess testified that he would have backed out of the transaction had he known about the AGECE Report. (R. at 4677:261-64.)

6. Without dispute, Mr. Hess suffered damages as a result of relying on the false representation. (E.g., r. at 4677:269-77.)

Thus, the jury properly concluded that Canberra and Allen are liable for fraudulent misrepresentation,⁴³ which the trial court affirmed.

IX. MISCELLANEOUS ISSUES.

4678:690; 3710.) Silence, in order to be actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party." (R. at 3710.)

⁴³ Canberra and Allen also argue that Mr. Hess should have offered expert testimony on duty in support of his fraudulent misrepresentation claim. But as the Court can see, fraudulent misrepresentation does not have a "duty" element. Therefore, in addition to the Hesses' argument *supra* concerning expert testimony and duty vis-à-vis the Hesses' fraudulent nondisclosure claim, which the Hesses incorporate to this section, it would have been unnecessary and illogical for Mr. Hess to provide expert testimony on "duty" for his fraudulent misrepresentation claim.

A. The Jury Based its Allocation of Fault Upon Sufficient, Competent Evidence.

Remittitur is generally reserved as a method for a trial court to reduce a jury's award of damages, and not to change a jury's allocation of fault. *See Utah State Road Comm'n v. Johnson*, 550 P.2d 216, 217 (Utah 1976). Furthermore, apportionment of fault is a role reserved for a fact-finding jury. *Godesky v. Provo City Corp.*, 690 P.2d 541, 544 (Utah 1984) (stating that determining relative fault is a question for the jury).

The jury instructions clearly informed the jury how to apportion fault. The Hesses introduced a significant amount of competent, relevant, and probative evidence that demonstrated Canberra and Allen's liability for the damages to the Hesses' home and lot.

Canberra and Allen argue that the jury apportioned 80% of the damages to Canberra/Allen because "the jury believed its job was to allocate 80% of the costs to [Canberra and Allen] and 20% of the costs to the remaining parties." (Appellants' Br. 45.)

There is no evidence or indication that the jury "believed" it was supposed to allocate the fault as Mr. Nordquist testified.⁴⁴ The jury was free to disregard any testimony and draw its own conclusions. And jury instruction number 32, which Canberra and Allen demanded be given over the Hesses' objection and motion in limine, instructed the jury to allocate fault "based upon how much that person's or entity's fault contributed to the harm." (R. at 3708.) Because the jury awarded 80% to Canberra and

⁴⁴ Mr. Hess also testified—consistent with Mr. Nordquist—that he was "looking for . . . 80% [of his damages from Canberra and Allen]." (R. at 4678:475-76.)

Allen,⁴⁵ it could be deduced that the jury found Mr. Nordquist credible.

The jury apportioned liability among five parties,⁴⁶ and the evidence presented at trial supports this allocation. Therefore, any alterations to the jury's fault determinations are not justified, and this Court should uphold the jury's apportionment of liability.

B. The Hesses' "Golden Rule" Argument was Proper.

Canberra and Allen also argue that the Hesses erred by using the phrase "reasonable man" and by asking the jury to step into the shoes of the Hesses. After reviewing the Hesses' memorandum on the matter (r. at 3621-37), the trial court correctly concluded that the Hesses' argument was proper.

"[T]he use of golden rule arguments is improper only with respect to damages." *Green v. Louder*, 2001 UT 62 ¶ 36, 29 P.3d 638, 648. But the use of the "golden rule" argument is perfectly proper "when urged on the issue of ultimate liability." *Id.*

The Hesses spoke only to the issue of ultimate liability, as Canberra and Allen seem to concede. (Appellants' Br. 39 n.12.) Therefore, there was no error.

CONCLUSION

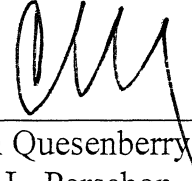
For the foregoing reasons, the Court should affirm both the jury's verdict and the trial court's unequivocal endorsement of that verdict.

⁴⁵ It is also worth noting that even though Mr. Nordquist testified that "[t]he natural clay soil that was found to be collapsible would attribute up to 80 percent [of the amount of settlement that the house experienced]" (r. at 4677:186-87), he did not split that percentage further. The jury independently found Canberra 45% liable and Allen 35% liable. (R. at 3745.)

⁴⁶ The jury carefully apportioned 35% of the fault to Allen, 45% to Canberra, 17% to GTS, 2% to Earthtec, 1% to the Hesses, and 0% to DaM.

RESPECTFULLY SUBMITTED this 5th day of April 2010.

HILL, JOHNSON & SCHMUTZ, L.C.

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Stephen Quesenberry

Charles L. Perschon

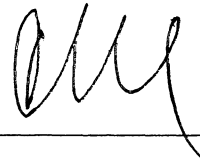
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of April 2010, two true and correct copies of the foregoing **BRIEF OF APPELLEES** were mailed, postage prepaid, first class, to each of the following:

MR. BRUCE R. BAIRD
BRUCE R. BAIRD, PC
2150 South 1300 East
Suite 500
Salt Lake City, Utah 84106
Telephone (801) 328-1400
Facsimile (801) 328-1444
Attorney for Defendants/Appellants

MS. DALLIS A. NORDSTROM
YOUNG HOFFMAN, LLC
170 South Main Street
Suite 1125
Salt Lake City, Utah 84101-1639
Telephone (801) 708-7019
Facsimile (801) 359-1980
Attorney for Defendants/Appellants

A handwritten signature in black ink, appearing to be 'DJ', is written over a horizontal line.

Tab A



Applied Geotechnical Engineering Consultants, Inc.

GEOLOGIC AND GEOTECHNICAL INVESTIGATION
PROPOSED CANBERRA HEIGHTS
PHASE I SUBDIVISION
MCKINLEY DRIVE AND CANBERRA DRIVE
LONDON, UTAH

PREPARED FOR:
CANBERRA DEVELOPMENT COMPANY
236 SOUTH 300 EAST
SALT LAKE CITY, UTAH 84111-2502

ATTENTION: BRIAN HASKELL

PROJECT NO. 973113

APRIL 3, 1997



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FIGURE 1
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FIGURE 7
TABLE I

CONCLUSIONS

1. The subsurface soils at the site consists predominantly of clayey and silty gravel with cobbles and boulders. Occasional clay and silt layers were encountered. The location of silt and clay layers across the site is erratic.
2. No free water was encountered in the test pits at the time of excavation.
3. The site is suitable for the proposed residential development. Recommendations contained in this report should be carefully followed.
4. The residences may be supported on spread footings bearing on the undisturbed natural soil or on compacted structural fill and may be designed for an allowable net bearing pressure of 1,500 pounds per square foot. Footings bearing on at least 2 feet of compacted structural fill or 2 feet of the natural gravel soil may be designed using an allowable net bearing pressure of 2,500 pounds per square foot.
5. ~~Moisture sensitive soils have been reported in the area.~~ Precautions with respect to constructing in moisture sensitive soil areas are included in the report.
6. Geotechnical information related to foundations, subgrade preparation and materials are included in the report.

SCOPE

This report presents the results of a geologic and geotechnical investigation for the proposed Canberra Heights, Phase I subdivision to be located at McKinley Drive at Canberra Drive in Lindon, Utah (see Figure 2). The report presents the geologic and subsurface conditions encountered, laboratory test results and recommendations for foundations. The study was conducted in accordance with our proposal dated February 26, 1997.

Field exploration was conducted to obtain information on the subsurface conditions. Samples obtained during the field investigation were tested in the laboratory to determine physical and engineering characteristics of the on-site soil. Information obtained from the field and laboratory was used to define conditions at the site for our engineering analysis and to develop recommendation for the proposed building foundations.

This report has been prepared to summarize the data obtained during the geologic and geotechnical studies and to present our conclusions and recommendations based on the proposed construction and subsurface conditions encountered. Design parameters and a discussion of geologic and geotechnical engineering considerations related to construction are included in the report.

SITE CONDITIONS

The site is located on the bench of Mt. Timpanogas, below Dry Canyon and Sumac Hollow. The eastern edge of the site falls approximately along elevation 5240 and the western portion of the site falls along the easement for the Salt Lake Aqueduct. The site extends from approximately 200 North to 200 South (see Figure 2). The property is located partially on alluvial fans formed at the mouth of Dry Canyon and Sumac Hollow. The Dry Canyon drainage channel extends through the southern portion of the property and the Sumac Hollow drainage crosses through the north-central portion of the property.

The property was vacant of permanent structures at the time of our investigation. The Salt Lake Aqueduct borders the west edge of the property. Several dirt roads extend through the property at various locations.

The site encompasses a hillside that slopes downward from northeast to southwest. Slopes in the northern portion of the site range from approximately 10 to 50 percent with some steeper slopes in drainage areas. The slopes in the southern portion of the property range from approximately 10 percent in the southern and western portion of the area to as steep as 50 percent in the eastern portion of the site and some steeper slopes in the Dry Canyon drainage.

Vegetation at the site consists predominantly of grass, sagebrush and oak brush.

The surrounding area includes the undeveloped slopes to the north and east, existing residences to the south and subdivisions under construction to the west. There is a debris basin on Dry Canyon, northeast of the site approximately 1/3 mile.

FIELD STUDY

The field study was conducted on March 7, 1997. Twelve test pits were excavated for the geotechnical investigation at the approximate locations indicated on Figure 2. The test pits were excavated with a track excavator. Excavations were logged and soil samples obtained by an engineer from AGEK. Logs of the subsurface conditions encountered in the test pits are graphically shown on Figure 3 with Legend and Notes on Figure 4.

GEOLOGIC STUDY

Geologic conditions at the site were evaluated by review of aerial photographs, a review of geologic literature and reconnaissance of the site. The general geology of the site and vicinity is presented on Figure 1.

Regional Geology

Lindon is located in the Basin and Range province. The province is made up of north/south elongated mountain blocks and valleys. Utah Valley is one of the valleys in the province with the Wasatch Mountains forming the eastern boundary of the valley.

The project is located below the mouth of Dry Canyon. The canyon is a stream cut drainage with a well developed alluvial fan at its mouth.

Utah Valley was once occupied by a large lake known as Lake Bonneville during the Wisconsin Glacial Period of the Pleistocene Age. The present day Great Salt Lake is a remnant of Ancient Lake Bonneville. Stillstands of Lake Bonneville formed benches along the Wasatch Front. The highest level of Lake Bonneville is marked by a bench, the Bonneville Shoreline, at approximate elevation 5150 feet. The lake remained at this high level from 17 to 15 thousand years before present, until it dropped approximately 350 feet during a catastrophic flood known as the Bonneville Flood (Currey and Oviatt, 1985 and Jarrett and Malde, 1987). This lower stillstand of Lake Bonneville is the Provo, which formed at approximate elevation 4800 feet.

Most of the site is located just below the Bonneville shoreline level.

Tectonic Setting

The site is located in the Salt Lake Valley along the western Wasatch Front, which is a prominent mountain front escarpment extending approximately 240 miles from southern Idaho to north-central Utah. The prominent west facing steep escarpment of the Wasatch Mountain Front is the result of repeated normal fault displacements which have taken place over the last several million years. The system of normal faults which makes up this escarpment is known collectively as the Wasatch Fault. Relatively recent fault movements are evidenced by offsets in Lake Bonneville sediments and more recent alluvial and colluvial deposits.

The Wasatch Fault is considered to be made up of several segments, each segment acting relatively independently (Machette and Others, 1987). The site is located along the American Fork sub-segment of the Provo rupture segment (Machette, 1989).

Site Geology

Surface deposits of the property consist predominantly of alluvial fan deposits. Soils are anticipated to be relatively deep with a depth to bedrock greater than 100 feet.

SUBSOIL CONDITIONS

The subsurface soils at the site consist predominantly of clayey and silty gravel with cobbles and boulders. Occasional clay and silt layers were encountered within the gravel. The location of silt and clay layers across the site is erratic.

A description of the various soils encountered in the test pits follows:

Topsoil - The topsoil consists of silty and clayey gravel to sandy lean clay with gravel. It is moist, dark brown in color and contains roots and organics.

Lean Clay and Silt - The clay and silt is interlayered. It is sandy, medium stiff, moist and light brown to brownish gray in color.

Laboratory tests conducted on samples of the clay and silt indicate natural moisture contents range from 15 to 22 percent and natural dry densities range from 87 to 96 pounds per cubic foot (pcf). A sample of the clay was found to have an unconfined compressive strength of 3,445 pounds per square foot (psf). Consolidation tests conducted on samples of the clay and silt indicate that the soil will undergo a "moderate" to "high" amount of compression with the addition of light to moderate loads. Some collapse of the soil occurred with the addition of water. Some of the compression indicated by the consolidation tests is attributed to disturbance of the sample during sampling. Results of the consolidation tests are presented in Figures 5 and 6.

Silty Gravel - The silty gravel contains clayey gravel layers. It also contains cobbles and boulders up to approximately 2 feet in size and occasional boulders up to approximately 5 feet in size. It is medium dense to dense, moist and brownish gray to light brown in color.

Laboratory tests conducted on samples of the gravel indicate natural moisture contents range from 9 to 30 percent. The results of gradation tests conducted on samples of the gravel are presented on Figure 7.

Laboratory test results are summarized on Table I and are included on the Logs of Exploratory Test Pits.

SUBSURFACE AND SURFACE WATER

No free water was encountered in the exploratory test pits at the time of excavation. We anticipate that the normal highest elevation of the seasonal high water table is at greater than 40 feet below the ground surface. No swamps, springs or seeps were observed at or adjacent the site.

PROPOSED CONSTRUCTION

We understand that it is proposed to construct a single-family PUD development in the northern portion of the property, approximately 8 acres in size. It is proposed to construct a town home development in the southwestern portion of the property which is approximately 6 acres in size and a subdivision in the south-central and eastern portion of the property, which is approximately 21 acres in size. Open space and park areas are planned for the central portion of the site.

We anticipate that roads extending through the property will generally have relatively light traffic volumes. We have assumed traffic for the proposed roads consisting of 1,000 cars and 2 delivery trucks per day and 2 garbage trucks per week.

If the proposed construction or traffic are significantly different from those described above, we should be notified to re-evaluate our recommendations.

GEOLOGIC CONSIDERATIONS

A geologic hazard review of the site and vicinity was performed which included seismic, rock fall, landslide and debris flow hazards.

Seismic Considerations

1. Surface Fault Rupture

The closest fault trace of the Wasatch Fault is located approximately 300 to 400 feet to the northeast of the east edge of the property. No evidence of surface fault rupture can be identified at the property from field reconnaissance and aerial photograph review.

2. Ground Shaking

The project is in an area which has a moderately high risk of experiencing strong ground shaking related to potential earthquake activity. The site is located in Uniform Building Code Seismic Zone 3. We recommend that the buildings be constructed conforming to the Uniform Building Code Seismic Zone 3 standards using a soil profile type "S-2".

3. Landslide Considerations

Along the American Fork sub-segment of the Wasatch Fault Zone south of American Fork Canyon, the Manning Canyon shale is exposed in the lower part of the Wasatch range. The shale is particularly susceptible to landsliding, often incorporating large blocks of bedrock. Landslides of Holocene and Pleistocene to Late Tertiary age are prominent along the Wasatch Front from the American Fork Canyon to the Provo vicinity. Several landslides have been identified along the fault

zone east of the property. The landslides are of the Upper Pleistocene to Upper Tertiary time and appear to be associated with earthquake activity (Machette, 1989). Cluff and others have identified an area of "possible landslide debris" which extends into the north corner of the property (Cluff and others, 1973).

Reconnaissance of the site and review of aerial photographs do not indicate evidence of landslide at the property. We feel that the relatively flat slopes present and the soil types encountered in the test pits excavated at the site indicate that landslide potential is minimal, if proper site grading practices are followed.

4. Debris Flow Considerations

The property is located near the mouth of Dry Canyon which is a well-developed drainage having a well developed alluvial fan at its mouth. The probability of debris flow originating from the drainage is dependant on the probability of an extreme climatic condition in combination with fire, drought or other damaging occurrences to the water shed. There is a debris basin to the northeast of the site, up the Dry Canyon drainage approximately 1/3 mile. The State of Utah Dam Safety Division was contacted to obtain information on the debris basin. They indicate that the basin was constructed in 1984 to mitigate the risk of debris flow. The basin has a crest height of 23 feet, a hydraulic height of 21 feet and a capacity of 11 acre feet. The State of Utah indicated that a hydrologic analysis of the basin was conducted by RB&G Engineering and that a study of the basin by the State of Utah Dam Safety Division is to be conducted this year.

5. Collapsible Soil Considerations

Collapsible soils are relatively dry, low density soils which undergo a decrease in volume when they become wet. The decrease in volume may occur without change in applied pressure and the decrease in volume will increase with additional applied pressure. These types of soils are generally found in arid to semi-arid environmental or associated with eolian deposits, alluvial fan deposits including mud flows and debris flows or with unconsolidated colluvial deposits.

The collapse potential of the soils at the project site have been identified to be very low to high on a scale of very low, low, moderate, high and very high (Rollins and Owens, 1988). Most of the property is within the area mapped as very low collapse potential. The central portion of the site, along the Dry Canyon drainage, is mapped as moderate. This ranking system is intended to alert the user or land owner to areas where collapsible soils are more likely to be found. The potential for collapsible soils at the site was evaluated by wetting the samples during the consolidation tests. Results of the consolidation tests indicate a moderate potential for collapse in the clay/silt soil with approximately 3 percent collapse occurring during wetting of the sample.

Most of the soils present within the study area consist of coarse granular soils which are typically not moisture sensitive. However, there appears to be localized areas of collapsible soils. We were not able to identify specific areas of concern due to the erratic nature of the clay and silt soils at the site. With the known erratic occurrence, we suggest that the owners be aware of the potentially moisture sensitive soils in the area and that the excavation observations and drainage precautions contained in the geotechnical recommendations of this report be carefully followed.

6. Rock Fall

Based on our site reconnaissance, there is one relatively small potential source of rock which could reach the site if it were dislodged from the hillside above. The rock source is approximately 5 to 6 feet in diameter and is located approximately 500 to 600 feet northeast of the northernmost drainage which extends through the site. It is nearly in line with the north property boundary. Based on our analysis, it is possible that rocks could roll from the rock source, down through the northernmost drainage which extends through the Single Family PUD portion of the site.

The rock source is relatively small and we anticipate that the rock fall hazard could be mitigated by removing the rock source or breaking the rock up to particles less than approximately 1 foot in size (which are not expected to reach the development area). Alternatively, a rock fall barrier could be provided at the top of the northernmost drainage above the Single Family PUD area.

GEOTECHNICAL RECOMMENDATIONS

Based on the subsoil conditions encountered, laboratory test results, and the proposed construction, the following recommendations are given.

A. Site Grading

We anticipate that only minor amounts of site grading will be required to construct the proposed development. Cuts and fills may be required to facilitate construction in the northern and eastern portions of the property.

1. Slopes

Permanent cut slopes of up to 10 feet should be designed no steeper than 2:1 (horizontal to vertical). Larger cuts should be considered on an individual basis.

Fill slopes compacted to at least 90 percent of the maximum dry density as determined by ASTM D-1557 near optimum moisture content and up to 10 feet high may be constructed on 2:1 (horizontal to vertical). Good drainage should be provided upslope of the fill.

Landscaping maintenance and surface protection may determine the most desirable slopes.

2. Excavation

We anticipate that excavation at the site can be accomplished with typical excavation equipment. Some difficulty can be expected when large boulders are encountered.

3. Materials

Materials placed as fill to support the foundations should be non-expansive granular soil. The on-site sand and gravel exclusive of any oversized material are suitable for use as structural fill. The clay and silt soils are not suitable for structural fill, but may be used in landscaping or under pavement areas.

4. Surface Drainage

With the moisture sensitive soils present at the site, it is important that in areas where moisture sensitive soils are encountered the following drainage precautions be observed during construction and maintained at all times after the residences have been completed.

- a. Excessive wetting or drying of soils in foundation excavations should be avoided.
- b. The ground surface surrounding the exterior of the residences should be sloped to drain away from the structures in all directions, maintaining a slope of at least 1/2 foot in 10 feet for a distance of at least 10 feet away from the buildings.
- c. The upper 2 feet of foundation wall backfill should be low permeable clay soils.
- d. Downspouts and drains should discharge well beyond the limits of all backfill.

- e The sprinkler lines and sprinkler heads should not be placed within 10 feet of the foundation walls

B. Foundations

1. Bearing Material

With the proposed construction and the subsurface conditions encountered, we recommend that the foundations be supported on spread footings bearing on the natural soil or on compacted structural fill. Compacted structural fill should extend down to undisturbed natural soils.

2. Bearing Pressure

The consolidation test results indicate that the natural clay soils may undergo a moderate to high amount of compression on the addition of light to moderate loads. Based on this consideration, footings may be designed for an allowable net soil bearing pressure of 1,500 pounds per square foot. Footings should have a minimum width of 20 inches and a minimum depth of embedment of 1 foot. Spread footings bearing on at least 2 feet of structural fill or 2 feet of the natural gravel soil may be designed using an allowable net bearing pressure of 2,500 psf.

3. Settlement

We estimate that settlement will be on the order of 1 inch, if the residences are supported on the natural clay and silt soils. If wetting of the foundation soil occurs, footing settlement could be significantly greater. We estimate that settlement will be less than ½ inch for footings bearing on the natural gravel soil.

4. Frost Depth

Exterior footings and footings beneath unheated areas should be placed at least 30 inches below grade for frost protection.

5. Foundation Base

The base of all excavations should be cleared of loose or deleterious material prior to fill or concrete placement.

6. Construction Observation

A representative of the geotechnical engineer should observe all footing excavations prior to structural fill or concrete placement. This is particularly important with the potential for moisture sensitive soils in the area.

C. Concrete Slabs-on-Grade

1. Slab Support

The concrete slabs may be supported on the natural soil or on compacted structural fill.

2. Slab Joints

A positive joint should be provided between the bearing walls and the floor slab to allow unrestrained vertical movement.

3. Underslab Gravel

A minimum 4 inch layer of free draining gravel should be placed beneath the slab.

D. Subsurface Drains

No free water was encountered at the time of the investigation, however, the interlayered clay and gravel may result in perched water conditions, or highly permeable layers may transmit water to the subgrade portion of the buildings during times of rainfall or snow melt. Consideration should be given to installing a permanent underdrain system for subgrade construction.

The underdrain system should consist of peripheral drains on the below grade portion of the structures, leading to a sump where water can be removed by pumping or gravity flow. The drain lines should consist of a perforated or open jointed pipe surrounded by free draining gravel. The drain lines should be placed at least 18 inches below the floor level to provide free drainage of the water. Three-quarter inch washed rock or similar material would be satisfactory drainage gravel. Drains should be connected to the gravel backfill and under slab gravel. In crawl space construction, the ground surface should be sloped to drain into the underdrain.

E. Water Soluble Sulfates

Two samples of the natural soil were tested in the laboratory for water soluble sulfate content. Results of the tests indicate that there is less than 0.1 percent water soluble sulfate in the soil. Based on the results of the test and published literature, the natural soils possess negligible sulfate attack potential on concrete. No special cement type is required for concrete placed in contact with the natural soil. Other conditions may dictate the type of cement to be used in concrete at the site.

F. Pavement

Based on the subsoil conditions encountered, laboratory test results and the assumed traffic, the following pavement support recommendations are given.

1. Subgrade Support

The near surface soil consists primarily of silty and clayey gravel with some silt and clay areas. A California Bearing Ratio (CBR) of 3 and 20 percent was assumed in the analysis, which assumes a clay and gravel subgrade, respectively.

2. Pavement Thickness

Based on the subsoil conditions, anticipated traffic, methods presented by the Utah Department of Transportation and a design life of 20 years, a flexible pavement

section consisting of 3 inches of asphaltic concrete overlying 8 inches of base course may be used in clay subgrade areas. The base course thickness could be reduced to 6 inches in gravel subgrade areas.

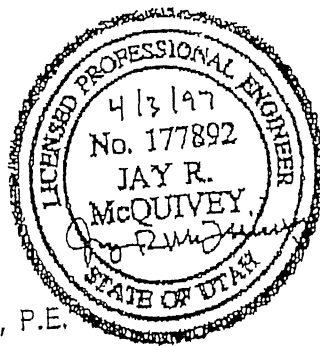
3. Pavement Material

Pavement materials should meet the Utah Department of Transportation specifications for gradation and quality. The pavement thickness indicated above assumes the base course is high quality material with a CBR of at least 80 percent. Other materials may be considered for use in the pavement section. The use of other materials may result in different pavement material thicknesses.

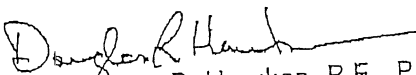
LIMITATIONS

This report has been prepared in accordance with generally accepted geologic and geotechnical engineering practices in the area for the use of the client for design purposes. The conclusions and recommendations included within the report are based on the information obtained from the test pits excavated at the location indicated on the site plan and the data obtained from laboratory testing. Variations in the subsurface conditions may not become evident until additional exploration or excavation is conducted. If the subsurface soil or groundwater conditions are found to be different than what is described in this report, we should be notified to re-evaluate the recommendations given.

APPLIED GEOTECHNICAL ENGINEERING CONSULTANTS, INC.



Jay R. McQuivey, P.E.


Reviewed by Douglas R. Hawkes, P.E., P.G.

JRM/cs

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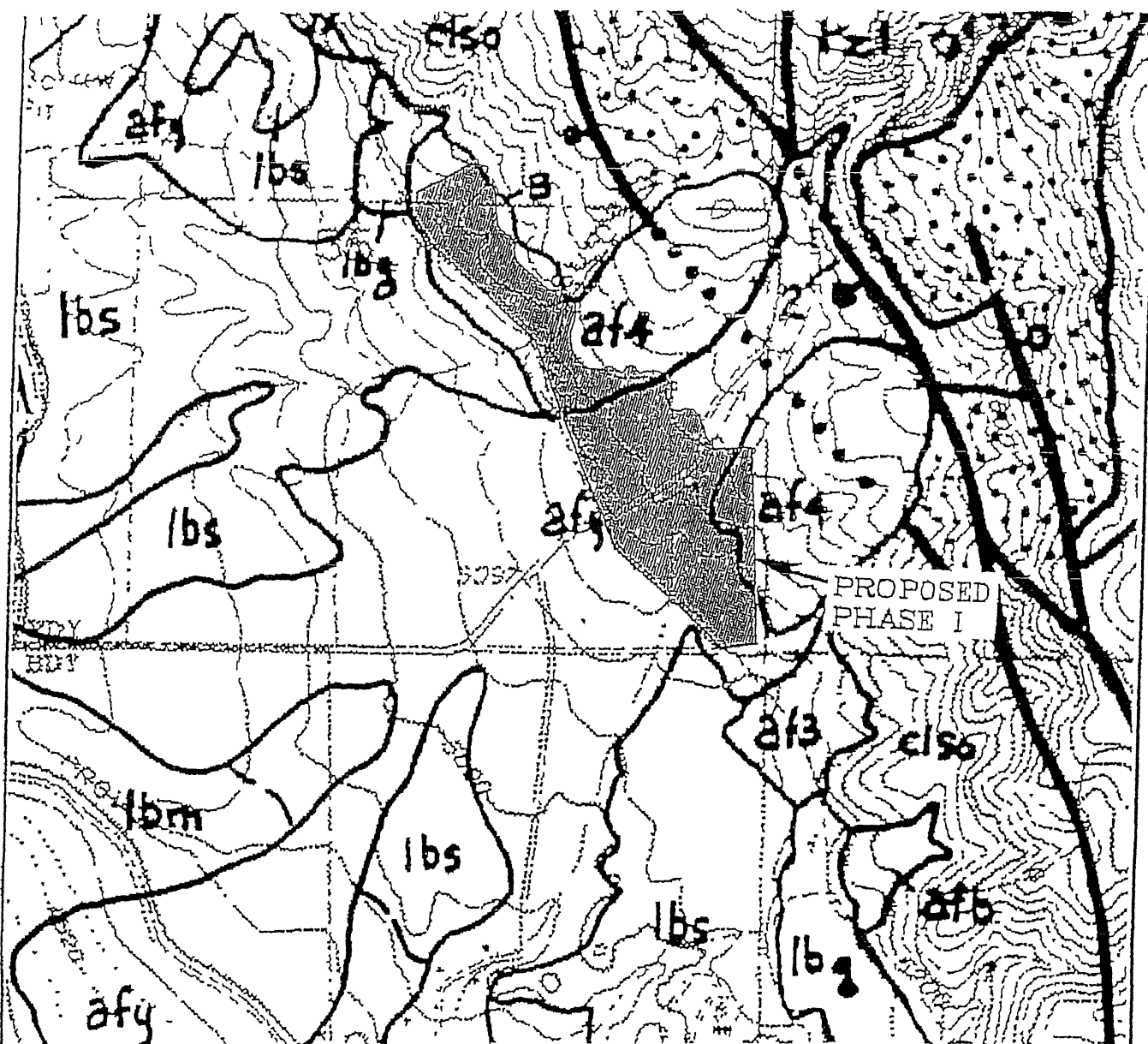
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Approximate Scale 1" 1,000'
Section 35, T5S, R2E, SLB&M

from Machette, 1989

PROPOSED CANBERRA HEIGHTS PHASE I CANBERRA DRIVE AND MCKINLEY DRIVE LONDON, UTAH

EXPLANATION OF SYMBOLS AND GEOLOGIC UNITS

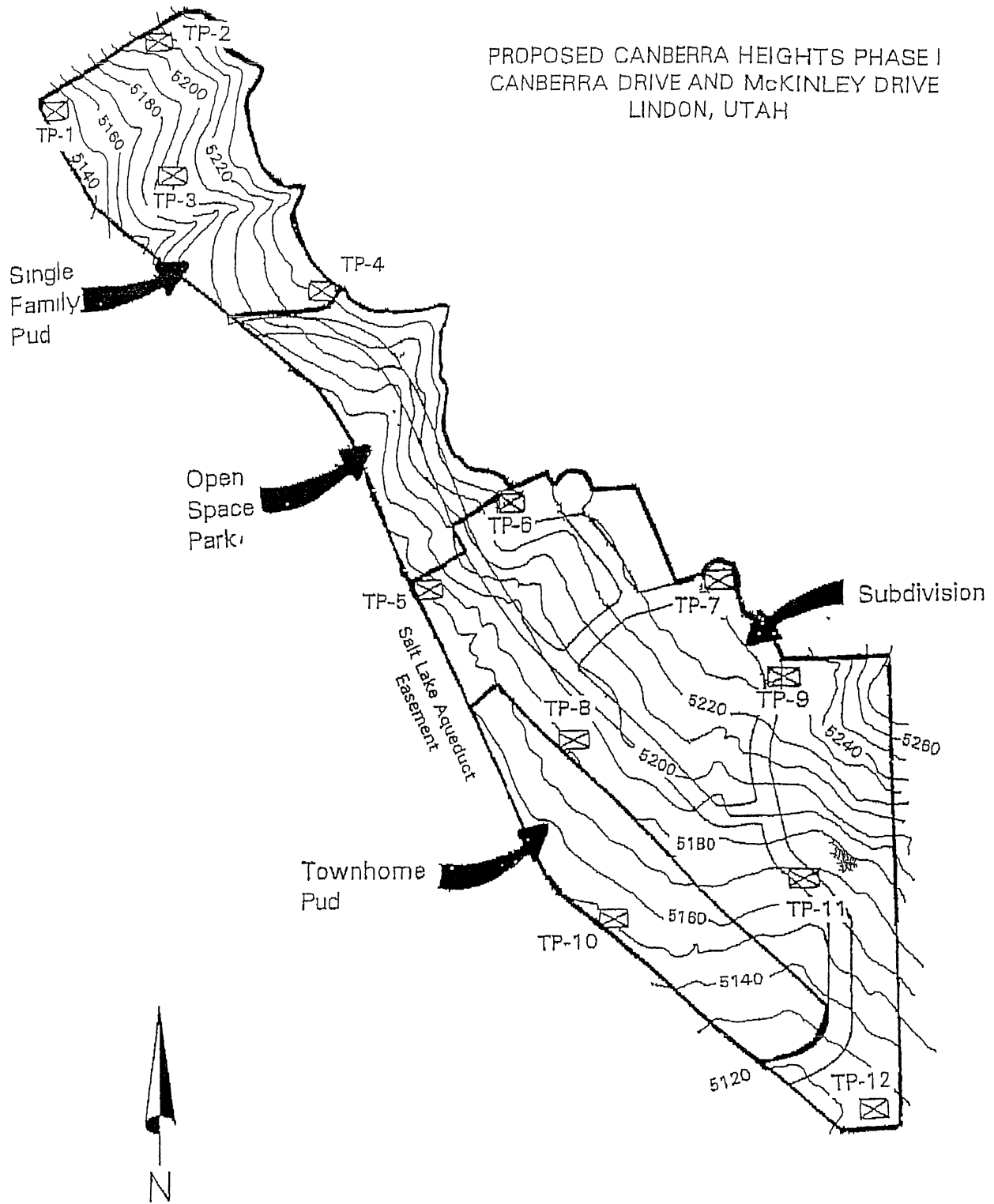
afy	Holocene to uppermost Pleistocene fan alluvium
af3	Upper Pleistocene Bonneville fan alluvium
af4	Upper to middle Pleistocene preBonneville fan alluvium
af5	Upper to middle Pleistocene preLittle Valley fan alluvium
lbs	Lacustrine Sand
lbm	Lacustrine silt and clay
lbg	Lacustrine gravel
clso	Upper Pleistocene to upper Tertiary older landslide deposit
Pzl	Paleozoic sedimentary rock

Contact - dashed where approximately located

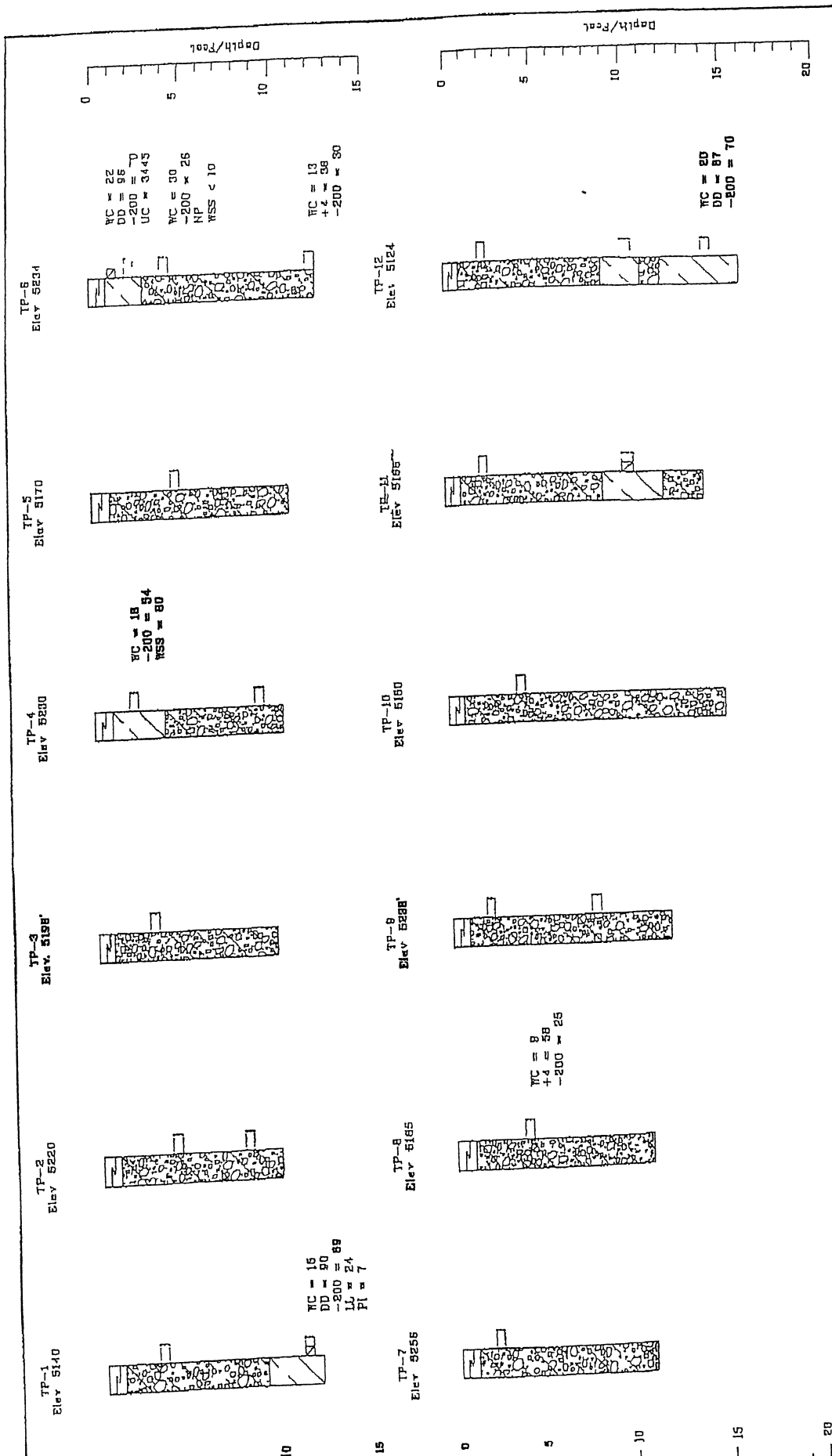
Normal Fault - bar and ball on downthrown side - dotted where concealed



PROPOSED CANBERRA HEIGHTS PHASE I
CANBERRA DRIVE AND MCKINLEY DRIVE
LINDON, UTAH



0 400 800 feet
Approximate Scale



Approximate Vertical Scale 1" = 8' See Figure 3 for Legend and Notes

LEGEND:



Topsoil: silty and clayey gravel to sandy lean clay with gravel, moist, dark brown, roots and organics.



Lean Clay and Silt (CL/ML): interlayered, sandy, medium stiff, moist, light brown to brownish gray.



Silty Gravel (GM): with clayey gravel layers, with cobbles and boulders up to approximately 2 feet in size, occasional boulders up to 8 feet in size, medium dense to dense, moist, brownish gray to light brown.



Indicates relatively undisturbed hand drive sample taken.

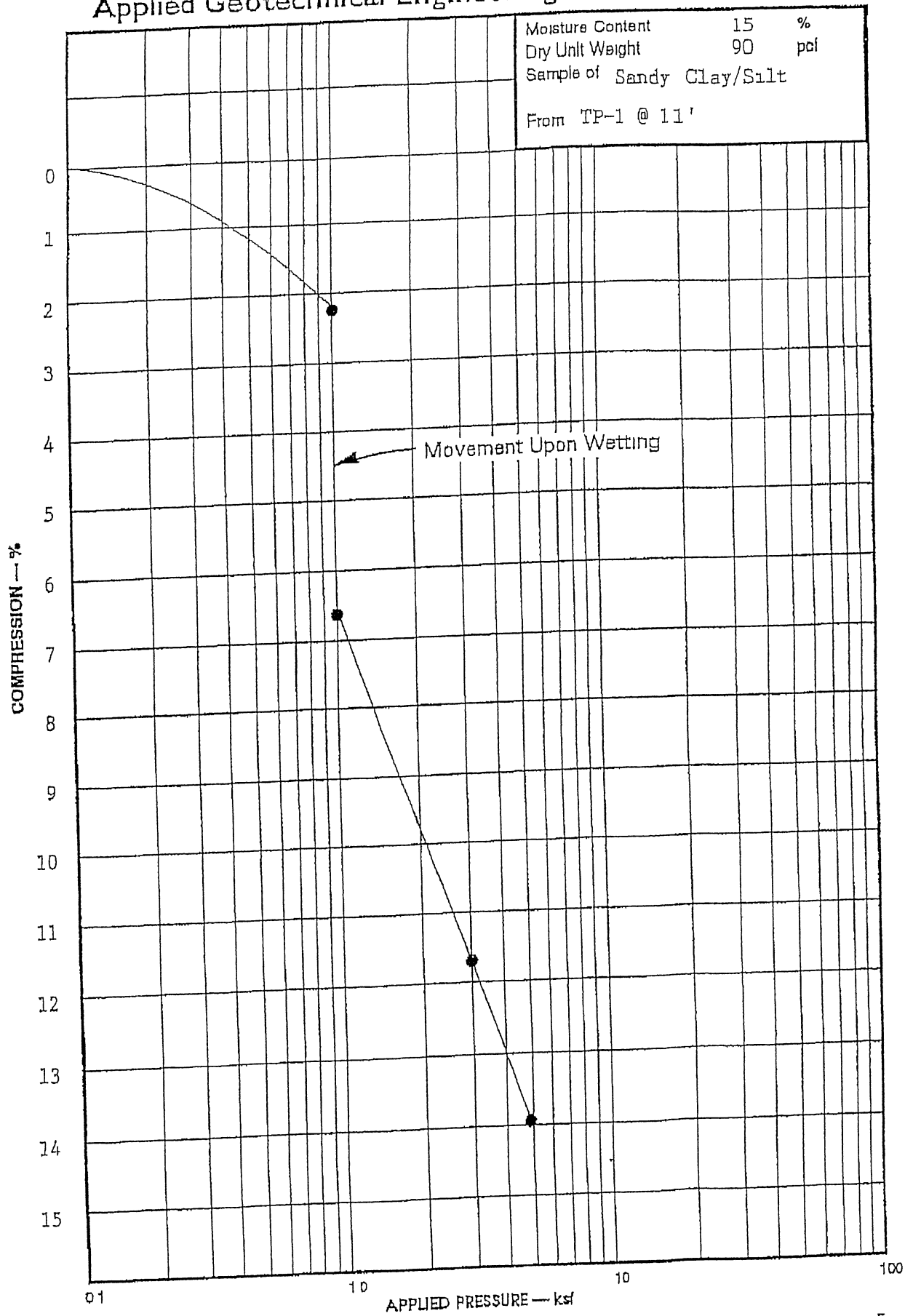


Indicates disturbed sample taken.

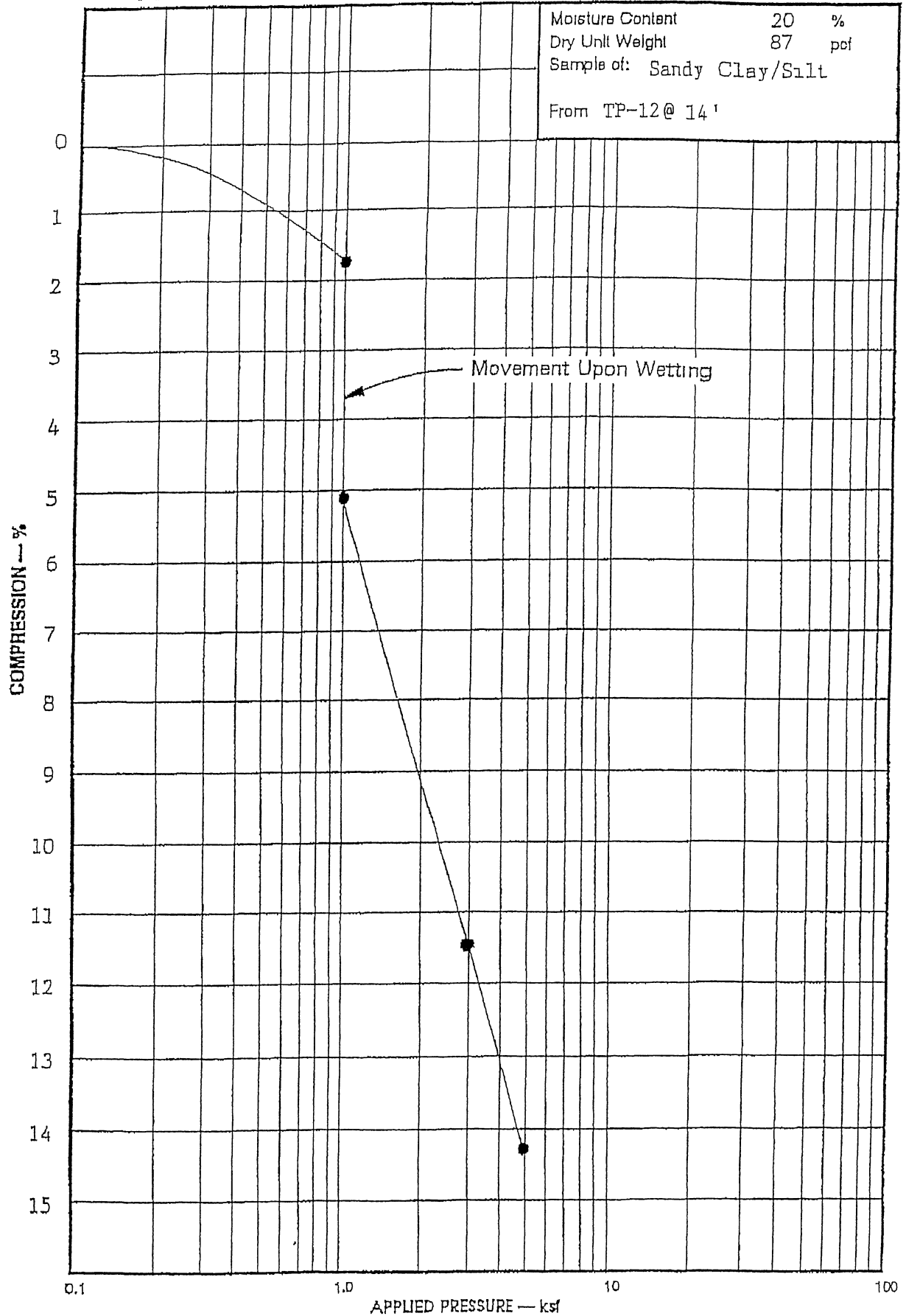
NOTES:

1. Test pits were excavated on March 7, 1997 with a track excavator.
2. Locations of test pits were measured approximately by pacing from features shown on the site plan.
3. Elevations of test pits were determined by interpolating between contours shown on the site plan.
4. The test pit locations and elevations should be considered accurate only to the degree implied by the method used.
5. The lines between the materials shown on the test pit logs represent the approximate boundaries between material types and the transitions may be gradual.
6. No free water was encountered in test pits at the time of excavation.
7.
 - WC = Water Content (%);
 - DD = Dry Density (pcf);
 - +4 = Percent Retained on the No. 4 Sieve;
 - 200 = Percent Passing No. 200 Sieve;
 - LL = Liquid Limit (%);
 - PI = Plasticity Index (%);
 - NP = Non-Plastic;
 - UC = Unconfined Compressive Strength (psi);
 - WSS = Water Soluble Sulfates (ppm).

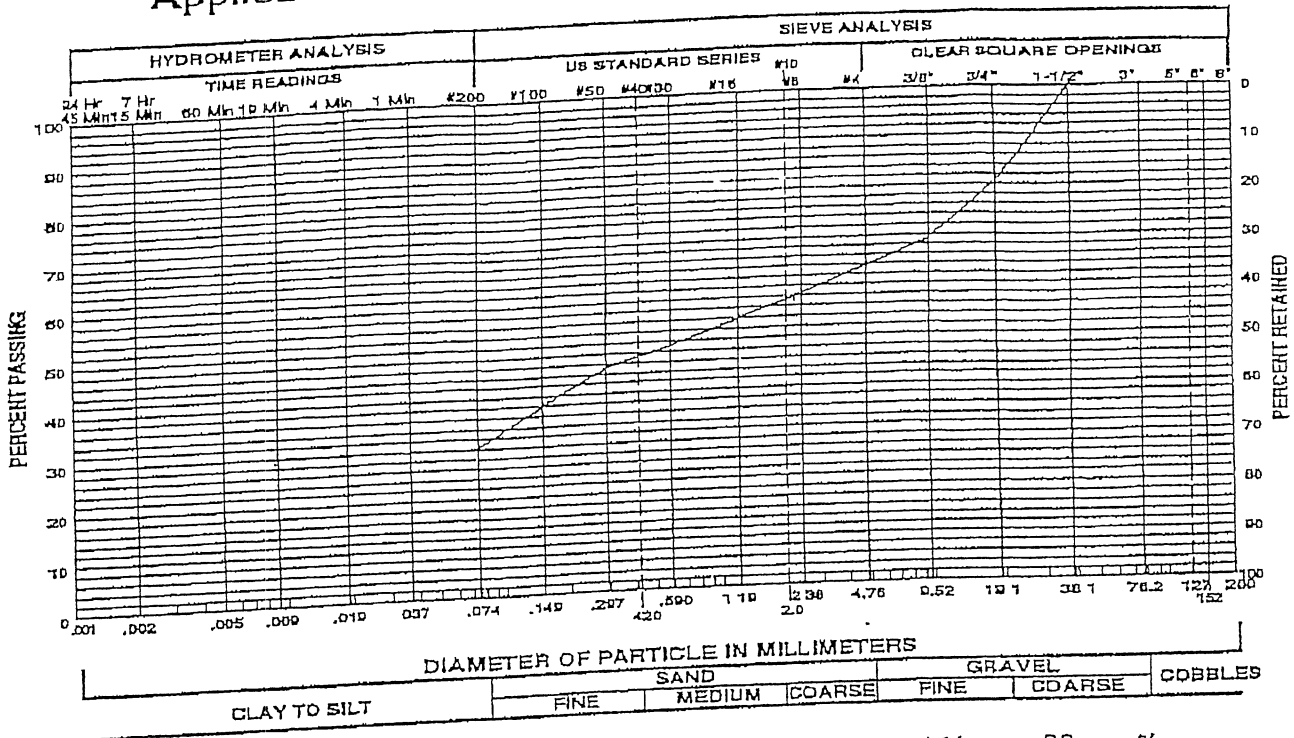
Applied Geotechnical Engineering Consultants, Inc.



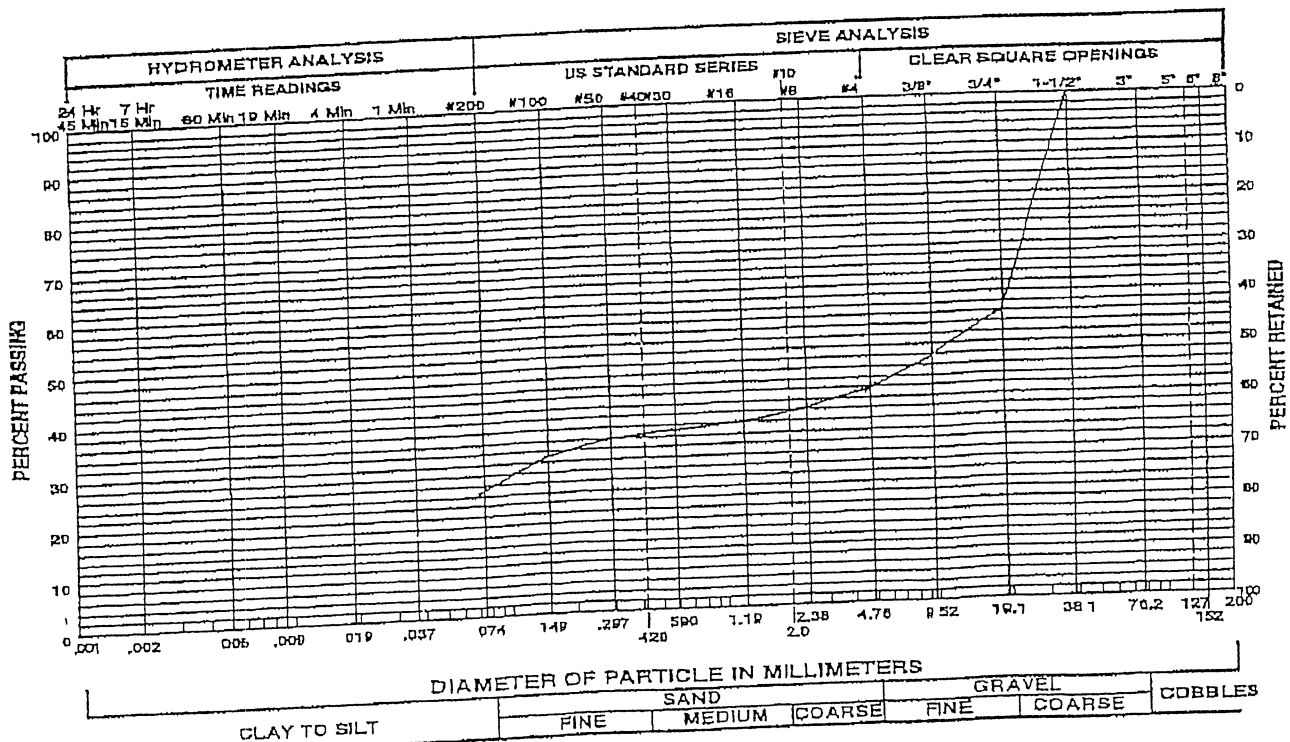
Applied Geotechnical Engineering Consultants, Inc.



Applied Geotechnical Engineering Consultants, Inc.



Gravel 36 % Sand 34 % Silt and Clay 30 %
 Liquid Limit % Plasticity Index %
 Sample of Silty Gravel w/Sand From TP-6 @ 12'



Gravel 58 % Sand 17 % Silt and Clay 25 %
 Liquid Limit % Plasticity Index %
 Sample of Clayey Gravel w/Sand From TP-8 @ 4'

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CONCLUSIONS

1. The subsurface soils at the site consists predominantly of clayey and silty gravel with cobbles and boulders. Occasional clay and silt layers were encountered. The location of silt and clay layers across the site is erratic.
2. No free water was encountered in the test pits at the time of excavation.
3. The site is suitable for the proposed residential development. Recommendations contained in this report should be carefully followed.
4. The residences may be supported on spread footings bearing on the undisturbed natural soil or on compacted structural fill and may be designed for an allowable net bearing pressure of 1,500 pounds per square foot. Footings bearing on at least 2 feet of compacted structural fill or 2 feet of the natural gravel soil may be designed using an allowable net bearing pressure of 2,500 pounds per square foot.
5. Moisture sensitive soils have been reported in the area. Precautions with respect to constructing in moisture sensitive soil areas are included in the report.
6. Geotechnical information related to foundations, subgrade preparation and materials are included in the report.

SCOPE

This report presents the results of a geologic and geotechnical investigation for the proposed Canberra Heights, Phase I subdivision to be located at McKinley Drive at Canberra Drive in Lindon, Utah (see Figure 2). The report presents the geologic and subsurface conditions encountered, laboratory test results and recommendations for foundations. The study was conducted in accordance with our proposal dated February 26, 1997.

Field exploration was conducted to obtain information on the subsurface conditions. Samples obtained during the field investigation were tested in the laboratory to determine physical and engineering characteristics of the on-site soil. Information obtained from the field and laboratory was used to define conditions at the site for our engineering analysis and to develop recommendation for the proposed building foundations

This report has been prepared to summarize the data obtained during the geologic and geotechnical studies and to present our conclusions and recommendations based on the proposed construction and subsurface conditions encountered. Design parameters and a discussion of geologic and geotechnical engineering considerations related to construction are included in the report.

SITE CONDITIONS

The site is located on the bench of Mt. Timpanogas, below Dry Canyon and Sumac Hollow. The eastern edge of the site falls approximately along elevation 5240 and the western portion of the site falls along the easement for the Salt Lake Aqueduct. The site extends from approximately 200 North to 200 South (see Figure 2). The property is located partially on alluvial fans formed at the mouth of Dry Canyon and Sumac Hollow. The Dry Canyon drainage channel extends through the southern portion of the property and the Sumac Hollow drainage crosses through the north-central portion of the property.

The property was vacant of permanent structures at the time of our investigation. The Salt Lake Aqueduct borders the west edge of the property. Several dirt roads extend through the property at various locations.

The site encompasses a hillside that slopes downward from northeast to southwest. Slopes in the northern portion of the site range from approximately 10 to 50 percent with some steeper slopes in drainage areas. The slopes in the southern portion of the property range from approximately 10 percent in the southern and western portion of the area to as steep as 50 percent in the eastern portion of the site and some steeper slopes in the Dry Canyon drainage.

Vegetation at the site consists predominantly of grass, sagebrush and oak brush.

The surrounding area includes the undeveloped slopes to the north and east, existing residences to the south and subdivisions under construction to the west. There is a debris basin on Dry Canyon, northeast of the site approximately 1/3 mile.

FIELD STUDY

The field study was conducted on March 7, 1997. Twelve test pits were excavated for the geotechnical investigation at the approximate locations indicated on Figure 2. The test pits were excavated with a track excavator. Excavations were logged and soil samples obtained by an engineer from AGECEC. Logs of the subsurface conditions encountered in the test pits are graphically shown on Figure 3 with Legend and Notes on Figure 4.

GEOLOGIC STUDY

Geologic conditions at the site were evaluated by review of aerial photographs, a review of geologic literature and reconnaissance of the site. The general geology of the site and vicinity is presented on Figure 1.



Regional Geology

Lindon is located in the Basin and Range province. The province is made up of north/south elongated mountain blocks and valleys. Utah Valley is one of the valleys in the province with the Wasatch Mountains forming the eastern boundary of the valley.

The project is located below the mouth of Dry Canyon. The canyon is a stream cut drainage with a well developed alluvial fan at its mouth

Utah Valley was once occupied by a large lake known as Lake Bonneville during the Wisconsin Glacial Period of the Pleistocene Age. The present day Great Salt Lake is a remnant of Ancient Lake Bonneville. Stillstands of Lake Bonneville formed benches along the Wasatch Front. The highest level of Lake Bonneville is marked by a bench, the Bonneville Shoreline, at approximate elevation 5150 feet. The lake remained at this high level from 17 to 15 thousand years before present, until it dropped approximately 350 feet during a catastrophic flood known as the Bonneville Flood (Currey and Oviatt, 1985 and Jarrett and Malde, 1987). This lower stillstand of Lake Bonneville is the Provo, which formed at approximate elevation 4800 feet.

Most of the site is located just below the Bonneville shoreline level.

Tectonic Setting

The site is located in the Salt Lake Valley along the western Wasatch Front, which is a prominent mountain front escarpment extending approximately 240 miles from southern Idaho to north-central Utah. The prominent west facing steep escarpment of the Wasatch Mountain Front is the result of repeated normal fault displacements which have taken place over the last several million years. The system of normal faults which makes up this escarpment is known collectively as the Wasatch Fault. Relatively recent fault movements are evidenced by offsets in Lake Bonneville sediments and more recent alluvial and colluvial deposits.

The Wasatch Fault is considered to be made up of several segments, each segment acting relatively independently (Machette and Others, 1987). The site is located along the American Fork sub-segment of the Provo rupture segment (Machette, 1989).

Site Geology

Surface deposits of the property consist predominantly of alluvial fan deposits. Soils are anticipated to be relatively deep with a depth to bedrock greater than 100 feet.

SUBSOIL CONDITIONS

The subsurface soils at the site consist predominantly of clayey and silty gravel with cobbles and boulders. Occasional clay and silt layers were encountered within the gravel. The location of silt and clay layers across the site is erratic.

A description of the various soils encountered in the test pits follows.

Topsoil The topsoil consists of silty and clayey gravel to sandy lean clay with gravel. It is moist, dark brown in color and contains roots and organics.

Lean Clay and Silt - The clay and silt is interlayered. It is sandy, medium stiff, moist and light brown to brownish gray in color.

Laboratory tests conducted on samples of the clay and silt indicate natural moisture contents range from 15 to 22 percent and natural dry densities range from 87 to 96 pounds per cubic foot (pcf). A sample of the clay was found to have an unconfined compressive strength of 3,445 pounds per square foot (psf). Consolidation tests conducted on samples of the clay and silt indicate that the soil will undergo a "moderate" to "high" amount of compression with the addition of light to moderate loads. Some collapse of the soil occurred with the addition of water. Some of the compression indicated by the consolidation tests is attributed to disturbance of the sample during sampling. Results of the consolidation tests are presented in Figures 5 and 6.

Silty Gravel - The silty gravel contains clayey gravel layers. It also contains cobbles and boulders up to approximately 2 feet in size and occasional boulders up to approximately 5 feet in size. It is medium dense to dense, moist and brownish gray to light brown in color.

Laboratory tests conducted on samples of the gravel indicate natural moisture contents range from 9 to 30 percent. The results of gradation tests conducted on samples of the gravel are presented on Figure 7.

Laboratory test results are summarized on Table I and are included on the Logs of Exploratory Test Pits.

SUBSURFACE AND SURFACE WATER

No free water was encountered in the exploratory test pits at the time of excavation. We anticipate that the normal highest elevation of the seasonal high water table is at greater than 40 feet below the ground surface. No swamps, springs or seeps were observed at or adjacent the site.

PROPOSED CONSTRUCTION

We understand that it is proposed to construct a single family PUD development in the northern portion of the property, approximately 8 acres in size. It is proposed to construct a town home development in the southwestern portion of the property which is approximately 6 acres in size and a subdivision in the south-central and eastern portion of the property which is approximately 21 acres in size. Open space and park areas are planned for the central portion of the site.

We anticipate that roads extending through the property will generally have relatively light traffic volumes. We have assumed traffic for the proposed roads consisting of 1,000 cars and 2 delivery trucks per day and 2 garbage trucks per week.

If the proposed construction or traffic are significantly different from those described above, we should be notified to re-evaluate our recommendations

GEOLOGIC CONSIDERATIONS

A geologic hazard review of the site and vicinity was performed which included seismic, rock fall, landslide and debris flow hazards.

Seismic Considerations

1. Surface Fault Rupture

The closest fault trace of the Wasatch Fault is located approximately 300 to 400 feet to the northeast of the east edge of the property. No evidence of surface fault rupture can be identified at the property from field reconnaissance and aerial photograph review.

2. Ground Shaking

The project is in an area which has a moderately high risk of experiencing strong ground shaking related to potential earthquake activity. The site is located in Uniform Building Code Seismic Zone 3. We recommend that the buildings be constructed conforming to the Uniform Building Code Seismic Zone 3 standards using a soil profile type "S-2".

3. Landslide Considerations

Along the American Fork sub-segment of the Wasatch Fault Zone south of American Fork Canyon, the Manning Canyon shale is exposed in the lower part of the Wasatch range. The shale is particularly susceptible to landsliding, often incorporating large blocks of bedrock. Landslides of Holocene and Pleistocene to Late Tertiary age are prominent along the Wasatch Front from the American Fork Canyon to the Provo vicinity. Several landslides have been identified along the fault

zone east of the property. The landslides are of the Upper Pleistocene to Upper Tertiary time and appear to be associated with earthquake activity (Machette, 1989). Cluff and others have identified an area of "possible landslide debris" which extends into the north corner of the property (Cluff and others, 1973).

Reconnaissance of the site and review of aerial photographs do not indicate evidence of landslide at the property. We feel that the relatively flat slopes present and the soil types encountered in the test pits excavated at the site indicate that landslide potential is minimal, if proper site grading practices are followed.

4. Debris Flow Considerations

The property is located near the mouth of Dry Canyon which is a well-developed drainage having a well developed alluvial fan at its mouth. The probability of debris flow originating from the drainage is dependant on the probability of an extreme climatic condition in combination with fire, drought or other damaging occurrences to the water shed. There is a debris basin to the northeast of the site, up the Dry Canyon drainage approximately 1/3 mile. The State of Utah Dam Safety Division was contacted to obtain information on the debris basin. They indicate that the basin was constructed in 1984 to mitigate the risk of debris flow. The basin has a crest height of 23 feet, a hydraulic height of 21 feet and a capacity of 11 acre feet. The State of Utah indicated that a hydrologic analysis of the basin was conducted by RB&G Engineering and that a study of the basin by the State of Utah Dam Safety Division is to be conducted this year.

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Collapsible soils are relatively dry, low density soils which undergo a decrease in volume when they become wet. The decrease in volume may occur without change in applied pressure and the decrease in volume will increase with additional applied pressure. These types of soils are generally found in arid to semi-arid environmental or associated with eolian deposits, alluvial fan deposits including mud flows and debris flows or with unconsolidated colluvial deposits.

The collapse potential of the soils at the project site have been identified to be very low to high on a scale of very low, low, moderate, high and very high (Rollins and Owens, 1988). Most of the property is within the area mapped as very low collapse potential. The central portion of the site, along the Dry Canyon drainage, is mapped as moderate. This ranking system is intended to alert the user or land owner to areas where collapsible soils are more likely to be found. The potential for collapsible soils at the site was evaluated by wetting the samples during the consolidation tests. Results of the consolidation tests indicate a moderate potential for collapse in the clay/silt soil with approximately 3 percent collapse occurring during wetting of the sample.

Most of the soils present within the study area consist of coarse granular soils which are typically not moisture sensitive. However, there appears to be localized areas of collapsible soils. We were not able to identify specific areas of concern due to the erratic nature of the clay and silt soils at the site. With the known erratic occurrence, we suggest that the owners be aware of the potentially moisture sensitive soils in the area and that the excavation observations and drainage precautions contained in the geotechnical recommendations of this report be carefully followed.

6. Rock Fall

Based on our site reconnaissance, there is one relatively small potential source of rock which could reach the site if it were dislodged from the hillside above. The rock source is approximately 5 to 6 feet in diameter and is located approximately 500 to 600 feet northeast of the northernmost drainage which extends through the site. It is nearly in line with the north property boundary. Based on our analysis, it is possible that rocks could roll from the rock source down through the northernmost drainage which extends through the Single Family PUD portion of the site.

The rock source is relatively small and we anticipate that the rock fall hazard could be mitigated by removing the rock source or breaking the rock up to particles less than approximately 1 foot in size (which are not expected to reach the development area). Alternatively, a rock fall barrier could be provided at the top of the northernmost drainage above the Single Family PUD area.

GEOTECHNICAL RECOMMENDATIONS

Based on the subsoil conditions encountered, laboratory test results, and the proposed construction, the following recommendations are given

A. Site Grading

We anticipate that only minor amounts of site grading will be required to construct the proposed development. Cuts and fills may be required to facilitate construction in the northern and eastern portions of the property.

1. Slopes

Permanent cut slopes of up to 10 feet should be designed no steeper than 2:1 (horizontal to vertical). Larger cuts should be considered on an individual basis.

Fill slopes compacted to at least 90 percent of the maximum dry density as determined by ASTM D-1557 near optimum moisture content and up to 10 feet high may be constructed on 2:1 (horizontal to vertical). Good drainage should be provided upslope of the fill.

Landscaping maintenance and surface protection may determine the most desirable slopes.

2. Excavation

We anticipate that excavation at the site can be accomplished with typical excavation equipment. Some difficulty can be expected when large boulders are encountered.

3 Materials

Materials placed as fill to support the foundations should be non-expansive granular soil. The on-site sand and gravel exclusive of any oversized material are suitable for use as structural fill. The clay and silt soils are not suitable for structural fill, but may be used in landscaping or under pavement areas.

4. Surface Drainage

With the moisture sensitive soils present at the site, it is important that in areas where moisture sensitive soils are encountered the following drainage precautions be observed during construction and maintained at all times after the residences have been completed.

- a. Excessive wetting or drying of soils in foundation excavations should be avoided.
- b. The ground surface surrounding the exterior of the residences should be sloped to drain away from the structures in all directions, maintaining a slope of at least 1/2 foot in 10 feet for a distance of at least 10 feet away from the buildings.
- c. The upper 2 feet of foundation wall backfill should be low permeable clay soils.
- d. Downspouts and drains should discharge well beyond the limits of all backfill.

- e. The sprinkler lines and sprinkler heads should not be placed within 10 feet of the foundation walls.

B. Foundations

1. Bearing Material

With the proposed construction and the subsurface conditions encountered, we recommend that the foundations be supported on spread footings bearing on the natural soil or on compacted structural fill. Compacted structural fill should extend down to undisturbed natural soils.

2. Bearing Pressure

The consolidation test results indicate that the natural clay soils may undergo a moderate to high amount of compression on the addition of light to moderate loads. Based on this consideration, footings may be designed for an allowable net soil bearing pressure of 1,500 pounds per square foot. Footings should have a minimum width of 20 inches and a minimum depth of embedment of 1 foot. Spread footings bearing on at least 2 feet of structural fill or 2 feet of the natural gravel soil may be designed using an allowable net bearing pressure of 2,500 psf.

3. Settlement

We estimate that settlement will be on the order of 1 inch, if the residences are supported on the natural clay and silt soils. If wetting of the foundation soil occurs, footing settlement could be significantly greater. We estimate that settlement will be less than ½ inch for footings bearing on the natural gravel soil.

4. Frost Depth

Exterior footings and footings beneath unheated areas should be placed at least 30 inches below grade for frost protection.

5. Foundation Base

The base of all excavations should be cleared of loose or deleterious material prior to fill or concrete placement

6. Construction Observation

A representative of the geotechnical engineer should observe all footing excavations prior to structural fill or concrete placement. This is particularly important with the potential for moisture sensitive soils in the area

C. Concrete Slabs-on-Grade

1. Slab Support

The concrete slabs may be supported on the natural soil or on compacted structural fill.

2. Slab Joints

A positive joint should be provided between the bearing walls and the floor slab to allow unrestrained vertical movement.

3. Underslab Gravel

A minimum 4 inch layer of free draining gravel should be placed beneath the slab

D. Subsurface Drains

No free water was encountered at the time of the investigation, however, the interlayered clay and gravel may result in perched water conditions, or highly permeable layers may transmit water to the subgrade portion of the buildings during times of rainfall or snow melt. Consideration should be given to installing a permanent underdrain system for subgrade construction

The underdrain system should consist of peripheral drains on the below grade portion of the structures, leading to a sump where water can be removed by pumping or gravity flow. The drain lines should consist of a perforated or open jointed pipe surrounded by free draining gravel. The drain lines should be placed at least 18 inches below the floor level to provide free drainage of the water. Three quarter inch washed rock or similar material would be satisfactory drainage gravel. Drains should be connected to the gravel backfill and under slab gravel. In crawl space construction, the ground surface should be sloped to drain into the underdrain.

E. Water Soluble Sulfates

Two samples of the natural soil were tested in the laboratory for water soluble sulfate content. Results of the tests indicate that there is less than 0.1 percent water soluble sulfate in the soil. Based on the results of the test and published literature, the natural soils possess negligible sulfate attack potential on concrete. No special cement type is required for concrete placed in contact with the natural soil. Other conditions may dictate the type of cement to be used in concrete at the site.

F. Pavement

Based on the subsoil conditions encountered, laboratory test results and the assumed traffic, the following pavement support recommendations are given:

1. Subgrade Support

The near surface soil consists primarily of silty and clayey gravel with some silt and clay areas. A California Bearing Ratio (CBR) of 3 and 20 percent was assumed in the analysis, which assumes a clay and gravel subgrade respectively.

2. Pavement Thickness

Based on the subsoil conditions, anticipated traffic, methods presented by the Utah Department of Transportation and a design life of 20 years, a flexible pavement

section consisting of 3 inches of asphaltic concrete overlying 8 inches of base course may be used in clay subgrade areas. The base course thickness could be reduced to 6 inches in gravel subgrade areas.

3. Pavement Material

Pavement materials should meet the Utah Department of Transportation specifications for gradation and quality. The pavement thickness indicated above assumes the base course is high quality material with a CBR of at least 80 percent. Other materials may be considered for use in the pavement section. The use of other materials may result in different pavement material thicknesses.

LIMITATIONS

This report has been prepared in accordance with generally accepted geologic and geotechnical engineering practices in the area for the use of the client for design purposes. The conclusions and recommendations included within the report are based on the information obtained from the test pits excavated at the location indicated on the site plan and the data obtained from laboratory testing. Variations in the subsurface conditions may not become evident until additional exploration or excavation is conducted. If the subsurface soil or groundwater conditions are found to be different than what is described in this report, we should be notified to re-evaluate the recommendations given.

APPLIED GEOTECHNICAL ENGINEERING CONSULTANTS, INC

Jay R. McQuivey, P.E.

Reviewed by Douglas R. Hawkes, P.E., P.G.

JRM/cs



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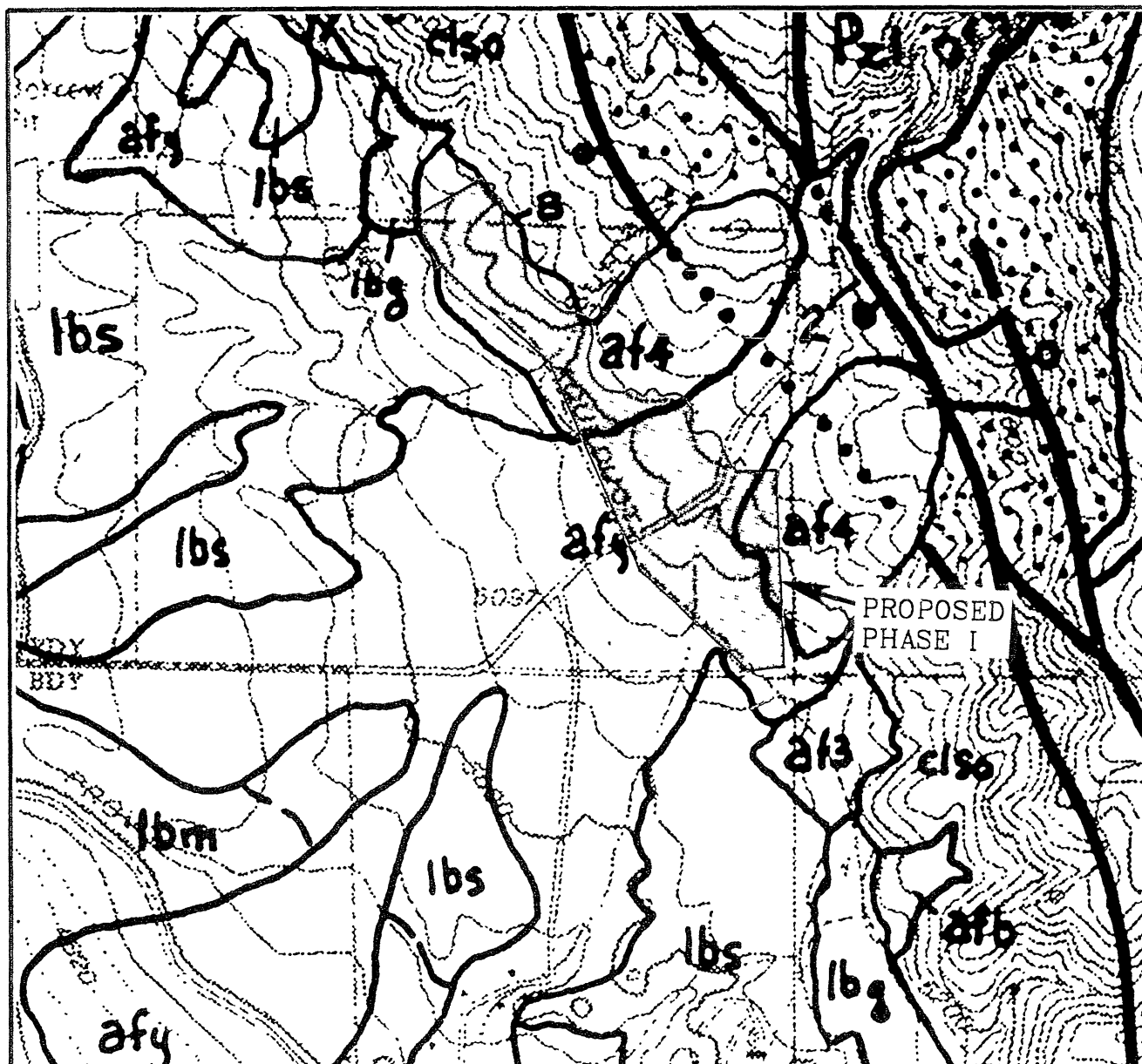
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Approximate Scale 1" : 1,000'
 Section 35, T5S, R2E, SLB&M

from Machette, 1989

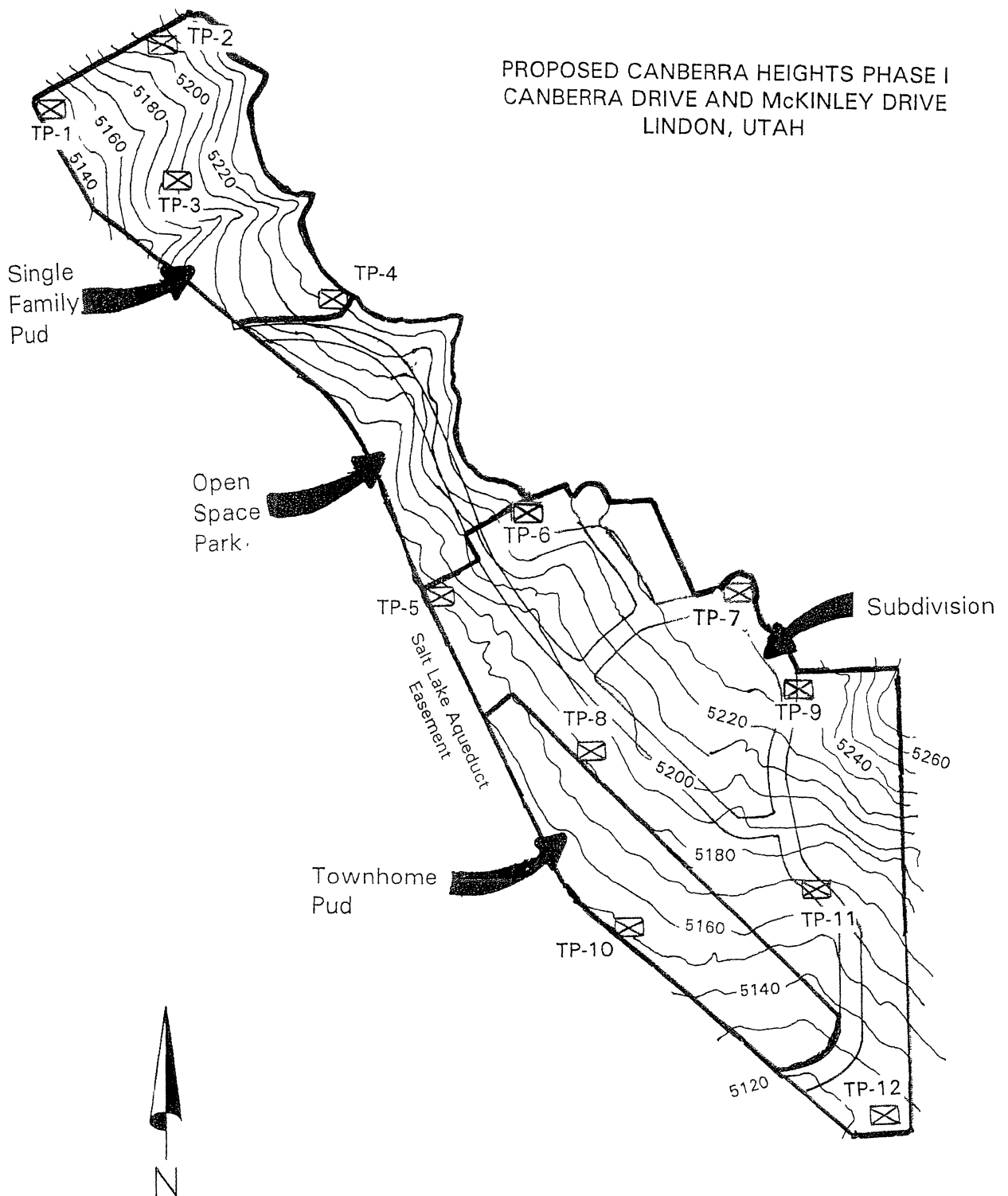
PROPOSED CANBERRA HEIGHTS PHASE I CANBERRA DRIVE AND MCKINLEY DRIVE LINDON, UTAH

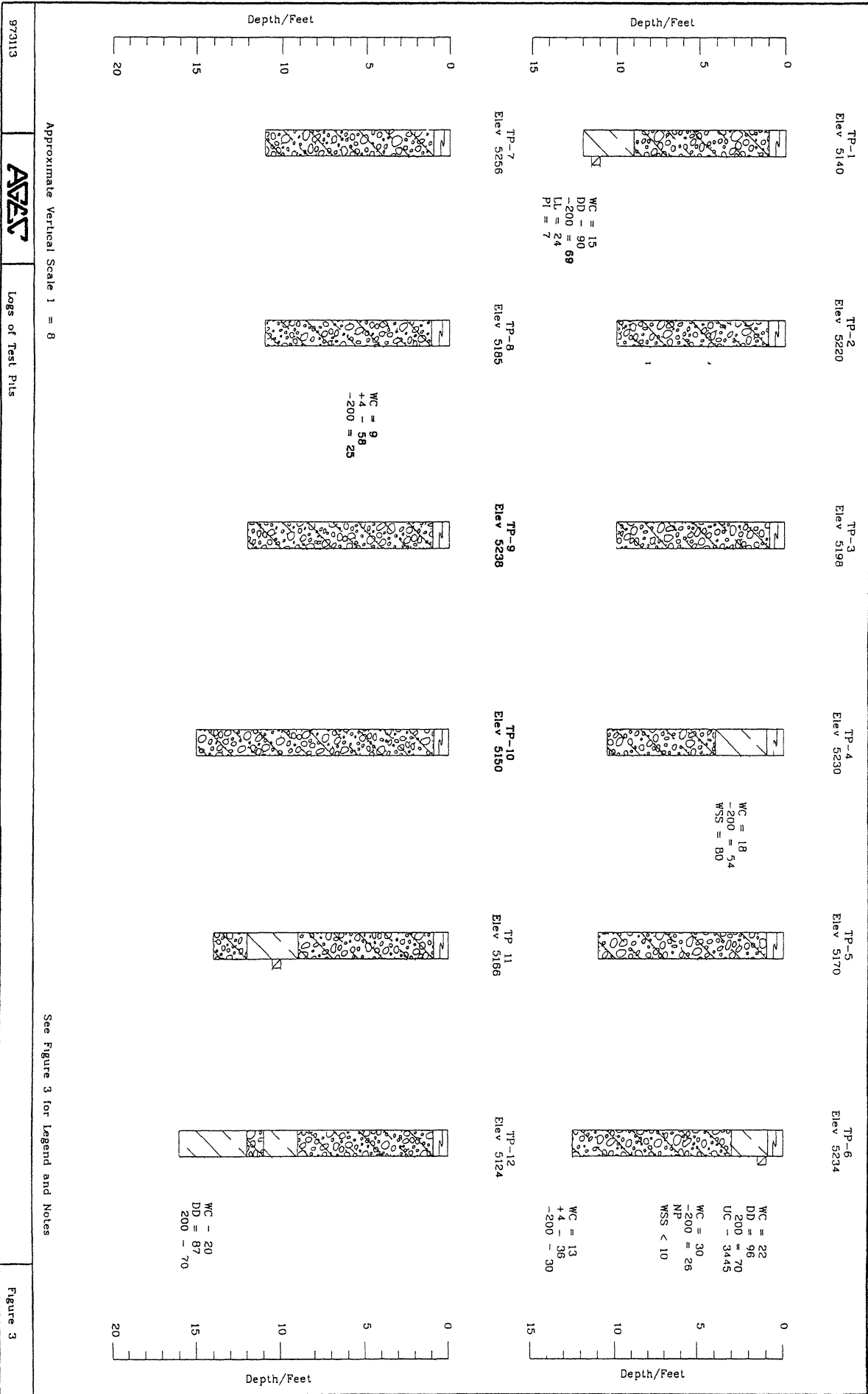
EXPLANATION OF SYMBOLS AND GEOLOGIC UNITS

afy	Holocene to uppermost Pleistocene fan alluvium
af3	Upper Pleistocene Bonneville fan alluvium
af4	Upper to middle Pleistocene preBonneville fan alluvium
af5	Upper to middle Pleistocene preLittle Valley fan alluvium
lbs	Lacustrine Sand
lbm	Lacustrine silt and clay
lbq	Lacustrine gravel
clso	Upper Pleistocene to upper Tertiary older landslide deposit
Pzl	Paleozoic sedimentary rock

--- Contact -- dashed where approximately located

--- Normal Fault -- bar and ball on downthrown side -- dotted where concealed





LEGEND



Topsoil silty and clayey gravel to sandy lean clay with gravel moist, dark brown roots and organics



Lean Clay and Silt (CL/ML) interlayered sandy medium stiff moist, light brown to brownish gray



Silty Gravel (GM) with clayey gravel layers with cobbles and boulders up to approximately 2 feet in size occasional boulders up to 5 feet in size medium dense to dense moist brownish gray to light brown



Indicates relatively undisturbed hand drive sample taken

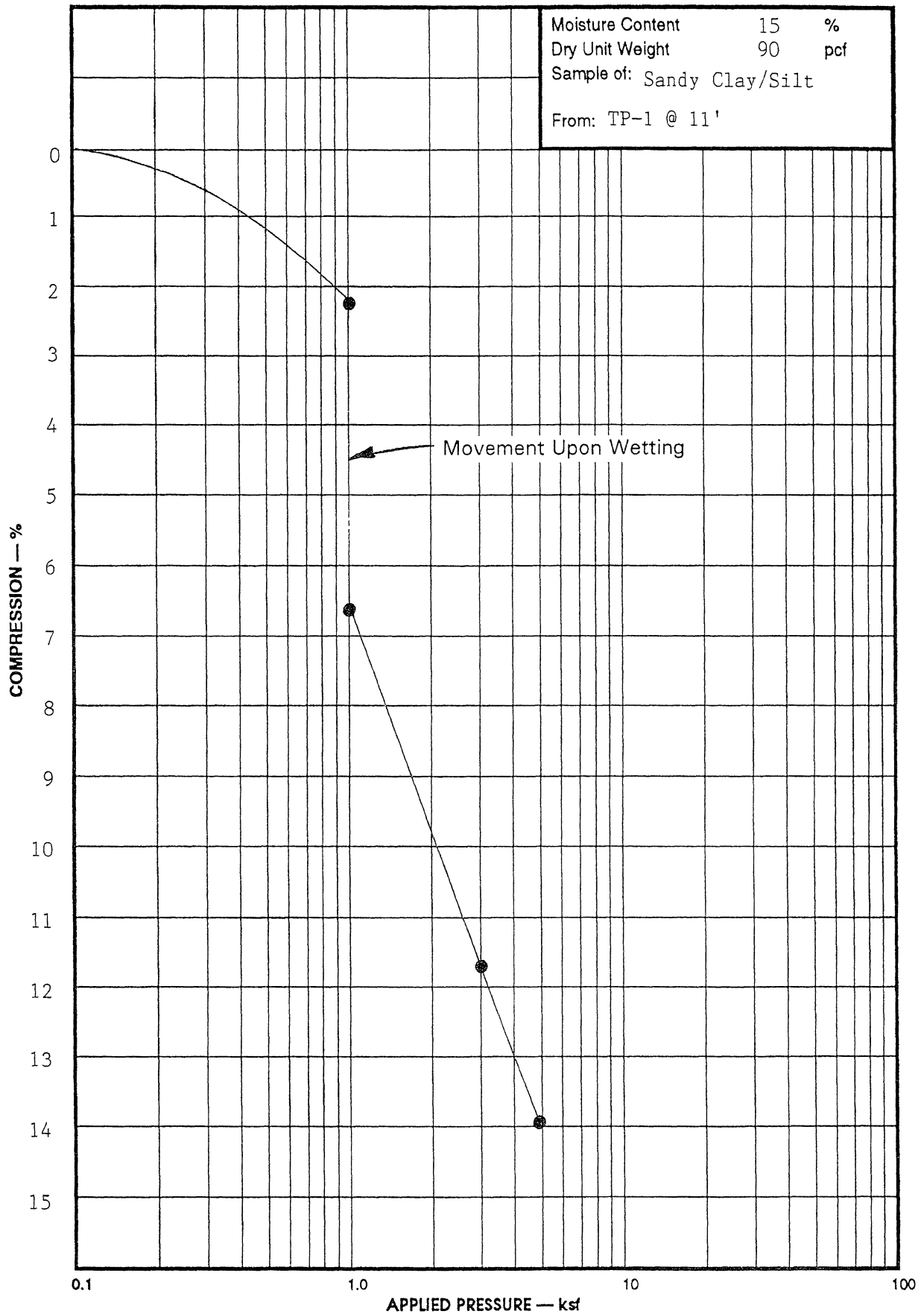


Indicates disturbed sample taken

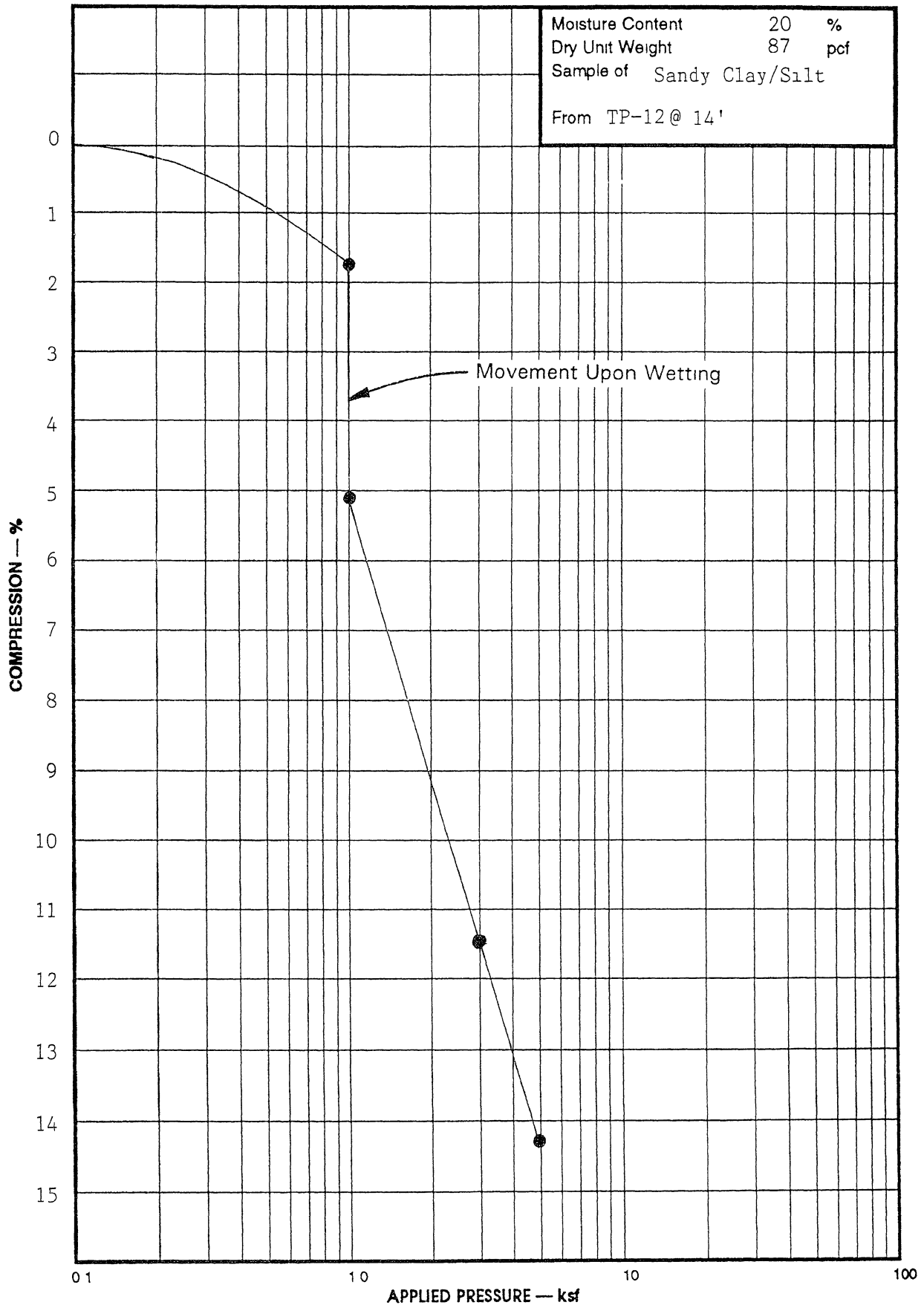
NOTES

- 1 Test pits were excavated on March 7 1987 with a track excavator
- 2 Locations of test pits were measured approximately by pacing from features shown on the site plan
- 3 Elevations of test pits were determined by interpolating between contours shown on the site plan
- 4 The test pit locations and elevations should be considered accurate only to the degree implied by the method used
- 5 The lines between the materials shown on the test pit logs represent the approximate boundaries between material types and the transitions may be gradual
- 6 No free water was encountered in test pits at the time of excavation
- 7
 - WC = Water Content (%)
 - DD = Dry Density (pcf)
 - +4 = Percent Retained on the No. 4 Sieve
 - 200 = Percent Passing No. 200 Sieve,
 - LI = Liquid Limit (%)
 - PI = Plasticity Index (%)
 - NP = Non-Plastic
 - UC = Unconfined Compressive Strength (psf).
 - WSS = Water Soluble Sulfates (ppm)

Applied Geotechnical Engineering Consultants, Inc.



Applied Geotechnical Engineering Consultants, Inc.

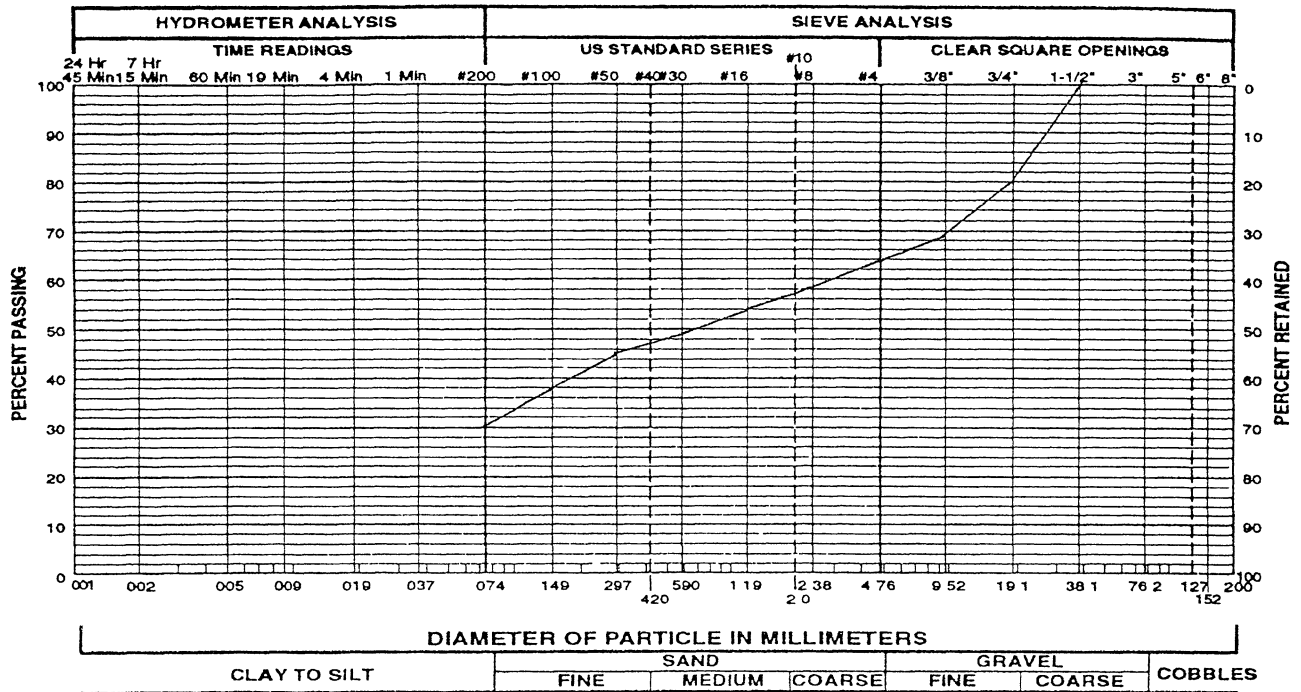


Project No. 973113

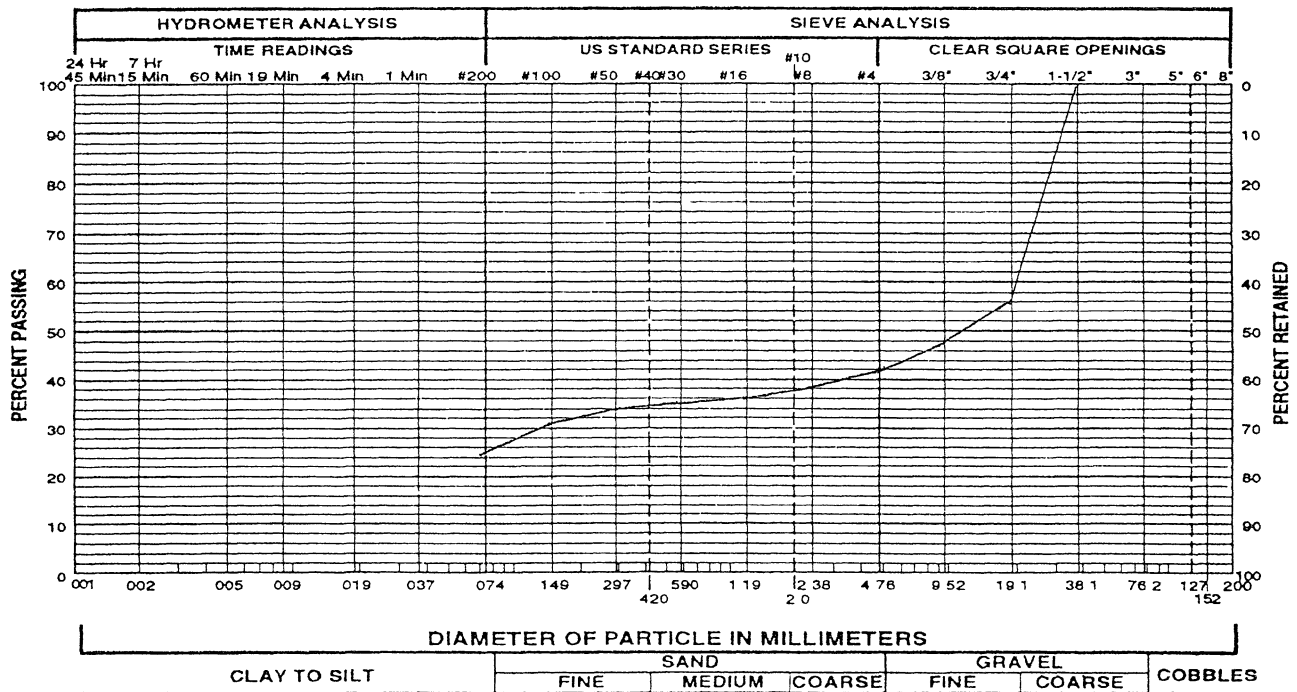
CONSOLIDATION TEST RESULTS

Figure 6

Applied Geotechnical Engineering Consultants, Inc.



Gravel 36 % Sand 34 % Silt and Clay 30 %
 Liquid Limit % Plasticity Index %
 Sample of Silty Gravel w/Sand From TP-6 @ 12'



Gravel 58 % Sand 17 % Silt and Clay 25 %
 Liquid Limit % Plasticity Index %
 Sample of Clayey Gravel w/Sand From TP-8 @ 4'

Tab B



REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer Mark L. Hess offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$ 1000.00 in the form of Personal Check which, upon Acceptance of this offer by all parties (as defined in Section 2.3), shall be deposited in accordance with state law.

Received by: Stephen Tanner on 2-21-04
(Signature of agent/broker acknowledges receipt of Earnest Money) (Date)

Brokerage: all Pro Realty Inc. Phone Number 224-5888

OFFER TO PURCHASE

1. PROPERTY: lot #41 plat B Canberra Heights
also described as:
City of Lindon, County of Utah, State of Utah, Zip 84042
(the "Property")

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system, permanently affixed carpels; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: N/A

1.2 Excluded Items. The following items are excluded from this sale: N/A

1.3 Water Rights. The following water rights are included in this sale: Culinary, secondary stubbed into lot

2. PURCHASE PRICE. The Purchase Price for the Property is \$ 150,000

2.1 Method of Payment. The Purchase Price will be paid as follows:

\$ 1000.00 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$ _____ (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☐ CONVENTIONAL ☐ FHA ☐ VA ☐ OTHER (specify) _____

If an FHAVA loan applies, see attached FHAVA Loan Addendum.

If the loan is to include any particular terms, then check below and give details:

☐ SPECIFIC LOAN TERMS _____

\$ _____ (c) Loan Assumption Addendum (See attached Assumption Addendum if applicable)

\$ _____ (d) Seller Financing (see attached Seller Financing Addendum if applicable)

\$ _____ (e) Other (specify) _____

\$ 149,000 (f) Balance of Purchase Price in Cash at Settlement

\$ 150,000 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)

(a) ☐ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c) (the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☒ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

PLAINTIFF'S
EXHIBIT

6

PENGAD 800-631-6989

2.3 Application for Loan.

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a) Buyer shall apply for the Loan "Loan Application" occurs only when Buyer has (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender, and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b) (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer, (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property [] IS [X] NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value") Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4 (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer, (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING.

Settlement shall take place on the Settlement Deadline referenced in Section 24(f) or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law, (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds, and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office, and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within [] hours [] days after Closing;

[X] Other (specify) after Recording

8. **TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

SELLER DISCLOSURES. No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) _____

8. **BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS.** Buyer's obligation to purchase under this Contract (check applicable boxes).

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) _____

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply, otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. **ADDITIONAL TERMS.** There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☒ Addendum No. 1

- ☐ Seller Financing Addendum ☐ FHA/VA Loan Addendum ☐ Assumption Addendum
- ☐ Lead-Based Paint Disclosure & Acknowledgment (in some transactions this disclosure is required by law)
- ☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law)
- ☐ Other (specify) _____

10. SELLER WARRANTIES & REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

- (a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;
- (b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;
- (c) the roof and foundation shall be free of leaks known to Seller;
- (d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and
- (e) the Property and Improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes): A one-year Home Warranty Plan ☐ WILL ☒ WILL NOT be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☐ Buyer ☐ Seller and shall be issued by a company selected by ☐ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$_____ and shall be paid for at Settlement by ☐ Buyer ☐ Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer. (a) no changes in any existing leases shall be made, (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

2/23/04

2/24/04

16. **DEFAULT.** If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

17. **ATTORNEY FEES AND COSTS.** In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. **NOTICES.** Except as provided in Section 23, all notices required under this Contract must be: (a) in writing, (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. **ABROGATION.** Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. **RISK OF LOSS.** All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. **TIME IS OF THE ESSENCE.** Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. **FAX TRANSMISSION AND COUNTERPARTS.** Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This contract and any addenda and counteroffers may be executed in counterparts.

23. **ACCEPTANCE.** "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. **CONTRACT DEADLINES.** Buyer and Seller agree that the following deadlines shall apply to this Contract

(a) Loan Application & Fee Deadline	<u>N/A</u>	(Date)
(b) Seller Disclosure Deadline	<u>2-27-04</u>	(Date)
(c) Evaluations & Inspections Deadline	<u>2-27-04</u>	(Date)
(d) Loan Denial Deadline	<u>N/A</u>	(Date)
(e) Appraisal Deadline	<u>N/A</u>	(Date)
(f) Settlement Deadline	<u>2-27-04</u>	(Date)

Page 5 of 6 pages Seller's Initials OM Date 2/24/04 Buyer's Initials MLL Date 2/21/04

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. Seller does not accept this offer by: ☐ AM ~~5:00 PM~~ Mountain Time on 2-23-04 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

Mark H. Hess 2/23/04
(Buyer's Signature) (Offer Date)

(Buyer's Signature)

(Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

(Buyers' Names) (PLEASE PRINT)

(Notice Address)

(Zip Code)

(Phone)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

☐ **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. _____

by: Frank Allen, CEO 2/23/04 12:00pm
(Seller's Signature) (Date) (Time)

(Seller's Signature)

(Date)

(Time)

Conterra Development Company, LC
(Sellers' Names) (PLEASE PRINT)

(Notice Address)

(Zip Code)

(Phone)

☐ **REJECTION:** Seller Rejects the foregoing offer.

Seller's Signature

(Date)

(Time)

(Seller's Signature)

(Date)

(Time)

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

Mark H. Hess 2/23/04
(Buyer's Signature) (Date)

(Buyer's Signature)

(Date)

Frank J. Allen, CEO 2/23/04
(Seller's Signature) (Date)

(Seller's Signature)

(Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be ☐ faxed ☐ mailed ☐ hand delivered on _____ (Date), postage prepaid, to the ☐ Seller ☐ Buyer.

Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 6, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

MA

2/23/04

MCH

2/23/04

Page 1 of 1

**ADDENDUM NO.
TO
REAL ESTATE PURCHASE CONTRACT**

THIS IS AN ☒ **ADDENDUM** ☐ **COUNTEROFFER** to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of _____, including all prior addenda and counteroffers, between _____ as Buyer, and Camberra Development as Seller, regarding the Property located at Lot # 41 plat B Camberra Heights. The following terms are hereby incorporated as part of the REPC:

- ① Buyer agrees to accept and abide by covenants conditions and Restrictions. (CC & R's)
- ② Buyer agrees to protect curbs, gutters, & sidewalks during construction.
- ③ Buyer agrees to pay a \$799. storm water impact fee at time of Settlement.
- ④ Earnest money is now Refundable.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☐ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☐ Buyer shall have until _____ ☐ AM ☐ PM Mountain Time on _____ (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Mark L. Heas 2/21/04
☒ Buyer ☐ Seller Signature (Date) (Time) ☐ Buyer ☐ Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☒ **ACCEPTANCE:** ☒ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM

☐ **COUNTEROFFER:** ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. ____.

David J. Allen CEO 2/23/04 12:00pm
 (Signature) (Date) (Time) (Signature) (Date) (Time)

☐ **REJECTION:** ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

Tab C

SELLER PROPERTY CONDITION D CLOSURE (LAND)



[LISTING AGENT Complete This Section ONLY]

SELLER NAME _____ (the "SELLER")
 PROPERTY ADDRESS / Tax I.D.# Lot # 41, Plat B Camberra Heights (the "PROPERTY")
 LISTING BROKERAGE All Pro Realty Inc. (the "COMPANY")

[SELLER (ONLY) Complete and Sign Remainder of Form]

NOTICE TO SELLER. Each Seller is obligated under law to disclose to the Buyer all known facts that materially or adversely affect the value of the Property and that are not readily observable. This disclosure statement is designed to assist the Seller in complying with these disclosure requirements and to assist the Buyer in evaluating the Property. The Company, and other real estate brokerages and agents will also rely upon the information contained in this disclosure statement.

NOTICE TO BUYER. This is a disclosure of the Seller's knowledge of the condition of the Property as of the date signed by the Seller and is not a substitute for any inspections or warranties that the Buyer may wish to obtain. **THIS IS NOT A WARRANTY OF ANY KIND BY THE SELLER.**

COMPANY REPRESENTATIONS REGARDING PROPERTY. The Company and its agents are trained in the marketing of real estate. Neither the Company nor its agents are trained or licensed to provide the Buyer with professional advice regarding the physical condition of any property or regarding legal or tax matters. Accordingly, neither the Company nor any of its agents will make any representations or warranties regarding the physical or legal condition of the Property, including, but not limited to, the square footage, acreage, or the location of property lines. **THE COMPANY AND ITS AGENTS STRONGLY RECOMMEND THAT IN CONNECTION WITH ANY OFFER TO ACQUIRE THE PROPERTY, THE BUYER RETAIN THE PROFESSIONAL SERVICES OF LEGAL AND/OR TAX ADVISORS, PROPERTY INSPECTORS, SURVEYORS, AND OTHER PROFESSIONALS TO SATISFY THE BUYER AS TO ANY AND ALL ASPECTS OF THE PHYSICAL AND LEGAL CONDITION OF THE PROPERTY.**

1. UTILITY SERVICE	Yes	No	Unknown
a. Does natural gas service the Property?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Location of nearest gas line _____			
c. Does public sewer service the Property?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Location of nearest sewer line? _____			
e. Is the Property approved for septic tank use?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
f. Is there electrical service to the Property?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Location of nearest electrical line. _____			
h. Is there telephone service to the Property?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i. Location of nearest telephone service line? _____			
j. Is the Property assessed as Greenbelt?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

k. Have you received any notices by any governmental or quasi-governmental agency adversely affecting the Property?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
---------------------------------------------------------------------------------------------------------------------	--------------------------	-------------------------------------	--------------------------

2. LAND (SOILS, DRAINAGE AND BOUNDARIES)	Yes	No	Unknown
a. Is there any fill or expansive soil on the Property?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
b. Do you know of any sliding, settling or earth movement on the Property?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

2. LAND (CONT.)	Yes	No	Unknown
c. Are there wetlands on the Property?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d. Is the Property located in a flood zone?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e. Do you know of any present or past drainage or flood problems affecting the Property?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
f. Do you know of any encroachments or boundary line disputes or easements affecting the Property?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

3. HAZARDOUS CONDITIONS Are there any existing hazardous conditions on the Property, such as methane gas, radio-active material, landfill, mineshaft, toxic materials? <input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Unknown Have you had any environmental testing performed on the Property? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

4. OTHER MATTERS a. Is there any existing or threatened legal action affecting the Property? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Unknown b. Do you know of any violation of local, state, or federal laws or regulations relating to the Property? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

5. HOMEOWNERS ASSOCIATIONS a. Is the Property part of a homeowners associations <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Unknown If the answer to this question is "No", disregard the remainder of this section. b. Does the homeowners association levy assessments for maintenance of common areas and/or other common expenses? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Unknown

c. For any questions regarding the homeowners' association, contact: (if known)

Name: _____

Address: _____

Phone: (____) _____

(Seller authorizes the release to Buyer regarding the condition of the Property and current and future assessments.)

d. Is there a Master Association for the Property? If yes, provide name and contact person for association on an addendum.

6 WATER RIGHTS

Yes

No

Unknown

Water Right#

Well, Spring, Water Company or
Other Water Source

a. Are there any culinary water rights with the Property?					
b. Is a culinary water source in place for the Property?	X				
c. Location of nearest culinary water line. _____					
d. Are there any irrigation water rights with the Property?					
e. Is there an irrigation water source and distribution facility in place for the Property such as canals, ditches or pressurized system?	X				
f. Are there separate shares in a water company with the Property? If yes, # of Shares _____ Name of Mutual Water Company _____		X			

IF THE ANSWER IS "YES" TO ANY OF THE QUESTIONS IN SECTIONS 1.K, 2, 3 AND 5, (WHICH ARE SHADED), PROVIDE AN EXPLANATION ON AN ATTACHED ADDENDUM.

Is there anything else which you should disclose to Buyer because it may materially or adversely affect the value or desirability of the Property:

SELLER REPRESENTS THAT, TO THE BEST OF SELLER'S KNOWLEDGE, THE INFORMATION SET FORTH IN THE FOREGOING DISCLOSURE STATEMENT IS ACCURATE AND COMPLETE. THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OR GUARANTEE OF ANY KIND BY SELLER. SELLER HEREBY AUTHORIZES THE COMPANY TO PROVIDE THIS INFORMATION TO PROSPECTIVE BUYERS AND TO REAL ESTATE BROKERS AND AGENTS. SELLER UNDERSTANDS AND AGREES THAT SELLER WILL NOTIFY THE COMPANY IN WRITING IMMEDIATELY IF ANY INFORMATION SET FORTH IN THIS DISCLOSURE STATEMENT BECOMES INACCURATE OR INCORRECT IN ANY WAY.

Seller: Hand J. Miller, CEO Date: 2/23/04 Seller: _____ Date: _____

ANY REPRESENTATIONS REGARDING ACREAGE OF THE PROPERTY ARE APPROXIMATIONS ONLY. BUYER IS RESPONSIBLE TO VERIFY THE ACCURACY OF SAID APPROXIMATE ACREAGE TO BUYER'S SATISFACTION. FENCES MAY NOT CORRESPOND WITH ACTUAL BOUNDARIES OF THE PROPERTY.

RECEIPT AND ACKNOWLEDGEMENT OF BUYER

BUYER HEREBY ACKNOWLEDGES RECEIPT OF A COPY OF THIS DISCLOSURE STATEMENT. BUYER FURTHER ACKNOWLEDGES THAT BUYER HAS BEEN ADVISED BY THE COMPANY TO SEEK COMPETENT PROFESSIONAL ADVICE FROM PROPERTY INSPECTORS AND OTHER PROFESSIONALS IN ORDER TO EVALUATE THE CONDITION OF THE PROPERTY AND THE DISCLOSURES CONTAINED HEREIN. BUYER FURTHER ACKNOWLEDGES THAT NEITHER THE COMPANY, NOR ANY OF ITS AGENTS, WILL MAKE ANY REPRESENTATIONS OR WARRANTIES REGARDING THE CONDITION OF THE PROPERTY OR REGARDING THE ACCURACY OF ANY STATEMENTS RELATING TO THE CONDITION OF THE PROPERTY CONTAINED HEREIN.

Buyer: Mark H. Hess Date: 2/21/14 Buyer: _____ Date: _____

Tab D

MAIL TAX NOTICE TO:
Mark Hess
87 N. 360 W.
Orem, UT 84057
M-37633

||| ENT 41545:2004 PG 1 of 1
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
2004 Apr 13 2:29 pm FEE 10.00 BY SFS
RECORDED FOR MOUNTAIN WEST TITLE CO

WARRANTY DEED

CANBERRA DEVELOPMENT COMPANY, L.C.

GRANTOR(S)

of SALT LAKE CITY, County of SALT LAKE, State of UTAH
hereby CONVEY and WARRANT to

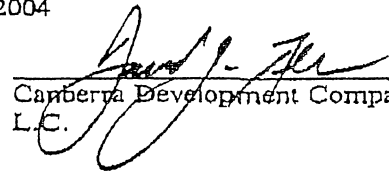
Mark Hess and Marilyn Hess, husband and wife, as joint tenants

GRANTEE(S)

of Orem, County of Utah, State of Utah,
for the sum of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION
the following tract of land in UTAH, STATE OF UT, to-wit

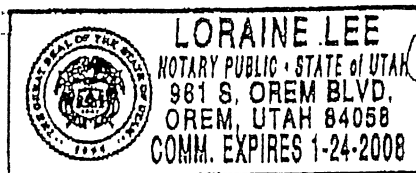
Lot 41, Plat "B", CANBERRA HEIGHTS SUBDIVISION, Lindon, Utah, according to the
official plat thereof on file in the Office of the County Recorder, Utah County, Utah.

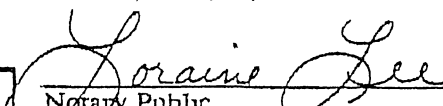
WITNESS the hand of said grantor, this 1st day of April, 2004


Canberra Development Company,
L.C.

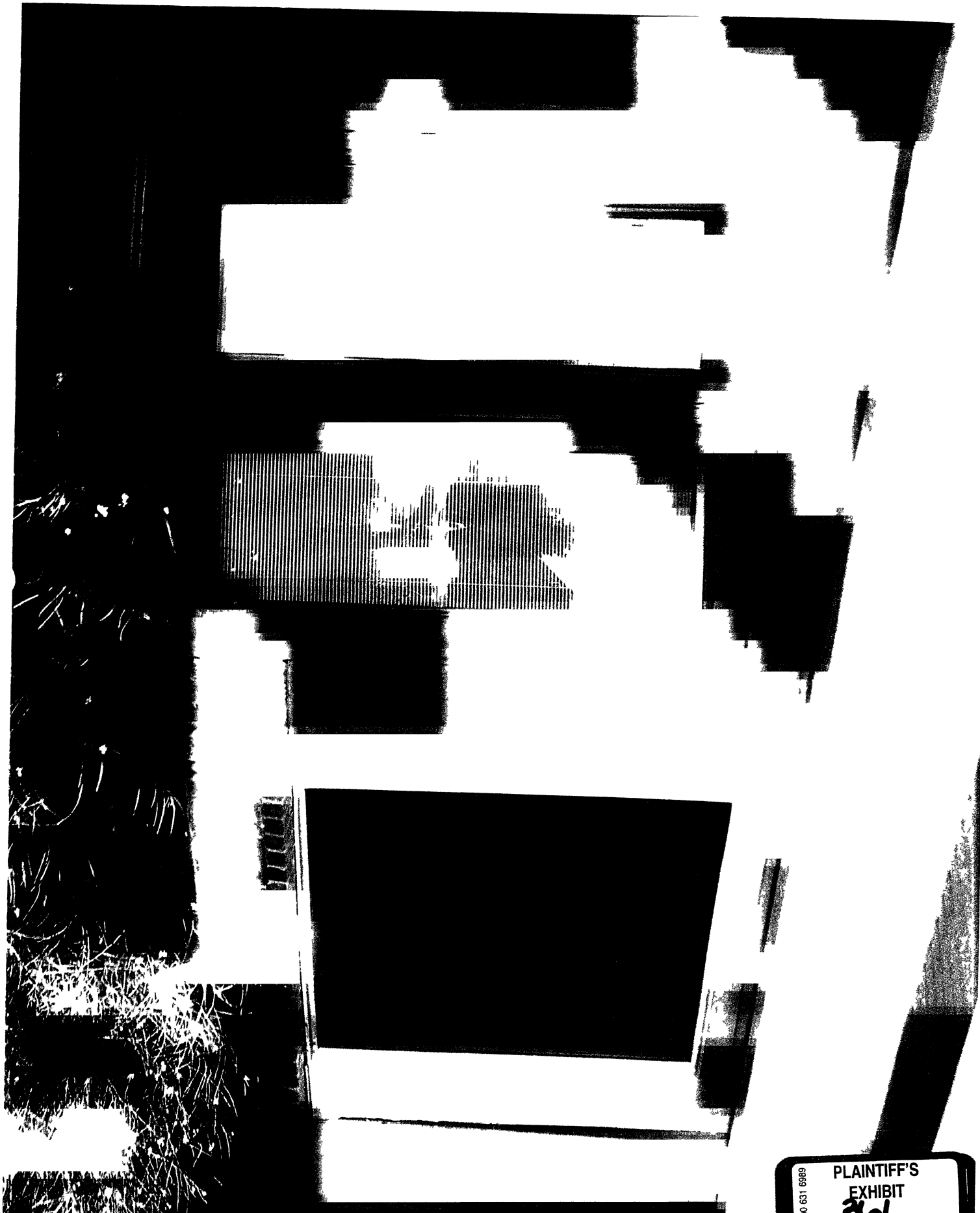
STATE OF UTAH)
:SS
COUNTY OF Utah)

On the 1st day of April, 2004, personally appeared before me, a notary public in and for the State
of Utah, DAVID J. Allen and _____ manager of Canberra
Development Company, L.C., a Utah Limited Liability Company, the signors of the above
instrument, who duly acknowledged to me that they have authority to execute the within and
foregoing instrument in behalf of said limited liability company, and that said limited liability
company executed the same.




Notary Public
My Commission Expires: 1-24-2008
Residing in: UTAH County

Tab E



X0 631 6989

PLAINTIFF'S
EXHIBIT
201

Tab F

PLAINTIFF'S
EXHIBIT
30kk

PENGAD 800 631-6989

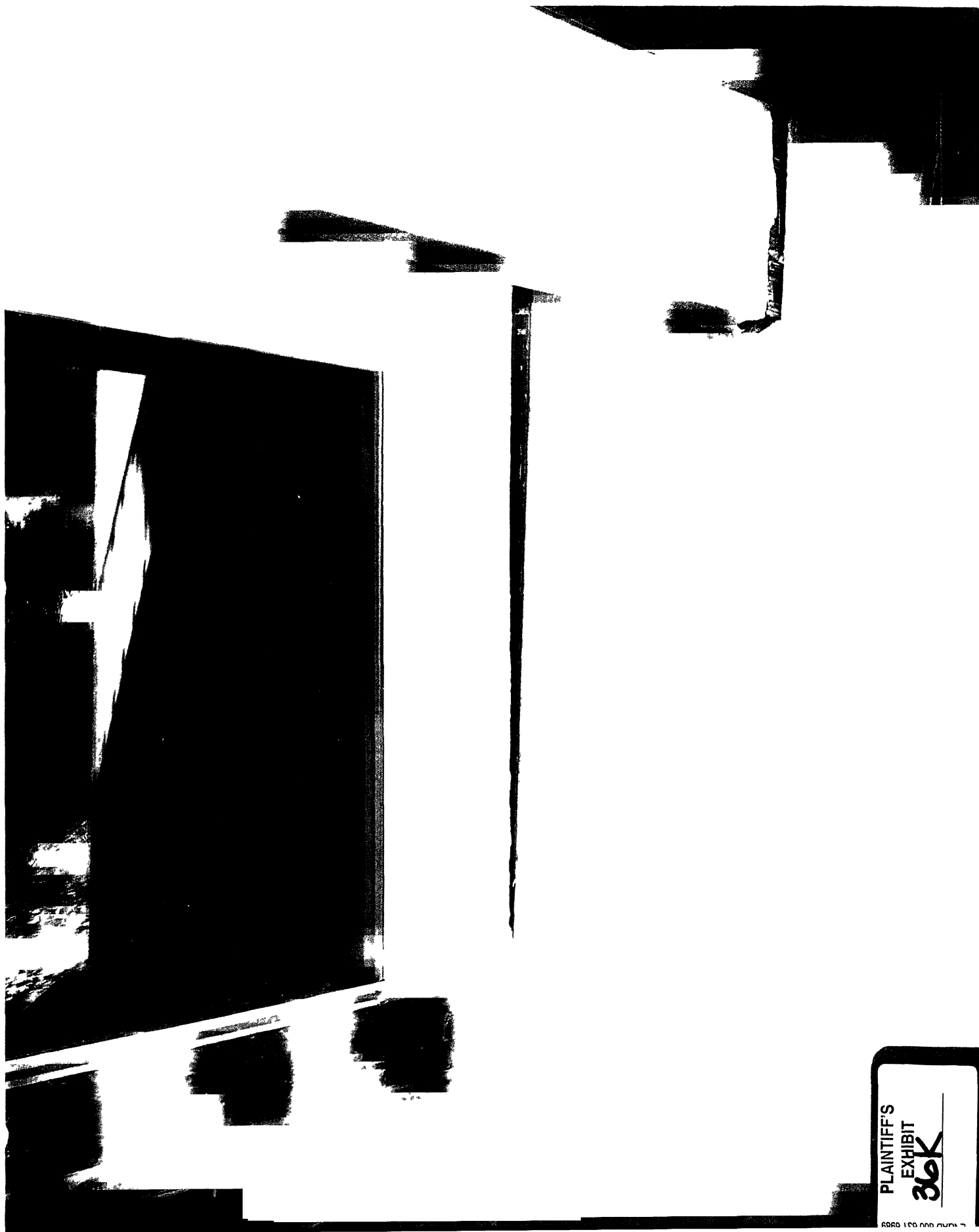
Tab G

IGAD 800-631 6989

PLAINTIFF'S
EXHIBIT

36DD

Tab H



PLAINTIFF'S
EXHIBIT

36K

Tab I

