

1989

West Valley City v. Majestic Investment Company, The Lockhart Co., Prudential Federal Savings and Loan Association, and Does 1 through 10 : Brief of Appellant

Utah Court of Appeals

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Robert S. Campbell; Clark W. Sessions; Paul T. Moxley; Matthew C. Barneck; Campbell, Maack & Sessions; Attorneys for Respondent.

Harold A. Hintze; Olsen, Hintze, Nielson & Hill; Paul T. Morris; J. Richard Catten; Attorneys for Appellant.

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BRIEF

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890379-CA

DOCKET NO. _____ IN THE UTAH COURT OF APPEALS

West Valley City, a Municipal
Corporation ,

Plaintiff and Appellant,

v.

Majestic Investment Company,
a Utah Corporation, The
Lockhart Co., a Utah
Corporation, Prudential Federal
Savings and Loan Association,
a Federal Corporation; and
Does 1 through 10,

Defendants and Respondents.

Case No. 890379-CA

Priority No. 16

BRIEF OF THE APPELLANT

Appeal from a Final Judgment of the
Third Judicial District Court of Salt Lake County
The Honorable Leonard H. Russon presiding

Harold A. Hintze, Esq.
OLSEN, HINTZE, NIELSON & HILL
3319 No. University Ave.
Suite 200
Provo, UT 84604

Robert S. Campbell, Jr., Esq.
Clark W. Sessions, Esq.
Paul T. Moxley, Esq.
Matthew C. Barneck, Esq.
Campbell Maack & Sessions
170 South Main Street, Suite 400
Salt Lake City, Utah 84101
Attorneys for Respondent

Paul T. Morris, Esq.
West Valley City Attorney
J. Richard Catten, Esq.
Assistant City Attorney
3600 Constitution Boulevard
West Valley City, UT 84119
Attorneys for Appellant

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Mary T. Noonan
Clerk
Utah

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Harold A. Hintze, P.C. A-1400
OLSEN, HINTZE, NIELSON & HILL
3319 North University Avenue, Suite 200
Provo, UT 84604
Telephone: (801)375-6600
Attorney for Plaintiff and Appellant

Paul T. Morris, #3738
West Valley City Attorney
J. Richard Catten, #4291
Assistant City Attorney
Attorneys for Plaintiff and Appellant
3600 Constitution Boulevard
West Valley City, UT 84119
Telephone: (801)966-3600

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY, a Municipal
Corporation,

Plaintiff and Appellant

v.

MAJESTIC INVESTMENT COMPANY,
a Utah Corporation, The
Lockhart Co., a Utah
Corporation, Prudential Federal
Savings and Loan Association,
a Federal Corporation; and
Does 1 through 10,

Defendants and Respondents.

APPELLANT'S BRIEF

Case No. 890379-CA

JURISDICTION

Jurisdiction in this case is vested in the Utah Court of
Appeals as a case which was transferred from the Supreme Court

pursuant to Section 78-2-2(4) Utah Code Annotated, 1953 as amended. Original jurisdiction was in the Supreme Court pursuant to Section 78-2-2(3)(j) Utah Code Annotated, 1953 as amended.

STATEMENT OF ISSUES

1. Based upon the evidence presented at trial and the plain terms of the lease between the parties, should the trial judge have awarded Majestic any value in the land which was taken by the City?

2. Did the trial judge improperly determine the fee value of the parcel when he included the value of the separate lease interests in the determination of the value of the whole parcel?

3. Does the plain contractual language of the condemnation clause in the lease between the parties limit Majestic to compensation for only the buildings and improvements on the parcel?

STATEMENT OF THE CASE

This action was brought by West Valley City to take by right of eminent domain, for public use, the leasehold interests and estates of Majestic Investment Company and its two sublessees, the Lockhart Company and Prudential Federal Savings and Loan Association, in two separate but contiguous properties located at approximately 3600 South 2700 West in West Valley City, Utah. The matter was tried before the Honorable Leonard

H. Russon, Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on December 14, 15, 16, 20, 1988, and January 4, 5, 1989. Judge Russon issued a memorandum decision on January 24, 1989, and Judgment was entered on February 15, 1989, awarding Majestic compensation for its value in the total property in the amount of \$363,040.00 (amended to \$364,888.36) of which \$223,665 was Majestic's interest in the buildings and improvements and buildings and \$141,223.36 was Majestic's share in the value of the land.

STATEMENTS OF FACTS

1. This is an action brought by West Valley City (hereinafter "City"), to take by right of eminent domain for public use the leasehold interests and estates of Majestic Investment Company (hereinafter "Majestic"), and its sublessees, The Lockhart Company and Prudential Federal Savings and Loan Association (hereinafter "Lockhart" and "Prudential"), in two separate but contiguous properties located at approximately 3600 South 2700 West in West Valley City, Utah.

2. Parcel No. 1, sometimes referred to as the Majestic-Lockhart property, constitutes approximately 14,164 square feet, in addition to certain easements of access, ingress and egress. Parcel No. 2, sometimes referred to as the Majestic-Prudential property, is located immediately north of Parcel No. 1, and consists of approximately 11,780 square feet, in addition to easements of access, ingress and egress.

3. The City did not attempt to take, by right of eminent domain, any interest or estate of the underlying fee simple owner of the subject properties. Such interests had been acquired by the City prior to the commencement of this action.

4. The only question of law before the trial court was the amount of just compensation payable to Majestic for the taking of its leasehold interests. Majestic did not contest the City's entitlement to condemn the leasehold interests and estates of Majestic. Also, both Lockhart and Prudential filed stipulations to the effect that neither claimed any compensation or damages in or as part of the just compensation award made by the trial court.

5. At the time of the commencement of this action, there were three leases on the property which formed the basis for an award of just compensation. The first such lease was entered into by the then owners of the property, Granger Shopping Center, Henry S. Pickrell and Barbara M. Pickrell (hereinafter "Pickrell"), who leased the property and right-of-way to Majestic in April, 1975 under and pursuant to the terms of a ground lease which was entered into evidence as Exhibit 1-D.

6. The same day that Majestic entered the ground lease with Pickrell, Majestic entered into subleases with Prudential and Lockhart. At trial, copies of these subleases were entered into evidence as Exhibits 2-D and 3-D.

7. All lessees were current on their respective rentals at the date of condemnation, however, Lockhart and Prudential

were not occupying the property.

SUMMARY OF ARGUMENTS

The City believes that the trial court erred in awarding Majestic compensation other than that specifically allocated by the lease between the parties. These errors occurred in four general areas.

First, the memorandum decision awarded Majestic compensation for their interest in the value of the land. There was no evidence presented at trial which would support this finding. Even the defendant's own expert testified that Majestic had no bonus value or excess rental in the ground lease. The award of compensation for Majestic's interest in the land is not supported by competent evidence.

The second error involves the interpretation of the condemnation clause contained in the lease between Majestic and Pickrell. The condemnation clause of the lease clearly sets forth an allocation formula whereby Majestic's only right to compensation is to a share of the value of the buildings and improvements on the land. Pursuant to relevant eminent domain and contract law, such contract provisions are binding upon the parties and should not be altered by the court.

The trial court also erred in its calculation of the value of the whole parcel. The cases are clear in that the entire parcel should be valued in fee, as if unencumbered, and then the amount should be apportioned among the several interests. In

this case, the court clearly erred by not determining the value of the unencumbered fee, but rather, by aggregating the value of the various subinterests into its determination of fee value of the whole parcel.

Finally, even assuming that Majestic may be entitled to compensation for the bonus value of its lease, a reading of the plain language of the subleases reveals that they did not contain any excess rental or bonus value. The formulas set forth in the subleases to Lockhart and Prudential were actually amortized repayment schedules of construction costs. These amortized payments had been accelerated by a payment acceleration clause in the lease which had the effect of eliminating any bonus value.

ARGUMENT

POINT I

THERE WAS NO EVIDENCE PRESENTED AT TRIAL WHICH WOULD SUPPORT AN AWARD OF COMPENSATION FOR THE VALUE OF THE LAND. THE EVIDENCE DEMONSTRATED THAT THERE WAS NO BONUS VALUE IN THE LAND LEASE.

The ground lease between Pickrell and Majestic and the subleases between Lockhart and Majestic, and Prudential and Majestic were submitted into evidence as Exhibits 1-D, 2-D, and 3-D, respectively. The Pickrell-Majestic lease (ground lease) provided in paragraph 1, for the payment of rentals as follows:

"1. LESSEE shall pay to LESSOR as rental for said premises the sum of THREE HUNDRED FIFTEEN THOUSAND and

NO/100 DOLLARS (\$315,000.00), (subject to escalation as hereafter provided), payable initially in monthly installments of SEVEN HUNDRED FIFTY and NO/100 DOLLARS (\$750.00) on or before the first (1st) day of each month of said term. Such rental amount shall be subject to escalation commencing at the beginning of the 11th, 21st and 31st lease years. Such escalation in rental amount shall be equal to a percentage of said \$750.00 installment as shall be determined by the percentage of increase in the Consumer Price Index for "All Items" as promulgated by the United States Department of Labor, 1967 Survey (or such successor series) during such ten year period next prior to the date of such escalation as determined by the calendar year end Index at the beginning of the term hereof, which was 155.4, and ending calendar year end Index of each such 10 year period. Notwithstanding the above, there shall be a minimum increase in such monthly rental amount equal to \$200.00 effective as of the time of each escalation."

(Exhibit 1-D, Page 2)

This lease provides for a rental on the land only in the amount of \$750.00 subject to escalations at certain intervals. The leases between Majestic and Lockhart, and Majestic and Prudential, respectively, set forth identical terms for payment of rentals as follows:

MAJESTIC LOCKHART LEASE and MAJESTIC-PRUDENTIAL LEASE

"1. LESSEE shall pay to LESSOR as rental for said premises the sum of the following amounts:

(a) \$112,500.00 (subject to escalation as hereinafter provided) payable initially in monthly installments of \$375.00 on or before the first day of each month of said term. Such rental amount shall be subject to escalation commencing at the beginning of the eleventh and twenty-first lease years. Such escalation in rental amount shall be equal to a percentage of said \$375.00 installment as shall be determined by the percentage of increase in the Consumer Price Index for "All Items" as promulgated by the U.S. Department of Labor, 1967 Series, (or adjusted to any appropriate successor series) during such ten year period next prior to the date of such escalation as determined by the calendar year index next preceding the beginning of the term hereof, which was 155.4, and the

ending calendar year index of each such ten year period. Notwithstanding the above, there shall be a minimum increase in such monthly rental equal to \$100.00 effective as of the time of such escalation."

(Exhibit 2-D, page 2; 3-D, page 2)

These subleases were entered into by Majestic the same day as the execution of the ground lease with Pickrell and together provide for a base rental of \$750.00 per month (\$375.00 x 2). Also, the formula in the subleases relating to the escalation of the rents is identical to that of the Pickrell-Majestic lease so that throughout the term of the subleases the rent taken in by Majestic from the subleases will exactly match the rent paid by Majestic to Pickrell. When the rent paid equals the rent received, there can clearly be no excess rent or bonus value.

Even the Defendant's own expert witness, appraiser Jerry R. Webber, testified that pursuant to the lease terms there is no bonus rent in the land attributable to Majestic. The testimony was as follows:

Q. (By Mr. Hintze) Doesn't in this scenario as it is presented in the leases, doesn't Majestic just serve as a conduit of the rent? They rent the property from Pickrell for \$750 original, they turn around and have leased it out for \$750. They are simply a pass-through of the rent from the consumer back to the landowner?

A. (Mr. Webber) Essentially, that is the case, yes.

Q. What I am asking you, Mr. Webber, is where is the bonus value in any of the land to Majestic, if it is leased out by them for exactly the rental they pay the landowner? Where is there a bonus factor?

A. The leases were for improved property, including land which was considered as the economic or market rent. Majestic was obligated to pay rent

under terms and conditions of the land leases. On this scenario, there is no bonus value.

Q. And as a matter of fact, Mr. Webber, if you take the position that there may be some bonus if you tie both the buildings and the land together, and were renting them out on the market, if there is any of that attributable, and apportionable to value of land in that leasehold, Lockhart and Prudential would be the holders of the bonus value, wouldn't they?

A. Yes.

(T 3, Page 26,27)

* * *

Q. (Mr. Hintze) Same day. So, that establishes that the land was renting to Majestic for \$750 per month, correct?

A. (Mr. Webber) Yes.

Q. That is the contract rent, right?

A. Yes.

Q. And then Majestic, same day, signed a lease for 25 years with two banks, two entities rather, not banks: Prudential and Lockhart to lease them the same land at the identical same rental, correct?

A. To my understanding, yes.

Q. So, we have another contract rent of \$750. For a period of those 25 years then, would Majestic have any bonus value in that land?

A. At that point, no.

Q. And, as a matter of fact, the leases that are in place between Pickrell -- the lease that is in place between Pickrell and Majestic is a straight ground lease, correct? There is no improvements on the property. There is permission to build improvements?

A. Yes.

Q. In fact, there is a requirement that if improvements are built, they have to be of a minimum dollar value?

A. As I recall, that is correct.

Q. Now, did there come a time in your opinion when the land, not talking about the improvements, the land had a rental value in excess of the contract rate?

MR. CAMPBELL: (objection omitted)

MR. HINTZE: Shall I rephrase the question, Judge?

THE COURT: Go ahead.

Q. (By Mr. Hintze) Do you understand when I refer to the second contract rent, I am referring to two leases that divide the property but split the \$750 into \$375 per parcel?

A. Yes.

Q. Now, was there any contract bonus rental then?

A. No, because there was no measurable difference.

(T3, pages 20-22)

Since the land rent collected by Majestic from Prudential and Lockhart exactly equalled the land rent paid by Majestic to Pickrell, there exists no bonus or excess rent. Majestic merely served as conduit of rent from the sublessees to Pickrell. Majestic realized no income stream from these ground leases and, therefore, has no compensable interest in them.

Since Majestic has no bonus value in its ground lease and therefore no compensable interest, Majestic's compensable interest is limited to that value attributable to the improvements on said property. Therefore, the trial court, which awarded Majestic \$72,200.36 interest in the "land value"

of the Lockhart parcel and \$68,023.00 as "leasehold share of the land" on the Prudential parcel, was clearly in error.

POINT II

BY THE CLEAR LANGUAGE OF THE MAJESTIC-PICKRELL GROUND
LEASE THE PARTIES TO THE LEASE CONTRACTUALLY
ESTABLISHED AN EMINENT DOMAIN ALLOCATION FORMULA THAT
LIMITS MAJESTIC'S PARTICIPATION IN THE COMPENSATION
AWARD TO A PERCENTAGE OF THE VALUE OF THE IMPROVEMENTS
ON THE LAND AND AWARDS THE LAND VALUE COMPENSATION TO
THE LESSOR.

"The lessor is entitled to compensation for injuries to his reversion, and the lessee for injuries to his leasehold interest. The lessee is entitled to the market value of the unexpired term of the lease less the present value of the rent called for by the lease; while the lessor gets the present value of the rents plus the value of the remainder of the estate or the value of the fee less the award to the lessee." (29A C.J.S. "Eminent Domain" §198, pp. 875-77.)

The parties are, however, free to contractually establish a different allocation formula and, if so provided, said formula will be enforced by the court.

"A lease may make provision for the contingency of condemnation and such a provision will be given effect in accordance with its language and purpose." (29A C.J.S. "Eminent Domain" §198 p. 882.)

* * *

"Of course, if the lease itself includes a provision in respect of the rights of the parties in the event of the condemnation of the leased premises, such provision is valid and controlling, if applicable to the particular case." (27 Am Jur 2d §250 p. 22.)

* * *

"Where a landlord and tenant have contractually agreed as to the disposition of compensation in the event of condemnation, such an agreement is generally held binding. This rule acknowledges that the allocation of risks in such circumstances is a matter to which the parties are free to bargain." (*City and County of Honolulu v. Market Place, Ltd.*, 517 P.2d 7, 15 (Haw. 1973) (citation omitted.)

* * *

"An apportionment by the Commission of its award for this whole tract between the landowner and the owner of the sand and gravel leasehold was unnecessary because the affected parties had, by their memorandum agreement, which was placed in evidence, agreed on their own apportionment based on the total award to be made. In the absence of such an agreement between all the affected parties it would be incumbent upon the commission to first find the value of the whole tract and then apportion the same between the landowner and the owner of the leasehold. But in view of this agreement, it would be improper for the Commission or this Court to make an apportionment other than as previously agreed to between the affected parties." (*United States v. 881.39 Acres of Land*, 254 F.Supp 294, 297 (E.D. Okla. 1966)) (emphasis added.)

* * *

"§1013 [Taking of Leasehold Interest]

(a) If all or part of the property taken includes a leasehold interest, the effect of the condemnation action upon the rights and obligations of the parties to the lease is governed (1) by the provisions of the lease, and (2) in the absence of applicable provisions in the lease, by this section... [not applicable]." (UNIFORM EMINENT DOMAIN CODE.)

* * *

"This section [§1013(a) of UNIFORM EMINENT DOMAIN CODE] applies only when the parties have not made provision in the lease governing the respective rights of the parties in the event of condemnation. If the lease does contain such a provision, such as a condemnation clause, it will govern." (Nichols, Eminent Domain §5.06[3][a] Vol 2, p. 123.)

* * *

[In this case, Pickrell and the principal lessee Majestic

entered into a negotiated agreement apportioning the condemnation award. The Majestic-Pickrell ground lease contains a clause which sets forth the rights of the parties in the event all or a portion of the property is taken by eminent domain. By the terms of that clause, the lease was immediately terminated by the condemnation:

"[If condemnation occurs]...all rights and obligations of the lessee hereunder shall immediately cease and be adjusted as of the time of such condemnation."
(Exhibit 1-D, pages 11,12.)

If there had not been additional language in the lease permitting the tenant limited right to claim certain damages, this clause would effectively have precluded Majestic's participation in the compensation award.

"The view has been taken in a substantial number of cases that under the automatic termination clause involved the lessee is not entitled to share in the condemnation award, the courts generally stating that the lessee's interest terminated with the taking of the property." (96 A.L.R. 2d at 1140, 1143 "VALIDITY, CONSTRUCTION, AND EFFECT OF SPECIFIC PROVISION OF LEASE OR STATUTE RELATING TO RIGHTS AND COMPENSATION OF LESSEE IN EVENT OF CONDEMNATION.")

See also, *United States v. Petty Motor Co.*, 327 U.S. 372, 90 L.Ed. 729, 66 S.Ct. 596 (1946); *Capitol Monument Co. v. State Capitol Grounds Com.*, 220 Ark 946, 251 S.W.2d 473 (1952).

However, the tenant, Majestic, had at its sole expense erected certain buildings on the land at a cost of approximately \$200,000 and, therefore, the parties negotiated a formula for apportioning that segment of the award regarding "buildings and improvements" which takes the total months in the lease term, to wit., 420 months, divided by the unexpired term of the lease

on the date of the condemnation, and the tenant receives the apportioned amount of value attributable solely to the "buildings and improvements."

The same clause of the Majestic-Pickrell lease states that:

"If land only is condemned, with no effect upon the improvement or rentals, LESSOR and any secured party holding a lessee mortgage on the above described premises it is affected by such condemnation shall share in such award as their interests may appear."
(Exhibit 1-D, page 12)

This language is a further indication of the intent of the parties that Majestic not share in that portion of the condemnation award which is attributable to land value but rather be restricted to the "buildings and improvements" apportionment set forth elsewhere in the clause.

In construing the meaning of a condemnation clause, the court must read the clause as a whole, giving effect to all its terms if reasonably possible. (*Pepsi-Cola Metropolitan Bottling Co. v. Romley*, 578 P. 2d 994 (Ariz.App. 1978).)

It is clear that the intent of the condemnation clause is two-fold. First, to terminate the lease provisions and the rights of the lessee, Majestic, and second, to specifically reserve the right of the lessee, Majestic, to share in that segment of the award regarding the "buildings and improvements." This condemnation clause goes hand in hand with the pass through rental arrangement discussed in Point I. The parties had arranged the leases so that Majestic had no bonus value in the ground leases, therefore, the only value available was the value in the buildings and improvements and they contractually

allocated that by the terms of the lease.

The trial court awarded Majestic \$72,200.36 as its interest in the "land value" of the Lockhart parcel, and awarded Majestic \$68,023.00 as its "leasehold share of the land" interest in the Prudential parcel. That award ignores, even contradicts, the express contractual allocation provided in the lease which specifically limits Majestic's recovery to a portion of the value of the buildings and improvements and not a share in the land value or lease residuals. It would have been a simple formula to expressly provide in the lease that the lessee would be able to make a claim for any interest it had in the land or for its leasehold interest based upon the actual versus market rent. Indeed, had no formula been provided in the lease reserved in the tenant the right to claim a portion of the award, that is the formula which would customarily be applied. However, as a matter of contract, the lease does not provide that the lessee receive the present value of anticipated rental receipts under its sublease, nor does it provide for the lessee to share in the value of the award with respect to the land. The lessee reserves solely an apportioned value of the buildings and improvements which it had placed on the property prior to the condemnation. Such contractual allocations have been uniformly held binding and enforceable, to the exclusion of application of different allocations:

"A condemnation clause in a lease setting for the respective rights of the parties thereto in the event of condemnation is valid, and upon the happening of such event becomes controlling." (*Territory v. Arneson*, 44 Haw. 557,

* * *

"It is not to be controverted that a landlord and tenant may, by a properly worded contract, provide that the tenant shall receive no compensation when the leased premises are taken by right of eminent domain. It also is not subject to dispute that a landlord and tenant may, by a properly worded contract, provide that in the event the leased premises are taken by condemnation proceedings, the lease shall terminate. These rules are so elementary that they need no citation of authority to support them." (*Columbus v. Huntington Nat. Bank*, 75 Ohio L Abs 214, 143 NE2d 874, app dismd 166 Ohio St 268, 2 Ohio Ops 2d 92 141 NE2d 175 (1956, App).)

Where the lease provides a clear and concise appropriation of the award, that formula governs:

"Where a lease provided that no part of any condemnation award belonged to the tenant, and a rider to the lease provided that the tenant would receive \$2,000 of any condemnation award, which sum was paid to the tenant when the demised property was taken by eminent domain proceedings, it was held in *United States v. Certain Parcels of Land* (1952, DC NY) 102 F Supp 854, affd *United States v. Knickerbocker Printing Corp.* (CA2) L ed 689, 75 S Ct 112, that the tenant could not assert a claim against his landlord for the value of trade fixtures, the court saying that the condemnation clause and another clause which provided that all improvements became the property of the landlord when the tenant vacated the premises effectively barred the tenant from making valid trade fixture claims." (96 A.L.R. 2d at 1163.)

* * *

"Where the pertinent parts of a lease provided (1) that in the event the demised premises were taken or condemned for public use the lessee's interest in the property would terminate and all compensation payable or to be paid by reason of the taking of any land, would be payable to and be the sole property of the lessors, (2) that any compensation representing the value of any buildings or improvements erected upon the land would be divided according to stated interests, and (3) that in case of a partial taking, the lessee's rent would be ratably reduced, it was held in *Territory v. Arneson* (1960) 44 Hawaii 557, 354 P2d 981, that the term "land" as used in the lease provision meant "land and its incidents,

including access rights, as distinguished from buildings and structures constructed thereon," and that the lessee was not entitled to assert a claim against the condemnor for damages to the lessee's remaining leasehold for loss of a right of access to the main highway when part of the demised premises was taken for public use. It was clear, said the court, that the intention of the parties was, in the event of condemnation, that the lessors would be entitled to all of the compensation payable by the condemnor, and that the only provision permitting the lessee to participate in any condemnation award was found in that part of the lease which referred to the lessee's right to share in the compensation allocable to improvements on the land, and that it was clear that the buildings and improvements did not include access rights." (96 A.L.R. 2d at 1164.)

* * *

"Where a lease agreement provided that in the event of condemnation the lessee's estate would cease and that the lessee would not be entitled to any compensation, except as to certain improvements and it appeared that a concrete supply ditch came within the phrase "certain improvements," it was held in *United States v. 257.654 Acres of Land* (1947, DC Hawaii) 72 F Supp 903, that a lessee was entitled to his proportionate share of the value of the improvement when the government subsequently took the leased property in exercise of its right of eminent domain, where another clause in the lease provided that compensation awarded for improvements would be divided "as their [lessor-lessee] interests shall appear, dependent upon the then unexpired term of the lease." (96 A.L.R. 2d at 1169.)

* * *

"Where a lessor agreed to construct a building with the cost of construction to be paid by the lessee over the 20-year period, and the lease provided that in the event of condemnation the lessee was to receive that proportion of the award "which the amount theretofore paid by [the lessee] to [the lessor] on account of the cost of construction of said building bears to the total cost of the building," it was held in *Coca-Cola Bottling Co v. Vanneck* (1956) 280 App Div 448, 113 NYS2d 781, affd 305 NY 596, 111 NE 2d 648, that where the total cost of the building was \$145,907.21 and the condemnation award was \$160,000, that the lessor, who had received \$55,323.41 in payment from the lessee during the term of the lease, was entitled to the return of his investment (\$90,992) from the condemnation award, and the lessee was entitled to receive

the remainder (\$69,416.20), the court saying that the lessee was entitled to recover his proportion of the basic construction cost plus the cost for the extra equipment which he had installed on the leased premises." (96 A.L.R. 2d at 1171-72.)

Based upon the above principles, the lease provision apportioning the award governs. The trial court's award of compensation for Majestic's "land value" was clearly in error and Majestic's claim is limited to its value in the "buildings and improvements" as allocated by the express provisions of the lease.

POINT III

THE MAJESTIC-PRUDENTIAL AND MAJESTIC-
LOCKHART SUBLEASES CONTAIN NO BONUS OR
EXCESS RENTAL FACTORS WHICH WOULD FORM THE
BASIS FOR SHARING IN THE CONDEMNATION
AWARD.

The trial court found that Majestic had entered into long-term leases with Prudential and Lockhart that were for rent certain and not subject to acceleration of payments. (Memorandum Decision, page 8). On that basis, the court determined that Majestic had a compensable interest in the two subleases. This interpretation of the subleases ignores the clear and unequivocal terms of the agreements.

First, the leases do not provide that the amortized payments, at least in regard to the "construction costs" in paragraph 1(b), once escalated, remain ongoing throughout the

entire term of the lease, and therefore, a literal reading of the lease brings the accelerated monthly payments in line with market. Secondly, condemnation does not customarily address the property interest on a subjective basis and award to prudent businessmen with above-average skill and business acumen, or simply good fortune, the "profits" associated with their business. Condemnation deals solely with the acquisition of real property interests and does not consider the "profit" being received by the condemnee. (*State Road Commission v. Brown*, 531 P.2d 1294 (Utah 1975).)

Addressing the first point, a careful reading of the Prudential and Lockhart leases indicates a significant difference in the obligations set forth in paragraphs 1(a) (ground-rent) and 1(b) (construction cost of building repayment). Paragraph 1(a) sets out the total 300 month rent, i.e.,

"(a) \$112,500 (subject to escalation as hereinafter provided) payable initially in monthly installments of \$375.00..."
(Exhibit 2-D, page 2; Exhibit 3-D, page 2)

and then further provides for cost of living increases after 10 and 20 years of the lease. In other words, the lease sets out the principal rent, \$112,500, followed by a parenthetical *caveat* that the total rent, not just the monthly amortized payment, would escalate.

Subparagraph (b) is an entirely different story. It utilizes an "interest" charge to compensate for a 25-year payoff of the construction costs. It contains an escalation clause,

but not of the underlying principal nor the interest or capitalization rate! It reads (for example, LOCKHART'S lease):

"(b) Approximately \$85,000.00 which represents LESSEE'S portion of the total cost of construction..."

Noticeably absent is the parenthetical *caveat* found in 1(a), that the total construction costs, not just the amortized monthly payments, would be magically "increased" by a cost of living escalation.

The only reference to escalation in subparagraph (b) is of "amortized payments": "Such escalation of said amortized amounts..." In other words, the \$85,000 construction costs, plus \$6,000 interim financing charges, plus minor change orders, and out-of-pocket expenses associated with construction (\$6,253.13, for a total of \$91,253.13) was to be repaid, at 12 percent interest over the term of the lease. ($\$91,253.13 \div 300$ months @ 12% interest = monthly payments of \$961.10.) If paid out at that rate, $\$961.10 \times 300$ months = \$288,330.00 in total payments. The cost of living escalator applied then only to the monthly amortized payments, not the deferred payment total balance or capitalization rate.

In other words, during the first 120 months of the lease, Lockhart was to send a monthly check to Majestic in the amount of \$961.10 to cover its obligations under subparagraph (b). Majestic was to credit the check on the debt identified in subparagraph (b) at 12 percent per annum interest, so that the first check was applied \$912.53 to interest and \$48.57 to principal. After 120 payments ($120 \times \$961.10 = \$115,331.99$)

Lockhart had paid \$104,159.22 interest and only \$11,124.20 toward principal, leaving an unpaid principal balance of \$80,080.35. The escalation clause resulted in the monthly "amortized amount" being increased from \$961.10 to \$1,951.03, and Lockhart was obligated to increase its monthly payments to that figure. But this only meant that the unpaid construction cost principal of \$80,080.35 was being repaid at an accelerated rate and the obligations under subparagraph (b) would, therefore, end on May 1, 1990.

It is an absurd interpretation of the lease that the unpaid principal actually increases pursuant to the escalation clause. This would mean that not only was Lockhart required to repay the construction costs of \$91,253.13 principal plus \$197,076.87 interest, but that at the end of the 10th year of the lease, the unpaid principal (not merely the monthly payments) of \$80,080.35 would be "magically" increased to \$162,562.07. If that was the result then the capitalization rate would change from 12 percent to 28.83 percent. In order to amortize the new monthly payment of \$1,951.03 over the remaining 180 months: \$1,951.03 payments @ 12% interest for 180 months = present value of \$162,562.07; or 180 payments of \$1,951.03 to pay off an \$80,080.35 balance = 28.83% interest. If you add the first 120 payments of principal (\$11,124.20) plus the new "accelerated" unpaid balance (\$162,562.07) with the 120 payments of interest previously made (\$104,159.22) and the 180 payments of "accelerated" interest (\$188,623.33), you have Lockhart paying a total of \$173,686.27

as the construction costs of a building which actually costs only \$91,253.13. The interest would be \$292,782.55 when the lease initially called for \$197,076.87 in interest payments. This interpretation in effect "capitalizes" the lease twice! The lease had a built-in 12 percent interest for deferred payment. To "escalate" the unpaid principal on top of interest is ludicrous at best! Lockhart could have paid off the unpaid balance at any time during the lease. The lease has neither a prepayment penalty nor a prepayment prohibition clause. If the interpretation found by the trial court was correct Lockhart could have, and surely would have, avoided invocation of the "escalation" clause by merely paying off the \$80,080.35 unpaid principal on the 9th year and 11th month of the lease rather than permitting the unpaid principal to "escalate" to \$162,562.07, or the effective interest rate to move from 12 percent to 28.83 percent per annum.

Based on the foregoing, the only logical reading of the subleases is that the payments "escalated" but the principal amount (construction cost repayment) did not. Therefore, Majestic has no bonus or excess rent in the subleases which would allow it to share in the condemnation award. In effect, the 12% interest being charged on the construction costs constitutes profit for erecting the buildings and profits are not recoverable in an eminent domain action. (*State v. Ouzounian*, 26 Utah 2d 442, 491 P.2d 1093, 1095-96 (1971); *State Road Commission v. Rozzelle*, 101 Utah 464, 120 P.2d 276 (1941).)

POINT IV

THE TRIAL COURT FAILED TO VALUE THE PROPERTY AS A
WHOLE UNIT, AS IF UNENCUMBERED, PRIOR TO APPORTIONING
THE VALUE BETWEEN THE FEE HOLDER AND LEASE HOLDERS.

The trial court failed to find the value of the property as a whole, as if unencumbered, prior to apportioning the various interests. Rather than determining the unencumbered whole, the court took into consideration the value of the encumbrances on the property, the lease and subleases. (Memorandum Decision, page 2) This is clear error since it may result in the sum of the parts exceeding the value of the whole, precisely the result the Supreme Court sought to avoid in *State Road Commission v. Brown*, 531 P.2d 1294 (Utah 1975).

Where there are different interests or estates in the property, the proper method of valuation is to ascertain the entire compensation as though the property belonged to one person and is unencumbered and then, after finding the "whole" value, apportion that sum among the different parties according to their respective rights and interests. The value of property cannot be enhanced by any contract arrangement among the owners of different interests. Whatever advantage is secured to one interest pursuant to that contract must be taken from another and the sum of the parts cannot exceed the whole.

"Where leased property is taken by eminent domain, it is ordinarily valued as though held in a single ownership rather than by separately evaluating the interest of the lessor and the lessee, and the compensation for the property taken or injured is then apportioned between the lessor and the lessee according to their respective

interests...As in the case of apportionment of awards generally...the condemnor ordinarily has no interest in the apportionment of the award between the lessor and the lessee." (29A C.J.S. "Eminent Domain", §198.) (emphasis added)

The Utah Supreme Court has embraced and adopted the above general principle as legal tenant in this state:

"Whatever damage he [the lessee] sustained should have been deducted from the total value of the land taken and the severance damages sustained. The rules regarding the respective interest of lessees and lessors are set out in 29A C.J.S. "Eminent Domain", §198." (*Ogden City v. Stephens*, 21 Utah 2nd 336, 445 P.2d 703, (1968).)

But while adopting said rule, the Court noted that the individual interests cannot equal more than the total value of the property as a whole:

"The condemning authority is liable for the value of the land taken and for severance damages to the land not taken, and it is from these amounts that the lessee must receive any damages which it may have sustained as a result of the taking. The annotation in 69 A.L.R. at page 1263 states the law as follows:

The rule is generally recognized...that, where there are several interests or estates in a parcel of real estate taken by eminent domain, a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates, rather than to take each interest or estate as a unit and fix the value thereof or damage thereto separately.

* * *

The total of all interests cannot exceed the value of the property as a whole." (*State Road Comm'n. v. Brown*, 531 P.2d 1294, 1295 (Utah 1975).) (emphasis added)

* * *

"Moreover, a cardinal principle of eminent domain valuation requires that condemnees receive the fair

market value of property, not the cumulative worth of their various interests." (Nichols, §5.07 [5] Vol 2, p. 149.)

Based on the law as set forth in the *Brown* and *Ogden City* cases, the decision of the trial court to include lease and sublease value in the determination of total value is clear error. The property should have been valued as if unencumbered. If the parts are aggregated to find the whole, then the sum of the parts obviously will never exceed the whole and the intent and spirit of the common law in Utah as set forth in the *Brown* and *Ogden City* cases is rendered meaningless.

CONCLUSION

Based on the foregoing, it is clear that the trial court made significant errors in the determining of the compensable interests in this case. There was no evidence presented to support an award of compensation for Majestic's value in the land, nor did the court correctly interpret the provisions of the relevant leases. By drafting the condemnation clause of the lease to restrict Majestic's share of the award, entering into leases which provided a pass through of the land rentals from sublessee to landowner, and by structuring the subleases so that the construction costs could be amortized while Majestic received profits on the construction, it was clearly the intent of the parties that Majestic not have any interest in the value of the land, but rather, only in the buildings and improvements that they erected. Therefore, Majestic should be limited to

compensation for the buildings and improvements, as set forth in the contractual provisions of the lease between the parties, and that portion of the judgment compensating Majestic for any interests other than their interests in land and buildings should be reversed.

Even if this court finds that Majestic is entitled to be compensated, if it can prove an interest in the land, then the clear provisions of the subleases show that there exists no bonus value for Majestic to claim. They merely have their profits on the construction, to which they are not entitled. Therefore, any compensation award Majestic received, other than that for land and buildings must be reversed.

Finally, if this Court finds that Majestic is entitled to a compensation award for interests other than that awarded for buildings and improvements, then the court should find that the value of the encumbering leasehold interests were improperly used to find the fee value of the "unencumbered whole" and should, therefore, remand the case with instructions to reduce the judgment by that amount the leasehold value contributed to the value of the whole parcel.

DATED this 30th day of APRIL, 1990.



J. Richard Catten
Attorney for Plaintiff

Mailing Certificate

I, the undersigned, certify that on April, 30 1990, I mailed, postage prepaid, four true and correct copies of the foregoing Appellant's Brief, to the following parties:

Robert S. Campbell, Esq.
Clark W. Sessions, Esq.
Paul T. Moxley, Esq.
Matthew C. Barneck, Esq.
Campbell Maack & Sessions
Attorneys for Majestic Investment Co., Respondent
170 South Main Street
Suite 400
Salt Lake City, UT 84101

A handwritten signature in dark ink, appearing to read "RSC", is written over a horizontal line.

ADDENDA

PICKRELL-MAJESTIC LEASE

Majestic

[Handwritten initials]

GROUND LEASE

THIS AGREEMENT OF LEASZ, made and entered into this 11 day of April, ¹⁹⁷³~~1974~~, by and between GRANGER SHOPPING CENTER, a General Partnership, HENRY S. PICKRELL and BARBARA M. PICKRELL, his wife, (hereinafter collectively referred to as "LESSOR"), Party of the First Part, and MAJESTIC INVESTMENT COMPANY, a Utah corporation, (hereinafter referred to as "LESSEE"), Party of the Second Part;

W I T N E S S E T H :

WHEREAS, LESSOR is the fee owner of and entitled to lease a certain tract and parcel of land situated at approximately 3600 South and 2700 West in Salt Lake County, State of Utah, more particularly described below and set forth on Exhibit "A" attached hereto and by reference made a part hereof. Said land is described as:

PARCEL 1.

Beginning at a point on the West side of 2700 West Street, said point being South 865.72 feet and West 50.00 feet from the N.E. corner of the N.W. 1/4 of Section 33, T. 1 S., R. 1 W., Salt Lake Base and Meridian, and running thence: S 00°00'44" W 90.67 feet along the West line of 2700 West Street; thence S 89°56'20" W 156.22 feet to a point 30.00 feet East of an existing building; thence running parallel to and 30.00 feet away from the said building for the next three courses and distances: N 00°00'44" E 2.33 feet; thence N 89°56'20" E 27.00 feet; thence N 00°00'44" E 88.34 feet; thence N 89°56'20" E 129.22 feet to the point of beginning.

Contains: 0.270 acres

PARCEL 2.

Beginning at a point on the West side of 2700 West Street, said point being South 956.39 feet and West 50.00 feet from the N.E. corner of the N.W. 1/4 of Section 33, T. 1 S., R. 1 W., Salt Lake Base and Meridian and running thence: S 00°00'44" W 90.67 feet along the West line of 2700 West Street; thence S 89°56'20" W 156.22 feet to a point 30.00 feet East of an existing building; thence running parallel to and 30.00 feet away from the said building N 00°00'44" E 90.67 feet; thence N 89°56'20" E 156.22 feet to the point of beginning.

Contains: 0.325 acres

TOGETHER with an easement for sewer, water and other utility purposes, and a right of way for ingress and egress over the following described property: Beginning at a point on the West side of 2700 West Street, said point being South 1047.06 feet and West 50.00 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1

West, Salt Lake Base and Meridian, and running thence South 00°00'44" West 18.0 feet along the West line of 2700 West Street; thence South 89°56'20" West 482.16 feet; thence North 00°00'44" East 18.0 feet; thence North 89°56'20" East 482.16 feet to the point of beginning.

ALSO TOGETHER with an easement for sewer, water and other utility purposes, and a right of way for ingress and egress over the following described property: Beginning at a point South 865.72 feet and West 179.22 feet from the North-east corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 89°56'20" West 30.0 feet to an existing brick building; thence along said building for the next three courses and distances: South 00°00'44" West 58.34 feet; thence South 89°56'20" West 27.0 feet; thence South 00°00'44" West 123.0 feet; thence North 89°56'20" East 30.0 feet; thence North 00°00'44" East 93.0 feet; thence North 89°56'20" East 27.0 feet; thence North 00°00'44" East 88.34 feet to the point of beginning.

and

WHEREAS, LESSOR is willing to lease and let unto LESSEE and LESSEE is willing to take and lease the above described tract and parcels of land upon the covenants, conditions, stipulations and terms hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereinafter set forth, and for and in consideration of the rents, covenants and agreements by LESSEE to be paid, kept and performed, LESSOR does by these presents grant, lease, demise and let unto LESSEE the above described tract and parcel of land.

TO HAVE AND TO HOLD the said premises, together with the appurtenances to LESSEE for a term of thirty-five (35) years, commencing on the 1st day of May, 1975, and ending on the 30th day of April, 2010.

THIS AGREEMENT OF LEASE is made strictly upon the covenants, promises, stipulations, terms and conditions hereinafter set forth, and to that end, it is agreed as follows:

1. LESSEE shall pay to LESSOR as rental for said premises the sum of THREE HUNDRED FIFTEEN THOUSAND and NO/100 DOLLARS (\$315,000.00), (subject to escalation as hereafter provided), payable initially in monthly installments of SEVEN HUNDRED FIFTY and NO/100 DOLLARS (\$750.00) on or before the first (1st) day of each month of said term. Such rental amount shall be subject to escalation commencing at the beginning of the 11th, 21st and 31st lease years. Such escalation in rental amount shall be equal to a percentage of said \$750.00 installment as shall be determined by the percentage of increase

in the Consumer Price Index for "All Items" as promulgated by the United States Department of Labor, 1967 Survey (or such successor series) during such ten year period next prior to the date of such escalation as determined by the calendar yearend Index at the beginning of the term hereof, which was 155.4, and ending calendar yearend Index of each such 10 year period. Notwithstanding the above, there shall be a minimum increase in such monthly rental amount equal to \$200.00 effective as of the time of each escalation.

It is agreed and understood that such amounts as shall have been received by LESSOR under the terms of that "Ground Lease Option Agreement" executed by LESSOR and Prudential Federal Savings and Loan Association on July 1, 1974, and as amended by an extension agreement dated December 31, 1974, - shall be applied to and credited against the monthly rental amounts due and owing to LESSOR hereunder during the last months of the 20th year of the term of this agreement.

Until it receives other instructions in writing from LESSOR, LESSEE will pay all rentals payable under this Lease to Granger Shopping Center, c/o H. S. Pickrell, 3404 North Central Ave., P. O. Box 7400, Phoenix, Arizona 85011.

2. LESSEE will use and occupy said premises for the purpose of making available to the general public business offices and facilities associated therewith. In connection therewith, LESSEE shall have the unlimited right to place such improvements upon the premises as it may desire so long as the same shall be consistent with the zoning laws of Salt Lake County, and so long as such improvements shall equal at least \$140,000.00 in value.

3. The demised premises shall not be used contrary to the ordinances of Salt Lake County, State of Utah, to the laws of the State of Utah, or of the United States of America, or to the valid regulations of any duly constituted regulatory or administrative body. LESSEE shall keep and maintain the premises in adequate repair and in a clean and presentable condition and shall not commit any nuisance thereon nor permit any nuisance to be committed or to exist thereon.

4. LESSEE shall pay for all gas, heat, electricity and power furnished and used by LESSEE on the demised premises during the term of this agreement of lease, and any extension thereof, together with all janitorial services and all license fees and other government charges levied and assessed on the operation of any business on the demised premises. LESSOR shall make water available to the premises at a cost to LESSEE of \$6.00 per month, which cost may vary in accordance with any cost increases or decreases billed from time to time by

the Granger Water District.

5. All structures, buildings and other permanent improvements (excluding all trade equipment, furnishings and fixtures) erected on the demised premises shall, at the expiration of this agreement, become and remain the property of LESSOR. LESSEE shall pay all costs of erection, repair and maintenance of such structures, buildings or improvements during the term of this agreement of lease or any extension thereof, and shall repair, at its own expense, any damage done to such structures, buildings or improvements occasioned by the removal therefrom of any non-permanent improvements.

6. LESSEE, upon entering into possession of the demised premises, accepts the same in the condition that they are in at the time of delivery of said possession unto it by LESSOR. At the expiration of the term of this lease, or at the earlier termination thereof for any reason herein set forth, LESSOR shall have the right to take possession of said premises, or any structures, buildings and other permanent improvements erected thereon, and LESSEE shall surrender to LESSOR said premises with all such structures, buildings and permanent improvements erected thereon (excluding all trade equipment, furnishings and fixtures) in as good condition as when the same were completed, reasonable wear and tear excepted.

7. LESSEE, at its own cost and expense, may erect and construct a building or buildings, structure or structures, or other improvements on the demised premises, which buildings, structures, or other improvements shall conform with all the rules, regulations and ordinances of Salt Lake County, State of Utah. Such construction shall be substantial and shall meet reasonable standard architectural and fire underwriters' requirements. All alterations and improvements to the building or structure erected on the demised premises shall be made at the expense of LESSEE, and with the exception of all trade equipment, furnishings and fixtures, shall be and become the property of LESSOR at the expiration or termination of this agreement of lease or any extension thereof. The foregoing provisions shall apply to any assignee or sublessee of LESSEE.

8. LESSEE shall not permit any lien to be filed against the demised premises for any work performed for LESSEE or material furnished LESSEE to remain unreleased for a period exceeding sixty (60) days; provided, however, nothing herein contained shall prevent LESSEE in good faith from contesting in the courts the claim or claims of any person or persons, partnerships or corporations, growing out of the erection, alteration or modification of any building, structure or other improvements on the demised premises, and the postponement of payment of such claim or claims until such contest shall finally be decided by the courts shall not be a violation of this agreement of lease.

9. This is a "net" lease, it being the intention of the parties hereto that LESSOR shall have and enjoy the rent reserved to it without deduction or offset with respect to any taxes, special improvement assessments, license fees and other governmental charges attributable to the demised premises or to the improvements constructed on the demised premises by LESSEE or attributable to the business conducted on the demised premises during the term of the lease and any extension thereof. Accordingly, said taxes, special assessments, license fees and charges shall be paid by LESSEE prior to the date of the delinquency thereof so that no tax sale or special assessment sale shall occur; provided, however, nothing herein contained shall prevent LESSEE in good faith from contesting in the court the validity of any such tax, assessment, fee or charge and postponing the payment of the same until such contest shall finally be decided by the courts. It is specifically agreed that LESSEE shall not be liable for the payment of any income taxes, business taxes, estate or inheritance taxes levied and assessed upon LESSOR or its successors, grantees or assigns. Taxes for the year 1975 and special assessments falling due and payable for the year 1975 shall be paid by LESSOR. Taxes for the year 2010 and special assessments falling due and payable for the year 2010 (or, if this lease is renewed or extended, the final year of such extended or renewed term) shall be prorated between LESSEE and LESSOR as of the date of redelivery of possession of the demised premises by LESSEE to LESSOR, their successors, grantees or assigns. LESSOR

shall, at its option, have the right at all times during the term of this agreement of lease to pay any of said taxes, special assessments, charges, penalties or other impositions remaining unpaid after they shall have become due and payable, and to pay, cancel and clear off all tax liens, special assessment liens, charges and claims upon or against the demised premises or any part thereof and to redeem the demised premises from any tax or special assessment sale from time to time, and to do anything necessary to make good any default of LESSEE in the payment of said taxes, special assessments and charges, and the amount so paid by LESSOR, including expenses and attorneys' fees, shall be additional rent due from LESSEE at the next rent date after any such payment or payments, with interest thereon at the rate of six (6%) percent per annum from dates when said sum or sums shall have been paid by LESSOR up to the date of actual repayment thereof by LESSEE.

10. (a) LESSEE shall cause the maintenance of such public liability, property damage and care, custody and control insurance coverage as to adequately protect ~~the parties to this agreement against any claim or~~ loss arising hereunder. LESSEE shall further comply and require the compliance of any sublessee with any and all requirements pertaining to said area of any insurance organization or company necessary for the maintenance of such coverage, as well as any further coverage maintained by LESSOR.

(b) LESSEE promises and agrees that it will, during the term of this lease and any extension thereof, keep the building or structures erected upon the demised premises insured against loss by fire with solvent insurance companies authorized and licensed to issue policies of fire insurance in the State of Utah, and to maintain such insurance at all times during the term of this lease, or any extension thereof, in an amount not less than the insurable value of such buildings and structures, with at least 90% co-insurance and extended coverage. Each and every policy of insurance shall provide that the loss, if any, shall be paid to LESSEE, subject to the terms of this lease, and all such policies shall be deposited with said LESSEE.

(c) LESSEE further covenants and agrees that it will not do, nor permit to be done, in, to or upon said demised premises any act or thing which will invalidate any insurance upon or about, or in any manner pertaining to such buildings or structures which may hereafter be erected thereon; and, further, LESSEE will not permit any building or structure to be put, kept or maintained on said demised premises in such condition or so occupied that the same will not be insurable.

(d) LESSEE further covenants and agrees that if said building or buildings, structure or structures, shall at any time or times during the term of this lease, or extension thereof, be destroyed or damaged by fire, LESSEE may elect either to rebuild or repair such building or structure destroyed or damaged as aforesaid, or to replace such damaged or destroyed building or structure with new buildings of different type or structure, but of at least equal appraised value to such replaced buildings and will proceed forthwith with such building, rebuilding or repair work. If said insurance money is not sufficient to pay the costs and expenses of said building or repair work, LESSEE covenants and agrees to pay promptly the deficiency from its own funds. Said new, rebuilt or repaired building or structure shall, in all respects, comply with all rules, regulations and ordinances of Salt Lake County, State of Utah, shall be substantial, and shall meet reasonable standard architectural and fire underwriters' requirements. Any balance of the said insurance money remaining after payment of the costs of such building or repair work shall be paid over to LESSEE.

(e) LESSEE covenants and agrees that it will not permit any lien to be filed against the demised premises or improvements thereon for labor engaged in or materials supplied for the building or repairing of said building or buildings, structure or structures; provided, however, that nothing herein contained shall require LESSEE to pay or discharge any lien or liens so long as LESSEE shall, in good faith, contest the legality or validity thereof, and until such legality or validity has been established by the final judgment of a court or courts of competent jurisdiction.

(f). Premiums for insurance for the year 2010 (or, if this lease is extended, the final year of such extended term) shall be prorated as of the date of redelivery of the demised premises to LESSOR by LESSEE.

11. LESSEE may at any time assign this lease, or sublease the demised premises or any part thereof; provided, however, LESSEE shall, at all times, remain liable to LESSOR under the terms of this agreement of lease.

12. If the rent above reserved or any part thereof shall not be paid when due, upon twenty (20) days' written notice to LESSEE, it shall be lawful for LESSOR, without notice or legal process, to re-enter and take possession of said demised premises and every part thereof, or in lieu of the exercise of such remedy, LESSOR may, at its option, sue for and obtain judgment against LESSEE for rent becoming due from time to time thereafter. In the event LESSEE shall default in the performance of any of the covenants or agreements herein assumed by it, other than the payment of rent, LESSOR shall, in writing, give notice to LESSEE of such default, and LESSEE shall, within sixty (60) days after the receipt of said notice, cure said default and rectify the aforesaid breach or breaches of covenants specified in said notice. If LESSEE shall fail within said sixty day period to cure said default or rectify said violation, LESSOR, without notice or legal process, may, at its option, re-enter and take possession of the demised premises and every part thereof, or in the alternative, LESSOR may, at its option, sue for and recover judgment against LESSEE for damages resulting from such default.

13. LESSEE is hereby given the absolute right without LESSOR'S consent, but after having mailed prior notice to LESSOR, to grant a "Leasehold Mortgage" security interest in this Lease and to assign this Lease as collateral for such security interest, or execute such other security instruments as may from time to time be required by party to be

secured, without LESSOR'S prior consent, provided that no other security interest in this lease is outstanding at the time such security interest is granted. If LESSEE or any successor or assign shall grant a security interest in this leasehold, then so long as such security interest in this lease shall remain in effect, the following provisions will apply:

(a) There shall be no cancellation, surrender, acceptance of surrender nor modification of this lease without the prior consent in writing of the secured party.

(b) LESSOR shall, upon serving on LESSEE any notice of default or any other notice under this lease, simultaneously deliver a copy of such notice to the secured party by Certified U. S. Mail, and no notice of such default shall be deemed to have been duly given unless or until a copy thereof has been so delivered to such secured party. The secured party shall thereupon be allowed at the same time within which to remedy or cause to be remedied the default complained of as is allowed to LESSEE, and LESSOR shall accept such performance by or at the instigation of the secured party as if such performance had been accomplished by LESSEE.

(c) For the purpose of this security interest, no default on the part of LESSEE in the performance of work to be performed, or acts to be done, or conditions to be remedied which cannot reasonably be completed within the grace period shall be deemed to exist, if steps shall, in good faith, have been commenced promptly to rectify the same, and shall be prosecuted to completion with diligence and continuity.

(d) Anything herein contained notwithstanding, while such security interest remains in effect, if, before the expiration of twenty (20) days after the date of service of a notice to terminate this lease for any reason whatsoever, the secured party shall have paid to LESSOR all rent and additional rent and shall have complied, or shall engaged in the work of

complying with the requirements of this Lease by reason of which default such notice has been sent, then LESSOR shall not be entitled to terminate this Lease and any such notice of termination theretofore given shall be -- void and of no effect.

(e) If LESSOR elects to terminate this Lease by reason of any default of LESSEE, the secured party shall not only have and be subrogated to all rights of LESSEE with respect to curing such default but shall also have the right to postpone and extend the specific date for the termination of this Lease as fixed by LESSOR in his notice of termination for a period of not more than six (6) months, provided:

(1) The secured party shall cure any then existing default and meanwhile pay the rent and additional rent and perform all of the other requirements of this Lease required to be performed by LESSEE..

(2) No further default shall accrue hereunder during such extended period.

(3) The secured party forthwith takes steps to acquire LESSEE'S interest in this Lease by foreclosure of its security interest or otherwise.

(f) The name of the secured party may be added to the "loss payable endorsement" of any and all insurance policies required to be carried by LESSEE hereunder. Subject to the provisions of any security instrument, --LESSEE shall take all insurance and condemnation proceeds to --- which LESSEE may be entitled hereunder for purposes of restoration of the leased property available jointly to LESSEE and to the secured party.

(g) LESSOR, within ten (10) days after a request in writing by LESSEE or the secured party, shall furnish a written statement duly acknowledging that this Lease is in full force and effect and that there is no default hereunder by the LESSEE; or if there is a default, such statement shall specify the default which LESSOR claims to exist.

14. LESSOR hereby covenants and agrees that LESSEE, by paying said rent in the manner aforesaid and by performing the other covenants, terms and conditions of this agreement of lease on the part of LESSEE to

be kept and performed, may and shall have the right at all times during the term of this agreement of lease to quietly and peacefully hold, possess, use, occupy and enjoy said demised land and premises and all improvements which may from time to time be placed thereon under and by virtue of this agreement -- of lease.

15. Any digression from the strict terms of this agreement of lease permitted by LESSOR shall in no way constitute a waiver, nor affect in any way the rights of LESSOR thereafter to demand strict compliance with all the terms, conditions and provisions of this agreement of lease.

16. In the event the demised premises are to be offered for rent or leasing by LESSOR, or its successors and assigns, at the expiration of the term of this agreement of lease, LESSEE shall have the right of first refusal upon terms and conditions as may be agreed upon by the parties, anything in this agreement notwithstanding. At least twelve (12) months prior to the expiration of the term of this lease, LESSOR shall give to LESSEE written notice of its intention or non-intention to offer the demised premises for rent or lease. If LESSOR gives notice to LESSEE of its intention to offer the demised premises for rent or lease, then LESSEE, within two (2) months -- from actual receipt of such notice by it shall give written notice to LESSOR that LESSEE desires to have the first refusal of a lease to be offered by lessor, its successors and assigns. The building or structure and other improvements, as well as the value of the land, shall be considered by LESSOR in determining the rental value for any period of extension or renewal of this agreement of lease. It is understood that LESSOR shall offer a lease to LESSEE on the same terms and conditions which LESSOR would be willing to lease to a third party.

17. Service of all notices specified in this agreement of lease shall be sufficient if mailed by United States mail to LESSOR at 3404 North Central Avenue, P. O. Box 7400, Phoenix, Arizona 85011, and to LESSEE at 254 South 6th East, Salt Lake City, Utah 84102.

18. If the whole or a substantial part of the demised premises, including any buildings and improvements thereon erected by LESSEE, shall be taken under any statute or by right of eminent domain or private purchase, in lieu thereof, then when possession shall be taken thereunder of the demised

premises, or the part thereof so taken, the term herein demised and all rights and obligations of the LESSEE hereunder shall immediately cease and be adjusted as of the time of such condemnation. LESSEE shall have the claim and right to share in and receive that amount of such award as represents that proportion of the value of the buildings and improvements erected on the demised premises by LESSEE which the number of months from the date of such taking by condemnation to the date of the expiration of this lease bears to the total number of months within the term herein demised, to-wit, 420 months. (As an example, if the property is so taken by condemnation twelve months after the date of this lease, then LESSEE would be entitled to 408/420ths of that amount of the award as represents the value of the buildings and improvements constructed on the demised premises.) It being understood and agreed, however, that LESSEE shall apply the amount so received by LESSEE to the payment of any Lessee mortgage or other Lessee-lien owing on the above described property. In the event of a partial condemnation of a small and insubstantial portion of the demised premises, LESSOR and LESSEE shall share in such award as their interests may appear on the same basis as set forth above and this lease as to such portion of the premises so taken shall cease and terminate and the monthly rental payments payable to LESSOR by LESSEE shall be reduced by the percentage of land taken in relationship to the whole. If land only is condemned, with no effect upon the improvements or rentals, LESSOR and any secured party holding a Lessee mortgage on the above described premises that is affected by such condemnation shall share in such award as their interests may appear.

19. If either party to this agreement shall be adjudged by a court of competent jurisdiction to have violated the terms of this agreement of lease or to be at fault in the performance of the same, the party guilty of violation hereof or at fault shall pay the innocent party all costs and attorneys' fees and expenses incurred by said innocent party in enforcing any of the covenants of this lease or in seeking judicial protection or relief.

20. Upon the execution hereof, LESSEE shall have the right to file a LESSEE'S notice of interest with the Recorder's office of Salt Lake County, State of Utah, covering the demised premises.

21. The promises, covenants and conditions hereof respectively assumed by the parties hereto shall be binding upon and inure to the benefit of the respective parties hereto and their respective successors and assigns.

22. It is understood and agreed that anything contained herein to the contrary notwithstanding, this agreement is conditional upon the obtaining of such permits and approvals by appropriate governmental bodies or agencies as will permit Prudential Federal Savings and Loan Association and the Lockhart Co. to proceed as separate sublessees on the demised premises and Lessee to construct those initial improvements indicated in said Exhibit "A".- If such permits or approvals cannot be obtained by Lessee and both sublessees as provided above, within 6 months from the date hereof, this agreement shall become automatically terminated as of the date that such governmental body or agency indicates its unwillingness to grant such permit or approval and the parties shall have no further duty or obligation hereunder.

23. It is understood that there is presently a dispute between LESSOR and Utah Power and Light Company regarding the right of said power company to maintain presently existing overhead power lines and poles over the demised premises and the premises adjacent to the easterly boundary thereof. LESSOR hereby agrees that within six (6) months of the execution of this agreement or by the date of commencement of construction of the said improvements upon the premises by LESSEE, whichever is earlier, it will procure a commitment from said power company to remove the said overhead power lines and poles at LESSOR'S expense...-

24. LESSOR covenants that it presently has and will during the term hereof maintain good title to the demised premises free of any defects or encumbrances and that LESSEE, on making the lease payments and on keeping, observing, and performing all the other terms, covenants, conditions and provisions herein required of it, shall, during the term hereby granted, peaceably and quietly have, hold, and enjoy the said premises for the full term of this lease.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed the day and year first above written.

GRANGER SHOPPING CENTER, a General Partnership.....

ATTEST:

Title: By Henry S. Pickrell
Title: Partner

Henry S. Pickrell
Henry S. Pickrell, an individual

Barbara M. Pickrell
Barbara M. Pickrell, his wife

MAJESTIC INVESTMENT COMPANY, a Utah Corporation ..

ATTEST:

Title: By Keith L. Pickrell
Title: _____

May 3, 1975

Majestic Investment Company
254 South 6th East
Salt Lake City, Utah

Attention: Mr. Keith Knight, President

Gentlemen:

With regard to the power pole and power line problem provided for in Paragraph 23 of that Ground Lease agreement between Granger Shopping Center, et al, and Majestic Investment Company dated April 11, 1975, and covering those premises situated at approximately 3600 South and 2700 West, Salt Lake County, State of Utah, please be advised that in order to allow you to proceed with the project and the construction of improvements at this time under the terms of the Ground Lease agreement, the undersigned hereby waives those conditions set forth in said Paragraph 23.

Accordingly, unless the power poles and power lines, as contemplated by said Paragraph 23, are removed from the premises within 90 days hereof, you are hereby authorized to cause the removal of the same as contemplated in said Paragraph 23 through Utah Power & Light Company and to offset the cost thereof against all monthly rental amounts required under the lease as the same shall become due. Such total offset shall equal twice the actual cost of such power pole and power line removal as determined by Utah Power and Light Company.

Very truly yours,

GRANGER SHOPPING CENTER, .
a General Partnership

By

Henry S. Pickrell
Henry S. Pickrell, Partner

Henry S. Pickrell
Henry S. Pickrell, an Individual

Barbara M. Pickrell
Barbara M. Pickrell, his wife

LEASE MODIFICATION AGREEMENT

THIS LEASE MODIFICATION, made and entered into this 8th day of May 1975 by and between GRANGER SHOPPING CENTER, a General Partnership, HENRY S. PICKRELL and BARBARA M. PICKRELL, his wife, (hereinafter collectively referred to as "LESSOR"), Party of the First Part, and MAJESTIC INVESTMENT COMPANY, a Utah corporation, (hereinafter referred to as "LESSEE"), Party of the Second Part;

W I T N E S S E T H :

WHEREAS, the parties hereto on the 11th day of April 1975 entered into and executed a certain Ground Lease agreement covering certain premises as described therein, and

WHEREAS, the description of the premises as set forth in said Ground Lease agreement does not conform with the actual intent of the parties, and the parties are now desirous of modifying said description of the premises as set forth in said agreement to conform with such actual intent.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and covenants of the parties hereto, it is agreed as follows:

1. That anything to the contrary notwithstanding, the description of the premises as set forth in the first preamble clause of said Ground Lease agreement dated April 11, 1975 (including Exhibit "A" attached thereto) shall include, and the same is hereby modified and amended to include, a provision for a right-of-way as set forth below, the same as though originally and completely set forth in said Ground Lease agreement. Said right of way provision reads as follows:

Together with an unlimited right-of-way over and across
the following described property:

BEGINNING at a point on the West side of 2700 West Street, said point being South 865.72 feet and West 33.0 feet from the Northeast corner of the Northwest quarter of Section 33 Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running; thence South 0°0'44" West 181.34 feet along the West line of 2700 West Street; thence South 89°56'20" West 17 feet; thence North 0°0'44" East 181.34 feet; thence North 89°56'20" East 17 feet to the point of beginning.

2. Except as herein modified, said Ground Lease agreement dated the 11th day of April 1975 is hereby ratified, confirmed and unchanged and this modification agreement shall henceforth be considered a part of said Ground Lease agreement as though the same had originally been set forth therein and shall be governed and interpreted by and in accordance therewith. The covenants, promises and conditions herein set forth shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their respective officers thereunto duly authorized, and their respective corporate seals be hereunto affixed the day and year first above written.

GRANGER SHOPPING CENTER, a General Partnership

ATTEST:

Title:

By- Henry S. Pickrell
Title: Partner

Henry S. Pickrell
Henry S. Pickrell, an individual

Barbara M. Pickrell
Barbara M. Pickrell, his wife

MAJESTIC INVESTMENT COMPANY, a Utah corporation

ATTEST:

Title:

By: [Signature]
Title: [Signature]

MAJESTIC-LOCKHART LEASE

AGREEMENT OF LEASE

THIS AGREEMENT OF LEASE, made and entered into this 11th day of April, 1975, by and between MAJESTIC INVESTMENT COMPANY, a Utah corporation, (hereinafter referred to as "LESSOR"), party of the first part, and THE LOCKHART CO., a Utah corporation, (hereinafter referred to as "LESSEE"), party of the second part;

W I T N E S S E T H

WHEREAS, LESSOR is entitled to lease a certain tract and parcel of land situated at approximately 3600 South and 2700 West in Salt Lake County, State of Utah, described below and set forth on Exhibit "A" attached hereto and by reference made a part hereof. Said land is described as:

BEGINNING at a point on the West side of 2700 West Street, said point being South 956.39 feet and West 50.00 feet from the N.E. corner of the N.W. 1/4 of Section 33, T. 1 S, R. 1 W, Salt Lake Base and Meridian and running thence: S 00°00'44" W 90.67 feet along the West line of 2700 West Street; thence S 89°56'20" W 156.22 feet to a point 30.00 feet East of an existing building; thence running parallel to and 30.00 feet away from the said building N 00°00'44" E 90.67 feet; thence N 89°56'20" E 156.22 feet to the point of beginning.

Contains: 0.325 acres

TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point on the West side of 2700 West Street, said point being South 1047.06 feet and West 50.00 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 00°00'44" West 18.0 feet along the west line of 2700 West Street; thence South 89°56'20" West 482.16 feet; thence North 00°00'44" East 18.0 feet; thence North 89°56'20" East 482.16 feet to the point of beginning.

ALSO TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point South 865.72 feet and West 179.22 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 89°56'20" West 30.00 feet to an existing brick building; thence along said building for the next three courses and distances; South 00°00'44" West 58.34 feet; thence South 89°56'20" West 27.0 feet; thence South 00°00'44" West 123.0 feet; thence North 89°56'20" East 30.00 feet; thence North 00°00'44" East 93.0 feet; thence North 89°56'20" East 27.0 feet; thence North 00°00'44" East 88.34 feet to the point of beginning.

WHEREAS, LESSOR is willing to lease and let unto LESSEE and LESSEE is willing to take and lease the above described tract and parcel of land upon the covenants, conditions, stipulations, and terms hereinafter set forth.

NOW, THEREFORE, in consideration of the premises of the mutual promises and agreements of the parties hereinafter set forth, and for and in consideration of the rents, covenants and agreements by LESSEE to be paid, kept and performed, LESSOR does by these presents grant, lease, demise and let unto LESSEE the above described tract and parcel of land.

TO HAVE AND TO HOLD the said premises, together with the appurtenances, for the term of twenty-five (25) years, commencing on the first day of the month next following the date of actual occupancy by LESSEE or the date that a certificate of substantial completion shall have been issued by W. Stanley Johnson, Architect, with respect to the construction of those improvements provided for in Paragraph 2 below, whichever is earlier.

Providing that there is no default in payment of rent and/or breach of any LESSEE obligation or covenant, LESSEE is hereby granted and may exercise its option to renew for additional terms provided for herein by giving a written notice of its intention to renew to LESSOR not later than ninety (90) days prior to the end of the then current term. Subject to the conditions as set forth above, LESSEE shall have the right to renew or extend the terms of this lease for two (2) successive five (5) year terms. The terms and conditions for any renewal shall be the same as those set forth herein.

THIS AGREEMENT OF LEASE is made strictly upon the covenants, promises, stipulations, terms and conditions hereinafter set forth and to that end it is agreed as follows:

1. LESSEE shall pay to LESSOR as rental for said premises the sum of the following amounts:

(a) \$112,500 (subject to escalation as hereinafter provided) payable initially in monthly installments of \$375.00 on or before the first day of each month of said term. Such rental amount shall be subject to escalation commencing at the beginning of the 11th year, 21st year and 31st year. Such escalation in rental amount shall be equal to a percentage of said \$375.00 installment as shall be determined by the percentage of increase in the Consumer Price Index for "All Items" as promulgated by the U.S. Department of Labor, 1967 Series, (or adjusted to any appropriate successor series) during such ten year period next prior to the date of such escalation as determined by the calendar year index next preceding the

beginning of the term hereof, which was 155.4, and the ending calendar year index of each such ten year period. Notwithstanding the above, there shall be a minimum increase in such monthly rental amount equal to \$100.00 effective as of the time of such escalation.

(b) Approximately \$85,000, which represents LESSEE'S portion of the total cost of the construction of improvements provided for in Paragraph 2 below. Such apportioned amount includes all of the architectural, engineering and construction costs of the structural improvements to be made upon the demised premises, one-half the cost of all site improvements covering the demised premises and those premises described in Paragraph 10 below, including those rights of way described herein. Said \$85,000 together with the ~~said~~ amount of \$6,000 which represents all of LESSOR'S interim costs financing such improvements, shall be amortized and paid monthly over a period of twenty-five (25) years at a capitalization rate of twelve percent (12%) per annum; subject, however, to escalation at the beginning of the 11th year, 21st year and 31st year. Such escalation of said amortized amounts shall be equal to a percentage of said amortized amount as shall be determined by the percentage of increase in the Consumer Price Index for "All Items" as promulgated by the U.S. Department of Labor, 1967 Series, (or adjusted to any appropriate successor series) during such ten year period next prior to the date of such escalation as determined by the calendar year index next preceding the beginning of the term hereof, which was 155.4, and the ending calendar year index of each such ten year period. Such monthly amount shall be payable concurrent with those monthly installments provided in (a) above. Said \$85,000 amount shall be adjusted at the commencement of said lease term in accordance with the actual cost of the construction as determined by the final successful bids submitted by contractors for such construction work and accepted by LESSOR and approved by LESSEE, and as modified by an authorized change orders and out-of-pocket expenses of LESSOR.

In addition to such rental provided above, LESSEE shall pay to LESSOR \$375.00 on the first day of each and every month during the interim period beginning

May 1, 1975 and ending on the first day of the month next preceding the commencement of said monthly rental amounts provided in subparagraph (a) above.

Until it receives other instructions in writing from LESSOR, LESSEE will pay all rentals payable under this lease to Majestic Investment Company, c/o Keith L. Knight, 254 South 6 East Street, Salt Lake City, Utah.

2. Concurrent with the execution of this agreement, LESSOR shall cause the commencement of construction of certain improvements as indicated in said Exhibit "A". The final plans and specifications for the construction of those improvements to be made upon the demised premises shall be mutually agreed upon by the parties within a reasonable time of the execution of this agreement. The cost of such improvements shall be equal to the final successful bid, or bids, accepted by LESSOR and approved by LESSEE. All improvements shall be performed in a sufficient and workmanlike manner to the reasonable satisfaction of LESSEE. LESSOR shall pay all expenses and liabilities arising out of or in any way connected with such improvements, and shall keep the demised premises and structures thereon free and clear of all liens of mechanics or materialmen and all liens of a similar character arising out of the construction of such improvements; provided, however, that nothing herein contained shall prevent LESSOR, in good faith, from contesting in the courts the claim or claims of any person or persons associated with such lien or liens. All of such improvements shall, at the expiration of this lease, be and remain upon the premises and belong to LESSOR.

3. LESSEE will use and occupy said premises for the purpose of making available to the general public business offices and facilities associated therewith. In connection therewith, LESSEE shall have the unlimited right to place additional improvements upon the premises as it may desire so long as the same shall be consistent with the initial improvements and with the zoning laws of Salt Lake County.

4. The demised premises shall not be used contrary to the ordinances of Salt Lake County, State of Utah, to the laws of the State of Utah, or of the United States of America, or to the valid regulations of any duly constituted regulatory or administrative body. LESSEE shall keep and maintain the premises in adequate repair and in a clean and presentable condition and shall not commit any nuisance thereon nor permit any nuisance to be committed or to exist thereon.

5. LESSEE shall pay for all gas, heat, electricity and power furnished and used by LESSEE on the demised premises during the term of this agreement of lease, and any extension thereof, together with all janitorial services and all license fees and other governmental charges levied and assessed on the operation of any business on the demised premises. LESSOR shall furnish water to the premises at a cost to LESSEE of \$3.00 per month, which cost may vary in accordance with any cost increases or decreases billed from time to time by the Granger Water District as determined under the provisions of said Exhibit "B".

6. LESSEE, upon entering into possession of the demised premises at the commencement of said term, accepts the same in the condition that they are in at the time of delivery of said possession unto it by LESSOR. At the expiration of the term or renewal term of this agreement of lease, or at the earlier termination thereof for any reason herein set forth, LESSOR shall have the right to take possession said premises, or any structures, buildings and other permanent improvements erected thereon, and LESSEE shall surrender to LESSOR said premises with all such structures, buildings, permanent improvements erected thereon (excluding all trade equipment, furnishings and fixtures) in as good condition as when the same were completed, reasonable wear and tear excepted. From the date of possession, LESSEE shall assume all obligations, maintenance and repair of interior and exterior of all improvements, subject to any guarantees of LESSOR'S contractors and suppliers.

7. LESSEE shall pay all taxes, special improvement assessments, license fees and all other governmental charges exclusively attributable to the improvements constructed on the demised premises by LESSEE or attributable to the business conducted by LESSEE on the demised premises during the term of the agreement of lease and any extension thereof. Said taxes, special assessments, license fees and charges shall be paid prior to the date of the delinquency thereof so that no tax sale or special assessment sale shall occur; provided, however, nothing herein contained shall prevent LESSEE, in good faith, from contesting in court the validity of any such tax, assessment, fee or charge and postponing the payment of the same until such contest shall finally be decided by the courts. Any such tax, assessment, fee or charge that is not exclusively attributable to the improvements on the demised premises, but which is in part attributable to such improvements, shall be allocated between such improvements and any other improvements to which such tax, assessment, fee or charge is also attributable. The amount of such allocation attributable to the improvements on the demised premises shall be the percentage

that the assessed value of the improvements on the demised premises (as determined by the Salt Lake County Assessor's office) bears to the total assessed value of all the improvements to which such tax, assessment, fee or charge is attributable. It is specifically agreed that LESSEE shall not be liable for the payment of any income taxes, corporate excise taxes, estate or inheritance taxes levied and assessed upon LESSOR or its successors, grantees, or assigns. Taxes and any special assessments falling due and payable for the first year hereof shall be paid by LESSOR. Taxes and any special assessments falling due and payable for the final year hereof (or, if this lease is renewed or extended, the final year of such extended or renewed term) shall be prorated as of the date of redelivery of possession of the demised premises by LESSEE to LESSOR, their successors, grantees or assigns. LESSOR shall, at its option, have the right at all times during the term of this agreement of lease to pay any of said taxes, special assessments, charges, penalties or other impositions remaining unpaid after they shall have become due and payable, and to pay, cancel and clear off all tax liens, special assessment liens, charges and claims upon or against the demised premises or any part thereof and to redeem the demised premises from any tax or special assessment sale from time to time, and to do anything necessary to make good any default of LESSEE in the payment of said taxes, special assessments and charges, and the amount so paid by LESSOR, including expenses and attorneys' fees, shall be additional rent due from LESSEE at the next rent date after any such payment or payments, with interest thereon at the rate of six percent (6%) per annum from dates when said sum or sums shall have been paid by LESSOR up to the date of actual repayment thereof of LESSEE.

8. (a) LESSEE shall maintain, at its sole cost and expense, such public liability, property damage and care, custody and control insurance coverage as to adequately protect the parties to this agreement of lease against any claim or loss arising hereunder. LESSEE shall further comply with any and all requirements pertaining to said area of any insurance organization or company necessary for the maintenance of such coverage, as well as any further coverage maintained by LESSOR.

(b) LESSEE promises and agrees that it will, during the term of this agreement of lease and any extension thereof, keep the buildings or structures erected upon the demised premises insured against loss by fire with solvent insurance companies

authorized and licensed to issue policies of fire insurance in the State of Utah, and to maintain such insurance at all times during the term of this lease, or any extension thereof, in any amount not less than the insurable value of such buildings and structures, with at least 90% co-insurance and extended coverage. Each and every policy of insurance shall provide that the loss, if any, shall be paid to LESSEE as trustee in trust for LESSEE and LESSOR as their respective interests may appear and subject to the terms of this agreement of lease, and all such policies shall be deposited with said trustee.

(c) LESSEE further covenants and agrees that it will not do, nor permit to be done, in, to or upon said demised premises any act or thing which will invalidate any insurance upon or about, or in any manner pertaining to such buildings or structures which may hereafter be erected thereon; and further, LESSEE will not permit any building or structure to be put, kept or maintained on said demised premises in such condition or so occupied that the same will not be insurable.

(d) LESSEE further covenants and agrees that if said building or buildings, structure or structures, shall at any time or times during the term of this lease, or extension thereof, be destroyed or damaged by fire, LESSEE may elect either to rebuild or repair such building or structure destroyed or damaged as aforesaid, or to replace such damaged or destroyed building or structure with new buildings of different type or structure, but of at least equal appraised value to such replaced buildings and will proceed forthwith with such building, rebuilding or repair work. If said insurance money is not sufficient to pay the costs and expenses of said building or repair work, LESSEE covenants and agrees to pay promptly the deficiency from its own funds. Said new, rebuilt or repaired building or structure shall, in all respects, comply with all rules, regulations and ordinances of Salt Lake County, State of Utah, shall be substantial, and shall meet reasonable standard architectural and fire underwriters' requirements. Any balance of the said insurance money remaining after payment of the costs of such building or repair work shall be paid over to LESSEE.

(e) LESSOR covenants and agrees that it will not permit any lien

to be filed against the demised premises or improvements thereon for labor engaged in or materials supplied for the building or repairing of said building or buildings, structure or structures; provided, however, that nothing herein contained shall require LESSOR to pay or discharge any lien or liens so long as LESSOR shall, in good faith, contest the legality or validity thereof, and until such legality or validity has been established by the final judgment of a court or courts of competent jurisdiction.

(f) Premiums for insurance for the final year of the lease term, or if extended, of such extended term, shall be prorated as of the date of redelivery of the demised premises to LESSOR by LESSEE.

9. LESSEE may at any time assign this lease or sublease the demised premises or any part thereof; provided, however, LESSEE shall, at all times, remain liable to LESSOR under the terms of this agreement of lease.

10. It is understood that concurrent herewith, LESSOR is executing a similar agreement of lease with PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION as LESSEE covering premises described below situated adjacent to those covered by this agreement. Said adjacent premises are described as:

BEGINNING at a point on the West side of 2700 West Street, said point being South 865.72 feet and West 50.00 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian; and running thence South $00^{\circ}00'44''$ West 90.67 feet along the West line of 2700 West Street; thence South $89^{\circ}56'20''$ West 156.22 feet to a point 30.00 feet east of an existing building; thence running parallel to and 30.00 feet away from the said building for the next three courses and distances: North $00^{\circ}00'44''$ East 2.33 feet; thence North $89^{\circ}56'20''$ East 27.00 feet; thence North $00^{\circ}00'44''$ East 88.34 feet; thence North $89^{\circ}56'20''$ East 129.22 feet to the point of beginning.

TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point on the West side of 2700 West Street, said point being South 1047.06 feet and West 50.00 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South $00^{\circ}00'44''$ West 18.0 feet along the West line of 2700 West Street; thence South $89^{\circ}56'20''$ West 482.16 feet; thence North $00^{\circ}00'44''$ East 18.0 feet; thence North $89^{\circ}56'20''$ East 482.16 feet to the point of beginning.

ALSO TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point South 865.72 feet and West 179.22 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1

South, Range 1 West, Salt Lake Base and Meridian, and running thence South 89°56'20" West 30.0 feet to an existing brick building; thence along said building for the next three courses and distances: South 00°00'44" West 58.34 feet; thence South 89°56'20" West 27.0 feet; thence South 00°00'44" West 123.0 feet; thence North 89°56'20" East 30.0 feet; thence North 00°00'44" East 93.0 feet; thence North 89°56'20" East 27.0 feet; thence North 00°00'44" East 88.34 feet to the point of beginning.

It is the desire of the parties to this agreement and the parties to said other agreement of lease that the LESSEE'S under both agreements shall, for their mutual benefit, share certain amenities and have certain rights pertaining to the demised premises covered by both leases. Accordingly, in consideration of LESSEE'S granting to said Prudential Federal Savings and Loan Association certain amenities and rights in the premises covered by this lease agreement, LESSOR does hereby grant and guarantee to LESSEE similar amenities and rights with regard to the above described adjacent premises which are covered by said other lease agreement. Such amenities and rights are described as:

(a) Joint use of and access to the parking, walkway, and driveway areas situated upon both premises by either party, its customers and other business invitees.

(b) Joint benefit from and access to sewer and utility lines placed upon either of the premises and serving the other.

(c) Joint maintenance and repair services pertaining to those improvements which are of mutual interest to LESSEE and said Prudential Federal Savings and Loan Association under this agreement and said other lease agreement, including but not being limited to those amenities described under (a) and (b) above. Such services shall include asphalt striping and repair, garbage and trash removal, snow removal and landscape care, together with any other similar services that may be mutually agreed to by the parties from time to time. The cost of such services shall be borne by the LESSEE'S equally. For the purpose of implementing this subparagraph (c), it is agreed that during the term of the agreement, Prudential Federal Savings and Loan Association shall act as agent on behalf of itself and ~~THE PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION~~ or its successors, assigns, or sublessees, and in such capacity shall be responsible for determining the extent, frequency and cost of such services and effectuating and supervising the same, all of which shall be done on a reasonable basis and in conference with said ~~Prudential Federal Savings and Loan Association~~ LESSEE or its successor,

assigns, or sublessees.

In the absence of any clear understanding or agreement between LESSEE and said Prudential Federal Savings and Loan Association or its assigns or successors with respect to any rights and obligations of the parties covered by this paragraph, LESSOR may, on a temporary basis until such understanding or agreement is reached, issue such rules as, in its sole discretion, may be necessary to accomplish the mutual purposes hereof and in addition, pay any expense associated with the joint services to which such rules apply, allocating the same to both LESSEE'S equally. In the event such understanding or agreement between the parties cannot be reached on a permanent basis as determined by LESSOR, the parties shall be left to their own courses of action without impairing LESSOR'S rights under either lease agreement.

LESSOR further agrees that any lease agreement entered into with respect to the above described premises, whether Prudential Federal Savings and Loan Association or other party as Lessee, shall contain such provisions as shall be consistent with and implementing the provisions set forth in this paragraph for the benefit of LESSEE under this agreement.

11. If the rent above reserved or any part thereof shall not be paid when due, upon twenty (20) days' written notice to LESSEE, it shall be lawful for LESSOR, without notice or legal process, to re-enter and take possession of said demised premises and every part thereof, or in lieu of the exercise of such remedy, LESSOR may, at its option, sue for and obtain judgment against LESSEE for rent becoming due from time to time thereafter. In the event LESSEE shall default in the performance of any of the covenants or agreements herein assumed by it, other than the payment of rent, LESSOR shall, in writing, give notice to LESSEE of such default, and LESSEE shall, within sixty (60) days after the receipt of said notice, cure said default and rectify the aforesaid breach or breaches of covenants specified in said notice. If LESSEE shall fail with said sixty day period to cure said default or rectify said violation, then LESSOR, without notice or legal process, may, at its option, re-enter and take possession of the demised premises and every part thereof, or in the alternative, LESSOR may, at its option, sue for and recover judgment against LESSEE for damages resulting from such default.

12. LESSOR hereby covenants and agrees that LESSEE, by paying said rent in the manner aforesaid and by performing the other covenants, terms and conditions of this agreement of lease on the part of LESSEE to be kept and performed, may and shall have the right at all times during the term of this agreement of lease to quietly and peacefully hold, possess, use, occupy and enjoy said demised land and premises and all improvements which may from time to time be placed thereon under and by virtue of this agreement of lease.

13. Any digression from the strict terms of this agreement of lease permitted by LESSOR shall in no way constitute a waiver, nor affect in any way the rights of LESSOR thereafter to demand strict compliance with all the terms, conditions and provisions of this agreement of lease.

14. Service of all notices specified in this agreement of lease shall be sufficient if mailed by the United States mail to LESSOR at LESSOR'S then current address in Salt Lake City, Utah, and to LESSEE at the then current principal address of LESSEE in Salt Lake City, Utah.

15. If the above or substantial part of the demised premises including any buildings and improvements thereon, at any time after the commencement of the term hereof, erected and paid for by LESSEE, shall be taken under any statute or by right of eminent domain or private purchase, in lieu thereof, then, when possession shall be taken thereunder of such demised premises, or the part thereof so taken, the term herein demised and all rights and obligations of LESSEE hereunder shall immediately cease and be adjusted as of the time of such condemnation. LESSEE shall have the claim and right to share in and receive that amount of such award as represents that proportion of the value of the LESSEE erected buildings and improvements on the demised premises which the number of months from the date of such taking by condemnation to the date of the expiration of this lease bears to the total number of months from the date of such erection to the date of expiration of the lease.

In the event of a partial condemnation of a small and insubstantial portion of the demised premises, LESSEE erected or otherwise, LESSOR and LESSEE shall share in such award as their interests may appear on the same basis as set forth above and this lease as to such portion of the premises so taken shall cease and terminate and the monthly rental payments payable to LESSOR by LESSEE shall be reduced by the percentage of land taken in relationship to the whole. If land only

is condemned with no effect upon the improvements or rentals, or in the event of the condemnation of the demised premises excluding LESSEE erected improvements, if any, then as between LESSEE and LESSOR, LESSOR shall receive the entire amount paid therefore.

16. If either party to this agreement shall be adjudged by a court of competent jurisdiction to have violated the terms of this agreement of lease or to be at fault in the performance of the same, the party guilty of violation hereof or at fault shall pay the innocent party all costs and attorneys' fees and expenses incurred by said innocent party in enforcing any of the covenants of this lease or in seeking judicial protection or relief.

17. LESSEE will keep the demised premises covered by this agreement of lease and the sidewalks adjacent thereto, and the parking lot area, free from snow, ice, paper, boxes, litter and other debris.

18. The promises, covenants and conditions hereof respectively assumed by the parties hereto shall be binding upon and inure to the benefit of the respective parties hereto and their respective successors and assigns.

19. LESSEE and LESSOR agree that the terms of this lease are subject to all the terms and conditions of that certain Ground Lease Agreement covering said premises between Granger Shopping Center, Henry S. Pickrell and Barbara M. Pickrell, his wife, as LESSOR, and Majestic Investment Company as LESSEE, dated April 11, 1975, a copy of which is attached hereto as Exhibit "B" and by reference made a part hereof.

20. It is understood and agreed that anything contained herein to the contrary notwithstanding, this agreement is conditional upon the obtaining of such permits and approvals by appropriate governmental bodies or agencies as will permit LESSOR to construct those improvements indicated upon said Exhibit "A". If such permits or approvals cannot be obtained as provided above, or in the event of the early termination of said Exhibit "B" by reason of the provisions of Paragraph 22 contained therein, this agreement shall become automatically terminated as of the date that such governmental body or agency indicates its unwillingness to grant such permit or approval, or as of the date of such termination of said Exhibit "B", and the parties shall have no further duty or obligation hereunder.

ATTEST:

MAJESTIC INVESTMENT COMPANY

By

Title:

THE LOCKHART CO.

ATTEST:

By

Title: President

Title: ~~Secretary~~ Ex V.P.

MAJESTIC-PRUDENTIAL LEASE

AGREEMENT OF LEASE

THIS AGREEMENT OF LEASE, made and entered into this 11th day of April, 1975, by and between MAJESTIC INVESTMENT COMPANY, a Utah corporation, (hereinafter referred to as "LESSOR"), party of the first part, and PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation of the United States of America, (hereinafter referred to as "LESSEE"), party of the second part;

W I T N E S S E T H :

WHEREAS, LESSOR is entitled to lease a certain tract and parcel of land situated at approximately 3600 South and 2700 West in Salt Lake County, State of Utah, described below and set forth on Exhibit "A" attached hereto and by reference made a part hereof. Said land is described as:

BEGINNING at a point on the West side of 2700 West Street, said point being South 865.72 feet and West 50.00 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian; and running thence South 00°00'44" West 90.67 feet along the West line of 2700 West Street; thence South 89°56'20" West 156.22 feet to a point 30.00 feet East of an existing building; thence running parallel to and 30.00 feet away from the said building for the next three courses and distances: North 00°00'44" East 2.33 feet; thence North 89°56'20" East 27.00 feet; thence North 00°00'44" East 88.34 feet; thence North 89°56'20" East 129.22 feet to the point of beginning.

TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point on the West side of 2700 West Street, said point being South 1047.06 feet and West 50.00 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 00°00'44" West 18.0 feet along the West line of 2700 West Street; thence South 89°56'20" West 482.16 feet; thence North 00°00'44" East 18.0 feet; thence North 89°56'20" East 482.16 feet to the point of beginning.

ALSO TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point South 865.72 feet and West 179.22 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 89°56'20" West 30.0 feet to an existing brick building; thence along said building for the next three courses and distances: South 00°00'44" West 58.34 feet; thence South 89°56'20" West 27.0 feet; thence South 00°00'44" West 123.0 feet; thence North 89°56'20" East 30.0 feet; thence North 00°00'44" East 93.0 feet; thence North 89°56'20" East 27.0 feet; thence North 00°00'44" East 88.34 feet to the point of beginning,

WHEREAS, LESSOR is willing to lease and let unto LESSEE and LESSEE is willing to take and lease the above described tract and parcel of land upon the covenants, conditions, stipulations, and terms hereinafter set forth.

NOW, THEREFORE, in consideration of the premises of the mutual promises and agreements of the parties hereinafter set forth, and for and in consideration of the rents, covenants and agreements by LESSEE to be paid, kept and performed, LESSOR does by these presents grant, lease, demise and let unto LESSEE the above described tract and parcel of land.

TO HAVE AND TO HOLD the said premises, together with the appurtenances, for the term of twenty-five (25) years, commencing on the first day of the month next following the date of actual occupancy by LESSEE or the date that a certificate of substantial completion shall have been issued by John N. Clawson, Architect, with respect to the construction of those improvements provided for in Paragraph 2 below, whichever is earlier.

THIS AGREEMENT OF LEASE is made strictly upon the covenants, promises, stipulations, terms and conditions hereinafter set forth and to that end it is agreed as follows:

1. LESSEE shall pay to LESSOR as rental for said premises the sum of the following amounts:

(a) \$112,500.00 (subject to escalation as hereinafter provided) payable initially in monthly installments of \$375.00 on or before the first day of each month of said term. Such rental amount shall be subject to escalation commencing at the beginning of the eleventh and twenty-first lease years. Such escalation in rental amount shall be equal to a percentage of said \$375.00 installment as shall be determined by the percentage of increase in the Consumer Price Index for "All Items" as promulgated by the U. S. Department of Labor, 1967 Series, (or adjusted to any appropriate successor series) during such ten year period next prior to the date of such escalation as determined by the calendar year index next preceding the beginning of the term hereof, which was 155.4, and the ending calendar year index of each such ten year period. Notwithstanding the above, there shall be a minimum increase in such monthly rental amount equal to \$100.00 effective as of the time of such escalation.

(b) Approximately \$90,000.00, which represents LESSEE'S portion of the total cost of the construction of improvements provided for in Paragraph 2 below. Such apportioned amount includes all of the architectural, engineering and construction costs of the structural improvements to be made upon the demised premises, one-half the cost of all site improvements covering the demised premises and those premises described in Paragraph 10 below, including those rights of way described herein and all of the costs of surface improvements covering the 13 feet of ground next south and adjacent to the demised premises. Said \$90,000.00, together with the amount of \$6,000.00 which represents all of LESSOR'S interim costs of financing such improvements, shall be amortized and paid monthly over a period of twenty-five (25) years at a capitalization rate of twelve percent (12%) per annum; subject, however, to escalation at the beginning of the eleventh and twenty-first years. Such escalation of said amortized amounts shall be equal to a percentage of said amortized amount as shall be determined by the percentage of increase in the Consumer Price Index for "All Items" as promulgated by the U. S. Department of Labor, 1967 Series, (or adjusted to any appropriate successor series) during such ten year period next prior to the date of such escalation as determined by the calendar year index next preceding the beginning of the term hereof, which was 155.4, and the ending calendar year index of each such ten year period. Such monthly amount shall be payable concurrent with those monthly installments provided in (a) above. Said \$90,000.00 amount shall be adjusted at the commencement of said lease term in accordance with the actual cost of the construction as determined by the final successful bids submitted by contractors for such construction work and accepted by LESSOR and approved by LESSEE, and as modified by any authorized change orders and out-of-pocket expenses of LESSOR.

In addition to such rental provided above, LESSEE shall pay to LESSOR \$375.00 on the first day of each and every month during the interim period beginning May 1, 1975, and ending on the first day of the month next preceding the commencement of said monthly rental amounts provided in subparagraph (a) above.

It is agreed and understood that the amount of \$3,750.00 is presently owing by LESSOR to LESSEE in consideration of the assignment by LESSEE of that certain "Ground Lease Option Agreement" executed by Prudential Federal Savings and Loan Association and Granger Shopping Center and Henry S. Pickrell and Barbara M. Pickrell, his wife, on July 1, 1974, and as amended by an extension agreement dated December 31, 1974, and that such amount shall be applied to an credited against the monthly rental amounts due and owing to LESSOR hereunder during the last months of the 20th year of the term of this agreement.

Until it receives other instructions in writing from LESSOR, LESSEE will pay all rentals payable under this lease to Majestic Investment Company, c/o Keith L. Knight, 254 South 6th East Street, Salt Lake City, Utah.

2. Concurrent with the execution of this agreement, LESSOR shall cause the commencement of construction of certain improvements as indicated in said Exhibit "A". The final plans and specifications for the construction of those improvements to be made upon the demised premises shall be mutually agreed upon by the parties within a reasonable time of the execution of this agreement. The cost of such improvements shall be equal to the final successful bid, or bids, accepted by LESSOR and approved by LESSEE. All improvements shall be performed in a sufficient and workmanlike manner to the reasonable satisfaction of LESSEE. LESSOR shall pay all expenses and liabilities arising out of or in any way connected with such improvements, and shall keep the demised premises and structures thereon free and clear of all liens of mechanics or materialmen and all liens of a similar character arising out of the construction of such improvements; provided, however, that nothing herein contained shall prevent LESSOR, in good faith, from contesting in the courts the claim or claims of any person or persons associated with such lien or liens. All of such improvements shall, at the expiration of this lease, be and remain upon the premises and belong to LESSOR.

3. LESSEE will use and occupy said premises for the purpose of making available to the general public business offices and facilities

associated therewith. In connection therewith, LESSEE shall have the unlimited right to place additional improvements upon the premises as it may desire so long as the same shall be consistent with the initial improvements and with the zoning laws of Salt Lake County.

4. The demised premises shall not be used contrary to the ordinances of Salt Lake County, State of Utah, to the laws of the State of Utah, or of the United States of America, or to the valid regulations of any duly constituted regulatory or administrative body. LESSEE shall keep and maintain the premises in adequate repair and in a clean and presentable condition and shall not commit any nuisance thereon nor permit any nuisance to be committed or to exist thereon.

5. LESSEE shall pay for all gas, heat, electricity and power furnished and used by LESSEE on the demised premises during the term of this agreement of lease, and any extension thereof, together with all janitorial services and all license fees and other governmental charges levied and assessed on the operation of any business on the demised premises. LESSOR shall furnish water to the premises at a cost to LESSEE of \$3.00 per month, which cost may vary in accordance with any cost increases or decreases billed from time to time by the Granger Water District as determined under the provisions of said Exhibit "B".

6. LESSEE, upon entering into possession of the demised premises at the commencement of said term, accepts the same in the condition that they are in at the time of delivery of said possession unto it by LESSOR. At the expiration of the term of this agreement of lease, or at the earlier termination thereof for any reason herein set forth, LESSOR shall have the right to take possession of said premises, or any structures, buildings and other permanent improvements erected thereon, and LESSEE shall surrender to LESSOR said premises with all such structures, buildings, permanent improvements erected thereon (excluding all trade equipment, furnishings and fixtures) in as good condition as when the same were completed, reasonable wear and tear excepted. From the date of possession, LESSEE shall assume all obligations, maintenance and repair of interior and exterior of all improvements, subject to any guarantees of LESSOR'S contractors and suppliers.

7. LESSEE shall pay all taxes, special improvement assessments, license fees and all other governmental charges exclusively attributable to the improvements constructed on the demised premises by LESSEE or attributable to the business conducted by LESSEE on the demised premises during the term of the agreement of lease and any extension thereof. Said taxes, special assessments, license fees and charges shall be paid prior to the date of the delinquency thereof so that no tax sale or special assessment sale shall occur; provided, however, nothing herein contained shall prevent LESSEE, in good faith, from contesting in court the validity of any such tax, assessment, fee or charge and postponing the payment of the same until such contest shall finally be decided by the courts. Any such tax, assessment, fee or charge that is not exclusively attributable to the improvements on the demised premises, but which is in part attributable to such improvements, shall be allocated between such improvements and any other improvements to which such tax, assessment, fee or charge is also attributable. The amount of such allocation attributable to the improvements on the demised premises shall be the percentage that the assessed value of the improvements on the demised premises (as determined by the Salt Lake County Assessor's office) bears to the total assessed value of all the improvements to which such tax, assessment, fee or charge is attributable. It is specifically agreed that LESSEE shall not be liable for the payment of any income taxes, corporate excise taxes, estate or inheritance taxes levied and assessed upon LESSOR or its successors, grantees, or assigns. Taxes and any special assessments falling due and payable for the first year hereof shall be paid by LESSOR. Taxes and any special assessments falling due and payable for the final year hereof (or, if this lease is renewed or extended, the final year of such extended or renewed term) shall be prorated as of the date of redelivery of possession of the demised premises by LESSEE to LESSOR, their successors, grantees or assigns. LESSOR shall, at its option, have the right at all times during the term of this agreement of lease to pay any of said taxes, special assessments, charges, penalties or other impositions remaining unpaid after they shall have

become due and payable, and to pay, cancel and clear off all tax liens, special assessment liens, charges and claims upon or against the demised premises or any part thereof and to redeem the demised premises from any tax or special assessment sale from time to time, and to do anything necessary to make good any default of LESSEE in the payment of said taxes, special assessments and charges, and the amount so paid by LESSOR, including expenses and attorneys' fees, shall be additional rent due from LESSEE at the next rent date after any such payment or payments, with interest thereon at the rate of six percent (6%) per annum from dates when said sum or sums shall have been paid by LESSOR up to the date of actual repayment thereof by LESSEE.

8. (a) LESSEE shall maintain, at its sole cost and expense, such public liability, property damage and care, custody and control insurance coverage as to adequately protect the parties to this agreement of lease against any claim or loss arising hereunder. LESSEE shall further comply with any and all requirements pertaining to said area of any insurance organization or company necessary for the maintenance of such coverage, as well as any further coverage maintained by LESSOR.

(b) LESSEE promises and agrees that it will, during the term of this agreement of lease and any extension thereof, keep the buildings or structures erected upon the demised premises insured against loss by fire with solvent insurance companies authorized and licensed to issue policies of fire insurance in the State of Utah, and to maintain such insurance at all times during the term of this lease, or any extension thereof, in any amount not less than the insurable value of such buildings and structures, with at least 90% co-insurance and extended coverage. Each and every policy of insurance shall provide that the loss, if any, shall be paid to LESSEE as trustee in trust for LESSEE and LESSOR as their respective interests may appear and subject to the terms of this agreement of lease, and all such policies shall be deposited with said trustee.

(c) LESSEE further covenants and agrees that it will not do, nor permit to be done, in, to or upon said demised premises any act or

thing which will invalidate any insurance upon or about, or in any manner pertaining to such buildings or structures which may hereafter be erected thereon; and further, LESSEE will not permit any building or structure to be put, kept or maintained on said demised premises in such condition or so occupied that the same will not be insurable.

(d) LESSEE further covenants and agrees that if said building or buildings, structure or structures, shall at any time or times during the term of this lease, or extension thereof, be destroyed or damaged by fire, LESSEE may elect either to rebuild or repair such building or structure destroyed or damaged as aforesaid, or to replace such damaged or destroyed building or structure with new buildings of different type or structure, but of at least equal appraised value to such replaced buildings and will proceed forthwith with such building, rebuilding or repair work. If said insurance money is not sufficient to pay the costs and expenses of said building or repair work, LESSEE covenants and agrees to pay promptly the deficiency from its own funds. Said new, rebuilt or repaired building or structure shall, in all respects, comply with all rules, regulations and ordinances of Salt Lake County, State of Utah, shall be substantial, and shall meet reasonable standard architectural and fire underwriters' requirements. Any balance of the said insurance money remaining after payment of the costs of such building or repair work shall be paid over to LESSEE.

(e) LESSOR covenants and agrees that it will not permit any lien to be filed against the demised premises or improvements thereon for labor engaged in or materials supplied for the building or repairing of said building or buildings, structure or structures; provided, however, that nothing herein contained shall require LESSOR to pay or discharge any lien or liens so long as LESSOR shall, in good faith, contest the legality or validity thereof, and until such legality or validity has been established by the final judgment of a court or courts of competent jurisdiction.

(f) Premiums for insurance for the final year of the lease term, or if extended, of such extended term, shall be prorated as of the date of redelivery of the demised premises to LESSOR by LESSEE.

9. LESSEE may at any time assign this lease or sublease the demised premises or any part thereof; provided, however, LESSEE shall, at all times, remain liable to LESSOR under the terms of this agreement of lease.

10. It is understood that concurrent herewith, LESSOR is executing a similar agreement of lease with THE LOCKHART CO. as Lessee covering premises

described below. Situated adjacent to those covered by this agreement.

Said adjacent premises are described as:

BEGINNING at a point on the West side of 2700 West Street, said point being South 956.39 feet and West 50.00 feet from the N. E. corner of the N. W. 1/4 of Section 33, T. 1S., R. 1 W., Salt Lake Base and Meridian and running thence: S 00°00'44" W 90.67 feet along the West line of 2700 West Street; thence S 89°56'20" W 156.22 feet to a point 30.00 feet East of an existing building; thence running parallel to and 30.00 feet away from the said building N 00°00'44" E 90.67 feet; thence N 89°56'20" E 156.22 feet to the point of beginning.

Contains: 0.325 acres

TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point on the West side of 2700 West Street, said point being South 1047.06 feet and West 50.00 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 00°00'44" West 18.0 feet along the West line of 2700 West Street; thence South 89°56'20" West 482.16 feet; thence North 00°00'44" East 18.0 feet; thence North 89°56'20" East 482.16 feet to the point of beginning.

ALSO TOGETHER with an easement for sewer, water and other utility purposes and a right of way for ingress and egress over the following described property: Beginning at a point South 865.72 feet and West 179.22 feet from the Northeast corner of the Northwest quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, and running thence South 89°56'20" West 30.00 feet to an existing brick building; thence along said building for the next three courses and distances: South 00°00'44" West 58.34 feet; thence South 89°56'20" West 27.0 feet; thence South 00°00'44" West 123.0 feet; thence North 89°56'20" East 30.00 feet; thence North 00°00'44" East 93.0 feet; thence North 89°56'20" East 27.0 feet; thence North 00°00'44" East 88.34 feet to the point of beginning.

It is the desire of the parties to this agreement and the parties to said other agreement of lease that the Lessees under both agreements shall, for their mutual benefit, share certain amenities and have certain rights pertaining to the demised premises covered by both leases. Accordingly, in consideration of LESSEE'S granting to said Lockhart Co. certain amenities and rights in the premises covered by this lease agreement, LESSOR does hereby grant and guarantee to LESSEE similar amenities and rights with regard to the above described adjacent premises which are covered by said other lease agreement. Such amenities and rights are described as:

(a) Joint use of and access to the parking, walkway, and driveway areas situated upon both premises by either party, its customers and other business invitees.

(b) Joint benefit from and access to sewer and utility lines placed upon either of the premises and serving the other.

(c) Joint maintenance and repair services pertaining to those improvements which are of mutual interest to LESSEE and said LOCKHART CO. under this agreement and said other lease agreement, including but not being limited to those amenities described under (a) and (b) above. Such services shall include asphalt striping and repair, garbage and trash removal, snow removal and landscape care, together with any other similar services that may be mutually agreed to by the parties from time to time. The cost of such services shall be borne by the Lessees equally. For the purpose of implementing this subparagraph (c), it is agreed that during the term of this agreement, LESSEE shall act as agent on behalf of itself and said Lockhart Co. or its successors, assigns, or sublessees, and in such capacity shall be responsible for determining the extent, frequency and cost of such services and effectuating and supervising the same, all of which shall be done on a reasonable basis and in conference with said Lockhart Co., or its successor, assigns or sublessees.

In the absence of any clear understanding or agreement between LESSEE and said Lockhart Co., or its assigns or successors with respect to any rights and obligations of the parties covered by this paragraph, LESSOR may, on a temporary basis until such understanding or agreement is reached, issue such rules as, in its sole discretion, may be necessary to accomplish the mutual purposes hereof and in addition, pay any expense associated with the joint services to which such rules apply, allocating the same to both Lessees equally. In the event such understanding or agreement between the parties cannot be reached on a permanent basis as determined by LESSOR, the parties shall be left to their own courses of action without impairing LESSOR'S rights under either lease agreement.

LESSOR further agrees that any lease agreement entered into with respect to the above described premises, whether The Lockhart Co. or other party as lessee, shall contain such provisions as shall be consistent with and implementing the provisions set forth in this paragraph for the benefit of LESSEE under this agreement.

11. If the rent above reserved or any part thereof shall not be paid when due, upon twenty (20) days' written notice to LESSEE, it shall be lawful for LESSOR, without notice or legal process, to re-enter and take possession of said demised premises and every part thereof, or in lieu of the exercise of such remedy, LESSOR may, at its option, sue for and obtain judgment against LESSEE for rent becoming due from time to time thereafter. In the event LESSEE shall default in the performance of any of the covenants or agreements herein assumed by it, other than the payment of rent, LESSOR shall, in writing, give notice to LESSEE of such default, and LESSEE shall, within sixty (60) days after the receipt of said notice, cure said default and rectify the aforesaid breach or breaches of covenants specified in said notice. If LESSEE shall fail with said sixty day period to cure said default or rectify said violation, then LESSOR, without notice or legal process, may, at its option, re-enter and take possession of the demised premises and every part thereof, or in the alternative, LESSOR may, at its option, sue for and recover judgment against LESSEE for damages resulting from such default.

12. LESSOR hereby covenants and agrees that LESSEE, by paying said rent in the manner aforesaid and by performing the other covenants, terms and conditions of this agreement of lease on the part of LESSEE to be kept and performed, may and shall have the right at all times during the term of this agreement of lease to quietly and peacefully hold, possess, use, occupy and enjoy said demised land and premises and all improvements which may from time to time be placed thereon under and by virtue of this agreement of lease.

13. Any digression from the strict terms of this agreement of lease permitted by LESSOR shall in no way constitute a waiver, nor affect in any way the rights of LESSOR thereafter to demand strict compliance with all the terms, conditions and provisions of this agreement of lease.

14. In the event the demised premises are to be offered for rent or leasing by LESSOR, or its successors and assigns, at the expiration of the term of this agreement of lease, LESSEE shall have the right of first refusal upon terms and conditions as may be agreed upon by the parties,

anything in this agreement notwithstanding. At least twelve (12) months prior to the expiration of the term of this lease, LESSOR shall give to LESSEE written notice of its intention or non-intention to offer the demised premises for rent or lease. If LESSOR gives notice to LESSEE of its intention to offer the demised premises for rent or lease, then LESSEE, within two (2) months from actual receipt of such notice by it, shall give written notice to LESSOR that LESSEE desires to have the first refusal of a lease to be offered by LESSOR, its successors and assigns. The building or structure and other improvements, as well as the value of the land, shall be considered by LESSOR in determining the rental value for any period of extension or renewal of this agreement of lease. It is understood that LESSOR shall offer a lease to LESSEE on the same terms and conditions which LESSOR would be willing to lease to a third party.

15. Service of all notices specified in this agreement of lease shall be sufficient if mailed by the United States mail to LESSOR at LESSOR'S then current address in Salt Lake City, Utah, and to LESSEE at the then current principal address of LESSEE in Salt Lake City, Utah.

16. If the whole or a substantial part of the demised premises, including any buildings and improvements thereon at any time after the commencement of the term hereof, erected and paid for by LESSEE, shall be taken under any statute or by right of eminent domain or private purchase, in lieu thereof, then when possession shall be taken thereunder of such demised premises, or the part thereof so taken, the term herein demised and all rights and obligations of LESSEE hereunder shall immediately cease and be adjusted as of the time of such condemnation. LESSEE shall have the claim and right to share in and receive that amount of such award as represents that proportion of the value of the LESSEE erected buildings and improvements on the demised premises which the number of months from the date of such taking by condemnation to the date of the expiration of this lease bears to the total number of months from the date of such erection to the expiration of this lease.

In the event of a partial condemnation of a small and insubstantial portion of the demised premises, LESSEE erected or otherwise, LESSOR and LESSEE shall share in such award as their interests may appear

on the same basis as set forth above and this lease as to such portion of the premises so taken shall cease and terminate and the monthly rental payments payable to LESSOR by LESSEE shall be reduced by the percentage of land taken in relationship to the whole. If land only is condemned with no effect upon the improvements or rentals, or in the event of the condemnation of the demised premises excluding LESSEE erected improvements, if any, then as between LESSOR and LESSEE, LESSOR shall receive the entire amount paid therefor.

17. If either party to this agreement shall be adjudged by a court of competent jurisdiction to have violated the terms of this agreement of lease or to be at fault in the performance of the same, the party guilty of violation hereof or at fault shall pay the innocent party all costs and attorneys' fees and expenses incurred by said innocent party in enforcing any of the covenants of this lease or in seeking judicial protection or relief.

18. LESSEE will keep the demised premises covered by this agreement of lease and the sidewalks adjacent thereto, and the parking lot area free from snow, ice, paper, boxes, litter and other debris.

19. The promises, covenants and conditions hereof respectively assumed by the parties hereto shall be binding upon and inure to the benefit of the respective parties hereto and their respective successors and assigns.

20. LESSEE and LESSOR agree that the terms of this lease are subject to all the terms and conditions of that certain Ground Lease Agreement covering said premises between Granger Shopping Center, Henry S. Pickrell and Barbara M. Pickrell, his wife, as Lessor, and Majestic Investment Company as Lessee, dated April 11, 1975⁶²², a copy of which is attached hereto as Exhibit "B" and by reference made a part hereof.

21. It is understood and agreed that anything contained herein to the contrary notwithstanding, this agreement is conditional upon the obtaining of such permits and approvals by appropriate governmental bodies or agencies as will permit LESSOR to construct those improvements indicated upon said Exhibit "A". If such permits or approvals cannot be obtained as provided above, or in the event of the early termination of said Exhibit "B"

by reason of the provisions of Paragraph 22 contained therein, this agreement shall become automatically terminated as of the date that such governmental body or agency indicates its unwillingness to grant such permit or approval, or as of the date of such termination of said Exhibit "B", and the parties shall have no further duty or obligation hereunder.

IN WITNESS WHEREOF, LESSOR and LESSEE have caused these presents to be executed by their officers thereto duly authorized, and their respective corporate seals to be hereto affixed the day and year first above written.

MAJESTIC INVESTMENT COMPANY

ATTEST:

By

King L. Kuller, Jr.

Title:

Title:

PRUDENTIAL FEDERAL SAVINGS AND LOAN
ASSOCIATION

ATTEST:

By

Charles P. Elliott

Title: *Senior Vice President*

John B. Audin
Title:

MEMORANDUM DECISION

JAN 24 1989

SALT LAKE COUNTY
By 22 Lindberg
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WEST VALLEY CITY, a Municipal Corporation,	:	MEMORANDUM DECISION
	:	CIVIL NO. C-87-6899
Plaintiff,	:	
	:	
vs.	:	
	:	
MAJESTIC INVESTMENT COMPANY, a Utah Corporation; and DOES 1 through 10,	:	
	:	
Defendants.	:	

This matter was tried on December 14, 15, 16, 20 of 1988, and January 4 and 5, 1989, at which time the matter was taken under advisement. The Court has now reviewed the evidence, the applicable law, and rules as follows:

This is a condemnation proceeding wherein West Valley City seeks to condemn the interests of Majestic Investment Company, lessee of the property in question. West Valley City previously settled with the owner of the property; Majestic did not participate in that settlement.

The land in question, consisting of vacant and unimproved land and rights of way, was leased by the owner to Majestic. The lease was for 35 years, commencing April of 1975, and permitted the lessee to construct office buildings. Majestic constructed

constructed does not limit Majestic's rights to share in the compensation award as to its other interests.

17 ALR4th 337, entitled "Eminent Domain: Measure and Elements of Lessee's Compensation for Condemnor's Taking or Damaging of Leasehold" collects federal and state cases addressing the issue in question. The annotation recognizes that the cases concerning the condemnation of leasehold interests reveals considerable confusion respecting the measure of such damages. However, the annotation points out quite clearly that regardless of the methodology utilized, a lessee is entitled to appropriate compensation for the loss of the leasehold. The annotator stated:

Generally, the courts, especially in older opinions, have summarily declared the market value of the leasehold taken to be the measure of damages for the taking. One frequent definition of market value is that price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy. However, the courts have frequently refined this broad standard by seeking to set out with more precision what the concept of "market value" entails. Thus, either as a definition of market value or without reference to that term, some courts have expressed the measure of a lessee's damages for a leasehold as the economic rent or fair rental value of the leasehold, less the rent reserved under the terms of the lease. Still another form which the market value standard has taken in the reported cases describes the measure of damages as the market value of the unexpired term of the lease, over and above the rent stipulated to be paid. Since courts, even within the same jurisdiction,

often seem to use a variety of market value concept definitions, sometimes without apparently distinguishable results, it remains unclear to what extent these different expressions are reflections of real differences.

The annotator went on to distinguish those leases having no market value from those that do. The annotator stated:

There are, of course, properties which are found to have no market value, and for which resort must be had to other data to ascertain their value. This may be especially true for leasehold interests, it being frequently stated that leases are not ordinarily sold, are often not assignable without the consent of the landlord, and very significantly in the length of the term, rent and other particulars, including the nature and use of the property demised. Under these circumstances, some courts have used actual value, intrinsic value, or the value to the owner as the best available measure of damages to a lessee. Similarly, some courts have awarded compensation to lessees on the basis of the actual damages to the lessees, or the amounts actually expended by the lessees which, because of the condemnation would not be redeemable by them, as well as resorting to a variety of other measures the employment of which the courts have evidently felt would effect a more equitable result from the circumstances.

Nichols on Eminent Domain, Vol. 7A, Section 11.03, states:

From the lessee's point of view, there must be compensation for loss of bonus rent. This figure is determined by finding the fair rental value and subtracting the contract rent from this figure. This yields the bonus value of the lease. This figure must be multiplied by the remaining term of the lease to determine the total bonus factor. In

calculating the remainder of the lease term, renewal clauses should be viewed as extending the term. Once again, this is a future right to payment, and must be reduced by an actuarial coefficient to determine the present value. . . .

Section 78-34-10, Utah Code Ann., requires this Court to ascertain and assess the value of the property sought to be condemned "and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein. . . . "

The Utah Supreme Court has taken the position that a landowner in condemnation cases is not entitled to loss of profits of a business or large rentals. In State Road Commission v. Brown, 531 P.2d 1294 (Utah 1975), the court cited 69 ALR 1263 with approval as follows:

Where there are several interests or estates in a parcel of real estate taken by eminent domain, a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damage to, the property as a whole, and then to apportion the same among the several owners according to their respective interests or estates, rather than to take each interest or estate as a unit and fix the value thereof or damage thereto separately... the total of all interests cannot exceed the value of the property as a whole.

The court further stated:

The landowner would no more be entitled to the benefits of large rentals which have been condemned than he would be entitled to

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huge profits which he might otherwise expect to earn from the realty if he operated a business instead of leasing it to another.

The most appropriate rule, and that accepted in most jurisdictions, is for a separate determination to be made of the fair market value of the leasehold itself in determining the compensable interest of the leaseholder. Utah, however, appears to have adopted a different rule. It apparently requires a determination of the value of the property as a whole, and from that value to apportion the separate interests. To do so, however, it is necessary to take into consideration all separate leasehold interests in determining the fair market value of the property, and from that amount to determine to what portion the leaseholder is entitled.

In this case, Majestic's land lease is for a sum certain rental, for 35 years, and provided for Majestic to construct commercial buildings on the said property. Majestic was not restricted in assigning its lease interest. Such lease must be taken into consideration in determining the fair market value of the property and Majestic is entitled to the value of its leasehold therefrom.

Based upon the evidence, the Court finds as follows:

1. In 1975, the owner of the land in question leased the same to Majestic for 35 years, at a sum certain monthly rent,

with a provision for periodic increases in the rental based upon the CPI index.

2. The said lease provided that Majestic would use and occupy the premises for the purpose of constructing buildings and making the same available to the general public for business offices and facilities associated therewith. In this regard, Majestic was given "unlimited right to place such improvements upon the premises as it may desire" so long as such had a value of at least \$140,000.00, and met zoning requirements.

3. The said lease was a triple net lease, that is, Majestic was required to pay all insurance, gas, heat, electricity, power, janitorial services, licensing fees, taxes, and other governmental charges levied or assessed.

4. The said land lease gave Majestic the "absolute right" without the owner's consent to grant leasehold mortgage security interests in the lease, and to assign the same as collateral, or make other similar security arrangements.

5. The said land lease did not restrict Majestic's right to assign the lease, in fact, it recognized such right by reasonable inference of the language of the lease.

6. The said land lease provided that in the event the premises were taken by eminent domain, the rights and obligations of the Majestic would cease "and be adjusted as of the time of the condemnation." Furthermore, Majestic was to have the right

to a proportionate share of the buildings and improvements made in accordance with a formula stated in the lease.

7. Majestic constructed two commercial buildings upon the land, made improvements in regards thereto, and entered into long-term leases in regards to each of the buildings and improvements, with Prudential Federal Savings and Loan Association and with the Lockhart Company. Both leases were long-term leases for 25 years, with rent certain, and with periodic increases in such rent based upon the CPI index. Such leases did not provide for acceleration, but were for rent certain, with increases over the 25 years life of the said leases.

8. Both Prudential and Lockhart are old line companies in the Salt Lake area, as well as other areas, and have triple-A reputations, and represent sublessees of such a substantial quality as to represent little or no risk of defaulting on their leases with Majestic.

9. Because of the nature of the lease between the lessor and Majestic with the long life of the lease of 35 years, the rent certain, the anticipation that Majestic would construct substantial buildings on the property for commercial purposes to the general public, and because of the nature of the buildings constructed, and the leases between Majestic and Prudential, and Majestic and Lockhart, all such leases must be taken into

consideration in determining the fair market value of the property in question. However, the Lockhart and Prudential leases are for 25 years, while the Majestic lease with the lessor is for 35 years. The remaining 10 years of the land lease are too speculative to be given value considered in determining the value of the leasehold. As stated in Nichols on Eminent Domain, Section 11.02:

Although most lessees are entitled to this compensation, there is a group of lessees which is not so entitled. This group includes those tenants whose leases are renewed by custom, where there is no provision in the lease which is binding upon the landlord. Also included are tenants from year to year, because of mutual satisfaction with the lease, there is the expectation that the lease will be renewed, that the lessor is not bound to renew. Tenants by sufferance and tenants under a lease which is void on public policy grounds are also within the group excluded from sharing in the compensation award.

10. In regards to the Prudential parcel, the Court finds the fair market value of the total property to be \$271,342.00. Of this amount, the value of the land is \$88,342.00, and the value of the buildings and improvements is \$183,000.00.

The present value of the leasehold (October 1987 to December 2000) is \$210,735.00. This represents 77% of the total value of the property, without the land lease allocation as to improvements.

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Majestic's leasehold share of the land is \$68,023.00.

Majestic's share of the buildings and improvements per the land lease allocation is \$118,950.00.

The fair market value of Majestic's leasehold interest \$187,187.50.

11. In regards to the Lockhart parcel, the fair market value of the total property is \$267,277.00. Of this, the land value is \$106,177.00, and the buildings and improvements have a value of \$161,100.00.

The present value of the leasehold (October 1987 to December 2000) is \$180,914.00. This represents 68% of the total property, without the land lease allocation.

Majestic's interest in the land value is \$72,200.36.

Majestic's share in the buildings and improvements pursuant to the land lease allocation is \$104,715.00.

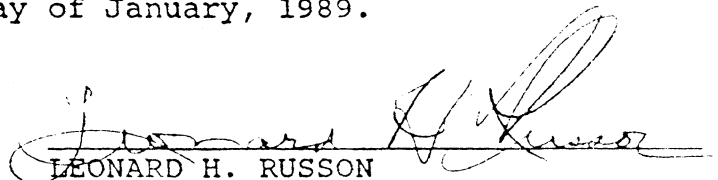
The fair market value of Majestic's leasehold is \$175,853.00.

12. Majestic is entitled to compensation for the value of its leasehold interests in the total property in the amount of \$363,040.00.

There may be additional facts established by the evidence supporting the decision of the Court, and the prevailing party in preparing the Findings of Fact, Conclusions and Judgment should take into consideration all facts established by the evidence.

The Findings of Fact, Conclusions of Law, and Judgment are to be prepared by defendant's counsel and be submitted to plaintiff's counsel for approval as to form before submitting to the Court for final signature and filing.

Dated this 23rd day of January, 1989.


LEONARD H. RUSSON
DISTRICT COURT JUDGE