

1989

Washington National Insurance Company, an Illinois corporation v. SHERWOOD ASSOCIATES, a Utah limited partnership; THE RIDGE ATHLETIC CLUB, INC., a Utah corporation; DARRELL D. TANNER, individually, and as Trustee of the Tanner Family Trust; JASON TANNER, an individual; TRACY A. TANNER MCDONALD, an individual; LINLEY A. TANNER, an individual; BRADLEY H. TANNER, an individual; et al. : Brief of

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Clark W. Sessions, Cynthia K. Cassell; Sessions & Moore; attorneys for appellees.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 89-0502 IN THE COURT OF APPEALS
OF THE STATE OF UTAH

WASHINGTON NATIONAL INSURANCE :	
COMPANY, an Illinois :	
corporation, :	
Plaintiff-Respondent :	Case No. 890502-CA
v. :	
SHERWOOD ASSOCIATES, a Utah :	Priority 14b
limited partnership; :	
THE RIDGE ATHLETIC CLUB, INC., :	
a Utah corporation; :	
DARRELL D. TANNER, :	
individually, and as Trustee :	
of the Tanner Family Trust; :	
JASON TANNER, an individual; :	
TRACY A. TANNER MCDONALD, an :	
individual; LINLEY A. TANNER, :	
an individual; BRADLEY H. :	
TANNER, an individual; et al., :	
Defendants-Appellants. :	

BRIEF OF RESPONDENT

APPEAL FROM THE SUMMARY JUDGMENT ENTERED BY
THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
THE HON. RAY M. HARDING

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DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

NOV 20 1989

in
the Court
of Appeals

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

WASHINGTON NATIONAL INSURANCE :
COMPANY, an Illinois :
corporation, :

Plaintiff-Respondent :

v. :

SHERWOOD ASSOCIATES, a Utah :
limited partnership; :
THE RIDGE ATHLETIC CLUB, INC., :
a Utah corporation; :
DARRELL D. TANNER, :
individually, and as Trustee :
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JASON TANNER, an individual; :
TRACY A. TANNER MCDONALD, an :
individual; LINLEY A. TANNER, :
an individual; BRADLEY H. :
TANNER, an individual; et al., :

Defendants-Appellants. :

Case No. 890502-CA

Priority 14b

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LIST OF PARTIES

Plaintiffs

In addition to the attorneys shown on the cover page, Plaintiff was represented by Sherman Young, of Ivie & Young, Provo, with respect to the title dispute with Holladay Bank & Trust.

Defendants

All Defendants in this action are listed below, in groups, with the names of the Defendants beginning at the left margin, and the names of the attorneys indented.

SHERWOOD ASSOCIATES, a Utah limited partnership;
WAYNE E. PEARCE, individually, and as general partner of Sherwood Associates;

Represented by Michael D. Esplin, of Aldrich, Nielson, Weight & Esplin, Provo.

DAVID R. STEWART, individually, and as general partner of Sherwood Associates;
OSMOND BROTHERS INVESTMENT TRUST, a Utah partnership;
GEORGE V. OSMOND, individually, and as Trustee of Osmond Brothers Investment Trust;
OLIVE DAVIS OSMOND, individually, and as Trustee of Osmond Brothers Investment Trust;
ALLAN R. OSMOND and SUZANNA P. OSMOND, individuals;
MERRILL D. OSMOND and MARY C. OSMOND, individuals;
M. WAYNE OSMOND and KATHLYN L. OSMOND, individuals;
DONALD C. OSMOND and DEBRA A. OSMOND, individuals;
JAY W. OSMOND, an individual;
OLIVE MARIE OSMOND, aka MARIE OSMOND, an individual;
OSMOND STUDIOS, a Utah partnership;
DURINDA A. STEWART, an individual;

Represented by Richard L. Hill and Douglas M. Whitehead, of Olsen, Hintze, Nielson & Hill, Provo.

CAROL PEARCE, an individual;

Deceased - May 3, 1987.

HOLLADAY BANK & TRUST, a Utah corporation;

Represented by Ronald G. Russell, of Kimball, Parr,
Crockett & Waddoups, Salt Lake City

IFG LEASING COMPANY, a Minnesota corporation;

Not represented by counsel. Default judgment entered.
Record at 145.

MOORE LEASING COMPANY, fka, FMA LEASING COMPANY, a Utah
corporation;

Represented by Geri A. Allison, Salt Lake City.
Disclaimed any interest in property. Record at 126.

BOW VALLEY DEVELOPMENT COMPANY, a Utah corporation;

Represented by John K. M. Olsen, of Olsen, Hintze,
Nielsen & Hill, Provo. Disclaimed any interest in the
property, and default judgment entered. Record at 109,
103.

ELIAS MORRIS & SONS COMPANY, a Utah corporation;

Not represented by counsel. Default judgment entered.
Record at 141.

THE RIDGE ATHLETIC CLUB, INC., a Utah corporation;
DARRELL D. TANNER, individually, and as Trustee of the Tanner
Family Trust;
JASON TANNER, an individual;
TRACY A. TANNER McDONALD, an individual;
LINLEY A. TANNER, an individual;
BRADLEY H. TANNER, an individual;

Represented by the attorneys shown on the cover page.

THE RICHARD GILL COMPANY, dba GILL COMPANIES, a Texas corporation;

Represented by Robert F. Nelson, Sr., Vice President and
General Counsel. Disclaimed any interest and dismissal
entered. Record at 112, 117.

BLUNDELL and WEBER, INC., dba UTAH ENGINEERING COMPANY, a Utah
corporation;

Not represented by counsel. Default judgment entered.
Record at 99.

TABLE OF CONTENTS

LIST OF PARTIES	i
TABLE OF AUTHORITIES	iv
JURISDICTION	1
ISSUES PRESENTED	2
DETERMINATIVE STATUTES	2
STATEMENT OF THE CASE	2
<u>Nature of the Case</u>	2
<u>Course of Proceedings Below</u>	2
<u>Statement of Facts</u>	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
POINT I	9
THE 1985 AMENDMENT TO SECTION 57-1-31 IS REMEDIAL AND APPLIES TO TRUST DEEDS EXECUTED PRIOR TO ITS EFFECTIVE DATE	9
A. <u>Because the 1985 Amendment is Remedial, it Applies to Trust Deeds in Existence Prior to its Enactment</u>	10
B. <u>When an Amendment or Statute Enacted Subsequent to the Execution of a Contract Makes Legal What the Parties Contracted for, There is No Impairment of Contract Obligations.</u>	19
C. <u>The Controlling Date for the Application of Remedial or Procedural Statutes is the Date of Judgment and Not the Date of the Execution of the Instrument</u>	25
POINT II	27
AT THE TIME OF THE NOVEMBER 30, 1987, LETTER, PLAINTIFF HAD ELECTED TO FORECLOSE THE TRUST DEED JUDICIALLY	27
POINT III	30
EVEN IF THE 1985 AMENDMENT TO SECTION 57-1-31 DOES NOT OPERATE RETROACTIVELY, RIDGE ATHLETIC CLUB'S TENDER WAS INADEQUATE AS A MATTER OF LAW	30
POINT IV	34
PLAINTIFF HAS A SECURITY INTEREST IN ANY PERSONAL PROPERTY ADDED BY THE TANNER DEFENDANTS WHICH WAS PROPERLY FORECLOSED AND INCLUDED IN THE ORDER OF SALE	34
CONCLUSION	39
APPENDICES	42

TABLE OF AUTHORITIES

Cases Cited:

<u>Alliance Trust Co. v. Hill</u> , 196 Okla. 31, 164 P.2d 984 (1946)	17
<u>American Heritage Bank & Trust Co. v. O. & E., Inc.</u> , 40 Colo. App. 306, 576 P.2d 566 (1978)	36
<u>Boucofski v. Jacobsen</u> , 36 Utah 165, 104 P. 117 (1909)	10, 14, 15, 26
<u>Central California Equipment v. Dolk Tractor</u> , 78 Cal. App. 3d 855, 144 Cal. Rptr. 367 (1978)	37
<u>Central Kentucky Production Credit Ass'n v. Smith</u> , 633 S.W.2d 64 (Ky. 1982)	23, 24, 26
<u>Columbian Building & Loan Co. v. Meddles</u> , 34 Ohio L. Abs. 484, 35 N.E.2d 902 (1941)	15, 16
<u>Docutel Olivetti Corp. v. Dick Brady Systems, Inc.</u> , 731 P.2d 475 (Utah 1986)	26
<u>Fogg v. Southeast Bank</u> , 473 So. 2d 1352 (Fla. Dist. Ct. App. 1985)	21, 22, 23, 26
<u>Foil v. Ballinger</u> , 601 P.2d 144 (Utah 1979)	10
<u>Gelfert v. National City Bank</u> , 313 U.S. 221 (1941)	18
<u>General Motors Acceptance Corp. v. Anzelmo</u> , 222 La. 1019, 64 So. 2d 417 (1953)	24, 25, 26
<u>Guardian Depositors Corp. v. Powers</u> , 296 Mich. 553, 296 N.W. 675 (1941)	17, 18
<u>Holloway v. Barrett</u> , 87 Nev. 385, 487 P.2d 501 (1971)	17, 18
<u>Home Bldg. & Loan Ass'n v. Blaisdell</u> , 290 U.S. 398 (1934)	10, 13, 14
<u>Hyams v. Bamberger</u> , 10 Utah 3, 36 P. 202 (Utah 1894)	30
<u>In re Southern Properties, Inc.</u> , 44 Bankr. 838 (Bankr. E.D. Va. 1984)	38
<u>Inter Mountain Ass'n of Credit Men v. Villager, Inc.</u> , 527 P.2d 664 (Utah 1974)	36
<u>Madsen v. Borthick</u> , 769 P.2d 245 (Utah 1988)	10
<u>Matter of Franchise Systems, Inc.</u> , 46 Bankr. 158 (Bankr. N.D. Ga. 1985)	38

<u>Matter of Matto's, Inc.</u> , 8 Bankr. 485 (Bankr. E.D. Mich. 1981)	37
<u>McNair v. Knott</u> , 302 U.S. 369 (1937)	22, 23
<u>Ogden v. Saunders</u> , 25 U.S. (12 Wheat.) 213 (1827)	14
<u>Oshkosh Waterworks Co. v. Oshkosh</u> , 187 U.S. 437 (1902)	10, 12, 13
<u>Petty v. Clark</u> , 113 Utah 205, 192 P.2d 589 (1948)	15, 26
<u>Pilcher v. State</u> , 663 P.2d 450 (Utah 1983)	10, 26
<u>Romero v. Schmidt</u> , 15 Utah 2d 300, 392 P. 2d 37 (1964)	29
<u>Smiley v. Wheeler</u> , 602 P.2d 209 (Okla. 1979)	36
<u>South Carolina v. Gaillard</u> , 101 U.S. 433 (1879)	10
<u>Sturges v. Crowninshield</u> , 17 U.S. (4 Wheat.) 122 (1819)	10, 11
<u>Tennessee v. Sneed</u> , 96 U.S. 69 (1877)	10, 11, 12
<u>Tompkins County Trust Co. v. Herrick</u> , 171 Misc. 929, 13 N.Y.S.2d 825 (Sup. Ct. 1939)	17
<u>Whalen v. Citizens Building & Loan Co.</u> , 67 Ohio App. 139, 36 N.E.2d 54 (1940)	16, 17

Constitutional Provisions, Statutes & Rules Cited:

Constitutional Provisions:

U.S. Const. art. I, § 10, cl. 1	10
Utah Const. art. I, § 18	10

Statutes:

Utah Code Ann. § 57-1-19 through 36 (1986 & Supp. 1989)	28
Utah Code Ann. § 57-1-23 (1986)	28
Utah Code Ann. § 57-1-28(2) (1986)	29
Utah Code Ann. § 57-1-31 2, 8, 9, 10, 11, 18, 19, 25, 26, 27, 30, 39	
Utah Code Ann. § 68-3-3 (1986)	10
Utah Code Ann. § 70A-9-306(2) (1980)	36
Utah Code Ann. § 70A-9-311 (1980)	35

Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1989)	1
Utah Code Ann. § 78-27-1 (1987)	30
Utah Code Ann. § 78-27-3 (1987)	30

Rules of Procedure:

Utah Rule of Civil Procedure 54(c)(1)	38
Utah Rule of Civil Procedure 56(e)	3
Utah Rule of Civil Procedure 66	28

Miscellaneous Authorities:

Black's Law Dictionary 364 (5th ed. 1979)	35
Uniform Commercial Code § 9-306(2)	37

IN THE COURT OF APPEALS
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Plaintiff-Respondent :	:	Case No. 890502-CA
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	:	Priority 14b
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limited partnership; :	:	
THE RIDGE ATHLETIC CLUB, INC., :	:	
a Utah corporation; :	:	
DARRELL D. TANNER, :	:	
individually, and as Trustee :	:	
of the Tanner Family Trust; :	:	
JASON TANNER, an individual; :	:	
TRACY A. TANNER MCDONALD, an :	:	
individual; LINLEY A. TANNER, :	:	
an individual; BRADLEY H. :	:	
TANNER, an individual; et al., :	:	
	:	
Defendants-Appellants. :	:	

BRIEF OF RESPONDENT

JURISDICTION

This is an action to judicially foreclose a trust deed. Plaintiff's Motion for Partial Summary Judgment was granted by Order signed and entered on May 11, 1989, which Order was expressly stated to be final and appealable. Record at 577. Defendants Darrell D. Tanner, Jason Tanner, Tracy A. Tanner McDonald, Linley A. Tanner, Bradley H. Tanner, Darrell D. Tanner as Trustee of the Tanner Family Trust, and the Ridge Athletic Club, Inc. (hereinafter "Tanner Defendants"), filed their Notice of Appeal on May 19, 1989. Record at 626. This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1989).

ISSUES PRESENTED

1. Whether the 1985 amendment to Utah Code Ann. § 57-1-31 operated retrospectively as a remedial statute.

2. Whether, even if the 1985 amendment to § 57-1-31 operated prospectively only, the tender of Ridge Athletic Club was inadequate as a matter of law.

3. Whether personal property added by the Tanner Defendants was after-acquired property and thus subject to a security interest in favor of Plaintiff.

DETERMINATIVE STATUTES

A copy of Utah Code Ann. § 57-1-31 prior to its 1985 amendment is reproduced in Appendix A and a copy of § 57-1-31 after its amendment in 1985 is reproduced in Appendix B.

STATEMENT OF THE CASE

Nature of the Case.

Plaintiff filed this action to judicially foreclose a deed of trust.

Course of Proceedings Below.

Plaintiff filed its Complaint to judicially foreclose a deed of trust on real property located in Utah County on December 10, 1987. Record at 1. The Tanner Defendants filed their Answer on January 5, 1988. Record at 81.

On November 21, 1988, Plaintiff filed a Motion for Summary Judgment, along with a Memorandum in Support thereof, the Affidavit of James W. Craig, and the Affidavit of Clark W. Sessions. Record at 308, 311, 355, 359. The Tanner Defendants responded in opposition to Plaintiff's Motion for Summary Judgment on December

19, 1988, record at 376, and filed their own Motion for Summary Judgment. Record at 374. On December 20, 1988, the Tanner Defendants filed the Affidavit of Darrell Tanner, record at 382, and Plaintiff filed a Motion to Strike Affidavit of Darrell Tanner on the grounds that the statements contained therein did not set forth specific facts showing that the statements were true as required by Utah R. Civ. P. 56(e). Record at 388.

Plaintiff filed a Reply to Tanner's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Response to Tanner's Motion for Summary Judgment, record at 391, and on March 10, 1989, filed a Notice to Submit for Decision and Request for Oral Argument. Record at 426. On March 22, 1989, the Tanner Defendants filed a Reply Memorandum in Support of Tanners' Motion for Summary Judgment, record at 484, and on March 29, 1989, Plaintiff filed a Motion to Strike the Tanner Defendants' Reply Memorandum in Support of Tanners' Motion for Summary Judgment and Memorandum in Support Thereof on the grounds that, among other things, the Tanner Defendants' Reply was untimely. Record at 491.

Plaintiff subsequently amended its Motion for Summary Judgment to omit any claims against Defendant Holladay Bank & Trust. Record at 477. On March 31, 1989, the Court heard oral argument on Plaintiff's and the Tanner Defendants' Motions for Summary Judgment, and on April 7, 1989, the Court issued its Memorandum Decision granting Plaintiff's Motion for Partial Summary Judgment. Record at 506.

On May 11, 1989, the Court executed and entered its Order granting Plaintiff's Motion for Partial Summary Judgment, record

at 577; the Judgment and Decree of Foreclosure, record at 582; and Order of Sale, record at 589.

The Tanner Defendants filed a Notice of Appeal on May 19, 1989. Record at 626. On May 22, 1989, the Court entered a Temporary Restraining Order, restraining the foreclosure sale of the subject property. Record at 629. On May 25, 1989, a hearing was held on the Tanner Defendants' Motion for Stay of Execution pending appeal and to set the amount of a supersedeas bond. The Court ordered that any foreclosure sale would be stayed pending the appeal of this matter upon the Tanner Defendants' posting of the subject property as a supersedeas bond so long as Defendant Darrell Tanner complied with certain conditions with respect to the property. However, an Order was never prepared by the Tanner Defendants for submission to the Court for execution and entry, and an undertaking on the property was never filed with the Court.

Statement of Facts.

On or about December 24, 1979, Sherwood Associates, by its general partners David R. Stewart and Wayne E. Pearce, executed in favor of Bettilyon Mortgage Loan Co. ("Bettilyon"), a Trust Deed Note ("Note") in the principal sum of \$1,200,000, payable, together with interest thereon, at the rate of 11 1/2% per annum until paid. Record at 313. A true and correct copy of the Note is reproduced in Appendix C. To secure payment of the Note, Sherwood Associates executed in favor of Bettilyon a Deed of Trust with Assignment of Rents ("Trust Deed") dated December 24, 1979, with respect to real property located in Utah County. Record at 313. A true and correct copy of the Trust Deed is reproduced in Appendix D.

In connection with the loan transactions evidenced by the Note and Trust Deed, Defendant Sherwood Associates executed a Security Agreement and a Financing Statement dated December 24, 1979, in favor of Bettilyon, which Security Agreement was duly filed with the office of the Lieutenant Governor/Secretary of State, State of Utah. The Financing Statement was recorded in the office of the Utah County Recorder. Record at 314-15. A copy of the Security Agreement is reproduced in Appendix E.

On or about December 24, 1979, the Osmond Defendants (Osmond Brothers Investment Trust, George V. Osmond, Trustee, and Olive Davis Osmond, Trustee; George V. Osmond, Olive Davis Osmond, Allan R. Osmond, Suzanna P. Osmond, Merrill D. Osmond, Mary C. Osmond, M. Wayne Osmond, Kathlyn L. Osmond, Donald C. Osmond, Debra A. Osmond, Jay W. Osmond, Olive Marie Osmond) and David R. Stewart, Durinda A. Stewart, Wayne E. Pearce and Carol Pearce, executed in favor of Bettilyon a certain Guaranty under which they guaranteed payments of all sums due under the Note and Trust Deed and timely performance of all obligations of Sherwood Associates contained in the Note and Trust Deed and collateral loan documents. Record at 315-16. A copy of the Guaranty is reproduced in Appendix F.

On or about January 2, 1980, Bettilyon executed and delivered to Washington National Insurance Co., the Plaintiff herein, an Assignment of Trust Deed under which Bettilyon transferred and assigned the beneficial interest in the Trust Deed to Plaintiff. On or about January 3, 1980, Bettilyon executed and filed with the office of the Lieutenant Governor/Secretary of State, State of Utah, an Assignment of the Financing Statement, which assigned to

Plaintiff the rights of Bettilyon under the Security Agreement and Financing Statement. Bettilyon also executed the Note over to Plaintiff. On or about April 10, 1980, Bettilyon assigned its interest in the Guaranty to Plaintiff. Record at 313, 314, 316.

On or about December 31, 1982, Defendant Darrell Tanner purchased the property described in the Trust Deed, record at 261, 265, 296, and on January 10, 1983, executed an Addendum to Guaranty of the obligations evidenced by the Note, Trust Deed and all of the loan documents and other documents evidencing the indebtedness to Plaintiff or executed in connection therewith by Sherwood Associates and/or the other Guarantors. Record at 344. A true and correct copy of the Addendum to Guaranty is reproduced in Appendix G.

The loan went in to default by reason of non-payment of installments due under the terms of the loan documents. The last payment received by Plaintiff was the April, 1987, payment received on or about May 1, 1987. Record at 317, 356. Plaintiff thereafter accelerated the Note according to its terms by letter dated November 30, 1987. Record at 317, 348. A copy of the November 30, 1987, letter is reproduced in Appendix H hereto. By said letter, Plaintiff demanded payment in full by December 7, 1987, indicating that if payment in full were not made by that date, "action will be commenced to collect the total sum due and owing, to foreclose the Trust Deed, to appoint a Receiver over the subject property, and to otherwise protect the interest of Washington National Insurance Company as by law provided together with costs and attorneys' fees." Record at 348.

Ridge Athletic Club responded to the November 30, 1987, letter with a tender purporting to tender payment of the delinquency due under the Note. Record at 352. A copy of the tender is reproduced in Exhibit I. Plaintiff objected to the tender on the grounds that the entire unpaid balance was due and owing, not just the delinquent amounts, and that Plaintiff doubted the ability of the Defendants to pay the tender. Record at 353. A copy of the December 8, 1987, letter is reproduced in Appendix J. Contrary to Darrell Tanner's Affidavit statement, record at 382, that he had the ability on December 7, 1987, the date of the tender, to cause Ridge Athletic Club to pay the full amount tendered, neither Ridge Athletic Club, nor Darrell Tanner had sufficient cash on hand or in a bank account to pay the tender. Deposition of Darrell Tanner at 50-51.

On December 10, 1987, Plaintiff filed its Complaint seeking judicial foreclosure of the Trust Deed. Record at 1. On Cross-motions for Summary Judgment, the Trial Court granted Plaintiff's Motion for Partial Summary Judgment, record at 577, and a final judgment for Plaintiff was entered on May 11, 1989. Record at 582.

SUMMARY OF ARGUMENT

Although statutes and amendments generally apply prospectively only, the United States Supreme Court, the Utah Supreme Court and courts of appeal of other states recognize that remedial or procedural statutes apply retrospectively to contracts in existence and to pending or accrued causes of action.

The 1985 amendment to Utah Code Ann. § 57-1-31 is remedial in nature and thus applies to the Trust Deed in this case. The 1985 amendment does not impair the obligations of the parties' contract.

In addition, the 1985 amendments merely ratified and made legal the express terms of the parties' contract. Accordingly, the amendment does not impair any terms of the contract of the parties.

Remedial and procedural statutes operate retrospectively in the sense that the applicable date for their application is the date of judgment and not the date the contract was executed. Even if the 1985 amendment only applied prospectively, the tender of Ridge Athletic Club dated December 7, 1987, was inadequate as a matter of law since neither Ridge Athletic Club nor Darrell Tanner had the ability to actually pay the tendered amount on that day.

Contrary to the Tanner Defendants' contentions, Plaintiff had clearly manifested its election to foreclose the Trust Deed in the manner provided by law for foreclosure of mortgages in its letter dated November 30, 1987, which warned that unless a sum certain was paid by December 7, 1987, Plaintiff would commence an action to foreclose the Trust Deed and have a receiver appointed over the property described in the Trust Deed.

Finally, Plaintiff's security interest in the personal property was granted by Sherwood Associates to Bettilyon, its successors and assigns, and bound not only Sherwood Associates, but also its successors and assigns. The Security Agreement also covered after-acquired property and as such any personal property added by the Tanner Defendants is appropriately part of the property to be sold.

ARGUMENT

POINT I

THE 1985 AMENDMENT TO SECTION 57-1-31 IS REMEDIAL AND APPLIES TO TRUST DEEDS EXECUTED PRIOR TO ITS EFFECTIVE DATE

In 1985, Utah Code Ann. § 57-1-31 was amended effective April 29, 1985. Prior to the 1985 amendment, § 57-1-31 provided in pertinent part as follows:

Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of such trust deed, taxes, assessments, premiums for insurance or advances made by the beneficiary in accordance with the terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, or, otherwise at any time prior to the entry of the decree of foreclosure, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed and the obligation secured thereby (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustees' and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

The 1985 amendment deleted the underlined phrase and made other minor changes in phraseology and punctuation.¹

A. Because the 1985 Amendment is Remedial, it Applies to Trust Deeds in Existence Prior to its Enactment.

Both the United States Constitution and the Utah Constitution provide that no laws shall be passed impairing the obligations of contracts. U.S. Const. art. I, § 10, cl. 1; Utah Const. art. I, § 18. Furthermore, Utah Code Ann. § 68-3-3 (1986) states: "No part of these revised statutes is retroactive unless expressly so declared."

Nevertheless, newly enacted statutes or amendments may apply retrospectively without express legislative intent if the statute or amendment affects remedial or procedural rights. Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 430 (1933); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1902); Tennessee v. Sneed, 96 U.S. 69, 74 (1877); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200 (1819); Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988); Pilcher v. State, 663 P.2d 450, 455 (Utah 1983); Foil v. Ballinger, 601 P.2d 144, 151 (Utah 1979); Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117, 119-20 (1909).

Significantly, the procedure elected by Plaintiff on the Defendants' default was that of judicial foreclosure pursuant to

¹Utah Code Ann. § 57-1-31 was also amended in 1981, subsequent to the execution of the Trust Deed. However, the Tanner Defendants make no claim that the pre-1981 version of § 57-1-31 applies in this case, and therefore, the pre-1981 version is not at issue. See South Carolina v. Gaillard, 101 U.S. 433 (1879) ("No question is raised in this case as to whether or not the act of 1877 impaired the [earlier] obligation of the contract of the State, which is contained in the bills of the bank, or the charter. By accepting the act and bringing suit under it, Trenholm conceded its validity.")

Title 78, Chapter 37 of the Utah Code Annotated. At the time Defendants defaulted under the terms of the loan documents, the 1985 amendments to Utah Code Ann. § 57-1-31 had been effective for some two years. Nevertheless, the pre-1985 version of § 57-1-31 appears to have allowed a trustor or his successor in interest to pay to the beneficiary the entire delinquency prior to the entry of the decree of foreclosure, thereby reinstating the trust deed if the beneficiary chose to judicially foreclose the trust deed. Whether the 1985 amendment, deleting the phrase "or, otherwise at any time prior to the entry of decree of foreclosure" altered a substantive right of the Tanner Defendants or merely altered the remedies available to the parties is at issue in this case.

The early case of Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), discussed the difference between an obligation of a contract and a remedy. The Court stated:

The law binds [a contract party] to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it.

. . .

The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.

Id. at 187, 200.

In Tennessee v. Sneed, 96 U.S. 69 (1877), the taxpayer was assessed property taxes in 1872 in payment of which the taxpayer

tendered bills of the Bank of Tennessee which a tax collector refused. In 1874, the taxpayer sought mandamus to compel the tax collector to receive the Bank of Tennessee bills in payment of the taxes. However, in 1873, the Tennessee Legislature passed a law providing that if a tax collector institutes a proceeding for the collection of taxes and the party against whom the proceeding is taken considers the proceeding to be unjust or illegal, the taxpayer shall pay the taxes under protest and within thirty days thereafter, sue the officer for recovery of the paid taxes. The 1873 Act further provided that the foregoing procedure was exclusive. The taxpayer claimed that the 1873 Act placed such impediments in the enforcement of the Bank of Tennessee charter as to render the contract obligation valueless. The Supreme Court recognized the plethora of cases holding that "the Legislature may alter and modify the remedy to enforce a contract without impairing its obligation." Id. at 73.

If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired.

The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right.

Id. at 74 (citations omitted). The Court held the 1873 Act did not impair the obligations set forth in the Bank of Tennessee charter.

Similarly, in Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1902), the Supreme Court held that remedies or procedures may be changed without impairing the obligation of contracts. Id. at 439.

In that case, the parties entered into contracts in 1883. In 1891, the city's charter was amended. The revised charter required those with an action against the city to present their claim or demand to the common council, with the right of appeal from the council on the posting of a cost bond. The waterworks company argued that the notice provisions impaired the obligation of its contracts with the city. The Court disagreed, stating:

It is well-settled that while, in a general sense, laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well-settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract.

Id. at 439 (emphasis added) (citations omitted).

In response to the Great Depression of the 1930s, the Minnesota Legislature passed a mortgage moratorium law which extended the time provided to a mortgagor to redeem his property after foreclosure sale so long as certain conditions were met. The United States Supreme Court upheld the mortgage moratorium law. In so holding, the Court noted that earlier case law established that the constitutional prohibition against impairment of contract obligations "is not an absolute one and is not to be read with literal exactness like a mathematical formula." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934).

The Court noted:

"[T]o assign to contracts, universally, a literal purport, and to exact from them a rigid literal fulfillment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfillment of contracts, as over the form and measure of the remedy to enforce them."

Id. at 429 (quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827)). The Blaisdell Court further stated:

Not only is the constitutional provision [prohibiting laws impairing the obligations of contracts] qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect."
. . . Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile, --a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

290 U.S. at 435 (emphasis added) (citations omitted).

The Utah Supreme Court has also recognized the difference between remedies and procedures and a party's substantive or vested rights, although not often in contract impairment cases. For example, in Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909), the Court held that a post-judgment amendment authorizing a trial court to make additional findings of fact and conclusions of law applied to all pending actions.

While it is true that a party's rights in a judgment, as a general rule, may not be affected by legislative acts passed or which become effective after the entry of judgment, the rule does not apply to laws which are

merely remedial, and which only affect matters of procedure or practice.

104 P. at 119.

Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948), indirectly involved the issue whether a later enacted amendment impaired the obligations of the contract of the parties. The amendment involved advisory juries in suits to foreclose mortgages and other liens. The Court stated:

The 1945 amendment does not deal with the substantive right of the parties on which they relied in their dealings with one another out of which this action arose, but only deals with the method, or machinery of determining what the facts are. . . . That is by nature a procedural rather than a substantive right. . . . Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause of action, as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective.

192 P.2d at 593-94.

Although the issues presented in this appeal appear to be of first impression, other states have passed laws regarding mortgages, trust deeds and their enforcement which have been held not to violate the constitutional prohibitions against impairment of contract obligations. In Columbian Building & Loan Co. v. Meddles, 34 Ohio L. Abs. 484, 35 N.E.2d 902 (1941), the mortgagors in 1927 executed a note and first mortgage, and later in that same year executed a second note and second mortgage. The holder of the first mortgage brought foreclosure proceedings in 1931, and in 1933, the Court found that no part of the proceeds from the sale of the mortgaged property were applied to the judgment rendered in favor of the second mortgagee, and that she had a deficiency

remaining for which judgment was rendered against the mortgagors. In 1939, a conditional order of revivor was issued on the motion of the second mortgagee's administrator. However, the mortgagor moved for an order setting aside the conditional order for the reason that the judgment was void and could not be revived by reason of a statute passed in 1937 and amended in 1939 which provided that deficiency judgments shall be unenforceable as to any deficiency remaining due after the expiration of two years from the date of the confirmation of the sale or two years from the effective date of the statute, whichever was later. The Court held that the statute related to a remedy and that it did not therefore violate the federal or state constitution. The Court stated:

The amendment to the effect that the judgment "shall be unenforceable as to any deficiency remaining due thereon, after the expiration of two years" brings the statute within the rules long recognized as to remedial rights. Parties to a contract have no vested interest in a particular limitation which has been fixed. They have no vested interest in time or the commencement of an action and as to the forms of action or modes of remedy. The Legislature may change these at its discretion, provided adequate means for enforcing the right remains.

35 N.E. 2d at 904 (citations omitted).

The 1937 law at issue in Columbian Building & Loan Co. was also at issue in Whalen v. Citizens Building & Loan Co., 67 Ohio App. 139, 36 N.E.2d 54 (1940). In that case, the Court held that the law did not impair existing contract obligations and stated:

It is well-settled in this state that no one has a vested right in an existing remedy, and a subsequently enacted section may curtail that remedy if a reasonable time is provided for assertion of the existing right. The fact that the law may, in such an instance, have a retroactive effect does not bring it within the inhibition of constitutional prohibition against enactment of retroactive laws. In each case, it becomes

a question of reasonableness of time within which the existing right may be asserted.

36 N.E. 2d at 55. In Whalen, the mortgagee did not take any steps to enforce the deficiency judgment within the two-year period following the statute's enactment, but only caused two certificates of judgment to be issued during that time. The Court held that the issuance of the certificates of judgment were not sufficient to keep the judgment alive.

Several Courts have held that statutes enacted subsequent to the execution of mortgages, which limit deficiency judgments to the amount by which the total indebtedness exceeds the fair market value or fair value of the property, is remedial in nature and therefore does not impair the constitutional prohibition against contract impairment. Guardian Depositors Corp. v. Powers, 296 Mich. 553, 296 N.W. 675 (1941); Tompkins County Trust Co. v. Herrick, 171 Misc. 929, 13 N.Y.S.2d 825 (Sup. Ct. 1939); Holloway v. Barrett, 87 Nev. 385, 487 P.2d 501 (1971); Alliance Trust Co. v. Hill, 196 Okla. 31, 164 P.2d 984 (1946).

In Guardian Depositors Corp., the defendant in a deficiency judgment action following foreclosure by advertisement was permitted to set off the difference between the price at which the property was sold and its fair value at the time of the sale. The Court noted that the Legislature "may modify and alter the manner and method of recovery as well as the time within which actions may be brought." 296 N.W. at 678. The Court quoted with approval the following propositions:

"It is within the power of the legislature to change the formalities of legal procedure."

"Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

"The rule seems to be that in modes of proceeding and of forms to enforce a contract, the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right."

"A statute is void as impairing the obligation of a contract if it takes away all remedy for the enforcement of the contract or if it leaves no substantial remedy therefor. Within these limitations, however, the Legislature may alter or abolish particular remedies, and may substitute one remedy for another."

Id. at 679 (citations omitted).

In Holloway v. Barrett, the Nevada Supreme Court, quoted Gelfert v. National City Bank, 313 U.S. 221 (1941), with approval:

"The formula which a Legislature may adopt for determining the amount of the deficiency judgment is not fixed and invariable. That which exists at the date of the execution of the mortgage does not become so embedded in the contract between the parties that it cannot be constitutionally altered."

487 P.2d at 505.

The foregoing cases which upheld subsequently enacted statutes or amendments limiting the time for bringing or enforcing deficiency judgments and limiting the amount of deficiency judgments were held to be remedial statutes and not statutes which impaired the obligations of contracts.

No less is the 1985 amendment to Utah Code Ann. § 57-1-31 remedial legislation. Although the 1985 amendment withdrew the trustor's ability to cure a deficiency if the beneficiary chose to judicially foreclose the trust deed, it must be remembered that the 1985 amendment took effect two years prior to the time the Defendants went into default under the terms of the loan documents.

In addition, the foregoing cases reveal that the obligations of a contract are the act the contract requires the parties to perform or abstain from performing. The Note and Trust Deed in this case required the Defendants to make installment payments when due. The contract prohibited Plaintiff from accelerating the entire amount due under the loan documents unless the Defendants were in default under the terms of the loan documents. The law relating to judicial foreclosure of mortgages and trust deeds and to trustee's sales under the trust deed statutes are remedial in nature, pertaining to the parties' remedies in the event of default.

Thus, because the 1985 amendment to Utah Code Ann. § 57-1-31 was remedial, it may be applied to trust deeds executed prior to its enactment.

B. When an Amendment or Statute Enacted Subsequent to the Execution of a Contract Makes Legal What the Parties Contracted for, There is No Impairment of Contract Obligations.

The Note executed by Sherwood Associates states that

[i]f default occurs for Five (5) business days in the payment of said installments of principal and interest or any part thereof, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable, whereupon the whole thereof shall bear interest at the rate of eighteen per cent (18%) per annum, or highest rate permissible under the laws of the State of Utah.

. . .

The makers, sureties, guarantors and endorsers hereby severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modification that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to release of any security, or any part thereof, with or without substitution.

See Appendix C (emphasis added).

The Trust Deed provides in pertinent part as follows:

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

. . .

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

See Appendix D (emphasis added).

Furthermore, the Guaranty provides:

Guarantors do hereby jointly and severally guarantee to Lender (1) prompt payment, when due, of any sums of money owing by Borrower to Lender by reason of a certain Trust Deed Note dated December 24, 1979 . . . (2) the full and timely performance of the terms and provisions of any instrument securing the payment of said Trust Deed Note; and (3) prompt payment, when due, of any and all sums of money at any time owing by Borrower to Lender by reason of, in connection with, or arising out of the aforescribed financing transaction.

. . .

The undersigned Guarantors hereby waive notice of the advancement of funds to Borrower by Lender and further waive notice of default, notice of extension for payment or performance of Borrower's indebtedness or obligations, presentment, demand for payment, protest and notice of protest.

See Appendix F (emphasis added).

The Addendum to Guaranty executed by Darrell Tanner provides:

1. Tanner hereby jointly and severally guarantees to Washington National, its successors or assigns, and agrees to pay any and all sums owing to Washington National by Sherwood as evidenced by said Note, said Trust Deed and all of the Loan Documents and other documents evidencing the Indebtedness or executed in connection therewith by Sherwood and/or the Guarantors.

2. Tanner adopts and agrees to be bound by the terms of the Guaranty . . . as though Tanner was a signatory thereto on the 24th day of December, 1979.

See Appendix G.

Thus, the loan documents themselves provided that upon default, Plaintiff had the option of immediately declaring all sums due and payable.

In Fogg v. Southeast Bank, 473 So. 2d 1352 (Fla. Dist. Ct. App. 1985), the Court held that an amendment enacted subsequent to the execution of a mortgage which exempted the mortgage from the operation of the original statute was a remedial statute which operated retrospectively. In that case, Fogg executed a promissory note and mortgage in 1981. The note, in the original amount of \$2,250,000 provided for principal payments of \$200,000 each on May 1, 1982, and May 1, 1983, with quarterly payments of interest and the balance of principal together with accrued interest due on May 1, 1984. The statute in effect when the mortgage was executed required a balloon mortgage legend to appear on the face of the mortgage. The mortgage did not contain the legend and was thus in violation of the original statute. The statute required a forfeiture of interest if the balloon mortgage did not contain the required legend on its face. In 1983, the balloon mortgage statute was amended to exempt from its operation mortgages securing

extensions of credit in excess of \$500,000. The mortgagor argued that the amendment should not apply to his mortgage because it would impair his property rights and cause him to be in default on the interest payments of his mortgage, allowing foreclosure. The mortgagor had withheld interest payments stating that he relied on the law in effect at that time. In upholding the constitutionality of the amendment as applied to the mortgage at issue, the Court stated:

Generally, statutes operate only prospectively as they might otherwise impinge upon vested rights or create new liabilities. On the other hand, statutes relating to remedies or procedure and including forfeitures operate retrospectively in the sense that all pending proceedings, including matters on appeal, are determined under the law in effect at the time of decision rather than that in effect when the cause of action arose or some earlier time.

Id. at 1353 (emphasis added).

The Court further stated that the amendment only exempted the mortgagor's mortgage from the penalty provision of the earlier statute. In response to the mortgagor's argument that the amendment placed him in default because of his failure to make interest payments, the Court stated: "Actually, appellant placed himself in default and exposed himself to foreclosure. It was his own fault that he was adversely affected by the amendment, as he had no right to withhold interest payments. Appellant in effect fashioned his own remedy for what he thought was an unlawful mortgage." Id. at 1355. The Court also stated:

In McNair v. Knott, 302 U.S. 369, 58 S.Ct. 245, 82 L.Ed. 307 (1937), the question was whether the National Bank Enabling Amendment of June 25, 1930, validated or made enforceable previous pledge agreements made to protect funds deposited before the amendment became effective. In that case, the receiver for a closed bank alleged that the pledge agreement was ultra vires and

illegal, and that it could not be validated by changing the law in force when the pledge agreement was made. The Supreme Court disagreed and said:

There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as "remedial," "curative," or "enabling," merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds, and other contracts. Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them.

473 So. 2d at 1356 (quoting McNair v. Knott, 302 U.S. 369, 372-74 (1937)) (emphasis added). The Fogg Court stated that "placing the stamp of legality on the mortgage, a contract which was created for the parties' mutual benefit took nothing away from either of them. The trial court therefore correctly applied the 1983 amendment . . . to this case." Id. at 1356.

Similarly, in Central Kentucky Production Credit Ass'n v. Smith, 633 S.W.2d 64 (Ky. 1982), the Kentucky Supreme Court held that a statute enacted subsequent to the execution of the parties' promissory notes and mortgage which act validated attorneys' fees agreement in notes and mortgages was not an unconstitutional impairment of the obligation of contracts. Prior to the 1980 enactment, contractual provisions for the allowance of attorneys' fees were held unenforceable as against public policy. The notes provided for the payment of reasonable attorneys' fees, and the mortgage provided that all sums advanced by the mortgagee including "'all costs, expenses and attorneys' fees permitted by law'" would

become part of the indebtedness secured by the mortgage. Id. at 65-66 (emphasis added).

In upholding the constitutionality of the statute allowing attorneys' fees, the Central Kentucky Court stated:

We are of the further opinion that [the statute] is remedial in nature and thus the controlling date for the application of the statute is the date of judgment and not the date of the execution of the instrument.

No contract rights of the parties have been impaired. On the contrary a public policy bar to enforcement of the express terms of the writing has been removed.

Id. at 66 (emphasis added).

General Motors Acceptance Corp. v. Anzelmo, 222 La. 1019, 64 So. 2d 417 (1953), involved a statute passed subsequent to the execution of a chattel mortgage which specifically allowed the right of executory process on movable property to creditors whose rights arose from acts under private signature, duly acknowledged. The right of executory process was not available to creditors at the time the chattel mortgage was executed. The chattel mortgage executed by the debtor stated that the mortgagor confessed judgment in favor of the vendor or subsequent holder for principal, interest, attorneys' fees and costs, and declared that if any installments were not paid at maturity, the vendor or future holder could seize the property covered by the mortgage and sell it under executory or other legal process.

The Court held that the statute which allowed executory process was remedial:

[The debtor's] obligations have not in anywise been rendered more burdensome; the defense which he could have asserted was nothing more than an opposition to the mode of procedure. Executory process is a remedy given by the Legislature to enforce obligations represented by a specified class of legal instruments. . . . It is the

settled law that remedial statutes and statutes governing procedure will be given retroactive effect in the absence of language showing a contrary intention.

64 So. 2d at 420 (citations omitted). With respect to the provision in the mortgage whereby the debtor confessed judgment and agreed to allow executory process, the Court stated:

This is the free and voluntary agreement of the obligor, signed without claim of duress. His argument loses all force in view of the fact that he confessed judgment in the manner prescribed by law, for the purpose of executory process; the fact that the procedural remedy he himself contracted for was in a form which at that time would not have authorized executory process does not detract from the validity of his confession of judgment.

Id.

The loan documents in this case provided that upon default, Plaintiff could immediately declare all amounts due and payable. The loan documents did not provide that if Plaintiff elected to accelerate and foreclose the Trust Deed in the manner provided by law for the foreclosure of mortgages, Defendants would nevertheless have the right to cure any deficiency up until the time the Decree of Foreclosure was entered. Although at the time the loan documents were executed, the Defendants apparently had that right, the 1985 amendment to Utah Code Ann. § 57-1-31 merely validated what the parties contracted for. The Tanner Defendants cannot now be heard to complain that the 1985 amendment impaired their contract obligations. Their contract obligations remain unchanged by the amendment.

C. The Controlling Date for the Application of Remedial or Procedural Statutes is the Date of Judgment and Not the Date of the Execution of the Instrument.

Remedial or procedural statutes operate retrospectively in the sense that the applicable date for their application is the date

of judgment, and not the date of the execution of the instrument. Fogg v. Southeast Bank, 473 So. 2d 1352, 1353 (Fla. Dist. Ct. App. 1985); Central Kentucky Production Credit Ass'n v. Smith, 633 S.W.2d 64, 66 (Ky. 1982); General Motors Acceptance Corp. v. Anzelmo, 222 La. 1019, 64 So. 2d 417, 420 (1953). See also Docutel Olivetti Corp. v. Dick Brady Systems, Inc., 731 P.2d 475 (Utah 1986) (in non-contract case, Court held that procedural statutes enacted subsequent to the commencement of a suit which do not enlarge, eliminate or destroy vested or contractual rights applied to accrued and pending actions as well as future actions); Pilcher v. State, 663 P.2d 450 (Utah 1983) (in non-contract case Court held that statutes facilitating recovery of existing child support debt which created no new obligations and destroyed no vested interests were remedial and procedural and therefore applied to accrued and pending actions); Petty v. Clark, 36 Utah 205, 192 P.2d 589 (1948) (in contract case, statute enacted subsequent to contract and commencement of suit with regard to advisory juries held remedial in nature and applicable to pending actions); Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909) (in non-contract case, Court held that statute allowing court to enter additional findings and conclusions enacted after judgment entered, remedial in nature and therefore applicable to pending actions).

Because the 1985 amendment to Utah Code Ann. § 57-1-31 was remedial in nature, the post-1985 version of § 57-1-31 applies since that was the statute in effect at the time judgment was entered in this case.

POINT II

AT THE TIME OF THE NOVEMBER 30, 1987, LETTER,
PLAINTIFF HAD ELECTED TO FORECLOSE THE TRUST DEED JUDICIALLY

The Tanner Defendants argue in Point III of their brief that even if the post-1985 version of Utah Code Ann. § 57-1-31 applies in this case, they had the right to cure at all times prior to Plaintiff's first manifest election to proceed by judicial foreclosure which, they argue, was on the day Plaintiff filed its Complaint, December 10, 1987. Because Ridge Athletic Club had tendered the delinquency on December 7, 1987, the Tanner Defendants argue that they were not in default at the time Plaintiff filed its Complaint. The Tanner Defendants' argument is fatally flawed for several reasons.

First, the Tanner Defendants argue that § 57-1-31 provides that a Trustor under a Trust Deed has a right to cure the default at any time within three months after the filing of a Notice of Default. "For contracts governed by the 1985 amendments, that right to cure can arguably be extinguished by electing to proceed by judicial foreclosure." Appellants' Brief at 14. However, the key provision of § 57-1-31 with respect to the Defendants' argument is that the Trustor can cure the default at any time within three months after the filing of a Notice of Default. There was no Notice of Default filed and recorded in this case. Thus, the Tanner Defendants cannot rely on § 57-1-31 for the proposition that they can cure a default at any time prior to the Beneficiary's election to proceed by judicial foreclosure. Obviously, if the Trustor were not in default under the terms of the loan documents,

a Beneficiary could not proceed with filing a Notice of Default or judicially foreclosing a Trust Deed.

Second, the Tanner Defendants argue that the November 30, 1987, letter does not contain a clear election to proceed by judicial foreclosure. However, the pertinent provisions of the November 30, 1987, letter, reproduced in Appendix H provide as follows:

This is to therefore advise that pursuant to Paragraph 27. of the Trust Deed and Paragraph 2. of the Trust Deed Note, Washington National Insurance Company hereby declares all sums secured by the Trust Deed immediately due and payable. Unless the total sum of \$1,103,528.73, together with interest at the per diem rate of \$327.37 from November 1, 1987, is received in the office of the undersigned on or before Monday, December 7, 1987, at 5:00 p.m., action will be commenced to collect the total sum due and owing, to foreclose the Trust Deed, to appoint a Receiver over the subject property and to otherwise protect the interest of Washington National Insurance Company as by law provided together with costs and attorneys' fees.

Appendix H (emphasis added). The phrase "foreclose the Trust Deed" and the phrase "appoint a Receiver over the subject property" permits no interpretation other than Plaintiff had elected to judicially foreclose the Trust Deed. Nowhere in the Trust Deed statutes, Utah Code Ann. §§ 57-1-19 through -36 (1986 and Supp. 1989), does the word "foreclose" or its derivations appear other than in § 57-1-23 which states that "at the option of the beneficiary a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property." Foreclose is a term of art. When the power of sale conferred on a Trustee by § 57-1-23 is exercised, the Trust Deed is not "foreclosed;" rather, the Trustee's Deed operates to convey to the purchaser without a right of redemption in the Trustor, the

Trustee's title and all the Trustor's right, title, interest, and claim in the property sold. Utah Code Ann. § 57-1-28(2) (1986).

Moreover, receivers cannot be appointed in non-judicial proceedings such as proceedings for Trustees' Sales. Utah Rule of Civil Procedure 66 states: "A receiver may be appointed by the court in which an action is pending or has passed to judgment:". Thus, an action or lawsuit must be instituted before a receiver can be appointed. The Trust Deed statutes do not provide for the appointment of a receiver.

Third, the loan documents provide the Plaintiff could declare the entire principal balance and accrued interest due and payable without notice or demand. See second paragraph of Note, Appendix C. In addition, the Guarantors expressly waived notice of dishonor and nonpayment of the Note. See fourth paragraph of Note, Appendix C; fifth paragraph of the Guaranty, Appendix F; and paragraph numbered 2 of the Addendum to Guaranty, Appendix G.

Thus, at the time Ridge Athletic Club tendered the delinquency, Plaintiff had already accelerated the entire principal balance and accrued interest and the Tender was consequently untimely and inadequate. See Romero v. Schmidt, 15 Utah 2d 300, 392 P.2d 37 (1964) (in judicial foreclosure of real estate contract, tender of delinquency must be made before balance accelerated).

POINT III

EVEN IF THE 1985 AMENDMENT TO SECTION 57-1-31
DOES NOT OPERATE RETROACTIVELY,
RIDGE ATHLETIC CLUB'S TENDER WAS INADEQUATE AS A MATTER OF LAW

Even if the Tanner Defendants are correct in their assertion that the pre-1985 version of Utah Code Ann. § 57-1-31 applies in this case, Ridge Athletic Club's December 7, 1987, tender of the delinquency due and owing was inadequate as a matter of law. Utah Code Ann. § 78-27-1 (1987) provides that "[a]n offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument or property." Section 78-27-3 (1987) provides that

[t]he person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards.

On receipt of Ridge Athletic Club's tender, counsel for Plaintiff immediately responded by letter dated December 8, 1987. See Appendix J. The December 8, 1987, letter specifically set forth Plaintiff's objections to Ridge Athletic Club's tender, stating that the amount tendered was insufficient and that Plaintiff doubted Ridge Athletic Club's ability to make the tender good based on earlier promises of Darrell Tanner to cure the deficiency. Thus, under § 78-27-3, Plaintiff did not waive any objections it had to Ridge Athletic Club's tender.

Hyams v. Bamberger, 10 Utah 3, 36 P. 202 (Utah 1894), set forth the requirement that in order for a Tender to be "equivalent

to the actual production and tender of the money," the party tendering must have the ability to produce it, and must act in good faith. 36 P. at 203.

Ridge Athletic Club did not have the ability to produce the amount tendered on the date of the tender. In support of the Tanner Defendants' Motion for Summary Judgment, and in opposition to Plaintiff's Motion for Summary Judgment, the Tanner Defendants' submitted the Affidavit of Darrell Tanner which stated in pertinent part, "On December 7, 1987, I had the ability to cause Ridge Athletic Club, Inc., to pay the sum of \$119,200 as indicated in the tender. . . . The tender was made in good faith." Record at 382. The foregoing statements were made without any factual basis set forth in the Affidavit, and Plaintiff accordingly filed a Motion to Strike Affidavit of Darrell Tanner, asserting that Rule 56(e) of the Utah Rules of Civil Procedure requires that affidavits submitted by the adverse party must set forth specific facts showing there is a genuine issue for trial. Record at 388. Plaintiff thereafter took the Deposition of Darrell D. Tanner and queried whether the \$119,200 was available to him when the tender was made. Defendant Tanner answered in the affirmative. Deposition of Darrell D. Tanner at 44. In response to the question concerning the source of the funds available to Defendant Tanner to meet the tender amount, Tanner stated that a loan was closing with Citicorp for considerably more than the \$119,200. Id. However, Defendant Tanner testified that the first advance on the loan was not made until December 31, 1987. Id. at 46. In response to further questioning concerning his ability to make good the

\$119,200 tender on December 7, 1987, Defendant Tanner testified as follows:

Q. All right. When I asked you what the source of the funds were available to make the \$119,200 tender, you indicated there were several sources and that this [the Citicorp loan] was one.

A. We had various company bank accounts that had funds in them also.

Q. \$119,200?

A. Well, we may not have had that much in the bank, but we could have gone and got an advance from our banks against the Citicorp closing. You know, there's a number of ways to do it.

Q. Did you have \$119,200 available to you on December 7, 1987?

A. Yes, we could have -- you know, if Washington National had accepted the tender, we'd have simply gone down to the bank -- with a combination of our bank accounts and the Citicorp deal, we could have just gone down, taken an advance on that from our bank, you know, in one day.

. . . .

Q. Besides advances that you believe you could have received from your local banks, did you have any other sources available to you --

A. Yes.

Q. -- that had \$119,200?

A. Yes. If I needed to, I didn't need to, but if I needed to I could have called my brother and got it in a day.

Q. Let me ask you this question: Did you have \$119,200 cash in hand on December 7, 1987?

A. Yes.

Q. Explain.

A. Well, I just did.

Q. Well, I understood that you could have --

A. I have credit lines at the bank. I could go draw against the credit line, one. I could call my brother and take an advance from him if I didn't have any other way to do it.

Q. In your personal account or in the Ridge Athletic Club --

A. Or a combination, or I could have taken it out of bank accounts, the combination.

. . . .

Q. In your bank accounts or in any Ridge Athletic Club bank accounts, was there \$119,200 in the accounts on December 7, 1987?

A. Well, I think you need to ask that again because that doesn't quite give me the whole picture. Would you repeat that question?

. . . .

Q. Did you have \$119,200 in any of your personal bank accounts on December 7 --

A. I don't even have a personal bank account.

. . .

Q. What about Ridge Athletic Club? Did the corporation have 119 --

A. The corporation did not have \$119,000 in their bank account.

Q. On December 7 --

A. No.

Q. -- 1987?

A. We don't carry that kind of money in that bank account, never have and never will, regardless of what it's making.

Deposition of Darrell Tanner at 48-51.

The Amended Notice of Taking Deposition (of Darrell Tanner) filed January 10, 1989, record at 402, requested that Darrell Tanner bring with him to his deposition "any and all documents, writing, notes, and memoranda, letters, or any other writing or document tending to support the allegations contained within the Affidavit of Darrell Tanner dated December 19, 1988. . . ." In response to the document request in the Amended Notice of Deposition, Darrell Tanner produced documents relating to the Citicorp loan. Deposition of Darrell Tanner at 56. All of the documents produced by Mr. Tanner, some of which were attached as Exhibits 6-10 to his Deposition, revealed that the first date Tanner or related persons or entities received any advances on the Citicorp loan was December 31, 1987, some three and one-half weeks subsequent to the date of the tender. See Exhibits 6-10 to Deposition of Darrell Tanner; Deposition of Darrell Tanner at 56-63.

Thus, despite Darrell Tanner's unsupported Affidavit allegations that he had the ability to cause the Ridge Athletic Club to pay the tendered amount on December 7, 1987, record at 382,

Mr. Tanner's own testimony reveals that neither he nor the Ridge Athletic Club had \$119,200 on hand on December 7, 1987. Consequently, even if the Tanner Defendants had the right to cure only the delinquency amount on December 7, 1987, Ridge Athletic Club's tender of \$119,200 was inadequate as a matter of law.

POINT IV

PLAINTIFF HAS A SECURITY INTEREST IN ANY PERSONAL
PROPERTY ADDED BY THE TANNER DEFENDANTS WHICH
WAS PROPERLY FORECLOSED AND INCLUDED IN
THE ORDER OF SALE.

Plaintiff is entitled to foreclose on all personal property which was placed on the real property by the Tanner Defendants and which falls within the definition of "personal property" as set forth in the Order of Sale. The Order of Sale provides:

It is further ordered that the equipment, furniture, fixtures, furnishings and other property described in said Judgment and Decree of Foreclosure and more particularly described as follows be sold at public auction:

All machinery, equipment, material, appliances and fixtures installed or placed by Debtor in the premises for the generation and distribution of air, water, heat, electricity, light, fuel or refrigeration, or for ventilating or air-conditioning purposes, or for sanitary or drainage purposes, or for the exclusion of vermin or insects, or for the removal of dust, refuse or garbage, and including all awnings, window-shades, draper [sic] rods and brackets, screens, floor coverings, incinerators, carpeting and all furniture and fixtures used in the operation of the buildings, together with all additions to, substitutions for, changes, in or replacements of the whole or any part of any or all of said articles of property.

Record at 589 (emphasis added).

The term "debtor" has the following common sense meaning which need not be defined in the Order of Sale: "One who owes a debt;

he who may be compelled to pay a claim or demand; anyone liable on a claim, whether due or to become due." Black's Law Dictionary 364 (5th ed. 1979) (emphasis added). The Tanner Defendants were specifically found to be jointly and severally liable along with the other Defendants on the claims of Plaintiff in the Judgment and Decree of Foreclosure referenced in the Order of Sale, and thus fall within the common definition of "debtor." Record at 582. The Order of Sale therefore unambiguously directs the sale of personal property installed or placed by the Tanner Defendants on the real property for any of the enumerated purposes.

As such, the Order of Sale grants Plaintiff relief to which it is specifically entitled under applicable case law and the Utah Uniform Commercial Code. The definition of "personal property" set forth in the Order of Sale tracts nearly verbatim the wording of the Security Agreement under which Defendant Sherwood Associates pledged as additional security for the repayment of the indebtedness evidenced by the Note all "present and future" machinery, equipment, material, appliances and fixtures "now or hereafter" installed or placed by Sherwood Associates in the subject property (including all proceeds thereof). Appendix E. Defendant Sherwood Associates then transferred its rights in Plaintiff's collateral to the Tanner Defendants pursuant to the Sale Agreement between Sherwood Associates, Darrell D. Tanner, and the Osmond Brothers Partnership, record at 265, and the Addendum to Guaranty executed by Darrell D. Tanner, Appendix G. Such transfer is permitted by Utah Code Ann. § 70A-9-311 (1980) which

provides: "[t]he debtor's rights in collateral may be voluntarily or involuntarily transferred. . . ."

Utah Code Ann. § 70A-9-306(2) (1980) provides:

[A] security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the Security Agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

Where the security agreement covers after-acquired property, the security interest also continues in or attaches to the after-acquired property of the transferee of the collateral. Inter Mountain Ass'n of Credit Men v. Villager, Inc., 527 P.2d 664, 670-71 (Utah 1974); Smiley v. Wheeler, 602 P.2d 209, 211-12 (Okla. 1979); American Heritage Bank & Trust Co. v. O. & E., Inc., 40 Colo. App. 306, 576 P.2d 566, 568 (1978).

In Villager, Inc., the Court relied not only on the provisions of Utah Code Ann. § 70A-9-306(2) (1980), but also the fact that the security agreement expressly provided that the parties therein should include the successors or assigns of the parties in concluding that the after-acquired property of the transferee or assignee was subject to the security interest. 527 P.2d at 670-71. The Security Agreement in this case contains a similar provision. It states: "This Agreement binds each Debtor, their respective heirs, personal representatives, successors, and assigns, and inures to the benefit of Secured Party, its successors and assigns." Appendix E.

Further, the Security Agreement expressly prohibits the disposition of the collateral without the written consent of the secured party, Plaintiff. Appendix E. In general, there must

either be actual prior or subsequent consent in writing by the secured creditor manifesting a purpose to authorize the disposition free of the security interest, in order for a court to find an authorization permitting disposition free of the security interest within the meaning of § 9-306(2) of the Uniform Commercial Code. Central California Equipment v. Dolk Tractor, 78 Cal. App. 3d 855, 144 Cal. Rptr. 367, 371 (1978). Mere acquiescence is insufficient. Id. While the "or otherwise" language of § 9-306(2) permits an implied agreement, such an agreement should be found with extreme hesitancy and should generally be limited to the situation of a prior course of dealing with the debtor permitting disposition. Id. See also Matter of Matto's, Inc., 8 Bankr. 485 (Bankr. E.D. Mich. 1981) (the term "otherwise" is not satisfied by any form of consent which does not clearly and unambiguously authorize disposition of the collateral free of the security interest).

The Addendum to Guaranty, Appendix G, specifically provides that the transfer of the collateral to the Tanner Defendants is subject to the following reservations of rights by Plaintiff:

[T]he Guarantors and Sherwood are in no way released, discharged or excused from performance under any of the Loan Documents including their respective obligations in connection with the payment of the indebtedness.

"Loan documents" is defined as the Trust Deed Note, the Trust Deed with Assignment of Rents, and other documents executed by Sherwood and/or the Guarantors in connection with the loan. Furthermore, Tanner guaranteed and agreed to pay any and all sums owing to Plaintiff "as evidenced by . . . all of the Loan Documents and other documents evidencing the Indebtedness or executed in connection therewith by Sherwood and/or the Guarantors." Appendix

G. The Security Agreement executed by Defendant Sherwood Associates in connection with the loan is one of the loan documents. Not only did Plaintiff not manifest a purpose to authorize the transfer of the collateral free of the security interest, but the parties agreed that the transfer would be made subject to the security interest. Under such circumstances, the transfer of the collateral is made subject to the security interest of the creditor. See Matter of Franchise Systems, Inc., 46 Bankr. 158 (Bankr. N.D. Ga. 1985), In re Southern Properties, Inc., 44 Bankr. 838 (Bankr. E.D. Va. 1984).

With respect to the Tanner Defendants' remaining contention that Plaintiff did not pray for the sale of any personal property added by the Tanner Defendants, the law in Utah is clear that

every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Utah R. Civ. P. 54(c)(1).

Plaintiff specifically asserted in its Complaint that "Plaintiff is entitled to foreclose its [security] interest as provided by law and to apply the proceeds of the sale to the indebtedness evidenced by the Note." Record at 1. As previously discussed, its security interest continued in the collateral sold to the Tanner Defendants and the personal property added to the real property by the Tanner Defendants. Plaintiff's assertion that it was entitled to foreclose on the security interest includes foreclosure on the additions made by the Tanner Defendants. The Order of Sale properly granted Plaintiff relief in the form of the directed sale of the personal property added to the real property

by the Tanner Defendants, despite any alleged failure to include such claim for relief in the prayer for relief. Record at 589.

The Order of Sale provides for the sale of any personal property placed on the premises by the "Debtor" and requires no clarification inasmuch as the Tanner Defendants are debtors pursuant to the Security Agreement. In the alternative, if the case should require remand to clarify the Order of Sale, the Court should direct that the Order of Sale provide that Plaintiff is entitled to foreclose on the personal property placed on the premises by the original debtor, Sherwood Associates, and its successors and assigns which include Darrell Tanner and the other Tanner Defendants.

CONCLUSION

The 1985 amendment to Utah Code Ann. § 57-1-31 was remedial in nature and thus applied retroactively to the Trust Deed and related loan documents executed in favor of Plaintiff. Accordingly, since Plaintiff had accelerated the entire principal balance, accrued interest and other charges on November 30, 1987, and had clearly elected, by its November, 30, 1987 letter to judicially foreclose the Trust Deed, Ridge Athletic Club's tender of the delinquency was untimely and inadequate. The 1985 amendment withdrew any right the Defendants may have had to cure a delinquency prior to the entry of a decree of foreclosure.

In addition, even if the 1985 amendment to § 57-1-31 operated prospectively, Ridge Athletic Club's tender was inadequate as a matter of law since neither Ridge Athletic Club nor Darrell Tanner

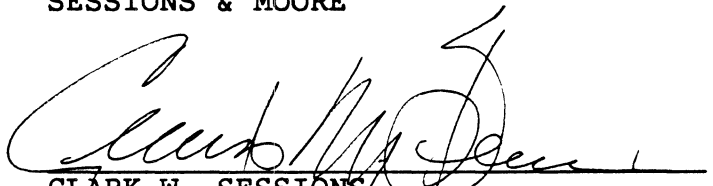
had the ability on the date of the tender to pay the tendered amount.

Plaintiff has a security interest in any personal property added by the Tanner Defendants under terms of the Security Agreement, Sale Agreement between Darrell Tanner, Sherwood Associates and Osmond Brothers Partnership, and the Addendum to Guaranty executed by Darrell Tanner. Consequently, Plaintiff's security interest in such personal property added to the real property by the Tanner Defendants was properly foreclosed and included in the Order of Sale.

Plaintiff respectfully requests that this Court affirm the Order granting Summary Judgment, the Judgment and Decree of Foreclosure and the Order of Sale in all respects.

DATED this 20 day of November, 1989.

SESSIONS & MOORE

A handwritten signature in black ink, appearing to read "Clark W. Sessions", is written over a horizontal line.

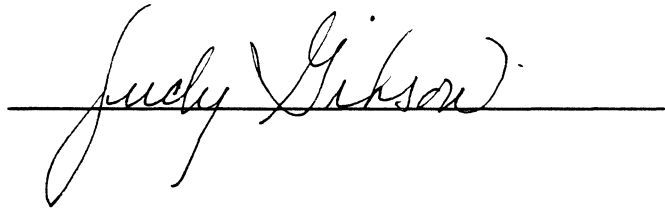
CLARK W. SESSIONS
CYNTHIA K. CASSELL

Attorneys for Plaintiff Washington
National Insurance Company

CERTIFICATE OF SERVICE,

I HEREBY CERTIFY that on the 20th day of November, 1989, I mailed four true and correct copies of the foregoing BRIEF OF RESPONDENT, first-class, postage prepaid, to:

Jackson Howard, Esq.
Leslie W. Slaugh, Esq.
HOWARD, LEWIS & PETERSEN
Attorneys for Appellants
120 East 300 North
Provo, Utah 84601

A handwritten signature in cursive script, reading "Judy Gibson", is written over a horizontal line.

APPENDICES

APPENDIX A

PERTINENT PROVISIONS OF THE PRE-1985
VERSION OF UTAH CODE ANN. § 57-1-31

Utah Code Ann. § 57-1-31 in pertinent part prior to 1985 amendment:

Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of such trust deed, taxes, assessments, premiums for insurance or advances made by the beneficiary in accordance with the terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, or, otherwise at any time prior to the entry of the decree of foreclosure, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed and the obligation secured thereby (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustees' and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

APPENDIX B

PERTINENT PROVISIONS OF UTAH CODE ANN § 57-1-31
WITH 1985 AMENDMENT

Utah Code Ann. § 57-1-31 in pertinent part following 1985 amendment:

(1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance or advances made by the beneficiary in accordance with the terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustees' and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

APPENDIX C

TRUST DEED NOTE

1412-177
400.10
TRUST DEED NOTE

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

U. S. \$1,200,000.00

Salt Lake City, Utah
December 24th, 1979

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay in U. S. Funds to the order of BETTILYON MORTGAGE LOAN CO., at its Salt Lake Office in Salt Lake City, Utah or at such other place, as the holder hereof may designate, ONE MILLION TWO HUNDRED THOUSAND and NO/100 - - - - - DOLLARS (\$1,200,000.00) together with interest from date at the rate of ELEVEN and ONE-HALF (11.5%) per annum on the unpaid principal, said principal and interest payable in U. S. Funds as follows: TWELVE THOUSAND EIGHT HUNDRED and NO/100 - - - - - DOLLARS (\$12,800.00) on the 1st day of FEBRUARY, 1980, and the same amount on the same day of each succeeding month until JANUARY 1, 2000, when the entire unpaid principal with accrued interest shall become due and payable. Each payment shall be applied first to accrued interest and the balance to the reduction of principal. If any such installment or any part thereof is not paid within Five (5) business days after the due date hereof, the undersigned shall pay, at the option of the holder hereof, a "late charge" of SIX per cent (6%) of the delinquent installment to cover the extra expense involved in handling delinquent payments.

If default occurs for Five (5) business days in the payment of said installments of principal and interest or any part thereof, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable, whereupon the whole thereof shall bear interest at the rate of eighteen per cent (18%) per annum, or highest rate permissible under the laws of the State of Utah.

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

The makers, sureties, guarantors and endorsers hereby severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modification that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith. The undersigned expressly states that this Trust Deed Note is made for business purposes.

PREPAYMENT PRIVILEGE:

The loan will be closed to prepayment for the first ten years. Thereafter, the Borrower will be permitted to prepay the loan in full during the eleventh year at 105%, decreasing 1/2 of 1% per year to a minimum of 101%.

Loan year means any twelve-month period commencing on the first principal and interest installment date, and on every yearly anniversary thereafter.

Thirty days written notice is required for any prepayment.

Payment during foreclosure will constitute a prepayment. Such payments, to the extent permitted by law, will therefore include the premium required under the prepayment privilege, or, if at that time there shall be no privilege of prepayment, a premium of ELEVEN and ONE-HALF (11.5%) percent of the principal balance outstanding, shall be due and payable. In the event a tender of payment of the amount necessary to satisfy the entire indebtedness evidenced by the Trust Deed Note and Trust Deed is made at any time prior to the sale under foreclosure of the Trust Deed, it will constitute an evasion of the prepayment terms and be deemed to be voluntary prepayment.

SHERWOOD ASSOCIATES, a Utah Limited Partnership


Wayne E. Pearce
Wayne E. Pearce, General Partner

By David R. Stewart
David R. Stewart, General Partner

ORIGINAL

Pay to the order of: WASHINGTON NATIONAL
INSURANCE COMPANY, without recourse.

BETTERLYON MORTGAGE LOAN CO.



Hoyt S. Wimer, Vice President

APPENDIX D

TRUST DEED

WHEN RECORDED, MAIL

40010

BETTILYON MORTGAGE LOAN CO.

P.O. BOX 15749

SALT LAKE CITY, UTAH 84115

Space Above This Line For Recorder's Use

50572

TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 24th day of DECEMBER, 1979.

between SHERWOOD ASSOCIATES, A Utah Limited Partnership

, as TRUSTOR,

whose address is 4303 North Foothill Drive, Provo, Utah

STEWART TITLE GUARANTY COMPANY, Provo, Utah

, as TRUSTEE,* and

BETTILYON MORTGAGE LOAN CO., Salt Lake City, Utah

, as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,

WITH POWER OF SALE, the following described property, situated in UTAH
County, State of Utah:

Commencing at a point which is SOUTH 79.94 feet and WEST 980.57 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 68° 25' East 417.00 feet; thence North 84° 57' East 160.00 feet; thence South 81° 31' 52" East 102.97 feet; thence along the arc of a 766.41 foot radius curve to the right 168.13 feet, the chord of which bears North 27° 17' 05" West 167.80 feet; thence along the arc of a 286.93 foot radius curve to the left 137.72 feet, the chord of which bears North 34° 45' West 136.40 feet; thence North 48° 30' West 178.86 feet; thence along the arc of a 1002.77 foot radius curve to the right 166.26 feet, the chord of which bears North 43° 45' West 166.08 feet; thence North 39° 00' West 250.32 feet; thence along the arc of a 2628.32 foot radius curve to the right 49.55 feet, the chord of which bears North 38° 27' 34" West 49.55 feet; thence South 52° 04' 48" West 362.79 feet; thence South 0° 40' 42" West 335.65 feet; thence South 20° 24' 30" West 98.88 feet; thence South 65° 06' 39" East 39.08 feet; thence South 35° 52' 55" East 41.26 feet; thence South 70° 42' 19" East 53.96 feet; thence South 55° 05' 10" East 54.25 feet; thence South 25° 31' 15" West 179.58 feet; thence South 24° 17' 45" East 58.84 feet; thence South 64° 06' 15" East 48.30 feet; thence North 50° 17' 13" East 158.78 feet to the point of beginning.
Containing 10.788 acres.

LESS 0.410 acre of OSMOND BROTHERS (Parcel A), A Utah Partnership.

Commencing at a point which is North 425.65 feet and West 895.81 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 24° 59' 48" West 158.00 feet; thence South 65° 00' 12" West 113.00 feet; thence South 24° 59' 48" East 158.00 feet; thence North 65° 00' 12" East 113.00 feet the point of beginning.
Containing 0.410 acres.

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

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$1,200,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

50572

BOOK 1803 PAGE 235

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES:

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

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

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

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

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

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

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

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

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

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ~~ten~~ eighteen per cent (18%) per annum until paid, and the repayment thereof shall be secured hereby. eighteen per cent (18%) or highest rate permissible under the laws of the State of Utah. *WEP*

IT IS MUTUALLY AGREED THAT:

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

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

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

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

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

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

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

SHERWOOD ASSOCIATES, A Utah Limited Partnership

BY: *David R. Stewart*

DAVID R. STEWART, General Partner

BY: *Wayne E. Pearce*

WAYNE E. PEARCE, General Partner

15. Trustors agree to provide and maintain the following insurance coverage written with companies having a Best's rating of A+ or A with mortgagee clauses in favor of the Beneficiary.

- 1) Fire and Extended Coverage Insurance for the full insurable value.
- 2) Public Liability Insurance in amount and terms acceptable to Beneficiary.
- 3) Business Interruption Insurance in the amount of \$533,000.00.
- 4) Other required insurance.
- 5) All policies shall be kept in force by the Borrower for the life of the loan and shall be held as directed by Beneficiary.

16. Trustor agrees that upon demand of the Beneficiary, Trustor will pay to Beneficiary on the first day of each month until the note secured hereby is fully paid, together with and in addition to the monthly payments of principal and interest set forth in the Trust Deed Note; (a) An installment of the taxes and assessments levied or to be levied against said property, and an installment of the premium or premiums that will become due and payable to renew the insurance on the improvements on said property. Such installment shall be equal, respectively, to the estimated premium or premiums for such insurance and taxes and assessments next due (as estimated by Beneficiary) less all installments already paid therefore, divided by the number of months that are to elapse before one month prior to the date when such premium or premiums and taxes and assessments will become due. The Beneficiary shall use such monthly payments to the extent that they will suffice to pay such premium or premiums and taxes and assessments when due. Beneficiary or its Assignee will not pay Trustor interest with respect to the funds held, as outlined above.

(b) All monthly payments mentioned in the preceding sub-section (a) of Paragraph 16, and all payments to be made under the Trust Deed Note secured hereby shall be added together and the aggregate amount thereof shall be paid by Trustor each month on the date specified in said Trust Deed Note for the payment of monthly installments in a single payment to be allocated by Beneficiary to the following items in the order set forth:

- i Taxes, assessments, insurance premiums;
- ii Interest on the indebtedness secured hereby;
- iii Amortization of the principal of the indebtedness secured hereby.

Any deficiency in the amount of any such aggregate monthly payment shall constitute an event of default under this Trust Deed.

If the total of the payments made by Trustor under (a) hereof shall exceed the amount of payments actually made by Beneficiary for taxes and assessments, or insurance premium, as the case may be, such excess, at the election of Beneficiary, shall be credited on subsequent payments to be made by Trustor for such items. If there shall be a default under any of the provisions of this Trust Deed resulting in a sale of the property covered hereby, or if Beneficiary acquires said property otherwise after default, Beneficiary may apply, at the time of the commencement of such proceedings, or at the time said property is otherwise acquired, the amount then remaining to the credit of Trustor under (a) thereof, as a credit on the interest accrued on the note to said date, and the balance, if any, in reduction of the principal amount of said indebtedness.

17. Trustor agrees to supply Beneficiary a certified annual operation statement for the subject property and copies of Sherwood Associates audited annual statements within ninety (90) days after the close of each calendar or fiscal year during the term of this mortgage.

Said statement shall contain at least the following information:

- | | |
|-------------------------------------|---|
| A. Current Rent Roll, Tenant Roster | E. Federal & State Income Tax |
| B. Gross Rental Income | F. Operating Expenses in Reasonable Detail |
| C. Other Income and Source | G. Depreciation Deduction (for Federal Income Tax purposes) |
| D. Real Estate Taxes | H. Insurance |

The statements are to be prepared by a C.P.A. in good standing.

18. Upon the occurrence of any of the following events, the Beneficiary will have the right to call the loan and make demand for payment of the unpaid principal and interest balance in full, including Prepayment penalty as outlined in Paragraph 25.

(a) Failure of Trustors to furnish annual operation statements as provided in Paragraph 16. Insolvency or business failure or the appointment of a permanent Receiver for any of the Trustors or appointment of a Receiver for the property or an assignment for the benefit of creditors, by, or the filing of a petition under bankruptcy, receivership, insolvency or debtor relief or the pendency of any such petition undismissed for a period of 30-days against any endorser or guarantor hereof or any person now or hereafter liable, absolutely or contingently for the payment of the whole or a part of this mortgage; (b) or in the event the described property shall be sold or if any person shall gain an interest in the property by deed, contract or other conveyance without prior written consent of Beneficiary, or by operation of law.

(over)

SHERWOOD ASSOCIATES, a Utah Limited Partnership

By: David R. Stewart
David R. Stewart, General Partner

By: Wayne E. Pearce
Wayne E. Pearce, General Partner

19. EMINENT DOMAIN:

The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation of or injury to the property, or part thereof, or for conveyances in lieu of condemnation, are hereby assigned and shall be paid to the Beneficiary.

20. Trustor agrees that in the event any of the subject property is sold during the term of this Trust Deed, without the prior written approval of the Beneficiary, the Beneficiary reserve the right to either call the loan or approve the purchaser as a satisfactory purchaser or trustor. Trustor agrees that no secondary financing is permitted on the secured property without the prior written approval of the Beneficiary. Approval or disapproval of the above shall not be unreasonably withheld by the Beneficiary.

21. UNIFORM COMMERCIAL CODE:

It is agreed that if any part of said premises is of a nature so that the security interest therein can be perfected under the Uniform Commercial Code, as adopted and in effect from time to time in Utah, this instrument shall constitute a Security Agreement and Trustor agrees to join with the Beneficiary in the execution of any financing statement and to execute any other instruments that may be required for the perfection or renewal of such security interest under said Uniform Commercial Code.

22. ASSIGNMENT OF RENTS AND PROFITS:

As additional security and collateral for the indebtedness secured by this Trust Deed, trustor agrees to the terms and conditions of the Assignment of Rents and Profits of even date executed by the trustor covering the subject property.

23. That as additional and collateral security for the payment of the indebtedness, Trustor hereby assigns to Beneficiary all of the bonus, rents, royalties, rights and benefits accruing under all oil, gas or mineral leases on said property, or which may hereafter be placed thereon, including all water and riparian rights, and the lessee or assignee or sublessee is hereby directed upon production by the holder of the indebtedness secured hereby of a certified copy thereof, to pay said bonus, rents, royalties, rights, and benefits to the owner of said debt; this provision to become effective, however, only upon secured, such direction to terminate and become null and void upon payment of the indebtedness hereby secured. Any amount received by Beneficiary under this provision shall be applied to the reduction of indebtedness secured hereby.

24. The Trustors hereby waive any and all rights of redemption from sale under any order or decree of foreclosure of this Trust Deed on its behalf and on behalf of each and every person except decree or judgment creditors of the Trustors; acquiring any interest in or title to the premises subsequent to the date of this Trust Deed. Trustor hereby waives any and all redemption rights in the event of Foreclosure.

25. PREPAYMENT PRIVILEGE:

The loan will be closed to prepayment for the first ten years. Thereafter the Borrower will be permitted to prepay the loan in full at 105%, decreasing 1/2 of 1% per year to a minimum of 101%. Loan year means any twelve-month period commencing on the first principal and interest installment date, and on every yearly anniversary thereafter. Payment during foreclosure will constitute a prepayment. Such payments, to the extent permitted by law, will therefore include the premium required under the prepayment, a premium of 11.5 per cent of the principal balance outstanding, shall be due and payable. In the event a tender of payment of the amount necessary to satisfy the entire indebtedness evidenced by the Trust Deed Note and Trust Deed is made at any time prior to the sale under foreclosure of the Trust Deed, it will constitute an evasion of the prepayment terms and be deemed to be a voluntary prepayment.

26. After the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of default and notice of sale having been given at then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder; the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without

SHERWOOD ASSOCIATES, a Utah Limited Partnership

By: David R. Stewart
David R. Stewart, General Partner

By: Wayne E. Pearce
Wayne E. Pearce, General Partner

any covenant or warranty, express or implied. The recitals in the Deed or any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 18% per annum or highest rate permissible under the laws of the State of Utah from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County in which the sale took place.

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

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

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

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

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

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

SHERWOOD ASSOCIATES, A Utah Limited Partnership

BY: David R. Stewart
DAVID R. STEWART, General Partner

BY: Wayne E. Pearce
WAYNE E. PEARCE, General Partner

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

On the 24th day of December, 1979, personally appeared before me DAVID R. STEWART, who being by me duly sworn did say that he is a General Partner of SHERWOOD ASSOCIATES, A Utah Limited Partnership, and that the foregoing instrument was signed in behalf of said Partnership by authority of its articles of Partnership, and said DAVID R. STEWART, acknowledged to me that said Partnership executed the same.

My commission expires:

1/8/80

Hoyt S. Wimer
Notary Public residing at:

Hoyt S. Wimer, Bountiful, Utah

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

On the 24th day of December, 1979, personally appeared before me WAYNE E. PEARCE, who being by me duly sworn did say that he is a General Partner of SHERWOOD ASSOCIATES, A Utah Limited Partnership, and that the foregoing instrument was signed in behalf of said Partnership by authority of its articles of Partnership, and said WAYNE E. PEARCE, acknowledged to me that said Partnership executed the same.

My commission expires:

1/8/80

Hoyt S. Wimer
Notary Public residing at:

Hoyt S. Wimer, Bountiful, Utah

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

TO: TRUSTEE.

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

Dated....., 19 87 WASHINGTON NATIONAL INSURANCE COMPANY

By:

J.E. Dresmal, Vice President

Attest:

J.W. Craig, Assistant Secretary

Mail reconveyance to

TRUST DEED

With Assignment of Rents

TO

AS TRUSTEE FOR

Dated....., 19.....

APPENDIX E

SECURITY AGREEMENT

PROMISSORY NOTE (Interest)

The undersigned jointly and severally promise to pay to the order of _____ at _____ Utah or at such other place as the holder hereof may designate in writing the sum of _____ Dollars (\$ _____) payable as follows:

together both before and after judgment with interest on the unpaid balance thereof from date until paid at the rate of _____ percent (_____ %) per annum interest payable as follows: _____

Prepayment of this note with interest to date of payment may be made at any time without penalty.

If the holder deems itself insecure or if default be made in payment of the whole or any part of any installment at the time when a the place where the same becomes due and payable as aforesaid then the entire unpaid balance with interest as aforesaid shall at the election of the holder hereof and without notice of said election at once become due and payable. In event of any such default or acceleration the undersigned jointly and severally agree to pay to the holder hereof a reasonable attorney's fees legal expenses and lawful collection costs in addition to all other sums due hereunder.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived and the undersigned consent to the release of any security or any part thereof with or without substitution.

Address _____
Address _____
Address _____

This Security Agreement is part of the SECURITY AGREEMENT attached UCC-1 Financing Statement of even date. (Equipment, Consumer Goods and Fixtures, But Not Motor Vehicles)

This 24th day of DECEMBER 19 79 SHERWOOD ASSOCIATES, A UTAH LIMITED PARTNERSHIP hereby agrees with and grants to BETTILYON MORTGAGE LOAN CO, Secured Party, a security interest in the following property: all present and future machinery, equipment, material, appliances and fixtures now or hereafter installed or placed by Debtor in the premises for the generation and distribution of air, water, heat, electricity, light, fuel or refrigeration, or for ventilating or air-conditioning purposes, or for sanitary or drainage purposes, or for the exclusion of vermin or insects, or for the removal of dust, refuse or garbage, and including all awnings, window shades, drapery rods and brackets, screens, floor coverings, incinerators, carpeting and all furniture and fixtures used in the operation of the buildings, together with all additions to, substitutions for, changes in or replacements of the whole or any part of any or all of said articles of property.

All additions and accessions thereto herein collectively called the Collateral to secure all Debtor's present and future debts obligations and liabilities of whatever nature to Secured Party (the Obligations), including the note executed by Debtor to Secured Party in the amount of \$1,200,000.00 and Debtor's obligations hereunder.

A. WARRANTIES

Debtor warrants:

1. USE — The Collateral is used or bought for use primarily for (check one): ☐ personal family or household purposes ☒ business ☐ farming operations
2. PURCHASE MONEY — If checked here ☐ the Collateral is being acquired by Debtor with the proceeds of a loan from Secured Party, which proceeds will be used for no other purpose and Secured Party may disburse such proceeds directly to the seller of the Collateral.

3. LOCATION OF COLLATERAL — The Collateral will be kept within the State of Utah at the address below Debtor's signature (or if not at _____) 4303 No Foothill Dr Provo, Utah 84601 _____ and will not be removed therefrom without prior written consent of Secured Party.

4. MOBILE EQUIPMENT — If any Collateral is equipment normally used in business or farming operations in more than one state Debtor's chief place of business is at the address below Debtor's signature (or if not at _____) Debtor immediately gave written notice to Secured Party of any change in such chief place of business.

5. FIXTURES — The Collateral is not attached or to be attached to real estate unless checked here ☐ (Balance applicable only if box checked) If the Collateral is or will become a fixture to real estate the legal description of such real estate is: FOR LEGAL DESCRIPTION SEE BELOW _____

the name of the record owner of such real estate is: SHERWOOD ASSOCIATES, A UTAH LIMITED PARTNERSHIP _____ and Debtor furnishes Secured Party with disclosures signed by all parties having interests in the real estate which are prior to the interest of Secured Party in the Collateral.

6. OWNERSHIP — Debtor has clear title to the Collateral free of all encumbrances and security interests other than this Agreement.

B. PERSONS BOUND

Each person signing this Agreement other than the Secured Party, is a Debtor and all obligations of all Debtors are joint and several.

C. OTHER PROVISIONS

LEGAL DESCRIPTION

SEE ATTACHED EXHIBIT "A"

THIS AGREEMENT INCLUDES ALL THE PROVISIONS ON THE REVERSE SIDE.

Party, BETTILYON MORTGAGE LOAN CO _____

By: _____
S. Wimer, Vice President
333 S. 2100 So.
Salt Lake City, Utah 84115

Debtor: SHERWOOD ASSOCIATES, A UTAH LIMITED PARTNERSHIP
DAVID R. STEWART, General Partner

Address: _____
Debtor: _____
WAYNE E. PEARCE, General Partner

ADDITIONAL SECURITY AGREEMENT PROVISIONS

1. **FILING** — Debtor warrants that there is no financing statement now on file in any public office covering any of the Collateral or any of the proceeds thereof and so long as any of the Obligations remain unpaid, Debtor will not execute a financing statement or security agreement covering the Collateral with anyone other than Secured Party. Debtor agrees to sign and deliver one or more financing statements or supplements thereto or other instruments as Secured Party may from time to time require to comply with the Utah Uniform Commercial Code or other applicable law or to preserve, protect and enforce the security interest of Secured Party and to pay all costs of filing such statements or instruments. Secured Party is authorized to sign such statements or instruments for Debtor.

2. **CARE OF PROPERTY** — Debtor shall: keep the Collateral in good repair and be responsible for any loss or damage to it; keep it free from all liens, encumbrances and security interests; pay when due all taxes, license fees and other charges upon it; not sell, misuse, conceal or in any way dispose of it or permit it to be used unlawfully or for hire or contrary to the provisions of any insurance coverage; not permit it to become a fixture or an accession to other goods except as specifically authorized in writing by Secured Party. Loss of or damage to the Collateral shall not release Debtor from any of the obligations.

3. **INSURANCE** — Debtor agrees, at his expense, to insure the Collateral against: loss, damage, theft (and such other risks as Secured Party may require) to the full insurable value thereof with insurance companies and under policies and in form satisfactory to Secured Party. Proceeds from the insurance shall be payable to Secured Party as its interest may appear on all policies shall provide for 10 days minimum written cancellation notice to Secured Party. Upon request, policies or certificates attesting the coverage shall be deposited with Secured Party. Insurance proceeds may be applied by Secured Party toward payment of any of the Obligations, whether or not due, in such order of application as Secured Party may determine.

4. **RIGHT TO PROTECT** — If Debtor fails to make any payment or perform any act required by this Agreement or which Secured Party deems advisable to preserve the Collateral or the priority or perfection of the Secured Party's security interest, Secured Party may advance funds for the same and such advances shall be one of the Obligations secured hereby and shall be immediately payable with a finance charge thereon at the maximum lawful rate or, if any of the Obligations secured hereby constitute a consumer loan under the provisions of the Utah Uniform Consumer Credit Code, at the highest annual percentage rate applicable to any such Obligation. *Further identified by Exhibit "A" - Legal Description D.E. WE*

5. **DEFAULT** — Debtor shall be in default hereunder if any of the following events occur: (1) Debtor fails to pay any of the Obligations when due; (2) Debtor fails to perform any undertaking or breaches any warranty in this Agreement or in any of the Obligations; (3) any statement, representation or warranty of Debtor herein or in any other writing at any time furnished by Debtor to Secured Party is untrue in any material respect when made; (4) Debtor becomes insolvent or unable to pay debts as they mature or makes an assignment for the benefit of creditors or any proceeding is instituted by or against Debtor alleging that Debtor is insolvent or unable to pay debts as they mature; (5) entry of any judgment against Debtor; (6) death of Debtor who is a natural person or of any partner of Debtor which is a partnership; (7) dissolution, merger or consolidation or transfer of a substantial part of the property of Debtor which is a corporation or a partnership; (8) an attachment, garnishment, execution or other process is issued or a lien filed against any property of Debtor; (9) transfer of any interest in any of the Collateral without the written consent of Secured Party; (10) any of the Collateral is lost, stolen or materially damaged; (11) Secured Party shall deem itself insecure for any reason whatsoever. Waiver of any default shall not constitute a waiver of any subsequent default.

6. **REMEDIES** — Upon the occurrence of any default hereunder and at any time thereafter all of the Obligations shall, at the election of Secured Party and without notice of such election, become immediately due and payable and Secured Party shall have the remedies of a secured party under the Utah Uniform Commercial Code or other applicable law, and: (1) Secured Party shall have the right to enter upon any premises where the Collateral may be and take possession thereof; (2) Debtor shall, if requested by Secured Party, assemble the Collateral at a place designated by Secured Party; (3) Secured Party may sell, lease or otherwise dispose of any or all of the Collateral and, after deducting the expenses incurred by Secured Party, including reasonable attorneys' fees and legal expenses, apply the residue against the Obligations; (4) Secured Party may give any notice to Debtor required by law by mailing such notice, postage prepaid, at least 5 days before the event to any address of Debtor set forth in this Agreement; and (5) Secured Party shall have the right immediately and without prior notice or demand to set off against the Obligations, whether or not due, all money or other amounts owed by Secured Party in any capacity to Debtor and Secured Party shall be deemed to have exercised such right of setoff and to have made a charge against any such money or amounts immediately upon occurrence of such default even though such charge is entered in the books of Secured Party subsequent thereto.

7. **GENERAL** — Secured Party may inspect the Collateral wherever located at any reasonable time. Secured Party is authorized to date this instrument and fill in any blanks. All words used herein shall be construed to be of such gender and number as the circumstances require and all references to Debtor shall include all other persons primarily or secondarily liable hereunder. This Agreement is governed by the laws of the State of Utah. Debtor appoints the County Clerk of the county in which the place specified in the address of Secured Party is located, as agent for the purpose of accepting service of process in any action pertaining to this Agreement and agrees that any such action may be brought in any court of said county. Any provisions hereof found to be invalid shall not invalidate the remainder. This Agreement constitutes the entire agreement between the parties and may not be altered or amended except by written agreement of the parties. This Agreement binds each Debtor, their respective heirs, personal representatives, successors and assigns, and inures to the benefit of Secured Party, its successors and assigns.

NOT LEGIBLE FOR MICROFILM

BOOK 1807 PAGE 510

BOOK 1808 PAGE 249

HSW
Legal Description attached to read Exhibit "A" to UCC-1 Financing Statement and Security Agreement dated December 24, 1979. *DR. WET*

Commencing at a point which is SOUTH 79.94 feet and WEST 980.57 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 68° 25' East 417.00 feet; thence North 84° 57' East 160.00 feet; thence South 81° 31' 52" East 102.97 feet; thence along the arc of a 766.41 foot radius curve to the right 168.13 feet, the chord of which bears North 27° 17' 05" West 167.80 feet; thence along the arc of a 286.93 foot radius curve to the left 137.72 feet, the chord of which bears North 34° 45' West 136.40 feet; thence North 48° 30' West 178.86 feet; thence along the arc of a 1002.77 foot radius curve to the right 166.26 feet, the chord of which bears North 43° 45' West 166.08 feet; thence North 39° 00' West 250.32 feet; thence along the arc of a 2628.32 foot radius curve to the right 49.55 feet, the chord of which bears North 38° 27' 34" West 49.55 feet; thence South 52° 04' 48" West 362.79 feet; thence South 0° 40' 42" West 335.65 feet; thence South 20° 24' 30" West 98.88 feet; thence South 65° 06' 39" East 39.08 feet; thence South 35° 52' 55" East 41.26 feet; thence South 70° 42' 19" East 53.96 feet; thence South 55° 05' 10" East 54.25 feet; thence South 25° 31' 15" West 179.58 feet; thence South 24° 17' 45" East 58.84 feet; thence South 64° 06' 15" East 48.30 feet; thence North 50° 17' 13" East 158.78 feet to the point of beginning.

Containing 10.788 acres.

LESS 0.410 acre of OSMOND BROTHERS (Parcel A), a Utah Partnership.

Commencing at a point which is North 425.65 feet and West 895.81 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 24° 59' 48" West 158.00 feet; thence South 65° 00' 12" West 113.00 feet; thence South 24° 59' 48" East 158.00 feet; thence North 65° 00' 12" East 113.00 feet the point of beginning.

Containing 0.410 acres.

BOOK 1807 PAGE 511

BOOK 1808 PAGE 247

50574

RECORDED AT THE REQUEST OF

SEWARD TRUST CO.

1979 DEC 28 PM 4: 03

NINA B. HELU

UTAH COUNTY RECORDER

DEPUTY PR. *850*

DESC. *1647-B-3-C*

(2)

SECOND RECORDING

2212

RECORDED AT THE REQUEST OF

Stewart Title

1980 JAN 15 PM 4: 05

NINA B. HELU

UTAH COUNTY RECORDER

DEPUTY PR. *850*

DESC. *1647-B-3-C*

Commercial Code.

1. Debtor(s) (Last Name First) and address(es)
SHERWOOD ASSOCIATES, A Ut. Limited Partnership
4203 No. Foothill Dr.
Provo, Utah 84601
Social Security of
Emp. Fed. I.D. No. 87-00334137

2. Secured Party(ies) and address(es)
BETTILYON MORTGAGE LOAN CO.
P.O. BOX 15749
SALT LAKE CITY, UTAH 84115

Dec 28 3 53 PM '79

7 000000 6

4. This Financing Statement covers the following types (or items) of property:

SEE ATTACHED SECURITY AGREEMENT OF EVEN
DATE FOR DESCRIPTION OF ADDITIONAL
SECURITY.

6. Gross sales price
of collateral

\$ _____

\$ _____ Sales

or use tax paid to
State of

For Filing Officer (Date, Time, Number,
and Filing Office)

WASHINGTON NATIONAL INS. C
Investment Department
Evanston, IL 60201

5. Assignee(s) of Secured Party and
Address(es)

The Secured party is _____ is not X a seller or
Purchase money lender of the collateral.

This statement is filed without the debtor's signature to perfect a security interest in collateral. (Check ☒ if so)

☐ already subject to a security interest in another jurisdiction when it was brought into this state.

☐ which is proceeds of the original collateral described above in which a security interest was perfected:

Check ☒ if covered: Proceeds of Collateral are also covered. ☐ Products of Collateral are also covered. No. of additional Sheets presented:

Filed with the secretary of State of The State of Utah.

3. Maturity date (if any): 1/1/2000

Approved by David S. Monson,

SHERWOOD ASSOCIATES, A UTAH LIMITED PARTNERSHIP
Ut. Governor / Secretary of State, for the State of Utah

BY:

David R. Stewart, General Partner

BETTILYON MORTGAGE LOAN CO.

By:

WAYNE E. PEARE
Signature(s) of Debtor(s)

By:

Signature(s) of Secured Party(ies)

STANDARD FORM - FORM UCC-1.

(4) SECURED PARTY COPY

ERWOOD ASSOCIATES, a Utah
Limited Partnership
303 No. Foothill Dr.
Provo, UT. 84601
Social Security No. _____
U.S. Fed. I.D. No. 87-0334137

Secured Party(ies) and address(es)
WASHINGTON NATIONAL INSURANCE CO. ANY
Investment Department
Evanston, IL. 60201

SECOND RECORDING

2212

This statement refers to original Financing Statement bearing File No. 760506
Date Filed December 28 19 79 Maturity Date January 1 *X2000

For Filing Officer (Date, Time and Filing Office)

- ☐ Continuation. The original financing statement between the foregoing Debtor and Secured Party, bearing file number shown above, is still effective.
☐ Termination. Secured party no longer claims a security interest under the financing statement bearing file number shown above.
☐ Assignment. The secured party's right under the financing statement bearing file number shown above to the property described in Item 10 have been assigned to the assignee whose name and address appears in Item 10.
☒ Amendment. Financing Statement bearing file number shown above is amended as set forth in Item 10. **40010**
☐ Partial Release. Secured Party releases the collateral described in Item 10 from the financing statement bearing file number shown above.

Legal Description attached to read Exhibit "A" to UCC-1 Financing Statement and Security Agreement dated December 24, 1979.

Additional Security Agreement provisions #4 to include the wording, "further identified by Exhibit "A" - Legal Description attached" as outlined in C of the provisions.

SHERWOOD ASSOCIATES, a Utah Limited Partnership

No. of additional Sheets presented:

By: David R. Stewart
David R. Stewart, Gen. Partner
Wayne E. Pearce
Wayne E. Pearce, Gen. Partner

BETTILYON MORTGAGE LOAN CO.
Loan Correspondent for Washington National
Insurance Company

By: Hoyt S. Wimer
Hoyt S. Wimer, Signature(s) of Secured Party(ies) Vice Pres.

Signature(s) of Debtor(s) (necessary only if item 8 is applicable).
Filing Officer Copy - Alphabetical

STANDARD FORM - FORM UCC-30

BOOK 1807 PAGE 50

07-01-06 (Rev. 1/77)

STANDARD FORM

Kelly Co. # 10448

INSTRUCTIONS:

UNIFORM COMMERCIAL CODE - FINANCING STATEMENT - FORM UCC-1

1. PLEASE TYPE this form. Fold only along perforation for mailing.
2. Remove Secured Party and Debtor copies and send other 3 copies with interleaved carbon paper to the filing officer. Enclose filing fee. The filing fee is \$2.00 for each name listed in the Debtors box with Soc. Sec. No. and/or Emp. Fed. Tax I.D. No., otherwise the fee is \$10.00.
3. If the space provided for any item(s) on the form is inadequate the item(s) should be continued on additional sheets, preferably 5" X 8" or 8" X 10". Only one copy of such additional sheets need be presented to the filing officer with a set of three copies of the financing statement. Long schedules of collateral, indentures, etc., may be on any size paper that is convenient for the secured party. Indicate the number of additional sheets attached.
4. If collateral is crops or goods which are or are to become fixtures, describe generally the real estate and give name of record owner.
5. When a copy of the security agreement is used as a financing statement, it is requested that it be accompanied by a completed but unsigned set of these forms, without extra fee.
6. At the time of original filing, filing officer should return third copy as an acknowledgment. At a later time, secured party may date and sign Termination Legend and use third copy as a Termination Statement.

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code.

1. Debtor(s) (Last Name First) and address(es) SHERWOOD ASSOCIATES, A Utah Limited Partnership 1310. Foothill Dr. Provo, Utah 84601 Social Security or Emp. Fed. I.D. No. <u>87-0334137</u>	2. Secured Party(ies) and address(es) BETTILYON MORTGAGE LOAN CO. P.O. BOX 15749 SALT LAKE CITY, UTAH 84115
--	--

50574

4. This Financing Statement covers the following types (or items) of property:

SEE ATTACHED SECURITY AGREEMENT OF EVEN
DATE FOR DESCRIPTION OF ADDITIONAL
SECURITY.

6. Gross sales price
of collateral

\$ _____
\$ _____ Sales

or use tax paid to
State ofFor Filing Officer (Date, Time, Number,
and Filing Office)

WASHINGTON NATIONAL INS.
Investment Department
EVANSTON, I. 60201

5. Assignee(s) of Secured Party and
Address(es)

The Secured party is _____ is not X a seller or
Purchase money lender of the collateral.

This statement is filed without the debtor's signature to perfect a security interest in collateral. (Check ☒ if so)☐ already subject to a security interest in another jurisdiction when it was brought into this state.☐ which is proceeds of the original collateral described above in which a security interest was perfected:

Microfilm No.

Check ☒ if covered: Proceeds of Collateral are also covered. ☐ Products of Collateral are also covered. No. of additional Sheets presented:

Filed with Utah County Recorder's Office

3. Maturity date (if any): 1/1/2000

Approved by David S. Monson,
Lt. Governor / Secretary of State, for the State of Utah

SHERWOOD ASSOCIATES, A Utah Limited Partnership

BY: David R. Stewart
David R. Stewart, General Partner

BETTILYON MORTGAGE LOAN CO.

By: Wayne E. Pearce
WAYNE E. PEARCE, General Partner

By: Hoyt S. Wimer
Hoyt S. Wimer, Vice President

NOT REFILE FOR MICROFILM

BOOK 18078 PAGE 508

BOOK 18078 PAGE 246

APPENDIX F

GUARANTY

142474

48050

G U A R A N T Y

IN CONSIDERATION of the mortgage financing accommodations extended to SHERWOOD ASSOCIATES, A Utah Limited Partnership, (hereinafter referred to as "Borrower"), by BETTILYON MORTGAGE LOAN CO., (hereinafter referred to as "Lender"), upon real estate described as follows, to wit:

Commencing at a point which is SOUTH 79.94 feet and WEST 980.57 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 68° 25' East 417.00 feet; thence North 84° 57' East 160.00 feet; thence South 81° 31' 52" East 102.97 feet; thence along the arc of a 766.41 foot radius curve to the right 168.13 feet, the chord of which bears North 27° 17' 05" West 167.80 feet; thence along the arc of a 286.93 foot radius curve to the left 137.72 feet, the chord of which bears North 34° 45' West 136.40 feet; thence North 48° 30' West 178.86 feet; thence along the arc of a 1002.77 foot radius curve to the right 166.26 feet, the chord of which bears North 43° 45' West 166.08 feet; thence North 39° 00' West 250.32 feet; thence along the arc of a 2628.32 foot radius curve to the right 49.55 feet, the chord of which bears North 38° 27' 34" West 49.55 feet; thence South 52° 04' 48" West 362.79 feet; thence South 0° 40' 42" West 335.65 feet; thence South 20° 24' 30" West 98.88 feet; thence South 65° 06' 39" East 39.08 feet; thence South 35° 52' 55" East 41.26 feet; thence South 70° 42' 19" East 53.96 feet; thence South 55° 05' 10" East 54.25 feet; thence South 25° 31' 15" West 179.58 feet; thence South 24° 17' 45" East 58.84 feet; thence South 64° 06' 15" East 48.30 feet; thence North 50° 17' 13" East 158.78 feet to the point of beginning.

Containing 10.788 acres.

LESS 0.410 acre of OSMOND BROTHERS (Parcel A), A Utah Partnership.

Commencing at a point which is North 425.65 feet and West 895.81 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 24° 59' 48" West 158.00 feet; thence South 65° 00' 12" West 113.00 feet; thence South 24° 59' 48" East 158.00 feet; thence North 65° 00' 12" East 113.00 feet the point of beginning. Containing 0.410 acres.

and as an inducement to Lender to extend said financing accommodations, the undersigned Guarantors do hereby jointly and severally guarantee to Lender (1) prompt payment, when due of any sums of money owing by Borrower to Lender by reason of a certain Trust Deed Note dated December 24, 1979, and executed by Borrower in favor of BETTILYON MORTGAGE LOAN CO., in the principal sum of ONE MILLION TWO HUNDRED THOUSAND DOLLARS AND NO/100- - - - (\$1,200,000.00); (2) the full and timely performance of the terms and provisions of any instrument securing the payment of said Trust Deed Note; and (3) prompt payment, when due, of any and all sums of money at any time owing by Borrower to Lender by reason of, in connection with, or arising out of the aforescribed financing transaction.

The obligation of the undersigned Guarantors hereunder is joint and several and shall survive the death of any or all of the undersigned Guarantors, and shall be binding upon the heirs, administrators, executors and estate of any deceased Guarantor hereunder and upon any surviving Guarantor hereunder the same as if such death had not occurred.

Lender shall not be required, before enforcing the obligation of the undersigned Guarantors hereunder, to exhaust its remedies against Borrower or any other person liable for the indebtedness of Borrower, and the undersigned Guarantors shall not be entitled to any right of subrogation whatsoever until the indebtedness and obligations of Borrower to Lender have been paid and performed in full.

The undersigned Guarantors hereby waive notice of the advancement of funds to Borrower by Lender and further waive notice of default, notice of extension for payment or performance of Borrower's indebtedness or obligations, presentment, demand for payment, protest and notice of protest.

No waiver of Lender's rights hereunder on any particular occasion shall be deemed to be a waiver of Lender's rights hereunder on any other occasion.

This Guaranty shall inure to the benefit of Lender and its successors and assigns.

(over)

For purpose of this Guaranty, all sums owing to Lender by Borrower shall be deemed to have become due if (1) Borrower defaults in the payment of said Trust Deed Note or in the performance of the terms and provisions of any instrument securing the payment of said Trust Deed Note, (2) a petition under any chapter of the Bankruptcy Act, as amended, or for the appointment of a receiver of any part of the property of Borrower be filed against Borrower and not be dismissed within thirty (30) days thereafter, (3) a petition under any chapter of the Bankruptcy Act, as amended, be filed by Borrower; or (4) Borrower makes a general assignment for the benefit of its creditor.

IN WITNESS WHEREOF, this Guaranty is executed by the undersigned Guarantors this 21th day of December, 1979.

OSMOND BROTHERS INVESTMENT TRUST a PARTNERSHIP

By George V. Osmond
GEORGE V. OSMOND, Trustee

George V. Osmond
GEORGE V. OSMOND, Individual

Allan R. Osmond
ALLAN R. OSMOND, Individual

Merrill D. Osmond
MERRILL D. OSMOND, Individual

M. Wayne Osmond
M. WAYNE OSMOND, Individual

Donald C. Osmond
DONALD C. OSMOND, Individual

Jay W. Osmond
JAY W. OSMOND, Individual

David R. Stewart
DAVID R. STEWART, Individual

Wayne E. Pearce
WAYNE E. PEARCE, Individual

By Olive Davis Osmond
OLIVE DAVIS OSMOND, Trustee

Olive Davis Osmond
OLIVE DAVIS OSMOND, Individual

Suzanna P. Osmond
SUZANNA P. OSMOND, Individual

Mary C. Osmond
MARY C. OSMOND, Individual

Kathlyn L. Osmond
KATHLYN L. OSMOND, Individual

Debra A. Osmond
DEBRA A. OSMOND, Individual

Olive Marie Osmond
OLIVE MARIE OSMOND, Individual

Durinda A. Stewart
DURINDA A. STEWART, Individual

Carol Pearce
CAROL PEARCE, Individual

STATE OF UTAH)
COUNTY OF UTAH) ss.

On the 24th day of December, 1979, personally appeared before me GEORGE V. OSMOND, Trustee and OLIVE DAVIS OSMOND, Trustee, who being by me duly sworn, says that they are Trustee's of OSMOND BROTHERS INVESTMENT TRUST a Partnership, and they executed the above and foregoing instrument and that said instrument was signed in behalf of said OSMOND BROTHERS INVESTMENT TRUST a Partnership, by authority of its by-laws (or by authority of a resolution of OSMOND BROTHERS INVESTMENT TRUST a Partnership) and said GEORGE V. OSMOND and OLIVE DAVIS OSMOND acknowledged to me that they executed the same.

My commission expires:

1/8/80

STATE OF UTAH)
COUNTY OF UTAH) ss.

Hoyt S. Wimer
Notary Public residing at.
Hoyt S. Wimer, Bountiful, Utah

On the 24th day of December, A.D. 1979, personally appeared before me GEORGE V. OSMOND and OLIVE DAVIS OSMOND, his wife, ALLAN R. OSMOND and SUZANNA P. OSMOND, his wife, MERRILL D. OSMOND and MARY C. OSMOND, his wife, M. WAYNE OSMOND and KATHLYN L. OSMOND, his wife, DONALD C. OSMOND and DEBRA A. OSMOND, his wife, JAY W. OSMOND, a single man, OLIVE MARIE OSMOND, a single woman, DAVID R. STEWART and DURINDA A. STEWART, his wife, WAYNE E. PEARCE and CAROL PEARCE, his wife, the signers of the above instrument, who duly acknowledged to me that they executed the same.

My commission expires.

1/8/80

Hoyt S. Wimer
Notary Public residing at.
Hoyt S. Wimer, Bountiful, Utah

APPENDIX G

ADDENDUM TO GUARANTY

2/24/71

ADDENDUM TO GUARANTY

This Addendum is attached to and forms a part of that certain Guaranty executed on the 24th day of December, 1979 by Osmond Brothers Investment Trust, a Partnership by George V. Osmond, Trustee, Olive Davis Osmond, Trustee, George V. Osmond, Olive Davis Osmond, Allan R. Osmond, Merrill D. Osmond, M. Wayne Osmond, Donald C. Osmond, Jay W. Osmond, David R. Stewart, Wayne E. Pearce, Suzanna P. Osmond, Mary C. Osmond, Kathryn L. Osmond, Debra A. Osmond, Olive Marie Osmond, Durinda A. Stewart and Carol Pearce as individuals, (hereinafter termed the "Guarantors") in favor of Bettilyon Mortgage Loan Co, therein termed the "Lender", and subsequently assigned to Washington National Insurance Company, an Illinois corporation (hereinafter termed "Washington National") a true and correct copy of said Guaranty is attached hereto as Exhibit "A" and by this reference incorporated herein and made a part hereof.

W I T N E S S E T H :

WHEREAS, Sherwood Associates, a Utah limited partnership (hereinafter termed "Sherwood"), has heretofore borrowed from Bettilyon Mortgage Loan Co. the principal sum of One Million Two Hundred Thousand Dollars (\$1,200,000.00) together with interest thereon at the rate of eleven and one-half percent (11½%) per annum on the unpaid balance (hereinafter collectively termed the "Indebtedness") as evidenced by a certain Trust Deed Note executed by Sherwood in favor of Bettilyon Mortgage Loan Co., or its order, (hereinafter termed the "Note") the repayment of which is secured in part by certain real property and improvements located in Utah County, State of Utah (hereinafter collectively termed the "Subject Property") as evidenced by a certain Trust Deed with Assignment of Rents dated the 24th day of December, 1979 and assigned thereafter with the Note (hereinafter with other documents executed by Sherwood and/or the Guarantors in connection with said loan are collectively termed the "Loan Documents") to Washington National, and,

WHEREAS, the repayment of the Indebtedness and the performance of Sherwood was guaranteed in all respects by the Guarantors named in the Guaranty (Exhibit "A" hereto), and,

WHEREAS, Washington National is the holder of the Promissory Note and the Loan Documents and has heretofore declared the loan and the remaining Indebtedness evidenced by said Promissory Note and the Loan Documents to be in default, and, further, that Washington National has or claims the right to call the remaining Indebtedness due and payable in the event of a sale of the Subject Property described in said Trust Deed, and,

WHEREAS, arrangements have been negotiated and entered into between Sherwood, the Guarantors and Darrell D. Tanner (hereinafter "Tanner") of 3209 Brookside Lane, Provo, Utah 84604 with respect to the sale or exchange of an interest in the Subject Property to which Washington National is willing to consent provided that Tanner becomes an additional Guarantor of the Indebtedness and provided further that the Guarantors and Sherwood are in no way released, discharged or excused from performance under any of the Loan Documents including their respective obligations in connection with the payment of the Indebtedness.

NOW, THEREFORE, in consideration of these premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Tanner agrees as follows:

1. Tanner hereby jointly and severally guarantees to Washington National, its successors or assigns, and agrees to pay any and all sums owing to Washington National by Sherwood as evidenced by said Note, said Trust Deed and all of the Loan Documents and other documents evidencing the Indebtedness or executed in connection therewith by Sherwood and/or the Guarantors.

2. Tanner adopts and agrees to be bound by the terms of the Guaranty (Exhibit "A" hereto) as though Tanner was a signatory thereto on the 24th day of December, 1979.

3. Tanner acknowledges and agrees that none of the Guarantors or Sherwood shall be released, discharged nor their obligations under said Guaranty or the Loan Documents affected, modified or changed by reason of Tanner's execution hereof.

4. Tanner has reviewed such documents, statements and conducted such inspection of the real property and improvements described in the Deed of Trust with Assignment of Rents as he has deemed necessary and advisable and has consulted with independent counsel and understands the effects, liabilities and obligations resulting from his execution hereof and becoming obligated to Washington National under and pursuant to the Guaranty (Exhibit "A" hereto).

5. That all other terms, provisions, conditions, priorities and limitations contained in said Guaranty (Exhibit "A" hereto) and the Loan Documents shall remain in full force and effect.

6. This Agreement shall be interpreted under and by virtue of the laws of the State of Utah.

IN WITNESS WHEREOF, this Addendum to Guaranty is executed by the undersigned this 10th day of January, 1983.


DARRELL D. TANNER

STATE OF UTAH)
 : ss.
COUNTY OF Salt Lake

On this 10th day of January, 1983, personally appeared before me DARRELL D. TANNER, the signer of the foregoing instrument who being first duly sworn stated he executed the same.

Sandra Wahlgren
NOTARY PUBLIC
Residing at S.L.C., Utah

My Commission Expires:

COMMISSION EXPIRES: 11-1-95

G U A R A N T Y

IN CONSIDERATION of the mortgage financing accommodations extended to SHERWOOD ASSOCIATES, A Utah Limited Partnership, (hereinafter referred to as "Borrower"), by BETTILYN MORTGAGE LOAN CO., (hereinafter referred to as "Lender"), upon real estate described as follows, to wit:

Commencing at a point which is SOUTH 79.94 feet and WEST 960.57 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 68° 25' East 417.00 feet; thence North 84° 57' East 160.00 feet; thence South 81° 31' 52" East 102.97 feet; thence along the arc of a 766.41 foot radius curve to the right 168.13 feet, the chord of which bears North 27° 17' 05" West 167.80 feet; thence along the arc of a 286.93 foot radius curve to the left 137.72 feet, the chord of which bears North 34° 45' West 136.40 feet; thence North 48° 30' West 178.85 feet; thence along the arc of a 1002.77 foot radius curve to the right 166.26 feet, the chord of which bears North 43° 15' West 166.08 feet; thence North 39° 00' West 250.32 feet; thence along the arc of a 2628.32 foot radius curve to the right 49.55 feet, the chord of which bears North 38° 27' 34" West 49.55 feet; thence South 52° 04' 48" West 362.79 feet; thence South 0° 40' 42" West 335.65 feet; thence South 20° 24' 30" West 98.88 feet; thence South 65° 06' 39" East 32.08 feet; thence South 35° 52' 55" East 41.26 feet; thence South 70° 42' 19" East 53.96 feet; thence South 55° 05' 10" East 54.25 feet; thence South 25° 31' 15" West 179.58 feet; thence South 2° 17' 45" East 58.84 feet; thence South 64° 06' 15" East 48.30 feet; thence North 60° 17' 13" East 158.78 feet to the point of beginning.

Containing 10.723 acres.

LESS 0.410 acre of OSMOND BROTHERS (Parcel A), A Utah Partnership.

Commencing at a point which is North 425.65 feet and West 895.81 feet from the Northeast Corner of Section 19, Township 6 South, Range 3 East, Salt Lake Base and Meridian; thence North 24° 59' 48" West 158.00 feet; thence South 65° 00' 12" West 113.00 feet; thence South 24° 59' 48" East 158.00 feet; thence North 65° 00' 12" East 113.00 feet the point of beginning. Containing 0.410 acres.

and as an inducement to Lender to extend said financing accommodations, the undersigned Guarantors do hereby jointly and severally guarantee to Lender (1) prompt payment, when due of any sums of money owing by Borrower to Lender by reason of a certain Trust Deed Note dated December 24, 1979, and executed by Borrower in favor of BETTILYN MORTGAGE LOAN CO., in the principal sum of ONE MILLION TWO HUNDRED THOUSAND DOLLARS AND NO/100 - - - - (\$1,200,000.00); (2) the full and timely performance of the terms and provisions of any instrument securing the payment of said Trust Deed Note; and (3) prompt payment, when due, of any and all sums of money at any time owing by Borrower to Lender by reason of, in connection with, or arising out of the aforescribed financing transaction.

The obligation of the undersigned Guarantors hereunder is joint and several and shall survive the death of any or all of the undersigned Guarantors, and shall be binding upon the heirs, administrators, executors and estate of any deceased Guarantor hereunder and upon any surviving Guarantor hereunder the same as if such death had not occurred.

Lender shall not be required, before discharging the obligation of the undersigned Guarantors hereunder, to exhaust its remedies against Borrower or any other person liable for the indebtedness of Borrower, and the undersigned Guarantors shall not be entitled to any right of subrogation whatsoever until the indebtedness and obligations of Borrower to lender have been paid and performed in full.

The undersigned Guarantors hereby waive notice of the advancement of funds to Borrower by Lender and further waive notice of default, notice of extension for payment or performance of Borrower's indebtedness or obligations, presentment, demand for payment, protest and notice of protest.

No waiver of Lender's rights hereunder on any particular occasion shall be deemed to be a waiver of Lender's rights hereunder on any other occasion.

This Guaranty shall inure to the benefit of Lender and its successors and assigns.

(over)

For purpose of this Guaranty, all sums owing to lender by Borrower shall be deemed to have become due if (1) Borrower defaults in the payment of said Trust Seed Note or in the performance of the terms and provisions of any instrument securing the payment of said Trust Seed Note; (2) a petition under any chapter of the Bankruptcy Act, as amended, or for the appointment of a receiver of any part of the property of Borrower be filed against Borrower and not be dismissed within thirty (30) days thereafter; (3) a petition under any chapter of the Bankruptcy Act, as amended, be filed by Borrower; or (4) Borrower makes a general assignment for the benefit of its creditor.

IN WITNESS WHEREOF, this Guaranty is executed by the undersigned Guarantors this 24th day of December, 1979.

OSMOND BROTHERS INVESTMENT TRUST a PARTNERSHIP

George V. Osmond
GEORGE V. OSMOND, Trustee

George V. Osmond
GEORGE V. OSMOND, Individual

Allan R. Osmond
ALLAN R. OSMOND, Individual

Merrill D. Osmond
MERRILL D. OSMOND, Individual

M. Wayne Osmond
M. WAYNE OSMOND, Individual

Donald C. Osmond
DONALD C. OSMOND, Individual

Jay W. Osmond
JAY W. OSMOND, Individual

David R. Stewart
DAVID R. STEWART, Individual

Wayne E. Pearce
WAYNE E. PEARCE, Individual

Olive Davis Osmond
OLIVE DAVIS OSMOND, Trustee

Olive Davis Osmond
OLIVE DAVIS OSMOND, Individual

Suzanna P. Osmond
SUZANNA P. OSMOND, Individual

Mary C. Osmond
MARY C. OSMOND, Individual

Kathlyn L. Osmond
KATHLYN L. OSMOND, Individual

Debra A. Osmond
DEBRA A. OSMOND, Individual

Olive Marie Osmond
OLIVE MARIE OSMOND, Individual

Burinda A. Stewart
BURINDA A. STEWART, Individual

Carol Pearce
CAROL PEARCE, Individual

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

On the 24th day of December, 1979, personally appeared before me GEORGE V. OSMOND, Trustee and OLIVE DAVIS OSMOND, Trustee, who being by me duly sworn, says that they are Trustees of OSMOND BROTHERS INVESTMENT TRUST a Partnership, and they executed the above and foregoing instrument and that said instrument was signed in behalf of said OSMOND BROTHERS INVESTMENT TRUST a Partnership, by authority of its by-laws (or by authority of a resolution of OSMOND BROTHERS INVESTMENT TRUST a Partnership) and said GEORGE V. OSMOND and OLIVE DAVIS OSMOND acknowledged to me that they executed the same.

My commission expires:

1/7/80

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

On the 24th day of December, A.D. 1979, personally appeared before me GEORGE V. OSMOND and OLIVE DAVIS OSMOND, his wife, ALLAN R. OSMOND and SUZANNA P. OSMOND, his wife, MERRILL D. OSMOND and MARY C. OSMOND, his wife, M. WAYNE OSMOND and KATHLYN L. OSMOND, his wife, DONALD C. OSMOND and DEBRA A. OSMOND, his wife, JAY W. OSMOND, a single man, OLIVE MARIE OSMOND, a single woman, DAVID R. STEWART and BURINDA A. STEWART, his wife, WAYNE E. PEARCE and CAROL PEARCE, his wife, the signers of the above instrument, who duly acknowledged to me that they executed the same.

My commission expires:

1/7/80

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

Heath S. Wimer
Notary Public residing at:
Poet S. Wimer, Bountiful, Utah

Heath S. Wimer
Notary Public residing at:
Heath S. Wimer, Bountiful, Utah

APPENDIX H

NOVEMBER 30, 1987, LETTER

SESSIONS & MOORE

ATTORNEYS AT LAW

400 FIRST FEDERAL PLAZA

505 EAST 200 SOUTH

SALT LAKE CITY UTAH 84102

(801) 359 4100

CLARK W. SESSIONS
ROY B. MOORE P.C.
JOHN F. CLARK
KEVIN EGAN ANDERSON
DEAN C. ANDREASEN
DOUGLAS J. PAYNE
JOHN K. WEST

E. CRAIG SMAY
OF COUNSEL

November 30, 1987

Sherwood Associates
a Utah limited partnership
4303 North Foothill Drive
Provo, Utah 84604

Re: Washington National Insurance Co. v. Sherwood Associates

Gentlemen:

This is to advise that we are counsel for Washington National Insurance Company, the assignee of a certain Trust Deed Note executed by Sherwood Associates, a Utah limited partnership in favor of Bettilyon Mortgage Loan Co. dated December 24, 1979, in the principal sum of \$1,200,000.00. The loan evidenced by the Trust Deed Note was secured in part by a Trust Deed with Assignment of Rents dated December 24, 1979, (hereinafter the "Trust Deed") which covers certain real property and improvements described therein and situated in Utah County, State of Utah.

This is to further advise that the loan evidenced by the Trust Deed Note is in default and the principal amount thereof is \$1,024,797.87, together with interest thereon to November 1, 1987, in the sum of \$68,746.86, and applicable late charges in the sum of \$9,984.00. It further appears that the property taxes on the real property described in the Trust Deed are delinquent and various mechanics and materialmen's liens have been filed against the property.

This is to therefore advise that pursuant to Paragraph 27 of the Trust Deed and Paragraph 2. of the Trust Deed Note, Washington National Insurance Company hereby declares all sums secured by the Trust Deed immediately due and payable. Unless the total sum of \$1,103,528.73, together with interest at the per diem rate of \$327.37 from November 1, 1987, is received in the office of the undersigned on or before Monday, December 7, 1987, at 5:00 p.m., action will be commenced to collect the total sum due and owing, to foreclose the Trust Deed, to appoint a Receiver

SESSIONS & MOORE

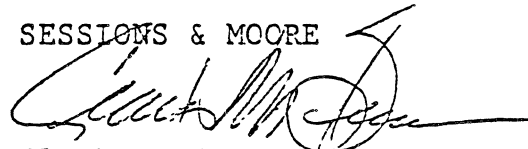
Sherwood Associates
November 30, 1987
Page -2-

over the subject property and to otherwise protect the interest of Washington National Insurance Company as by law provided together with costs and attorneys' fees.

GOVERN YOURSELVES ACCORDINGLY.

Yours truly,

SESSIONS & MOORE



Clark W. Sessions

CWS/mc

cc: Guarantors and General Partners as per attached

George V. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Olive Davis Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Allan R. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Suzanna P. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Merrill D. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Mary C. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

M. Wayne Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Kathlyn L. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Donald C. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Debra A. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Jay W. Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

Olive Marie Osmond, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

David R. Stewart, General Partner & Guarantor
Sherwood Associates,
a Utah limited partnership
4303 North Foothill Drive
Provo, Utah 84604

Durinda A. Stewart, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

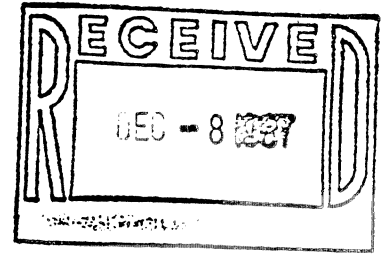
Wayne E. Pearce, General Partner & Guarantor
Sherwood Associates,
a Utah limited partnership
4303 North Foothill Drive
Provo, Utah 84604

Carol Pearce, Guarantor
4303 North Foothill Drive
Provo, Utah 84604

APPENDIX I

TENDER

RIDGE ATHLETIC CLUB, INC.
4303 North Foothill Drive
Provo, UT 84604
224-6969



TENDER

TO: Washington National Insurance Co.
c/o Clark W. Sessions
505 East 200 South #400
Salt Lake City, UT 84102

Tender is hereby made to Washington National Insurance Co., hereinafter referred to as "WNI" of One Hundred Nineteen Thousand Two Hundred and no/100 Dollars (\$119,200.00) the amount the undersigned calculates to be due under that certain note, executed by Sherwood Associates, a Ltd. Partnership, secured by Trust Deed dated December 24, 1979. Notwithstanding the specific sum tendered, the undersigned tenders the entire delinquency due under said note upon presentation of satisfactory proof demonstrating the calculation of such indebtedness.

This tender is made pursuant to U.C.A. §78-27-1 et. seq.

DATED this 7th day of December, 1987.

RIDGE ATHLETIC CLUB, INC.

By: 
DARRELL TANNER, President

APPENDIX J

DECEMBER 8, 1987, LETTER

SESSIONS & MOORE

CLARK W SESSIONS
ROY B MOORE PC
JOHN F CLARK
KEVIN EGAN ANDERSON
DEAN C ANDREASEN
DOUGLAS J PAYNE
JOHN K WEST

ATTORNEYS AT LAW
400 FIRST FEDERAL PLAZA
505 EAST 200 SOUTH
SALT LAKE CITY UTAH 84102
(801) 359 4100

E CRAIG SMAY
OF COUNSEL

December 8, 1987

Darrell Tanner, President
Ridge Athletic Club, Inc.
4303 North Foothill Drive
Provo, Utah 84604

Re: Sherwood Associates

Dear Mr. Tanner:

We received today your letter dated December 7, 1987, in which you tender the amount of \$119,200.00 or in the alternative "the entire delinquency due under said note . . .". Pursuant to Utah Code Annotated §78-27-3, Washington National Insurance Company hereby objects to your tender on the following grounds:

1. Pursuant to the terms of the subject Trust Deed Note and Trust Deed and our letter to you dated November 29, 1987, the entire unpaid principal balance and accrued interest together with all amounts secured and due under the Trust Deed were accelerated on November 30, 1987, and were and are now due and payable.

The specific amounts due and payable are as follows:

a.	Unpaid principal balance as of November 1, 1987	\$1,024,797.87
b.	Unpaid accrued interest as of November 1, 1987	68,746.86
c.	Unpaid accrued interest for November, 1987	9,820.98
d.	Late Charges	11,520.00
e.	Unpaid accrued interest for December 1-8, 1987, at 18% (per diem rate of \$512.40)	<u>4,099.19</u>
	TOTAL DUE	<u>\$1,118,984.90</u>

SESSIONS & MOORE

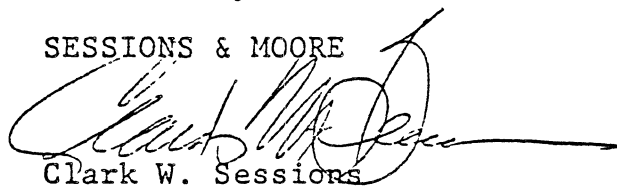
Darrell Tanner, President
December 8, 1987
Page -2-

3. Based upon past performance and various promises made in connection with the subject loan as evidenced by the Trust Deed Note and Trust Deed, it is highly doubtful that performance pursuant to the tender would be accomplished. Representations have been made to the undersigned concerning various avenues of funding, letters of credit, etc. since September and as recently as yesterday. All to no avail.

On behalf of our client Washington National Insurance Company, the action previously described in our letter dated November 29, 1987, will be taken and pursued.

Yours truly,

SESSIONS & MOORE



Clark W. Sessions

CWS/mc

cc: James W. Craig,
Washington National Insurance Company