

1955

# Pacific States Cast Iron Pipe Company and Alvin T. Locke v. Harsh Utah Corporation et al : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rawlings, Wallace Roberts & Black; Dwight L. King; Counsel for Appellants;

---

## Recommended Citation

Brief of Appellant, *Pacific States Cast Iron Pipe Co. v. Locke*, No. 8314 (Utah Supreme Court, 1955).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2350](https://digitalcommons.law.byu.edu/uofu_sc1/2350)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

---

PACIFIC STATES CAST IRON PIPE  
COMPANY,

*Plaintiff,*

and

ALVIN T. LOCKE,

*Intervening Plaintiff and Respondent,*

— vs. —

HARSH UTAH CORPORATION, a  
corporation, HARSH INVESTMENT  
CORPORATION, a corporation, and  
HAROLD J. SCHNITZER, an  
individual,

*Defendants and Appellants.*

---

**BRIEF OF APPELLANTS**

---

RAWLINGS, WALLACE  
ROBERTS & BLACK  
DWIGHT L. KING

*Counsel for Appellants*

530 Judge Building  
Salt Lake City, Utah

---

## TABLE OF CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	2
In re Background of Parties.....	2
In re The Contracts Between the Parties.....	4
In re The Construction Contract — “Lump Sum” .....	15
In re Construction Changes.....	18
In re Disbursements of Mortgage and Escrow Funds.....	20
In re The Pleadings .....	22
In re The Court’s Decision.....	29
In re Payment of Balance of Funds.....	32
In re Wiring of Schnitzer’s Hotel Room.....	33
In re Accountings .....	33
In re Costs Eliminated From Report.....	39
In re Calculations of Profit by Locke before Litigation....	40
STATEMENT OF POINTS .....	41
ARGUMENT .....	42
POINT I. THE TRIAL COURT MISCONSTRUED THE AGREEMENT OF OCTOBER 4, 1951 .....	42
(a) The Terms of the Agreement Show an Intention to Consider all Costs. ....	43
(b) The Conduct of the Parties Before Litigation Shows a Consideration of all Costs. ....	49
CONCLUSION .....	57
POINT II. LEGAL PRINCIPLES GOVERNING THE INTERPRETATION OF THE AGREEMENT RE- QUIRE A CONSIDERATION OF ALL COSTS .....	57
CONCLUSION .....	71

## TABLE OF CONTENTS—(Continued)

	<i>Page</i>
POINT III. A PROPER AND ACCURATE AC- COUNTING SHOWS NO BONUS DUE LOCKE .....	72
(a) Total Receipts on the Project were Improperly and Inaccurately Calculated. ....	72
CONCLUSION .....	78
(b) The Total Expenditures on the Project were Im- properly and Inaccurately Calculated. ....	79
CONCLUSION .....	87
POINT IV. THE COURT HAS MISCONSTRUED THE FEDERAL HOUSING RULES GOVERNING WHERRY HOUSING PROJECTS .....	88
(a) The Escrow Fund Must Be Paid Out By Irving Trust Company Prior to Payment of Any Mort- gage Proceeds. ....	89
CONCLUSION .....	95
(b) The Finding of Inadequacy of Financing is Un- supported by Evidence. ....	92
CONCLUSION .....	95

## APPENDIX

Agreement of July 21, 1951 .....	1
Agreement of July 24, 1951 .....	3
Agreement of August 29, 1951.....	5
Agreement of October 4, 1951.....	7
Card Greaves' Report.....	11
Goldberg Audit .....	15
Peat, Marwick, Mitchell & Co. Report.....	19
Comparison of Project Costs .....	23
Cost Analysis .....	36

# TABLE OF CONTENTS—(Continued)

## AUTHORITIES CITED

*Page*

Barmeier v. Oregon Physicians' Service, 194 Ore. 659, 243 P. 2d 1053 .....	67
Barry v. Bernaip, 164 Mo. App. 27, 141 S.W. 933.....	78
Biersdorf v. Putnam, 181 Ore. 522, 182 P. 2d 992.....	71
Burton v. Oregon-Washington R. & Nav. Co., 148 Ore. 648, 38 P. 2d 72 .....	70
Citizens' Nat. Bank v. Corl, 225 N.C. 96, 33 S.E. 2d 613.....	62
City Messenger & Delivery Co. v. Postal Telegraph Co., 74 Ore. 433, 145 Pac. 657 .....	60
City of Reedsport v. Hubbard, ..... Ore. ...., 274 P. 2d 248.....	68
Corvallis & A.R.R. Co. v. Portland, E. & E. Ry. Co., 84 Ore. 524, 163 Pac. 1173 .....	60
Edwards' Estate, In re, 140 Ore. 431, 14 P. 2d 274.....	61
Erickson v. Grande Ronde Lumber Co., 162 Ore. 552, 92 P. 2d 170 .....	63
Hardin v. Dimension Lumber Co., 140 Ore. 385, 13 P. 2d 602....	61
Hayes v. Hayes, 66 N.W. 134, 19 Allen 571.....	62
Haynes v. Douglas Fir Exploitation & Export Co., 161 Ore. 538, 90 P. 2d 207 .....	66
Lawson v. Tripp, et al., 34 Utah 28, 95 Pac. 520.....	58
Levin v. Stratford Plaza, 196 Md. 293, 76 A. 2d 558.....	62
Markham & Callow v. International Woodworkers, 170 Ore. 517, 135 P. 2d 727 .....	71
Martin v. City of New York, 35 N.Y. Supp. 2d 182, 264 App. Div. 234 .....	77, 87
Merrick v. Delanan Eng. Co., 243 Iowa 39, 50 N.W. 2d 586.....	62
Northwestern Transfer Co. v. Investment Co., et al., 81 Ore. 75, 158 Pac. 281 .....	58
Nunner, et al. v. Erickson, et al., 151 Ore. 575, 51 P. 2d 839....	61

## TABLE OF CONTENTS—(Continued)

	<i>Page</i>
Parsons v. Boggie, 139 Ore. 469, 11 P. 2d 280.....	61
Purdue v. Ralph, 100 F. 2d 518 .....	62
Rosenau v. Lansing, 113 Ore. 638, 234 Pac. 270.....	58
Salem King's Products Co. v. Ramp, 100 Ore. 329, 196 Pac. 401 .....	60
Spande v. Western Life Indemnity Co., 68 Ore. 171, 136 Pac. 489 .....	60, 71
Standard Oil Company v. Stubbs-Auckland Oil Co., 221 Iowa 489, 265 N.W. 121 .....	82
Sterrett v. Stoddard Lumber Co., 150 Ore. 491, 46 P. 2d 1023....	58

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

PACIFIC STATES CAST IRON PIPE  
COMPANY,

*Plaintiff,*

and

ALVIN T. LOCKE,

*Intervening Plaintiff and Respondent,*

Case No.  
80336

— vs. —

HARSH UTAH CORPORATION, a  
corporation, HARSH INVESTMENT  
CORPORATION, a corporation, and  
HAROLD J. SCHNITZER, an  
individual,

*Defendants and Appellants.*

---

BRIEF OF APPELLANTS

---

PRELIMINARY STATEMENT

Throughout this brief, appellants, Harsh Utah Corporation, Harsh Investment Corporation and Harold J. Schnitzer, will be referred to either by name or as defendants, and respondent, Alvin T. Locke, will be re-

ferred to as plaintiff or by name. Other parties to the action who have appeared from time to time but are no longer before this court, will be referred to by the name of the party.

This appeal arises out of a suit by intervening plaintiff against defendants for a bonus claimed to have been earned by plaintiff as the construction superintendent on the Hill Field Air Force Base Housing Project. Defendants counterclaim for moneys owing on a promissory note and funds supplied to plaintiff which were misappropriated by him while acting as construction superintendent at Barstow, California. The lower court awarded judgment in favor of plaintiff on his complaint and in favor of defendants on their counterclaim. Defendants appealed from the judgment against them.

All italics are ours.

## STATEMENT OF FACTS

### **In re Background of Parties**

Plaintiff, prior to becoming acquainted with defendants, was a construction superintendent. He had had considerable experience supervising the construction of large housing projects and buildings. As a part of his employment, he had worked on what are known as Wherry Housing Projects. The Wherry Housing Act provided for a private business to finance housing projects for military personnel. It involved the use of the Federal Housing Administration procedures and a



guarantee of any mortgage on the project by the Federal National Mortgage Association. Plaintiff had become familiar with the kind of procedures set up by the Federal Housing Administration for qualifying as a sponsor of a Wherry Housing Project.

Shortly before June of 1951, plaintiff contacted defendant, Harold J. Schnitzer, at Portland, Oregon, where defendant operated and was engaged in the business of remodeling buildings and in a limited way in the construction business. Defendants, Harsh Utah Corporation and Harsh Investment Corporation, were not at that time incorporated or existing.

Defendant, Harold J. Schnitzer, did not own construction equipment nor did he do the actual building of the projects in which he had an interest. His *modus operandi* was to subcontract all of the actual construction work which he undertook.

Plaintiff informed defendant, Schnitzer, of the opportunity which existed for construction of Wherry Housing Projects. He informed him of his qualifications and suggested that a joint working arrangement be considered. Defendant, Schnitzer, was in a position to provide substantial sums of money for the financing of the proposed housing projects and had credit facilities which would supply additional sources of money.

### **In re The Contracts Between the Parties**

After several conferences, an agreement was drafted. This agreement is dated June 21, 1951, and contemplated a proposed bid on a Wherry Housing Project at Deseret Chemical Depot near Salt Lake City, Utah. The entire agreement is set forth in the appendix at page 1 and is Exhibit 156.

Plaintiff and defendant, Schnitzer, in furtherance of their agreement of June 21st, came to Salt Lake City, Utah, in July of 1951 and visited the Deseret Chemical Depot site, discussed the bids which were necessary for submission to the army and Federal Housing Administration and discussed at length the possibilities of financing the housing project should they be the successful bidder. While they were in Salt Lake City, defendant, Schnitzer, and plaintiff drew an additional document entitled "Agreement" dated July 24, 1951. The agreement was to supersede any prior agreements entered into between the parties. It differs considerably from the June 21st document. Whereas the June 21st document provided for plaintiff to assist defendant, Schnitzer, in his efforts to procure a mortgage loan for construction of the Wherry Housing Project at Deseret Chemical Depot, the second agreement dated July 24th provided for defendant, Schnitzer, to furnish the capital for the construction of the project. The second agreement dated July 24, 1951, is reproduced in the appendix at page 3 and is Exhibit 157.

The July 24th agreement provided that defendant, Schnitzer, and plaintiff would form a joint venture to construct the housing project. The joint venture was to guarantee to defendant, Schnitzer, from profits of the venture, a minimum of \$150,000.00. In addition, Schnitzer was to receive one-half of all profits earned above this amount, and plaintiff was to receive the other half. The agreement provided that it would be binding in the event that Schnitzer and Locke were successful bidders on the Deseret Housing Project.

The parties returned to Portland and bids were submitted. They were not successful in obtaining an award for the construction of the Deseret Housing Project. Both, the June 21st and the July 24th agreements provided for the preparation of bids by Locke. As a result of the various inquiries and conferences, Locke and Schnitzer had received information that other Wherry Housing Projects were being contemplated by the various branches of the armed services.

On the 29th of August, 1951, a third agreement was drawn and executed by Schnitzer and Locke. This agreement is reproduced in the appendix at page 5 and is Exhibit 158. The agreement of August 29th contemplated bids being submitted on three separate Wherry Housing Projects. They were the Davis Monthan Housing Project in Arizona, the Hill Field Housing Project in Davis County, Utah, and the Great Falls Air Force Base Housing Project at Great Falls, Montana. Locke and Schnit-

zer were the successful bidders on all three of the projects but withdrew from the Davis Monthan Housing Project bid after it had been awarded to them. The reason was that construction of two housing projects of the size of Hill Field and Great Falls overextended the facilities and finances of Schnitzer.

Locke, in the agreement of August 29th, was to provide supervision of the construction and completion of the projects in the event that an award was made to Locke and Schnitzer or their companies. Schnitzer and Locke again, in the agreement, provided for a ten percent guarantee to Schnitzer from profits of the venture and stated their understanding in the following language :

“Any company which shall be so-formed by Harold Schnitzer and Alvin T. Locke for the purpose of constructing Wherry Housing Projects shall guarantee to Harold J. Schnitzer from profits of the venture, a minimum sum equal to ten per cent of the total moneys received from the government for such construction.”

All profits in excess of the ten percent guarantee to Schnitzer were to be divided, one-half to Schnitzer and one-half to Locke. Locke agreed to devote all of his skill, energy and time to the successful completion of any project awarded to the joint venture between himself and Schnitzer. The agreement provided for a termination date of December 1, 1951, unless terminated by writing prior thereto.

On the 4th day of October, 1951, a fourth agreement was executed by Schnitzer and Locke. This agreement is reproduced in the appendix at page 7 and is Exhibit 162. For the first time, the Harsh Investment Corporation appears as a party to the agreements between Schnitzer and Locke. The agreement became and was the document under which Locke, Schnitzer and Harsh Investment Corporation operated during the construction of the Hill Field Housing Project and Great Falls, Montana project. The terms and provisions of the agreement have never been modified by writing or otherwise. It is the basic document governing the rights, duties and liabilities of the parties.

The October 4th agreement recites that there have been prior agreements contemplating bidding and construction of Wherry Housing Projects and recites that the Harsh Investment Corporation, as sponsor corporation, had three housing projects, one in Arizona, one at Ogden and one at Great Falls, Montana. It then recites that the parties desired to cancel all the agreements made before and supersede said agreements with this new agreement. These portions of the agreement of October 4th, are set forth in the "Whereas" recitals of the agreement and lay the background for that portion of the agreement which sets forth the duties and rights of the parties.

The agreement of October 4th, throughout its terms, refers to Harsh Investment Corporation as Harsh.

Schnitzer is referred to as Schnitzer and Locke as Locke. It provides that in the event Harsh was awarded a contract for the construction and management of any one of the three projects, it could employ Schnitzer or any other person or corporation to perform the actual construction of the project and did employ Locke as general construction superintendent of the projects. The contract provides that Harsh would pay to Locke for his services as construction superintendent \$1,000.00 per month retroactive to the 1st of October, 1951, for a term of one year and as long thereafter as Harsh required the services of Locke in connection with the completion of the construction projects.

Locke, agreed, in the best interest of Harsh, to devote his full time and attention exclusively to the services of Harsh and to perform such services as may be directed by Harsh.

In addition to his salary Locke was to receive, he would also receive a bonus computed in the following manner: From the net profit earned by Harsh in connection with the construction of any of the three projects, there shall first be retained by Harsh a sum of money equal to ten percent of the total amount of the bids made by Harsh and accepted by the government. On the remaining net profits earned by Harsh there shall be paid to Locke, fifty percent thereof by way of bonus. This provision is the one under which Locke claims that moneys are due and owing to him and is the basis of the court's judgment in his favor.

The contract provided for alternatives covering situations where Harsh did not elect to engage Schnitzer to do the construction work. The contract provided also that Locke would receive a sum equal to ten percent of all net profits received by Harsh on F.H.A. adjustments. Such adjustments were needed to accomplish changes in plans and specifications or increased labor costs. The sums due to Locke under the agreement other than his monthly salary and reimbursement for expenses were to be paid upon the completion of the construction projects and receipt by Harsh of profits earned.

The final paragraph of the October 4th agreement provided that Locke was to have no interest in or to the ownership or management of the housing project or in connection with any profits that might be derived therefrom, it being the intention of the parties that the interest of Locke would be limited to the construction of the projects in accordance with the terms of the agreement.

**In re Administrative Rules and Regulations for  
Military Housing Insurance under Title VIII  
of The National Housing Act.**

The Harsh Investment Corporation was awarded the contract for the construction of the Hill Field Housing Project at Ogden, and Schnitzer and Locke commenced the necessary procedures to qualify for construction of the project and obtaining necessary finances.

Exhibit 3 is the Administrative Rules and Regulations for Military Housing Insurance under Title VIII of the National Housing Act. This act sets up the requirements for sponsors of Wherry Housing Projects. Sections IV and V at pages 6 to 10 set forth the basic rules for qualifying mortgagors.

Section IV requires that the mortgagors, where the mortgage is in excess of \$200,000.00, be a corporation or trust and requires that the capital structure, methods of operation, *et cetera*, shall be subject to the Federal Housing Commissioner's Regulation which regulations are to remain in effect until the mortgage insurance is terminated.

Section V (1) requires of the mortgagor basic escrow funds to cover equipping of the rental units and initial renting expenses. Section V (2) requires the establishment of a special fund to insure that there will be funds available in addition to the proceeds of the insured mortgage to complete the housing project. This fund is to be held in escrow under an appropriate agreement approved by the housing commissioner. It requires that the escrow fund be expended for the work and material on the physical improvements prior to the advance of any mortgage money.

Section V (3) provides that the commissioner may require a deposit with the mortgagee, under an appropriate agreement, of funds necessary for the completion



of off site public utilities and streets. Section V (4) provides a system by which the corporate mortgagor shall be regulated by the housing commissioner. It provides that the commissioner shall own certain shares of special stock which stock shall acquire majority voting rights upon the happening of any of the following events:

- (a) a default under the mortgage;
- (b) violation of provisions of the charter of the mortgagor; and
- (c) violation of any valid agreement between mortgagor and mortgagee and/or the commissioner.

The section provides that the stock issued to the commissioner shall be in sufficient amount to constitute under the laws of the state of incorporation a valid, special class of stock and shall be issued in consideration of not to exceed \$100.00. The stock is to be issued in the name of the commissioner or in the name of the Federal Housing Administration. Upon the termination of all obligations of the Federal Housing Commissioner under the title, all regulations and restrictions of the mortgagor cease and the shares of special stock shall be surrendered by the commissioner upon receipt by him of his payment plus accrued dividends, if any. The provisions of Section V (4) are to be made effective by incorporation of appropriate provisions in the charter under which the mortgagor is created or by agreement. Additional restrictions concerning charges for rental services, creation of re-

serve for replacement, keeping of full and complete records and the furnishing of additional information are contained in Section V (4).

Section V (5) requires of the mortgagor a personal undertaking in an amount at least equal to ten percent of the construction costs or an escrow deposit of cash or securities in a like amount to insure that the project will be completed to the satisfaction of the housing commissioner. The Administrative Rules and Regulations for Military Housing Insurance under Title VIII of the National Housing Act, Exhibit 3 as herein recited, were all applicable to Hill Field Housing Project.

Schnitzer organized the Harsh Montana Corporation and the Harsh Utah Corporation to comply with the requirements of Sections IV and V. The Harsh Utah Corporation was issued its charter on the 20th of December, 1951. The total amount of authorized capital was \$10,400.00 paid for in full by a note from Schnitzer. All of the common stock of the corporation was held by Schnitzer except four shares issued to his nominees. The special preferred class of stock which was required by Section V (4) to be held by the Federal Housing Commissioner was provided for and issued to him.

Harsh Utah Corporation then became the mortgagor and sponsor for the construction of the Hill Air Force Housing Project. The Harsh Utah Corporation applied to Irving Trust Company for a loan on the Utah project

and received a commitment from the housing administrator to insure the loan made by Irving Trust Company. The amount, in the beginning, was in the sum of \$2,636,800.00 (Ex. 186-188).

As a part of the application for insurance commitment on the housing project, there was furnished by the Federal Housing Administrator, a financial requirement for closing of the Hill Air Force Housing Project. This document is Exhibit 188. The financial requirement for closing sets forth the F.H.A. total requirements and then breaks said amount down into various component parts. One of the basic figures contained in the document is the amount of the Construction Contract — “Lump Sum” which was shown as \$2,995,205.00. The mortgage loan is shown as \$2,636,800.00. The amount to be deposited in escrow by the mortgagor was the sum of \$585,442.00. The total amount of cash required from the mortgagor was \$651,690.00. This amount of \$651,690.00 became a sum which was necessary for the Harsh Utah Corporation to provide before it could commence construction of the housing project and qualify under the Federal Housing Administrator’s regulations.

The sum necessary to qualify Harsh Utah Corporation under F.H.A. regulations was furnished by defendant, Schnitzer. On the 21st of July, 1952, a meeting of the board of directors of the Harsh Utah Corporation was held in the Judge Building at Salt Lake City, Utah. The financial requirements for commencement of the

construction project were discussed and defendant, Schnitzer, agreed to contribute \$624,994.00 to Harsh Utah Corporation and the corporation agreed to accept said sum as contributed surplus (Ex. 161, p. 13). With the contributed surplus, Harsh Utah then had available sufficient sums to meet the financial requirement for closing. The funds which were contributed by Schnitzer were obtained through bank loans and his family, namely from his father-in-law.

The mortgage documents were executed on July 21, 1952, and the Hill Field Project was commenced, the first work being done on or about the 28th of July, 1952. The lump sum construction contract dated July 21, 1952, was executed between Harsh Investment Corporation and Harsh Utah Corporation. It was executed on behalf of Harsh Investment Corporation by the defendant, Schnitzer, and on behalf of Harsh Utah Corporation by the defendant, Schnitzer (Ex. 61 & 63). In addition to the mortgage and construction contract, on the 21st of July, 1952, Harsh Utah Corporation, as borrower, and the Irving Trust Company of New York, as lender, entered into an agreement entitled Building Loan Agreement which is Exhibit 64 and which provided for the Irving Trust Company to advance to Harsh Utah Corporation \$2,636,800.00 as a loan. With the proceeds from the loan and the contributed surplus from defendant, Schnitzer, of \$624,994.00, the Harsh Utah Corporation undertook the construction of the Hill Field Housing Project.

**In re The Construction Contract — “Lump Sum”**

Walter Hutchinson, an attorney, prepared all of the closing documents for Harsh Investment and Harsh Utah corporations. Hutchinson testified concerning the method of calculating the amount of the Construction Contract — “Lump Sum” as follows:

“Q. How, did you arrive at the figure of \$2,995,000.00, I believe that appears as the amount of the lump sum contract?

A. The FHA cost estimate was \$3,185,550.00, and under their requirement that we could reduce, that is, we had to put up in cash the difference between the cost and the loan, but that that cost could be reduced by a builder's fee which they had included in that cost provided that the builder's fee was not to be paid in cash. The builder's fee amounted to \$149,035.00. So, subtracting that from the FHA cost, we get a reduced FHA cost of \$3,036,515.00. Then we had rather included in that Three million dollar figure \$185,827.00 earmarked for carrying charges, carrying charges with interest, ear-marked for interest during construction; FHA examination fee, insurance premium, and insurance during construction, and similar costs which we just mentioned a little while ago, which were costs of the project. There was a further sum of \$41,310.00 that the sponsor had to pay for architectural fees which was also included in this FHA estimated cost. So, deducting that figure we have a net figure of \$2,995,205, and that was the amount of the construction contract.

Q. Now, how does that figure relate to the amount of the mortgage?

A. That figure is in excess, some three hundred thousand, in excess of the mortgage. Now, as I stated previously, because of the FHA requirement that we had to assure the FHA of the Sponsor's ability to complete the project by depositing in cash with the lender the difference between their estimated cost and the funds available through the mortgage proceeds, which total figure amount to some \$624,000.00.

Q. Now, that \$624,000.00, Mr. Hutchinson, how do you say; that is returned to the person placing it?

A. Well, the hundred thousand of it would be returned through the payments during construction on the construction contract.

Q. How are they figured?

A. In other words, since the contract is more than the mortgage, then the trade payment breakdown that goes with the—I must see the schedule of payments pursuant to this—is made out by the FHA to agree with that. That is, the various trades are adjusted so that the sum of the trade payments payable under this construction contract would exactly agree with the total sum payable under this contract, some approximately \$300,000.00 of it comes back to the mortgagor corporation during construction here, and the other items were the \$41,000.00 which was drawn out to pay the architect. That didn't go through. That was paid direct by the mortgagor corporation to the architect or rather reimbursed

the Government. The Government had paid the architect and the mortgagor corporation had to reimburse the Government for the architect's fees of \$41,000.00, here. That is one of the requirements, and then \$185,000.00 of it had to be held in escrow by the lender to meet the carrying charges that I just referred to. That takes up the total of the \$624,000.00—odd dollars that was put up in escrow.” (R. 336).

The above-recited testimony was undisputed.

The actual construction subcontracts were awarded by Harsh Investment Corporation. In the subcontracts, an example of which is Exhibit 4, the Harsh Utah Corporation was shown as the owner of the housing project. Several of the subcontracts were negotiated by Locke and approved by defendant, Schnitzer.

Work commenced for the clearing of the site on July 28, 1952. In the very beginning, there developed problems of an unusual and unique nature. The plats showing the elevation of the construction site indicated that the site was approximately eleven inches lower than the actual elevation. After the construction had commenced, it was discovered that natural gas might be available for the heating of the housing units. This necessitated a change in the plans and specifications since originally it was contemplated that oil furnaces would be installed. Later, butane gas was designed and finally natural gas

was installed. Harsh Investment Corporation incurred considerable expense in excess of its normal expectation because of the two problems relating to elevation and the change in heating plans.

### **In re Construction Changes**

The procedures developed by the Federal Housing Administration required the mortgagor, the contractor and the mortgagee to submit forms entitled, "Request For Consideration of Proposed Changes" to the Federal Housing Administration. An example of a number of such requests is contained in defendants' Exhibit 164. The request for changes was then approved or disapproved by the Federal Housing Administration officials. Changes involved an increase in the amount which could be insured by the Federal National Mortgage Association, a decrease in the amount, or in many instances, would, in no way, effect said amount. The requests were necessary, in all instances if Harsh was to deviate from the plans and specifications. Requests for changes were made by Irving Trust Company, Harsh Investment Corporation and Harsh Utah Corporation on the heating system changes and were rejected. On the excess earth removal problem created by the mistake in elevation, requests for changes were rejected. Some requests for changes were signed for both Harsh corporations by Locke (see first 20 requests in Ex. 164). Many were signed for both corporations by Schnitzer and some for both corporations by Kahn, the assistant manager of



both corporations. No negotiations ever occurred between Harsh Utah Corporation and Harsh Investment Corporation concerning amounts, if any, which were to be added to the Construction Contract—"Lump Sum" as a result of the change requests. A large number of such requests were approved and, during the construction of the Hill Field Project, a total net increase in the amount of the sponsor's mortgage was allowed in the sum of \$154,400.00 (see defendants' Ex. 443). This exhibit, a photostat of the Federal Housing Administration Project Analysis prepared after the close of the Hill Field Project on the 21st of December, 1954, was offered by plaintiffs as an exhibit but was rejected by the trial court. However, the information contained on it is not disputed as to its accuracy.

With the net increase of \$154,400.00 resulting from approved requests for consideration of proposed changes, the final amount of the mortgage on the Hill Field Housing Project was \$2,791,200.00. This sum constituted all of the receipts by Harsh Utah Corporation from the mortgage. All other sums which it had available were contributions to its capital from Harold Schnitzer or earnings from the rent of the individual living units at Hill Field.

Locke testified that he devoted approximately one-third of his time to the Hill Field Housing Project and divided the other two-thirds of his time between the housing project at Great Falls, Montana, and the home office

of defendants, Schnitzer and Harsh Investment Corporation, from July, 1952, through June, 1953. The actual construction work on the housing project was substantially completed in October of 1953.

### **In re Disbursements of Mortgage and Escrow Funds**

During the construction period, payments were made by the Irving Trust Company to the mortgagor, Harsh Utah Corporation, on a F.H.A. form denominated "Request for Payment." The F.H.A. file of Request for Payment is Exhibit 141. The Request for Payments were compiled by Harsh Utah Corporation from information supplied it by its subcontractors and was a representation to the Federal Housing Administration and Irving Trust Company that the amounts requested were in accordance with the construction contract and represented ninety percent of the value of work performed during the period for which the request was submitted. The requests for payment were submitted by Harsh Utah Corporation, as mortgagor, and signed by the defendant, Schnitzer, as its president. They contained a certificate by the Harsh Investment Corporation as architect on the project. The forms were submitted for approval to the Federal Housing Administration before the mortgagee was permitted to advance the sums requested. The maximum which could be drawn was ninety percent of the value of work as various jobs were evaluated.

Prior to the completion of the housing project on September 26, 1953, Pacific States Cast Iron Pipe Com-

pany, one of the material suppliers for the subcontractor, Moulding Brothers, filed a materialman's lien on the project in Davis County. Following the filing of this lien, there were filed two additional liens, one by the Utah Fire Clay Company, another material supplier of Moulding Brothers, and a number of individual painters whose employer had become insolvent while working on the Hill Field Project. The filing of the liens prevented normal processing of applications for fund advances. A bond was obtained by Harsh Investment Corporation to indemnify the lienholders and at the time said bond was filed, the Vitt Construction Company, one of the subcontractors, filed an additional lien in a very large sum.

At the time the liens were filed, there was still in the hands of Irving Trust Company, in excess of ten percent of the amount of the mortgage. Ultimately there was paid into court by Irving Trust Company, as a last advance on the proceeds of the mortgage and escrowed funds, the sum of \$550,653.35 (R. 191).

Since the deposit of the balance from Irving Trust Company, all of the parties to the original lawsuit have been paid and have released and satisfied all claims against the Harsh Investment Corporation and Harsh Utah Corporation with the exception of Locke. After the payment of all claims, there remained on deposit with the Davis County Treasurer, \$273,558.75. Most of the fund remaining with Irving Trust Company at the close

of the project represented the ten percent withholding on actual project costs and the \$154,400.00 which was ultimately approved by the Federal Housing Administration for project changes.

### **In re The Pleadings**

Locke filed his notice of mechanics lien on the 14th day of December, 1953. The lien recited that there was due and owing to him the sum of \$150,000 for services rendered, and stated as follows:

“Said lien is claimed for services rendered to Harsh Investment Corporation, Harold J. Schnitzer, Sponsor, and Harsh Utah Corporation as general superintendent of construction, pursuant to a written contract of employment with Harsh Investment Corporation, Harold J. Schnitzer, Sponsor. (R. 9).”

The notice of lien stated that the services for which payment was claimed were rendered between August, 1951, and October 10, 1953. Appellants answered the lien, denied that it was presented within the time permitted by the laws of the State of Utah, denied that any sum whatsoever was due to Locke and denied generally “that he was entitled to a lien.”

No complaint was filed on the Locke lien until the 8th of June, 1954, at the time the above-entitled action was actually in trial.

The complaint in intervention alleges that Locke rendered services as general contractor to Harsh Investment Corporation and Harsh Utah Corporation and to defendant, Harold J. Schnitzer, individually, pursuant to the contract of October 4, 1951. It joined as parties, the Irving Trust Company and Massachusetts Bonding and Insurance Company, a corporation, which furnished the completion bond for Harsh Investment Corporation (R. 16).

The complaint alleged the filing of the lien by Locke, the fact that Irving Trust Company was mortgagee on the premises liened and claimed that the lien rights of plaintiff were superior to the mortgage by reason of the fact that Locke had rendered services to Harsh Investment Corporation, Harsh Utah Corporation and Harold J. Schnitzer prior to the 21st day of July, 1952, the day on which the mortgage was filed (R. 18). Locke then alleged that he and the defendant, Harold J. Schnitzer, individually, and Harold J. Schnitzer as President of Harsh Investment Corporation, were parties to the agreement of October 4, 1951, and that Locke was to receive as compensation for services to the said Harsh Investment Corporation, Harsh Construction Corporation and Harold J. Schnitzer, individually, a sum equal to fifty percent of the profits on the Hill Field Project.

The complaint also alleges that Harsh Investment Corporation was to receive a sum equal to ten percent of the original bid on the project to compensate it for all

of the financing necessary to complete the said project and then alleged that Harold J. Schnitzer and Harsh Investment Corporation were not entitled to said sum for the reason that they had failed, neglected and refused to perform the portion of the agreement that would entitle them to retain the said ten percent but by connivance, artifice and misrepresentation, fraudulently, maliciously and intentionally withdrew funds furnished by Irving Trust Company and did hypothecate and transfer said funds for their own use; that they did not at any time adequately and properly provide the necessary financing of the project (R. 19).

Locke alleged that he had performed fully all of the terms and conditions of the contract of October 4th; that the housing project had been completed and that defendant, Harold Schnitzer, had withdrawn large sums of money and transferred them for his own use and benefit. He than alleged that there was still retained by Irving Trust Company the sum of approximately \$573,000.00 in which he claimed an interest for services rendered to Harsh Investment Corporation, Harsh Utah Corporation and Harold J. Schnitzer, individually (R. 19).

He further alleges that a certified audit of the books of Harsh Investment and Harsh Utah Corporation would disclose a net profit on the project of \$296,226.89; that there were accruals of \$176,781.27 due and owing to subcontractors and materialmen.

Locke claimed an interest in the accrued net rental income on the housing project and alleged that said sum was in the amount of \$98,843.92; that additional sums were due for rentals in 1954, and that he should be permitted to participate in the rentals for the months of April, May, June and July of 1954 (R. 20). The total amount claimed to be due and owing to him by Harold J. Schnitzer, individually, Harsh Investment Corporation and Harsh Utah Corporation, is a sum in excess of \$250,000.00.

Locke then requested that Irving Trust Company be required to retain all of the sums in its possession until the amount owing him was determined by the court. He claimed that the last services rendered on the Hill Field Project was on or about the 14th day of December, 1953 (R. 21).

Paragraph 9 of the complaint in intervention set forth that the Massachusetts Bonding and Insurance Company had filed a surety bond for protection of materialmen and for services rendered on the Hill Field Project in the amount of \$299,521.00 and then requested that in case the fund of Harsh Investment Corporation proved insufficient to pay his claim that he have judgment against the Massachusetts Bonding and Insurance Company (R. 21).

Paragraph 10 alleged that Schnitzer was the holder of all shares of stock of Harsh Investment Corporation and Harsh Utah Corporation and that he transferred

funds from said corporations in complete disregard of their corporate entity. He then alleged that Schnitzer had no cash investment in said corporations and no capital account to substantiate his interest; that the finances of the corporation had been handled by Schnitzer without proper corporate authority and in fact said corporations are an alter ego and a single proprietorship of Harold J. Schnitzer (R. 22).

Paragraph 10 alleges that Schnitzer had no assets in Utah except the leasehold interest in the Hill Field Housing Project and requested the appointment of a receiver to collect the rental income from the project; that Harold J. Schnitzer, individually, and as president, was in complete control of Harsh Investment Corporation and Harsh Utah Corporation and would cause to be hypothecated and misappropriated the rental funds and that they would not be available for payment of claims unless a receiver were appointed.

Locke prayed judgment for a sum in excess of \$250,000, together with interest for his services as general construction superintendent on the Hill Field Air Force Housing Project under the terms and conditions of the contract of October 4, 1951. Paragraph 2 of the prayer requested that the court adjudge and decree that plaintiff, Locke, have a lien on the premises at Hill Field to secure the sums owed by Harsh Investment Corporation, Harsh Utah Corporation and Harold J. Schnitzer, individually, and that said lien was prior to and superior



to any and all liens and mortgages upon the lands and improvements; that the court then apply the proceeds from the mortgage to the payment of Locke and other claimants. Paragraph 3 of the prayer requested that the court give judgment in favor of Locke and against Massachusetts Bonding and Insurance Company for any unsatisfied or unpaid portions of his judgment. The prayer further requested that Irving Trust Company be required to pay out of the funds in its possession or that may come into its possession the judgments awarded to plaintiff, Locke.

Defendants' answer to the complaint in intervention admitted the execution and the significance of the contract of October 4, 1951, denied that Locke's claim was a proper subject for a mechanics lien, admitted the prior interest of the Irving Trust mortgage and denied that Locke had any rights prior to those of Irving Trust Company alleging that the rights of Locke accrued after the 28th of July, 1952, when the first work was actually commenced on the Hill Field Project. Defendants further denied that there was any sum due and owing to Locke, alleged that he violated the terms of the agreement of October 4th and that he had no interest whatsoever of the funds in the hands of the Irving Trust Company. It denied that Locke rendered services on the Hill Field Housing Project after the 1st of July, 1953. The answer admitted the existence of the interest of Massachusetts Bonding and Insurance Company, but denied the allegations that defendant, Schnitzer, had ignored and disre-

garded the corporate entity of the Harsh Investment Corporation and Harsh Utah Corporation, and that said corporations were merely alter egos of Harold J. Schnitzer (R. 25-27).

Defendants filed a counterclaim against intervening plaintiff and alleged that Locke expended large sums of money entrusted to him for his own benefit and personal affairs and that he embezzled from the Harsh Investment Corporation approximately \$14,000.00. The counterclaim further alleged that Locke had embezzled from Harsh Construction Company, a wholly owned corporation of Schnitzer, approximately \$5,300.00; that the embezzlements were consummated by the filing of fraudulent and false travel voucher claims for advances to subcontractors and business expenses. The counterclaim further alleges that as a result of the breach of the duty of fidelity which Locke owed to Harsh Investment Corporation, he had forfeited all rights to any compensation under the agreement of October 4, 1951. The counterclaim denied that Locke had devoted his full time to the business of the Harsh Investment Corporation and Harold J. Schnitzer. The answer and counterclaim of defendants were filed one day after receipt by defendants of the complaint in intervention by Alvin T. Locke.

After the pleadings had been filed and all of the various lien claimants, including intervening plaintiff, Locke, were before the court, a stipulation was entered into which provided: (1) that the mortgage of Irving

Trust Company was superior to and prior in time to all claims including the claim of Locke; (2) that funds in the hands of Irving Trust Company could be paid into court and held by the court pending the outcome of the lawsuits then pending. Based on this stipulation on the 16th day of July, 1954, the court entered an order providing for the receipt and handling of the balance of the Irving Trust Company mortgage (R. 49). The trial of the Locke matter commenced on June 8th and continued thereafter until the 24th day of June, 1954.

### **In re The Court's Decision**

The court filed the basic findings in favor of intervening plaintiff on his complaint and in favor of the defendants on their counterclaim on November 12, 1954 (R. 241-244). Plaintiff filed his proposed Findings of Fact, Conclusions of Law and Decree which were signed by the court on the 31st day of December, 1954.

In the memorandum decision of November 12, 1954, the court adopted a theory that the word, "profits", as used by the parties in the October 4th agreement, meant only *construction profits* and that the construction profits were to be calculated on the basis of the Construction Contract—"Lump Sum" between Harsh Utah Corporation and Harsh Investment Corporation. Using as the income to the Harsh Investment Corporation the amount of the lump sum contract, namely, \$2,995,205.00, and added to this, the amount of the change order extras

or the sum of \$154,400.00 to arrive at an income figure for Harsh Investment Corporation, said income figure amounts to \$3,149,605.00.

The court further found that Locke was entitled to participate in the rental income from the housing project up to and including July 1st, 1954, disallowed as deductions from the rental income, the interest accrued during the construction period and depreciation during that period. The court further found that all expenses of Harsh Utah Corporation should be eliminated and disallowed as construction costs. He disallowed an inter-company profit between Pacific Coast Equipment Company and the salary of Harold J. Schnitzer.

The court found that defendants were entitled to retain their ten percent of the bids as provided in the contract and that the project was adequately financed by defendant although certain funds have been siphoned off by defendant, Schnitzer, during the construction period. The court found further that Locke did not breach his contract and that Schnitzer was not entitled to participate in "Alvin T. Locke's Kansas Oil Venture."

Schnitzer and/or Harsh Investment Corporation were entitled to a judgment on their counterclaim for nine of the items which they claimed Locke misappropriated. The total amount of those items is \$14,565.91. The court then found that other items were submitted to the court for adjudication by defendants' counterclaim and

that said items are *res adjudicata*; that defendant should dismiss a lawsuit which was filed in Portland, Oregon. Defendants were entitled to submit evidence on attorneys fees under a promissory note which was one of the claims. The court found that a Barstow, California case should be dismissed and that Alvin T. Locke was entitled to one month's salary, bonus and certain expenses. Each of the parties were entitled to interest on the amount of their judgment.

Intervening plaintiff, Locke, was not entitled to a lien on his profit sharing contract upon which the suit was based. The court ordered that a receiver be appointed if thirty days after judgment sufficient moneys were not deposited in court to cover the judgment, interests and costs.

On December 17, 1954, the trial court made an additional order after the arguments of counsel concerning the proposed findings of fact, conclusions of law and decree and in it allowed income tax paid by Harsh Utah Corporation to the State of Utah as a proper deduction and disallowed a management fee paid by Harsh Utah Corporation to Schnitzer, and allowed real property taxes as a proper deduction from income earned by Harsh Utah Corporation. The court found further that defendants were entitled to \$1,000 attorneys fees on the note for which judgment was granted (R. 245).

On January 25, 1955, a hearing on defendants' objections to the findings and judgment in favor of Locke was held. At the time there were offered in evidence three exhibits. They were Exhibits 443, 444 and 445. Exhibit 443 was the Federal Housing Administration Closing Project Analysis completed on the 21st of December, 1954. Exhibit 444 was a letter setting forth information concerning the payments by Harsh Utah Corporation to Irving Trust Company. Exhibit 445 was a series of checks showing payments to Irving Trust Company for items of expenses incurred by Harsh Utah Corporation during the construction period. The court refused to permit the reception of said documents in evidence but the same were filed and are a part of the record now before this court. Exhibit 442 was received and said exhibit shows the income and expenses of the Harsh Utah Corporation from April 1st to June 30, 1954. The court rejected Exhibit 447 which is a letter from the Federal Housing Administration to the Harsh Utah Corporation concerning the date of acceptance of the Hill Field Housing Project.

### **In re Payment of Balance of Funds**

On the 29th of January, 1955 there was deposited in the court, the sum of \$550,653.35 which was the total of two checks of Irving Trust Company in the following amounts: \$154,400.00, the amount of the change requests, and \$396,253.35, the balance of the mortgage (R. 153A). Following the receipt of the funds into court, upon stipulation and motions, many of the parties mak-

ing claim against the fund on deposit with the court were paid. Thereafter, plaintiff paid and satisfied all of the judgments which had been entered against it with the exception of the judgment in favor of intervening plaintiff, Alvin T. Locke. The last judgment paid and satisfied was the judgment of K. H. Vitt and Vitt Construction Company which was paid on the 3rd day of August, 1955 (R. 222).

### **In re Wiring of Schnitzer's Hotel Room**

During the trial of the Locke case, intervening plaintiff had installed in the hotel room of defendant, Harold Schnitzer, a microphone and recording device. The device was installed on the 6th of June, 1954, and remained in the room to and including June 18, 1954 (Tr. 656). During the whole of that time, Locke, and his counsel, John Sherman, together with the installer of the recording device, listened to conferences between the defendant, Schnitzer, and his attorneys, employees and associates. The information which was obtained in this manner was used by plaintiff in the cross-examination of the defendant, Schnitzer, and his other witnesses and in the preparation of the plaintiff's own testimony.

### **In re Accountings**

Intervening plaintiff employed a certified public accountant, Milton T. Goldberg, to audit the books and records of the Harsh Investment Corporation and the Harsh Utah Corporation. Said audit was conducted im-

mediately prior to the 7th of May, 1954. The results of the audit are shown by Exhibit 201. Additional items of information which were obtained from the audit of both the Montana and Utah projects of Schnitzer, are shown by Exhibits 202, 203 and 204. These exhibits contain statements of income and construction costs. The pages of the exhibits which concern the Hill Air Force Housing Project have been reproduced in the appendix at pages 15 - 18. In addition to the audit conducted by Goldberg, there was introduced in evidence, a great deal of accounting information by William Ellis, the controller of Harsh Investment Corporation and Harsh Utah Corporation. The basic figures provided by the audit of Goldberg and those supplied by the accountants for the defendants were in general agreement.

Locke introduced a report by Card Greaves, the certified public accountant employed by Schnitzer and Harsh corporations. It is Exhibit 182. The exhibit shows a cost report of the Hill Garden Homes at Hill Air Force Base with the breakdown of overhead costs including salaries, professional fees, *et cetera*. This report was checked by Goldberg. His audit made corrections amounting to approximately \$5,000.00. The overall costs as reported by Card Greaves in Exhibit 182 were accurate and Goldberg so testified (Tr. 589, 590). The Card Greaves report, as far as it pertained to the Hill Garden Homes, is reproduced in full in the appendix at pages 11 - 14. In addition to the costs reflected by the books and re-



cords of the Harsh Corporation on May 14, 1954, there were a number of accrued items which were on the books. A list of those accruals was made by Goldberg and became Exhibit 202. It is reproduced in full in the appendix at page 18.

As it has been stated, the actual records and books of the Harsh corporation were checked by Goldberg and found to be accurate with the few adjustments which have been mentioned.

Goldberg stated that his audit consisted of checking out almost every item with the Card Greaves report. He examined all paid invoices, vouchers and contract files and read correspondence as to differences in unpaid balances. He examined the contract between the different companies, and examined the books for any inter-company profits that should be eliminated. He examined the contracts purporting to reflect income to the respective companies. He “\* \* \* examined the pay estimates as made up monthly showing the amount that should have been received by the respective companies and whether the charges were proper to the respective companies and whether they were applicable to another subsidiary or affiliated company rather” (Tr. 472, 473). At a later place in the record, Goldberg testified concerning the procedure followed in auditing the books of the Harsh corporations and Schnitzer as follows:

“Q. Let’s see where they were.

- A. If I may, Mr. King, we took the books and records of the Harsh Investment Company, the subsidiary records showing the detailed costs which were furnished by Mr. Ellis — he had a separate subsidiary record and we itemized the various cost items, we checked invoices and vouchers and contracts, and so forth; made out test cases, and we sat down with Mr. Greaves and reconciled every difference between the books and Mr. Greaves’ report. The books were based on payments actually made, charged to the account, but they had a subsidiary record showing the amount of the contract, accrued liability which were furnished to Mr. Greaves in his previous examination and with Mr. Ellis. They provided the figures according to the account and report. We reconciled every difference and submitted the accrual items which have been introduced here in evidence, and there were minor differences, I think of \$350.00 or so which resulted in items of a dollar six cents and ten dollars and so fourth, due to the volume of the work and the type of report.
- Q. Would it be then your statement, Mr. Goldberg, as far as the accuracy of the Greaves’ statement of costs, that it’s within three hundred dollars?
- A. No, there were other items he failed to pick up, and we picked them up as additional costs and added those to his report. That is commented on in this report, I think on page — we gave him credit for additional costs \$5,597.25 Mr. Greaves did not pick up as cost, and in checking the books we found one item

of \$3,000.00 he did not pick up. We added it. Another item of \$2597.25 he omitted to pick up in his, and we added it on his cost, and our cost were over and above the cost he submitted, and he stipulated these were omission on his part.

- Q. So these cost figures show additional to what Mr. Greaves shows of \$5,000.00.
- A. \$5,097.95 shown on page three in the comments in exhibit B.
- Q. Then, so that I can understand you, your costs, other than the \$5,000.00 items, checked out with Mr. Card Greaves' cost.
- A. And the books and records.
- Q. Yes, so far as showing the cost of the job, it would be your testimony I suppose that the books actually reflected the cost and Mr. Card Greaves' accounting report actually reflects the cost.
- A. That's true." (Tr. 588-590)

Goldberg, in his audit, adopted a construction of the contract of October 4, 1951, which differentiated between total costs incurred for the Hill Field Construction Project and "construction costs" on the project. Following that theory, he testified that the profits, as the word is used in the October 4th agreement, meant profits only to Harsh Investment Corporation, the contractor, who was in charge of the actual construction work. His formula then took as income to Harsh Investment the amount of the lump sum contract, Exhibit 61, which was in the amount of \$2,995,205.00 and added to this sum the total

amount of requested changes 1-79 or \$279,126.00; his income figure for the Harsh Investment Corporation amounts to \$3,274,331.00. Goldberg then added to this figure \$98,843.92 which is the net amount of rentals before interest or depreciation at the Hill Field Project (see Exhibits 203, 204).

These calculations by Goldberg became the findings of the court with some major adjustments. The court increased the amount of the net rental income from the \$98,000.00 figure to \$165,986.49. He reduced the amount of the change order extras from the \$279,000.00 figure to \$178,672.00. He refused to accept the overhead costs shown by the Goldberg audit for the Hill Field Project, but substituted instead the overhead costs as shown by the Goldberg audit for the Great Falls Wherry Housing Project (see R. 99, 101). He made a finding that the overhead costs of Harsh Investment Corporation as audited and certified to by Goldberg included costs and overhead expenses of other activities other than Harsh Investment Corporation.

At the time the judgment was entered on the 31st day of December, 1954, none of the litigants in the above-entitled matter had been paid and in some instances the amount of the judgment had not been definitely determined. The final closing figures on the project, as was shown by the checks from Irving Trust Company which were received by the clerk on January 29th, were offered in evidence (R. 153A). On the 31st of January, 1955,

the Harsh companies and Schnitzer filed a motion requesting permission to offer and file the Federal Housing Administration Project Analysis showing the total revised bids and the other information as determined at the close of the project on the 21st day of December, 1954. The motion further requested permission to show the total amount of judgments and other payments that had been made since the Goldberg audit and which were, at the time of the audit, shown as accrued items and were not accurately on the books. The motion sought permission to introduce evidence concerning the date when the project was accepted by the Federal Housing Administration, namely, the 26th of January, 1955. The motion was denied by the court and no evidence was permitted to bring the records of the project up-to-date as of the time of closing.

To bring the Goldberg, Card Greaves and other accounting information into the proper perspective, Harsh corporations had prepared an audit and comparison of project costs by Peat, Marwick, Mitchell & Company. This information, together with an explanatory note of the differences, is set forth in the appendix at pages 19 - 35.

### **In re Costs Eliminated From Report**

In the court's judgment, there was eliminated from the costs paid by the Harsh Investment Corporation, all of the salary of Harold Schnitzer which amounted to the sum of \$26,250.00, an inter-company profit which was in

the books of Harsh Investment Corporation and Pacific States Coast Equipment Company in the amount of \$95,547.30, and the interest expense of Harsh Utah Corporation during the period that rents were collected and included in the income considered by the court. The interest on mortgages and advancements which were eliminated amounts to the sum of \$105,845.39 (see Exhibits 203 & 442). The actual payments are shown in the record by the court orders for payment and by the satisfaction of judgments which have been filed since the decree was entered (see R. 163 & 200 - 223).

### **In re Calculations of Profit by Locke Before Litigation**

During the time that Locke was employed with the Harsh corporations and Harold J. Schnitzer, he, on several occasions, made cost breakdown analyses. These analyses were to be used for the submission of bids on Wherry Housing Projects. One of such documents is Exhibit 222, dated August 31, 1951. This document contains, on its face, a detailed breakdown of the expected costs on the Hill Air Force Base Project. In the calculations, there are shown the various costs including the architect's fees, the F.H.A. fees, the insurance fees and the legal and recording fees before any profit was calculated. The document shows, on its face, that the profit was the difference between the total costs of the project and the mortgage loan which it was anticipated would be obtained.

Exhibit 223 is a bid calculation prepared by Locke for the Harsh corporations showing the breakdown of the various items of cost and includes in the costs, all of the items which the Goldberg audit eliminated as proper items of cost before a profit is determined. A further example of calculations made by Locke for the Harsh corporations and Schnitzer is Exhibit 241. This exhibit pertained to the bid on the Tucson, Arizona, project. It again shows an inclusion in the costs of the project of the items eliminated by Goldberg.

## STATEMENT OF POINTS

### POINT I.

THE TRIAL COURT MISCONSTRUED THE AGREEMENT OF OCTOBER 4, 1951.

(a) The Terms of the Agreement Show an Intention to Consider all Costs.

(b) The Conduct of the Parties Before Litigation Shows a Consideration of all Costs.

(c) Pleadings of Locke Show a Theory which Considers all Costs.

### POINT II.

LEGAL PRINCIPLES GOVERNING THE INTERPRETATION OF THE AGREEMENT REQUIRE A CONSIDERATION OF ALL COSTS.

## POINT III.

A PROPER AND ACCURATE ACCOUNTING SHOWS NO BONUS DUE LOCKE.

(a) Total Receipts on the Project were Improperly and Inaccurately Calculated.

(b) The Total Expenditures on the Project were Improperly and Inaccurately Calculated.

## POINT IV.

THE COURT HAS MISCONSTRUED THE FEDERAL HOUSING RULES GOVERNING WHERRY HOUSING PROJECTS.

(a) The Escrow Fund Must be Paid out by Irving Trust Company Prior to Payment of any Mortgage Proceeds.

(b) The Finding of Inadequacy of Financing is Unsupported by Evidence.

## ARGUMENT

## POINT I.

THE TRIAL COURT MISCONSTRUED THE AGREEMENT OF OCTOBER 4, 1951.

The court misconstrued the agreement of October 4, 1951, under which Locke claims a bonus to be due to him. The basic misconception is set forth in finding 17 of the court's findings (R. 98). The finding reads as follows:



“In computing the profits to be divided pursuant to the contract, Exhibit ‘A’, distinction must be made between the construction and project costs.”

It is the position of defendants that this distinction cannot be properly or lawfully made and that the parties to the agreement all intended that the total costs properly incurred were to be deducted from the total proceeds received by the parties for the construction of the housing project.

It is apparently conceded that unless the Harsh Investment Corporation can be segregated from Harsh Utah Corporation and Harold Schnitzer and considered as a separate entity whose income and expenditures can be separately considered from the income and expenditures of Harsh Utah Corporation and Harold Schnitzer, that no profit can be found. It was conceded by Goldberg, auditor for Locke, and his witness that a consolidated balance sheet for the two Harsh corporations and Harold J. Schnitzer would reveal that there was no profit on the housing project (Tr. 578).

This concept in the court’s findings, that the parties intended by the agreement of October 4th to distinguish between construction costs and project costs, is the basic and fundamental cause of the appeal by defendants.

(a) THE TERMS OF THE AGREEMENT SHOW AN INTENTION TO CONSIDER ALL COSTS.

The agreement of October 4, 1951, was drawn after Harsh Investment Corporation had submitted bids on both the Hill Field Project and the Great Falls Project. It was drawn at a time when all parties knew and understood what would be required of Harsh Investment Corporation should their bids be accepted by the government. The first paragraph of the contract invisioned Harsh Investment Corporation as sponsor being responsible not only for the construction, but also for the management of any of the projects which might be awarded to it. The last paragraph on the first page of Exhibit 2 clearly sets this forth. It reads in part as follows:

“In the event that Harsh is awarded by the United States Government the contract for the construction and management of the projects hereinabove mentioned or any of them, Harsh may employ Schnitzer, and/or any other person or corporation, as Harsh may elect, to perform the actual construction of said projects or any of them, and Harsh shall employ Locke as general construction superintendent therefor.”

Locke, on October 4th, as a result of his familiarity with the Wherry Housing Act and the Federal Housing Administration regulations, knew that a corporation would have to be organized to hold the lease on the housing project constructed by Schnitzer and Harsh Investment Corporation. He knew that this corporation would have to issue special shares to the Federal Housing Commissioner and would have to qualify under all of the other Federal Housing Administration regulations. The

quoted paragraph, when considered against the background of knowledge and experience which Locke had and which he had informed Schnitzer of, has but one reasonable interpretation. That is that the parties recognized that Harsh Investment Corporation would be the moving party in the housing project. Harsh Investment would make the bids, would organize the owner-manager corporation, would direct the awarding of any construction contracts and would employ Locke as general construction superintendent.

The first sentence of the second paragraph on page 2 of the agreement is an additional, clear indication of the overall plan which all parties had in mind. The sentence reads as follows:

“In the event that Harsh shall employ Schnitzer to construct the aforesaid projects or any of them, then Harsh shall pay to Locke for his services as construction superintendent, as aforesaid the sum of One Thousand and no/100 Dollars (\$1,000.00) per month, retroactive to October 1, 1951, for a term of one year thereafter and for such term thereafter as Harsh may require the services of Locke in connection with the completion of the construction of said projects or any of them. \* \* \*

The quoted language indicates that Harsh, which means Harsh Investment Corporation, was to be in charge of construction and also submit the bids to the government. The final arrangements, resulted in Harsh Investment Corporation being in charge of the actual

construction of the project and Harsh Utah Corporation being the nominal and formal manager-owner corporation which assumed the responsibilities which was originally incurred by Harsh Investment Corporation in the submission of bids to the government.

It appears from the language contained in the agreement, that parties contemplated that actual construction of the housing project might be awarded to Schnitzer personally or to some other organization other than a Harsh corporation. Regardless of the manner in which the actual construction of the project was accomplished the second paragraph on page 2 provides that ten percent of the total amount of the bids shall be retained by Harsh out of the profits and fifty percent of any excess profits paid to Locke.

All other provisions of the agreement repeatedly referred to the guaranteed profit to Harsh Investment Corporation of ten percent of the bids accepted. This ten percent guarantee is to the sponsor corporation. It is the corporation which owns and which submits bids for the construction of the housing project. Nothing in the contract indicates any intention to guarantee a ten percent profit to the construction company contracting to complete the building program.

The next to the last paragraph in the agreement is very significant concerning the kind of arrangement which the parties intended to make. It provided that the

sums due to Locke other than his salary and reimbursements for expenses would become due "immediately upon completion of the construction of the projects awarded to Harsh and receipt by Harsh of profits earned." The significance, is clearly demonstrated when one considers that the only moneys which would have been received by Harsh upon completion of the construction of the projects is the balance of the moneys borrowed and representing the face of the mortgage. If Locke were to participate, in any way, in profits or earnings from rentals, his share could not be paid until the lease itself had expired.

The language also demonstrates the intentions and plans of the parties to have the Harsh Investment Corporation receive directly the moneys from the government. If there had been any intention or plan for receipt by Harsh Investment Corporation of profits from a sponsoring or owner-manager corporation, the language would have referred to final payments on the completion of the work necessary in the construction project.

The last paragraph of the agreement has been completely ignored by the court in its Findings of Fact, Conclusions of Law and Decree and even though the paragraph provides that Locke was to have no interest in and to the ownership or the management of the housing projects, the court has considered and awarded to Locke what he considered to be profits from rentals on the Housing Project for eleven months following the project's completion.

For a proper and correct understanding and interpretation of the agreement, appellants submit one must keep in mind that not only was Harsh Investment Corporation a party to the agreement but Harold Schnitzer personally was a party.

When one considers all of the terms and provisions of the agreement, it would appear that what the parties had in mind was a simple profit sharing joint venture. In the venture, Harsh Investment and Schnitzer considered as an entity, were to receive ten percent of the bids accepted by the government as profit. The balance of the profit was to be divided evenly between Harsh and Schnitzer on one hand and Locke on the other. Nowhere in the terms and provisions of the agreement are we able to discover any provision which would justify a court in believing that Harsh Investment Corporation could be singled out and separated from Harold Schnitzer and its interests considered separate and apart from his interests. An interpretation of the terms which reached such a result, it is respectfully submitted, is absurd. Such an interpretation would make it possible for one of two parties to a profit sharing agreement to pay, out of his own separate property and funds, a sum denominated as profit but which, in fact, was a contribution, increasing the amount of his loss.

The interpretation that the trial court has placed on the language of the agreement results in such an absurdity. It does violence to the plain, unambiguous

and clear language of the agreement and ignores completely the intentions of the parties as demonstrated by the language.

(b) THE CONDUCT OF THE PARTIES BEFORE LITIGATION SHOWS A CONSIDERATION OF ALL COSTS.

During the period immediately following the execution of the agreement of October 4th, parties commenced activities directed toward the construction of the Great Falls Project and the Hill Field Project. Part of their activities consisted of preparing estimates of the costs and also was concerned with the obtaining of bids from subcontractors interested in doing the actual construction work. An example of the kind of estimates and calculations which were prepared is Exhibit 222, a part of which is set forth in the appendix at page 36. This particular exhibit is entitled, "Cost Control" and bears the date of August 31, 1951. It concerns the Hill Field Project.

On the face of the exhibit, there is a mathematical calculation of the costs as anticipated on Hill Field. These costs include not only the costs incurred and paid by Harsh Investment Corporation for actual construction of the housing project but included also those costs which were disallowed by the court as being costs of the Harsh Utah Corporation, the owner-manager corporation. There is an amount for the architect's fees, for the FHA fees, for the insurance, legal and recording fees. There is also

an item entitled guarantee which is approximately ten percent of the total amount which it would be required to bid in order to have a mortgage loan sufficient in amount to construct the housing project. A very significant item on the exhibit is denominated "*Proffit.*" This profit is not a profit on the construction costs. It is a profit on the overall project costs.

There were numerous other calculations made by Locke demonstrating this basic concept which he and Schnitzer had concerning what was to be considered profit and what was to be taken into account as costs to be deducted from proceeds before a profit could be determined.

The first of such calculations is the Deseret Chemical Depot estimates. They are shown by Exhibit 239 and clearly demonstrate that the parties had in mind total costs when they used the word "cost." In fact, on the face of the document, there is this language:

"The construction costs include interest during construction, overhead supervision, all *ofsite* and *onsite* work, *ref*, and ranges, all as in accordance with the plans and specifications."

Exhibit 226 is a cost analysis on the Great Falls, Montana Project. It bears a printed date of September 24, 1951, which has been stricken out, and October 16th written at the side. This cost analysis includes, before profits are calculated, as a cost item, the architect's fee, the F.H.A. fees, the loan fees, insurance title and record-



ing fees. All of these were costs the owner-manager corporation paid and which the court, by distinguishing between construction costs and project costs, eliminated in his calculations for the purpose of determining profits on the project.

A very explicit and clear demonstration of what the parties had in mind, as profits to be shared from the construction of the housing project, is found on Exhibit 241. It concerned the Tucson, Arizona Project which was not constructed by the parties. The exhibit contains a number of pages, the last of the pages being entitled "Recap". In the Recap, the total costs are indicated and separated from a figure entitled "Total Construction Costs". The profit is segregated and indicated as being the amount over and above the total costs which again includes the costs borne by Harsh Utah Corporation as owner-manager corporation.

The last cost analysis prepared by Locke in his own hand is Exhibit 223. It was a cost analysis for a project to be constructed at Rapid City, South Dakota. In the cost analysis, Locke again included the costs which were borne by Harsh Utah Corporation, including the architect's fees, recording fees and F.H.A. fees. He included everyone of the costs which were disallowed by the trial court. This analysis was prepared by Locke after the October 4th agreement was executed and after a considerable amount of construction work had been done on the Great Falls, Montana Project.

All of the cost analyses were prepared by Locke prior to the time when any difficulty arose between him and Schnitzer.

Appellants respectfully submit that these analyses demonstrate more clearly than could anything else the exact concepts which Locke and Schnitzer had in their minds when they discussed the profits to be made from the Wherry Housing Project.

Locke, during the construction of the Hill Field Project, spent one-third of his time at the project and one-third of his time at the home office doing the necessary bookwork on the Hill Field Project and the Great Falls Project. He did not consider himself to be employed only by Harsh Investment Corporation, but signed indiscriminately for Harsh Investment Corporation and Harsh Utah Corporation.

The first twenty Requests for Consideration of Proposed Changes were signed by Locke. He signed them in two separate places, once as representative of Harsh Investment Corporation, contractor, and once as representative of Harsh Utah Corporation, mortgagor. The requests for consideration of proposed changes were dated August 11, 1952, ten months after the execution of the October 4th agreement and after all of the working arrangements for the construction of the housing project had been completed. By August 11, 1952, Harsh Utah

had been organized and all of the documents including the lump sum contract, between Harsh Utah Corporation and Harsh Investment Corporation had been executed.

This conduct, on the part of Locke, shows clearly that he considered the Harsh corporations, though two in number, to be one single entity. The Harsh Utah Corporation was considered as an instrument created by the Harsh Investment Corporation, Schnitzer and Locke for the purpose of holding the lease. The real party in interest for whose benefit, Harsh Utah Corporation existed and was created, was Harold Schnitzer.

On many of the Requests for Consideration of Proposed Changes, Schnitzer signed on behalf of both Harsh Utah or Harsh Investment, as did Locke on the first twenty. On occasion, an employee of the Harsh interest, Robert Kahn, signed on behalf of both Harsh Utah Corporation and Harsh Investment Corporation.

The first seventy of the Requests for Consideration of Proposed Changes are shown as Exhibit 164.

These change requests demonstrate a fact which appellants consider to be undisputed. It is that at no time prior to the actual litigation of Locke's claim for a bonus, did anyone in the Harsh organizations, including Locke, consider that Harsh Utah Corporation and Harsh Investment Corporation and the interests of Harold Schnitzer were separate and could be considered separately or individually.

It was not until the audit by Goldberg on May 7, 1954, that there ever appeared in any record a differentiation between constructions costs and project costs as a basis for the calculation of Locke's bonus.

Nowhere in the dealings of Harsh Utah Corporation or Harsh Investment Corporation was there any negotiation between those corporations concerning contract amounts, allowances for changes or consideration to be paid one corporation by the other.

It is respectfully submitted, that this conduct of the parties before litigation was considered, is a strong and unimpeachable demonstration of the intentions of the parties. It shows a practical construction of the language of the agreement of October 4th. It demonstrates that all costs incurred in the construction of the housing projects were to be considered before there was any determination of profits to be divided between Harsh and Locke.

(c) PLEADINGS OF LOCKE SHOW A THEORY WHICH CONSIDERS ALL COSTS.

The Complaint in Intervention by Locke was not filed in this action until the 8th of June, 1954. Even at that late date, Locke did not, in his pleadings, differentiate between Harsh Investment Corporation, Harsh Utah Corporation, and defendant, Harold Schnitzer. The first

paragraph of his complaint demonstrates a continuation of the concept which had permeated all of the transactions between Locke and appellants.

In the first paragraph, Locke alleges that he rendered the services as general construction superintendent to the defendants and he names them, Harsh Investment Corporation and Harsh Utah Corporation and too, defendant Harold J. Schnitzer, individually. He alleges that these services were rendered pursuant to their contract of October 4th.

Throughout the whole complaint Locke repeatedly refers to and makes claims against, not the Harsh Investment Corporation considered as a separate entity, but against the two Harsh corporations and Harold J. Schnitzer, considered as a single unit.

The repeated reference to the corporations and Schnitzer as a unit demonstrates clearly, appellants submit, the basic propositions that Schnitzer and the corporations are to be considered together and only if, when considered together, a profit has been realized, can Locke receive any sum whatsoever.

The complaint in intervention specifically alleges that during all of the construction period Schnitzer was holder of all of the shares of the two corporations, that he used the corporate entities as alter egos and disregard their separate corporate existence. The evidence demonstrates that as far as the parties to this agreement were

concerned, they did not consider Harold Schnitzer and the two Harsh corporations as separate entities. Certain basic formalities were observed but as far as the substantial and material benefits were concerned, all parties regarded Schnitzer and the corporations as a single entity. What benefited one, benefited all. What harmed one, harmed all.

The complaint in intervention sought to have the trial court disallow the Harsh interests the ten percent of the bid amount which the agreement provided for them prior to the receipt of any profits by Locke.

Under the theory of the complaint which, it is respectfully submitted, pleads as a fact, the existence of a single entity composed of Harsh Utah, Harsh Investment and Harold J. Schnitzer, the only way in which Locke can receive any sum as a bonus is for the court to ignore the provisions of the agreement and disallow the ten percent guarantee to the Harsh interests.

The court refused to accept and find on the theory advocated by Locke's pleadings, and permitted the Harsh interests the agreed ten percent profit. Only then did it become necessary for Locke to segregate the Harsh Investment Corporation from Harsh Utah Corporation and Harold J. Schnitzer, personally, for then it became obvious that there would be no profit to be shared by Locke if the two corporations and Schnitzer were considered together.

## CONCLUSION

It is respectfully submitted that the court, in order to find that parties intended to distinguish between construction costs incurred by Harsh Investment Corporation in the construction of Hill Field and project costs which included construction costs and the costs incurred by Harsh Utah Corporation, it had to ignore the plain and unambiguous terms of the agreement of October 4th; it had to disregard the conduct of the parties which clearly indicated their intentions; it had to avoid the practical construction which the parties placed on the October 4th agreement; it had to destroy the pleadings filed by Locke, and adopt a theory not advanced by any party nor any pleading but one which was advanced by the auditor and accountant for Locke as being the only theory under which Locke could receive or be entitled to receive a bonus.

## POINT II.

LEGAL PRINCIPLES GOVERNING THE INTERPRETATION OF THE AGREEMENT REQUIRE A CONSIDERATION OF ALL COSTS.

The agreement of October 4th was executed by all of the parties at Portland, Oregon. It was drawn in Portland and each of the parties had the benefit of legal counsel in the preparation of the agreement.

The Utah law thus requires that the courts of the State of Utah apply to the agreement the rules of law which the Oregon courts would apply if they had before them the contract between Locke and appellants.

See *Lawson v. Tripp, et al.*, 34 Utah 28, 95 Pac. 520; *Sterrett v. Stoddard Lumber Co.*, 150 Ore. 491, 46 P. 2d 1023.

The law of Oregon seems to be in agreement with the general principles applied throughout the United States in the interpretation of written instruments. Certain principles, however, seem to be given stronger emphasis by the Oregon judiciary and therefore, an examination of the Oregon judicial principles of interpretation is deemed necessary.

Basic to all of the court decisions in Oregon seems to be a strict adherence to the principle that the court, in interpreting and construing a contract must be governed absolutely by the intentions of the party and their interpretation must give effect to those intentions.

The early cases in Oregon stated this principle in simple language and referred to a statutory requirement that the intentions of the parties must be pursued and found, if possible.

See *Northwestern Transfer Co. v. Investment Co., et al.*, 81 Ore. 75, 158 Pac. 281.

Following the *Northwestern Transfer Co.* case, one of the land mark decisions in Oregon was decided. It is *Rosenau v. Lansing*, 113 Ore. 638, 234 Pac. 270, p. 271; rehearing denied, 113 Ore. 638, 232 Pac. 648.



In the *Rosenau* case, the Supreme Court of Oregon placed emphasis on three basic considerations in the construction of contracts. They are: (1) the language employed; (2) the subject matter, and (3) the surrounding circumstances. The court specifically states that it is not shut out from the same light which the parties enjoyed when the contract was executed and with that in view, the court is entitled to place itself in the same situation as the parties who made the contract so as to view the circumstances as the parties viewed them and to judge the meaning of the words and the correct application of language to the things described.

It is these principles which the Oregon law requires to be applied to the facts, circumstances and written content of the October 4th agreement that appellants here seek to have applied.

Considering the language of the October 4th agreement, the situation of the parties at the time the contract was executed, the surrounding circumstances and the subject matter covered, appellants respectfully submit that the construction and interpretation placed on the contract by the trial court is erroneous and does violence to the intentions of the parties. Appellants respectfully submit that the trial court has constructed a new and different agreement from the one which the parties intended to govern their conduct.

The *Rosenau* case followed a long line of Oregon decisions which set forth, without conflict, the principle that the intentions of the parties must govern the court decision.

See *City Messenger & Delivery Co. v. Postal Telegraph Co.*, 74 Ore. 433, 145 Pac. 657; *Spande v. Western Life Indemnity Co.*, 68 Ore. 171, 136 Pac. 1189; *Salem King's Products Co. v. Ramp*, 100 Ore. 329, 196 Pac. 401.

The principles of interpretation which the Oregon court has set forth are universally accepted as being proper for the control of contract interpretation. In *Corvallis & A.R.R. Co. v. Portland, E. & E. Ry. Co.*, 84 Ore. 524, 163 Pac. 1173, the Oregon Supreme Court set forth and cited with apt quotes the applicable principles. The language appears as follows (p. 1177) :

"In construing contracts it is a recognized principle that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in their contract, and that in written contracts which permit of construction this intent is to be derived from an examination of the entire instruments.

" 'The problem is not what the separate parts mean, but what the contract means when considered as a whole.' 2 Page on Contracts, vol. 2 § 1112.

"It was said by Mr. Justice Woods in *Merriam v. United States*, 107 U.S. 441, 2 Sup. Ct. 540, 27 L. Ed. 533 :

“‘It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.’

“In Beach on Modern Law of Contracts, vol. 1, §702, the author says:

“‘To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have.’”

Since the *Rosenau* decision, the Supreme Court of Oregon has, on numerous occasions cited it and applied the principles set forth in it and the *Corvallis & A.R.R. Co.* case.

See *Nunner, et al. v. Erickson, et al.*, 151 Ore. 575, 51 P. 2d 839; *Hardin v. Dimension Lumber Co.*, 140 Ore. 385, 13 P. 2d 602; *In re Edwards' Estate*, 140 Ore. 431, 14 P. 2d 274; *Parsons v. Boggie*, 139 Ore. 469, 11 P. 2d 280.

One of the basic problems which confronts the court in the present case is to ascertain the meaning of the word “profit” as that word is used in the October 4th agreement. The parties do not set out in the language of the agreement the costs which are to be deducted and taken into consideration before profit can be determined. Nowhere in the agreement nor in any of the prior agree-

ments executed by the parties did they use the term "construction costs" and draw a distinction between such costs and project costs as the trial court has done in its interpretation of the agreement.

The word profit was used by the parties in all of their prior agreements and in the October 4th agreement. This word was also used repeatedly by Locke and Schnitzer in the cost analysis documents wherein they were estimating the amount of bids which it would be necessary to submit in order to have a profit.

The word profit has been variously defined but usually it is stated to be the difference between the receipts and expenditures or the amounts which remain after deducting all expenses and capital paid in.

See *Hayes v. Hayes*, 66 N.W. 134, 19 Allen 571; *Levin v. Stratford Plaza*, 196 Md. 293, 76 A. 2d 558; *Purdue v. Ralph*, 100 F. 2d 518; *Merrick v. Delanan Eng. Co.*, 243 Iowa 39, 50 N.W. 2d 586.

One very interesting case which defines profits is *Citizens' Nat. Bank v. Corl*, 225 N.C. 96, 33 S.E. 2d 613. There, the North Carolina court stated that profit is an elastic and ambiguous word often properly used in more than one sense and held that its meaning in a written instrument is governed by the intention of the parties appearing therein.

In discovering the intentions of the parties concerning the meaning of a word such as profit, the Supreme Court of Oregon has set down in a very carefully reasoned case, the principles which are applicable and appellants submit should be applied by this court. In *Erickson v. Grande Ronde Lumber Co.*, 162 Ore. 552, 92 P. 2d 170; rehearing denied, 162 Ore. 552, 94 P. 2d 139, the court was seeking the meanings that parties to a contract had for the words "liabilities" and "indebtedness", and set forth in their opinion the reasoning processes and the evidence on which it placed particular significance in uncovering the meaning of the language. Its reasoning process is demonstrated by the following language (p. 174):

"The words 'liabilities' and 'indebtedness' would be deemed by Dean Goodrich as accordion words: they are capable of expanding and contracting in their connotations. They may mean present, current, future, fixed or contingent debts. Their meaning in each instance must be determined, not by looking in the dictionaries, but by reading the context, reviewing the transaction, and taking note of the subsequent conduct of the parties who used the equivocal words. We may properly consider: (1) the close relationship between the Grande Ronde and the Stoddard Companies; (2) the knowledge possessed by at least three directors of the Stoddard Company, one of whom was treasurer and another of whom was secretary and attorney for that corporation, that the plaintiff was performing these services; (3) the fact that the Stoddard Company, immediately after the plaintiff had commenced the performance of

his services, deprived the employer corporation of every item of its assets; (4) the dissolution in 1933 of the Grande Ronde Company which had been closely identified with the Stoddard Company; (5) the fact that the Stoddard Company had received the Nibley-Mimnaugh Lumber Company Trustee Deposit, and that any reduction in the tax would inure to the Stoddard Company's benefit; (6) the circumstance that the Stoddard Company's officials must have known that the federal government, by the use of the principles of law which we quoted from *West Texas Refining & Development Co. v. Commissioner of Internal Revenue*, supra, might have attempted to enforce payment of the tax out of the property which the Stoddard Company received from the Grande Ronde Company; and (7) the fact that the plaintiff while performing his work sent to the Stoddard Company from time to time statements of expenses which he was incurring, and the fact that these charges were paid by the Stoddard Company. Apparently, the Stoddard Company had a special fund which originated with the former Grande Ronde stockholders out of which payment was made; nevertheless, the bills were submitted to it as debtor and its checks were drawn in payment of them.

"The above facts convince us that when the Stoddard Company used the words 'liabilities' and 'indebtedness' it did not limit them to debts then appearing upon the Grande Ronde Company's books, nor to debts owing at that time. The mere fact that the officials of the Stoddard Company knew that the plaintiff was performing the aforementioned services cannot charge the Stoddard Company with payment for the services; but that knowledge, together with the fact that concurrent-

ly with the Stoddard Company's acceptance of all of the Grande Ronde Company's assets, the former agreed to pay all of the latter's liabilities, is a strong indication that the parties included in the term 'liabilities' the indebtedness which was accruing in the plaintiff's favor. We are satisfied that the Stoddard Company included in the words sums which would become due to the plaintiff at the conclusions of his employment."

Appellants submit that the principles demonstrated by the *Erickson* case should be applied by this court to discover the meaning that the parties had in mind when they used the word profit in the October 4th agreement.

The court should take into consideration: (1) the extensive experience and knowledge which Locke possessed and his familiarity with Wherry Housing Act procedure; (2) the knowledge that all parties possessed that Federal Housing Administration rules and regulations would require the organization or qualification of a corporation to be the owner-manager of the housing projects; (3) the knowledge that all moneys and credit which would be necessary to qualify under the Federal Housing Administration rules and regulations would have to be furnished by Schnitzer personally; (4) the knowledge which Locke possessed concerning the organization of Harsh Investment Corporation, Harsh Utah Corporation and the numerous other corporate entities organized on the Montana and California jobs which Schnitzer used to accomplish the construction program planned by him and Locke; and (5) the conduct following the organiza-

tion of the corporation during the construction periods which indicates without dispute that Locke, Schnitzer and all parties concerned with the construction projects treated the total project costs as being the basic figure upon which the existence of profit or its lack would be determined.

The Oregon Supreme Court recognizes and specifically applies in the interpretation of contracts, the usages and business practices which the contracting parties used, applied and recognized. Their mode of operation must be taken into consideration to ascertain their true intent.

This principle is set forth in the carefully reasoned case of *Haynes v. Douglas Fir Exploitation & Export Co.*, 161 Ore. 538, 90 P. 2d 207; rehearing denied, 161 Ore. 538, 90 P. 2d 761. The court sets forth the applicable principle under Oregon law in the following language (p. 211):

“In construing an agreement between parties the circumstances under which it was made, including the situation of the subject matter of the instrument and of the parties to it, may be shown, so that the court may be placed in the position of those whose language is to be interpreted. § 9-216, Oregon Code 1930; *Hurst v. W. J. Lake & Co.*, 141 Or. 306, 16 P. 2d 627, 89 A.L.R. 1222. In the instant case, we find that the ties which were purchased by the defendant were for export trade and were to be transferred from freight cars on the Southern Pacific open dock in Portland Harbor to a vessel. This open dock is approximately 1,200 feet long. Two vessels at a time can be tied



up alongside it, and four freight cars can be unloaded simultaneously alongside each vessel. The amount of cargo which each vessel can hold is much greater than four carloads. This open dock, as has already been stated, is not used for storage purposes, but only for transshipment.

“This court, in *Simms v. Sullivan*, 100 Or. 487, 198 P. 240, 242, 15 A.L.R. 678, observed: ‘Valid usages, known to the contracting parties, concerning the subject-matter of the agreement, or usages of which the parties are chargeable with knowledge, are, by implication, incorporated therein, unless expressly or impliedly excluded by its terms, and are admissible to aid in its interpretation, not as tending in any respect or manner to contradict, add to, take from, or vary a contract, but upon the theory that the usage forms a part of the contract.’

“See also, in this connection: *Hurst v. W. J. Lake & Co.*, supra; *Hurst v. W. J. Lake & Co.*, 146 Or. 500, 31 P. 2d 168; 17 C.J. 492 and 499, §§ 58 and 62.”

The purpose that the parties intended to accomplish, the Oregon court likewise stated, is a principal consideration which must be taken into account in any interpretation of written instruments. This principle has been carefully enunciated by the Oregon court in *Barmeier v. Oregon Physicians' Service*, 194 Ore. 659, 243 P. 2d 1053, wherein the supreme court stated as follows (p. 1059):

“To fortify our conclusion in this regard, we resort to still other rules of interpretation. The first of these is that which requires us to take into consideration all the circumstances accompanying

or surrounding the transaction. *McDonald v. Supple*, 96 Or. 486, 495, 190 P. 315; *Crowell Elevator Co. v. Kerr, Gifford & Co.*, 114 Or. 675, 680, 236 P. 1047; *Teiser v. Swirsky*, 137 Or. 595, 604, 2 P. 2d 920, 4 P. 2d 322; *Haynes v. Douglas Fir Exploitation & Export Co.*, 161 Or. 538, 549, 90 P. 2d 207, 761; *Restatement, Contracts*, § 235 (d). The second is that which requires us to take into consideration the principal apparent purpose of the parties. Such purpose is given great weight in determining the meaning to be given to the manifestations of their intention. *Restatement, Contracts*, § 236 (b)."

The Oregon Supreme Court, in outlining the principles governing the interpretation of the contracts, has been very explicit in denying to a trial or appellate court the right to change the contract between the parties into something other than they intended. The decisions cited heretofore very carefully demonstrate that principal. A very recent decision seems to bring into clear focus this basic principle.

In *City of Reedsport v. Hubbard*, ..... Ore. ...., 274 P. 2d 248, this explicit admonition concerning the court's power to modify or remake a contract is stated in the following language (p. 255):

"\* \* \* The court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh and unjust. The contracts of parties sui juris are solemn undertakings, and in the absence of any recognized ground for denying

enforcement, they must be enforced strictly according to their terms. It is not the province of the court to rewrite a contract for the purpose of accomplishing that which, in the court's opinion, might appear proper. ORS 174.010, 174.020; Fendall v. Miller, 99 Or. 610, 196 P. 381; Sinnott v. Interstate Contract Co., 86 Or. 189, 168 P. 81.

“In 17 C.J.S., Contracts, §296, p. 702, it is said

“ ‘It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of the terms, or to the fact that the rights of the parties are not carefully guarded, as the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract.’ ”

Another principle which is basic in the law of Oregon, is that the practical interpretation which the parties to an agreement place on the agreement should not be interfered with nor should the court deviate therefrom. This principle is especially important in appellants' view of this case for the reason that until the Goldberg audit was examined and the significance of the figures therein contained appreciated no one by act or word distinguished the interests and costs of Harsh Investment Corporation from those of Harsh Utah Corporation and

Harold J. Schnitzer. Up to that moment all parties had conducted themselves and by their conduct they gave a practical construction to the October 4th agreement. Their conduct indicates an intention that profits means profit to the Harold J. Schnitzer interests considered as a whole and not just paper profit to one of the numerous corporations organized to effectuate the construction program.

The principle is firmly established in the Oregon law that practical construction should be given great weight in the interpretation of contracts. This principle has been consistently applied since early Common Law recognition. Its antiquity and applicability in Oregon is indicated in *Burton v. Oregon-Washington R. & Nav. Co.*, 148 Ore. 648, 38 P. 2d 72, wherein the supreme court stated as follows (p. 75):

“What construction did the employees and the company give to the schedule relative to seniority rights, prior to the adoption of the schedule under consideration? As stated by Lord Chancellor Sugden in *Attorney General v. Drummond*, 1 Drury and Warren 353, ‘\* \* \* Tell me what you have done under such a deed, and I will tell you what that deed means.’ The same rule of construction has often been applied by this court. *Jaloff v. United Auto Indemnity Exchange*, 120 Or. 381, 250 P. 717, and cases therein cited. Also see 13 C.J. 549, wherein it is stated: ‘Construction of similar contract. The mode adopted by the parties in performing previous similar trade contracts is entitled to great weight in determining the meaning of the contract, especially where its meaning is doubtful.’”

For further instances of the application of the principle that the conduct of the parties in giving to their written instruments, a practical construction should be given great weight.

See *Spande v. Western Life Indemnity Co.*, supra; *Biersdorf v. Putnam*, 181 Ore. 522, 182 P. 2d 992.

The principle which is clear in the Oregon law was stated succinctly in *Markham & Callow v. International Woodworkers*, 170 Ore. 517, 135 P. 2d 727. It states as follows (p. 735):

“\* \* \* This court cannot ignore the plain language of the contract and the practical construction placed upon it by both parties and accept in lieu thereof the interpretation of a few employees, who, although they refused to recognize the contract, did nevertheless recognize the union which executed it as the exclusive bargaining agency for all the employees including themselves.”

#### CONCLUSION

It is respectfully submitted that under the law of Oregon which must govern the interpretation of the agreement between Locke and appellants the intention of the parties is the controlling factor. The intention is found by considering the language employed, the subject matter and the surrounding circumstances. The practical construction that the parties placed upon the agreement is considered a most reliable indicia of their intent.

## POINT III.

A PROPER AND ACCURATE ACCOUNTING SHOWS NO BONUS DUE LOCKE.

(a) TOTAL RECEIPTS ON THE PROJECT WERE IMPROPERLY AND INACCURATELY CALCULATED.

The court, in determining the amount of income to Harsh Investment Corporation, assumed that the amount of the lump sum contract of \$2,995,205.00 would be received by Harsh Investment Corporation. This is not the fact. The evidence of Walter Hutchinson, Schnitzer, Locke and all other parties concerned with the determination of the amount of the lump sum contract indicates it was never intended to be a calculation of the cost of construction to Harsh Investment Corporation. It was not intended to be a bid by that corporation to the Harsh Utah Corporation for the construction of the housing project.

The testimony of Hutchinson, as quoted in the statement of facts, sets forth the method of calculating the amount of the lump sum contract and his testimony was undisputed. The lump sum was obtained by taking the estimated replacement costs supplied by the Federal Housing Administration, deducting therefrom the builders' fee which the Federal Housing Administration had included in their estimate of costs as \$149,035.00 and then subtracting the architects' fees which had already been paid by the government.

The bid which Harsh Investment Corporation and Schnitzer submitted for the construction of the housing project and which was accepted by the government for the construction of the housing project was only \$2,767,000.00 (Ex. 163); it is \$228,205.00 less than the amount of the lump sum contract. The amount of the mortgage with all of the change order extras at the closing of the project was only \$2,791,200.00 (see Ex. 443).

It is respectfully submitted that no one involved in the fixing of the amount of the lump sum contract anticipated or expected that the figure set forth would ever be paid to anyone or that it would be the basis for calculating the amount of income to Harsh Investment Corporation.

In paragraph 20 of the findings of fact, the court added to the amount of the lump sum contract of \$2,995,205.00, the figure of \$178,672.00 and finds that said figure represents the amount of change order extras which were authorized additions to the contract price for additional work performed on the Hill Field Housing Project. This figure is false and is unsupported by any evidence whatsoever. The actual amount received as an allowance for change order extras cannot be disputed.

It was finally determined, after several figures were proposed, as being the sum of \$154,400.00, proposed Exhibit 443. This figure was the net amount allowed as an increase in the mortgage sum. The amount allowed

as an increase in the bid placed by Harsh Utah Corporation was \$171,583.00, the figure of \$154,400.00 being arrived at by reducing the \$171,583.00 by ten percent of the amount.

The allowance of \$178,672.00 is an example of the court's adoption of other than realistic and accurate figures concerning the amounts of money which were received by Harsh Utah, Harsh Investment and the Schnitzer's interest for the construction of the Hill Field Housing Project. Nothing in the language of the October 4th agreement could be interpreted as permitting the addition of this sum. The paragraph of said agreement which covers the Federal Housing Administration adjustments reads as follows:

“In addition to the sums otherwise provided in the preceding paragraph, Locke shall receive a sum equal to ten percent of all net profits *received by Harsh* as F.H.A. adjustments, the same being additional compensation to Harsh for changes in plans and specifications or increased labor costs from the United States Government for the construction of said projects or any of them over and above the profits involved in the original bids of Harsh accepted by the government.”

The total receipts by the Harsh corporations and Harold J. Schnitzer from Irving Trust Company is \$2,791,200.00. This item was the final mortgage amount and included in its total the allowance for change order extras. The court found that the income to Harsh Investment was \$3,173,877.00 or \$382,677.00 more than was actually



received by the Harsh corporations or Harold Schnitzer.

In addition to the erroneous figures used by the court in calculating the amount of income from the mortgage, the court also used a fictitious figure in calculating the amount of net rental income. He allowed in paragraph 20 of the findings as net rental income, the sum of \$165,986.49 (not actual rentals). This figure did not give to the appellants any consideration whatsoever for mortgage interest actually paid during the period that the rental income was earned. The mortgage interest items are undisputed (see Ex. 203, 442). The interest to March 31, 1954, was \$83,190.97 and the interest from March 31st to June 30th was \$22,654.42. The total amount of interest was \$105,845.39. This amount was actually paid; it was incurred during the period that the \$165,986.49 was earned as income. It is submitted that such interest was a *bona fide* expense of the Harsh Utah Corporation.

The three erroneous items of income the court has used, inflates the amount of income by the sum of \$488,522.39.

Assuming the cost of construction to be found by the court in paragraph 25 of the findings or \$2,771,685.86 and if the income figures are reduced to the actual, factual amounts received, it would completely eliminate any bonus to Locke. The amount remaining as income would be only \$79,655.24, an amount insufficient to pay the ten percent guaranteed profit to Schnitzer.

The language of the agreement was clear and unambiguous concerning the interest of the parties in the project ultimately constructed. The last paragraph of the agreement specifically stated that Locke was to have no interest in the ownership or management of the project nor interest in the proceeds derived therefrom.

It reads as follows:

“It is understood and agreed between the parties hereto that Locke has and shall have no interest in and to the ownership or the management of the projects hereinbefore mentioned or any of them, or in connection with any profits that may be derived therefrom, it being the intention of the parties that the interest of Locke shall be limited to the construction of said projects or any of them as in the manner hereinbefore set forth.”

The court completely ignored the provision. The amount of rental income the court erroneously allowed was for the period immediately following the first occupancy of any of the rental units to and including the 30th of June, 1953.

The theory under which the court apparently allowed the rental income was that the project had been constructed more rapidly than was anticipated and that the increased speed of construction was the result of overtime and other extraordinary costs. No evidence justifying such a finding was presented and no finding was made to that effect by the court.

In paragraph 22 of the findings, the court sets forth the means by which he calculated the net amount of the rental income. In these calculations it refused to permit Harsh Utah Corporation to deduct from the amount of rental income the actual expenditures for interest on the mortgage paid to Irving Trust Company.

The court also disallowed all management fees on the Harsh Utah Project, one-half of the insurance premium without evidence to support such disallowance and even though this insurance premium had been allowed in full by the accountants. It would not permit any depreciation to be deducted for the period prior to June 30, 1953.

It appears to be a clearly settled principal of law that actual costs must be allowed on profit sharing contracts. Interest on borrowed money actually paid where the loan is one contemplated by the parties and within the purview of the profit sharing agreement is an allowable cost. Such a holding was made by the New York Appellate Division Court in *Martin v. City of New York*, 35 N.Y. Supp. 2d 182, 264 App. Div. 234, the court there held that interest paid on borrowed money, which it was understood would be required to finance the construction project, was a proper expense to be deducted prior to the calculation of a bonus based on a percentage of the profit received.

It has even been held that interest on an advancement by one of the partners in a profit sharing arrangement

was a proper cost item to be deducted before the profit could be calculated to determine the individual shares of the partners. See *Barry v. Bernaip*, 164 Mo. App. 27, 141 S.W. 933.

It is respectfully submitted that in the light of the last paragraph of the agreement of October 4th, no item of rental income could be considered by the court in determining whether or not profit existed on the construction project and to calculate the bonus of Locke after considering such rental income is compounding the error which the court first fell into.

### CONCLUSION

It is respectfully submitted that the only proper method of calculating the amount of the total receipts on the Hill Field project is to consider all three of the entities composing the Harsh interests, namely, Harsh Investment Corporation, Harsh Utah Corporation and Harold J. Schnitzer as a single unit. This unit's total receipts is the amount of the mortgage at closing or \$2,-791,200.00. No other sum under the terms of the agreement is a proper receipt.

The Court's failure to consider this amount the actual income to the Harsh's interests was error and its use of the fictitious and unrealistic amount on the lump sum contract inflated erroneously the income of the Harsh

interests. There can be no justification under the terms of the contract for an inclusion in receipts of an amount represented by rental income from the housing project.

(b) THE TOTAL EXPENDITURES ON THE PROJECT WERE IMPROPERLY AND INACCURATELY CALCULATED.

In paragraph 23 of the findings of fact, the court set forth the figures which it used in arriving at the construction costs of the housing project. Those figures consisted of three separate categories. The direct construction costs, he found to be \$2,656,457.21. This figure was taken from the Goldberg audit dated May 7th.

It did not take into consideration the amounts of money which were actually awarded to contractors whose claims were in litigation at the time of the audit. It did not take into consideration the actual payments that were ultimately made to the contractors in satisfaction of the judgments entered and the amount which appellants stipulated was due and owing.

The adjustments which were necessary to make the total direct construction costs accurately reflect the amounts paid as judgments and on other disputed claims is shown by the Peat, Marwick, Mitchell and Company report in the appendix at page 19-35. The Peat, Marwick, Mitchell and Company report indicates that after the adjustments were all made, the total direct construction costs amounted to \$2,904,921.04. This amount was never considered, although at the time of the hearing on the ob-

jections to the court's Findings of Fact, Conclusions of Law and Decree, appellants moved the court for an opportunity to furnish a certified public accountant's statement to bring the Goldberg accounting up-to-date. Most of the substantial adjustments in the Goldberg audits are the results of judgments rendered and paid or accounts which were actually paid on order of court after receipt of the mortgage money.

The second category was indirect construction costs.

The court, in sub-paragraph (b) of paragraph 23 of the findings, substituted a completely irrelevant figure for the amount of indirect construction costs which the Goldberg audit revealed were incurred by Harsh Investment Corporation on the Hill Field Project.

Instead of using the figures for the Hill Field Project, the court took the Great Falls indirect cost figure. This substituted figure was in the sum of \$45,631.34 (see Ex. 201). The actual indirect construction costs of the Harsh Investment Corporation on the Hill Field Housing Project amounted to \$120,384.90 (see Ex. 201).

Goldberg was of the opinion that the salary of Schnitzer should not be allowed as an overhead cost for Harsh Investment Corporation and had excluded it from this figure.

The \$120,384.94 figure for indirect costs was nowhere questioned. It confirms the figure which Card Greaves

found to be the overhead and indirect costs on the Hill Field Project. An adjustment by Peat, Marwick, Mitchell and Company of the indirect costs took out of the legal and auditing expense shown as an indirect cost of Harsh Investment Corporation the fee to Walter E. Hutchinson and charged said fee to Harsh Utah Corporation (see Explanation of Differences, Entry 33, 35) at page 31 in the appendix.

The assigned reason for substituting the indirect construction costs of the Montana project for the Utah project is that in the Utah project, there were some overhead costs not directly applicable to the project. This finding is unsupported by any evidence whatsoever. All of the evidence is to the contrary.

The project in Montana and the one in Utah are unique in their nature. An accurate check of costs cannot be made by comparison. In Utah, there were a number of problems which arose which did not plague the Montana project. Examples are: (1) the excess earth problem requiring additional engineering expense on the part of the Harsh Investment Corporation and; (2) the oil to propane to natural gas changes which required overhead and engineering costs in excess of what would normally be expected.

Appellants submit that the overhead costs on one unique project cannot be used as the basis of a finding for the overhead and indirect costs on another unique proj-

ect. This seems to be an obvious truism. In *Standard Oil Company v. Stubbs-Auckland Oil Co.*, 221 Iowa 489, 265 N.W. 121 at page 125, the Iowa Supreme Court held in an analogous situation that profits from operation of one service station would not be admissible to show what profits of another station should be.

Goldberg stated categorically that he checked the books and records of the Harsh Investment Corporation and the subsidiary records showing the detailed cost as was furnished by Ellis. He stated categorically that he examined the pay estimates as made monthly showing the amounts that should have been received by the respective companies and whether the charges were proper to the respective companies or whether they were applicable to another subsidiary or affiliated companies (Tr. 472, 473). He categorically stated that the books and the costs as shown by the Card Greaves accounting actually reflected the costs (Tr. 589, 590).

Concerning the way in which Goldberg made his audit, he stated (Tr. 589):

“\* \* \* The books were based on payments actually made, charged to the account, but they had a subsidiary record showing the amount of the contract, accrued liability which were furnished to Mr. Greaves in his previous examination and with Mr. Ellis. They provided the figures according to the account and report. We reconciled every difference and submitted the accrual items which have been introduced here in evidence, and there were minor differences, I think of \$350.00 or so



which resulted in items of a dollar six cents and ten dollars and so forth, due to the volume of the work and type of report.”

The indirect overhead costs for Hill Field reflected by Goldberg’s audit were verified by the Card Greaves report and by William Ellis (Tr. 1039) and are, in turn, verified by the Peat, Marwick, Mitchell and Company report.

Mr. Ellis, the controller of Harsh Utah and Harsh Investment corporations and a number of the other Schnitzer entities, testified concerning the total cost figure which included the indirect construction costs (Tr. 1039, 1040):

- “Q. And that figure then, Mr. Ellis, of \$2,752,-004.51, is that an accurate figure, and does it reflect accurately these direct construction costs plus the accrued items to the day of 4-30-’54? It’s obvious it doesn’t agree with it.
- A. Yes, it does too. It’s right off Mr. Goldberg’s report, and Mr. Goldberg’s report checked out with what is shown in our accounts.
- Q. So that, that is accurate both by Goldberg’s report and by your books and records. Is that correct?
- A. It’s a three-way check from our construction accounts, Mr. Greaves’ report, and this report, I’ll say are extremely substantially in agreement on practically everything.

MR. SHERMAN: I can’t hear you.

- Q. He said all three agreed.
- A. I said it's a kind of three way check. Our construction accounts, Card Greaves' account or report, and Mr. Goldberg's report are in substantial agreement on practically all the statements that are discussed.
- Q. Then the next item you have here is overhead \$146,634.90. Now, what corporation's overhead does that figure represent?
- A. That is from the Harsh Investment Corporation, and I'll point out that it differs from Mr. Goldberg's figure by the amount of salary to Harold J. Schnitzer which in his opinion he disallowed, which is in our account as carried as part of the overhead.
- A. \$25,250.00.
- Q. Now, is there any other item of that overhead figure which was disallowed, left out by the Goldberg report other than Mr. Schnitzer's salary?
- A. I think that is the only one."

To permit a substitution of a fictitious figure, for such an actual and verified figure we submit, is a palpable error.

The figure substituted finds no support in any of the evidence. The difference between the substituted figure and the audit figure as shown by all audits is \$74,753.56.

The third figure used in calculating the cost to the Harsh Investment Corporation of the housing project is the amount of accruals plus judgments which were

rendered against the Harsh Investment Corporation for contractors. The actual payments made to the various subcontractors and the amounts paid on judgments is revealed in the record.

These items have been placed in the Peat, Marwick, Mitchell and Company report and adjustments made on the cost figures. When all of the adjustments are taken into consideration, the total cost of construction for the Hill Field Housing Project amounted to \$3,221,695.38 (see Peat, Marwick, Mitchell and Company report). This is \$519,606.83 greater than the costs shown by the Goldberg report as adjusted by the court's disallowance of overhead costs on Hill Field and the substitution of the overhead costs on the Montana job.

The difference is accounted for in three main categories. The Peat, Marwick, Mitchell and Company report shows as costs the actual payments by Harsh Utah Corporation for expenses of that corporation. At the Hill Field project it allowed the salaries incurred by Schnitzer and the various management fees. There are, in the Peat, Marwick, Mitchell and Company report, two adjustments upon which evidence was not available and submitted at the trial. These two errors are shown by the Explanation of Differences, items 28 and 46. Item 28 states that the Goldberg audit eliminated \$27,155.57 of inter-company profit which was never charged. Item 28 contains an estimation of costs incurred by Pacific Coast Equipment Company for the purchase of materials on the Hill Field

Project. Item 46 pertains to an error discovered by Peat, Marwick, Mitchell and Company in the operating expense of the Harsh Utah account.

An entirely separate and distinct actual expenditure which the court eliminated is the interest on the Irving Trust Company mortgage which Harsh Utah Corporation paid on balances outstanding during the construction period. There was no dispute among the auditors or the parties concerning the amount of this expense. It is accurately shown by Exhibits 203 and 442. The interest expense from July 1, 1953 through March 31, 1954 was \$83,190.97 (Ex. 203). The interest from April 1st to June 30th was \$22,654.42 (Ex. 442). The total of these two interest expenditures was \$105,845.39.

The court included in his calculations of the amount of the income, the income to Harsh Utah Corporation for the period in which this expenditure was actually made. It seems to be undisputed as a legal principle that interest on funds actually borrowed for the construction of a project is a legitimate and *bona fide* expense for the construction of the project where it was understood that a loan would be necessary for the financing of the work. Certainly there can be no dispute that the parties understood that a loan would be necessary to finance the construction of the project and that such loan would qualify under the Federal Housing Administration's rules and regulations and be insured by the Federal National Mortgage Association.

This principle that an actual expenditure of funds to pay the costs of money used in a construction project should be considered as an expense is so clear that little authority should be needed to support the principle. A clear and unequivocal holding to that effect is *Martin v. City of New York*, supra.

Appellants do not present the Peat, Marwick, Mitchell and Company report as being new evidence which this court can consider. It is presented as a part of appellants' argument to bring into active perspective the numerous adjustments necessary to bring the Goldberg audit up-to-date. It includes the final amounts which are shown by the court records to be moneys received from Irving Trust Company and expenditures made on court order to satisfy judgments awarded by the court.

Appellants submit that the report is of great assistance. By reference to the explanation of differences included in the report, a clear and accurate understanding of differences between the parties can easily be referred to. The court is assured of the reliability of the mathematical calculations and accuracy of the figures presented.

## CONCLUSION

It is respectfully submitted that the actual cost figures as revealed by the Goldberg audit, as adjusted, and the court records of actual receipts and disburse-

ments made after the audit must be used as the basis for findings of the cost on the Hill Field Project. To make findings which ignore undisputed facts and are based on irrelevant evidence of no probative weight, it is submitted is arbitrary and capricious and should not be permitted to go unchallenged by this court.

#### POINT IV.

THE COURT HAS MISCONSTRUED THE FEDERAL HOUSING RULES GOVERNING WHERRY HOUSING PROJECTS.

The Administrative Rules and Regulations for Military Housing Insurance under Title VIII of the National Housing Act was offered by appellants and became Exhibit 3. These rules and regulations are of great importance. An understanding of the various provisions with which Harsh Utah, Harsh Investment and Harold Schnitzer were required to comply presents a proper background to the actions which were taken in completing the housing project at Hill Field.

The rules and regulations were before the court at all times during the trial and considerable evidence was presented concerning the conduct of the parties in compliance with them.

The court made two findings concerning the conduct of appellants in respect to the housing regulations which it is believed show a basic misunderstanding on his part of those regulations. The findings are important because

they color or discolor, as the case may be, the whole disposition that the trial court has made of the cause now before the court.

The two findings attacked are contained in paragraphs 14, 15 and 16 of the findings. They concern the escrow fund and the adequacy of financing by Schnitzer of the Hill Field Project.

(a) THE ESCROW FUND MUST BE PAID OUT BY IRVING TRUST COMPANY PRIOR TO PAYMENT OF ANY MORTGAGE PROCEEDS.

The escrow fund, which the finding 14 of the court's findings of fact is concerned with, was found to be the sum of approximately \$611,000.00. As was indicated by the finding, this sum was to be placed in escrow with the Irving Trust Company of New York. The fund was actually deposited with Irving Trust Company before the project at Hill Field was commenced. In finding 14, the court found that the escrow funds were not to be withdrawn from said escrow account or from Harsh Utah Corporation and Harsh Investment Corporation for the personal use of Schnitzer. This finding embodies a mistaken interpretation of Rule V (2) and Rule V (5) of Exhibit 3. Rule V (2) as regards the escrow funds, states as follows:

“2. The mortgagor must establish in a manner satisfactory to the Commissioner that, in addition to the proceeds of the insured mortgage, the mortgagor has funds sufficient to assure completion of construction of the project. The Commis-

sioner may require such funds, if any, to be deposited with and held by the mortgagee in a special account or with an acceptable trustee or escrow agent under an appropriate agreement approved by the Commissioner which will require such funds to be expended for work and material on the physical improvements prior to the advance of any mortgage money."

It is apparent, from a reading of the rule, that the escrow required as is stated in clear and unmistakable language must be paid out by the escrow agent which, in this instance, is the Irving Trust Company before any amount of the mortgage is advanced for the construction of the housing project. The rules require that the escrow amount be withdrawn first and used on the project.

The court apparently is confused between the requirements governing the use of the escrow fund and the requirements of V (5). The requirements of V (5) pertain to a bond in the amount of ten percent of the construction costs. The completion bond which was furnished by Schnitzer and the Harsh interests and was in the amount of \$299,521.00. This bond, it is undisputed, was at all times on deposit and was supplied by the Massachusetts Bonding and Insurance Company. The description of the bond was given in paragraph 9 of Locke's complaint (R. 21). It, even to the present time, is on deposit. It was conditioned on completion of the project to the satisfaction of the housing commissioner. Rule V (5), which sets forth the requirements, reads as follows:



“5. Assurance for the completion of a project may be either (1) the personal undertaking or obligation in a form and by an obligor or obligors designated by the mortgagee and satisfactory to the Commissioner, in an amount at least equal to ten per centum (10%) of the construction cost, or (2) an escrow deposit in an approved depository of cash or securities of or fully guaranteed as to principal and interest by, the United States of America, in an amount at least equal to ten per centum (10%) of the construction cost, conditioned on completion of the project to the satisfaction of the Commissioner.”

A comparison of the language in the two sections indicates the ease with which the court become confused.

The requirements of V (2) and V (5), when considered in relation to the financial requirements of a Wherry Housing Act sponsor, provided a double guarantee that the project will be completed and that funds will be available to pay all of the costs incurred in the construction.

Under V (2) the sponsor is required to deposit actual cash making up the difference between the mortgage amount and the estimated costs of construction. V (5) requires, in addition, a bond in the amount of ten percent of the estimated cost of construction. It will be noted, that the amount of the bond is equal to ten percent of the Construction Contract—“Lump Sum” which became the estimated cost of construction.

(b) THE FINDING OF INADEQUACY OF FINANCING  
IS UNSUPPORTED BY EVIDENCE.

The court, in paragraphs 15 and 16 found that because of withdrawals during the construction of the Hill Field Project by Schnitzer that the project was inadequately financed. This finding is unsupported by any evidence whatsoever.

During the construction of the Hill Field Project, Schnitzer and Locke through the other Schnitzer corporations were finishing up the construction project at Great Falls and in the latter stages of the Hill Field Project, Schnitzer was commencing the construction of the housing project at Barstow, California. These projects were all undertaken with the knowledge of Locke and there does not appear in any part of the record or testimony that Locke ever objected to the commencement of the projects. To the contrary, it appears throughout the record that Locke knew and participated as the general construction superintendent on the Hill Field Project and the Great Falls, Montana Project in the financing arrangements for the constructing of the projects. He knew and understood the ways the finances of the projects had to be arranged.

The evidence is clear as to how Schnitzer used funds available to him to finance the projects and meet his personal obligations. He considered all of the obligations to be personal and met them with resources which he had available. On the Hill Field Project, funds were actually

expended for its construction approximating the total amount received from the mortgage and the escrow account.

At the request of Locke, the controller of Harsh Utah Corporation and all other Harsh Wherry Housing Corporations, prepared an exhibit to show the amount of money withdrawn by Schnitzer or used to pay accounts and bills of the Harsh Investment Corporation. That exhibit is 195.

It showed at the time of trial that there had been received from the Irving Trust Company as the mortgage proceeds, \$2,240,546.00. In addition, there had been received \$512,158.00 from the escrow funds making a total received from Irving Trust Company, an amount of \$2,752,704.00. The exhibit also shows that there had been paid by Harsh Investment Corporation for materials, labor and other direct costs incurred on the Hill Field Project, a total amount of \$2,747,775.00. The difference between the total funds received and the total funds paid was \$4,929.00 (Tr. 502). Ellis' statement was undisputed during the whole trial and proves, beyond refutation, that no substantial sum was siphoned off by Schnitzer for his own personal uses from the amounts furnished by the mortgage and escrow fund for the construction of the Hill Field Housing Project.

In addition to the amounts paid up to the time of trial, there remained with the Irving Trust Company, a

substantial sum of money to pay the last costs on the project. It was finally deposited with the County Clerk of Davis County and was in the sum of \$550,653.35 (R. 153A).

After the payment of all subcontractors and materialmen for claims against Harsh Investment and Harsh Utah corporations on the Hill Field Project, there remained on deposit with the County Clerk of Davis County \$273,000.00, plus. These amounts of money, it is respectfully submitted, demonstrate, beyond refutation, that adequate funds were always available to complete the Hill Field Project and pay all costs incurred.

During the trial, the controller of Harsh corporations stated, and at no place was there evidence introduced to the contrary, that the bills and accounts payable of the Harsh corporations were met as they became due and owing (Tr. 1070).

As a result of the filing by Pacific States Cast Iron Pipe Company of a materialman's lien, which the court found was not proper, the ability of the Harsh interests to withdraw from Irving Trust Company the funds still on deposit was terminated. The record shows a strenuous effort through the placing of bonds to obtain a release of Irving Trust Company funds. The filing of the lien by Locke in the amount of \$150,000.00 added additional insurmountable obstacles to the obtaining of that fund. After all liens were fixed in their amount, by stipulation

of the parties, no payments were made except on the order of the trial court. Certainly this procedure, which was requested by Locke in his complaint, cannot be cited as a failure of the Harsh interests to meet their obligations and accounts payable as they became due.

### CONCLUSION

It is respectfully submitted that the Harsh interests have adequately and fully financed the construction of the Hill Field Housing Project; that the large sum of money remaining on deposit after all of the liens and accounts had been satisfied demonstrates the truth of this statement beyond refutation.

It is further respectfully submitted that the financing of the project under the circumstances and facts shown by the undisputed evidence was in no way a violation of the Federal Housing Administration's rules and regulations, nor did it, in any way, affect the rights of Locke.

### CONCLUSION

It is respectfully submitted that this court should place upon the October 4th agreement a proper and lawful construction. It should order that the trial court consider all actual and *bona fide* costs incurred in the construction of the Hill Field Housing Project by the Harsh Utah Corporation, Harsh Investment Corporation and Harold J. Schnitzer. It should determine that only

if the costs do not exceed the amount of the mortgage to Irving Trust Company as finally adjusted to include the allowance for change orders can there be any profit under the terms of the agreement of October 4th.

It is further respectfully submitted that if the court should conclude that the October 4th agreement justifies a distinction between construction costs and project coats, then the court should order that the trial court take into consideration, in determining the construction costs of the project, the following:

(1) the actual amount of direct construction costs incurred and paid by Harsh Investment Corporation,

(2) the actual amount of the indirect construction costs incurred by Harsh Investment Corporation on the Hill Field Housing Project.

It is respectfully submitted that this court should order the trial court to eliminate in its findings of the income of Harsh Investment Corporation the amount of the lump sum contract and should substitute therefor the amount of the mortgage as finally adjusted to include the change order extras on the housing project; that it should order the trial court to eliminate from its calculations of income to Harsh Investment the amount of rental income earned by Harsh Utah Corporation. If said sum is to be included, the court should order that the amount of interest expense actually paid by Harsh Utah Corporation during the period that rental income was earned should be deducted as a cost.

Appellants respectfully submit that if the court shall adopt either alternative suggested by this conclusion no sum whatsoever will be due and owing to Locke. The court should therefore order the trial court to find in appellants' favor on its counterclaim and against intervening plaintiff, no cause of action on his complaint.

Respectfully submitted,

RAWLINGS, WALLACE, ROBERTS  
& BLACK AND DWIGHT L. KING

*Counsel for Defendants and Appellants*

530 Judge Building  
Salt Lake City, Utah

# APPENDIX



PHONE: ATWATER 5000

CABLE ADDRESS: HARSHCO

**HAROLD J. SCHNITZER**

HARSH BUILDING

209 S.W. 5TH AVENUE

PORTLAND, OREGON

June 21, 1951

THIS AGREEMENT, made this date in and between Harold J. Schnitzer, party of the first part, and A. T. Locke, party of the Second part, do hereby agree as follows:

The party of the second part will procure plans and specifications for the Wherry Housing Project to be built at the Desserett Chemical Depot, South of Salt Lake City, Utah, project consists of 150 units. Party of the second part will, in conjunction with party of the first part, prepare bid documents, obtain all bid quotations, will assist party of the first part to procure a reputable contract to construct this project, will assist party of the first part to procure the mortgage loans required from the Walker Bank and Trust Co., Salt Lake City, Utah. Party of the first part and party of the second part will together place this bid with the U. S. Corps of Engineers, Salt Lake City District. Party of the second part will do all in his power and furnish his services as requested for certification of a corporation as sponsoring corporation for this contract.

Party of the first part will pay party of the second part a fee for the above enumerated services in the amount of \$50,000.00, payable from profits as might be derived by him from construction of this project. Party of the first part will assist party of the second part where necessary and will procure from the San Francisco District Corp. of

Engineers necessary bid documents and plans for this project. Party of the first part will form a sponsoring corporation and management corporation for the operation of this project.

In the event that party of the first part does not desire to submit a bid on this project for any reason whatsoever, this agreement shall be void.

However, if the party of the first part should, under any conditions, lend his assistance to any other corporation bidding on this project the above enumerated fee shall be due and payable.

/s/ Harold J. Schnitzer

/s/ A. T. Locke

PHONE: ATWATER 5000

CABLE ADDRESS: HARSHCO

**HAROLD J. SCHNITZER**

HARSH BUILDING  
209 S.W. 5TH AVENUE  
PORTLAND 4, OREGON

July 24, 1951  
Salt Lake City, Utah

**AGREEMENT**

It is hereby agreed between Harold Schnitzer and Alvin T. Locke, both parties residing in Portland, Oregon as follows:

Whereas Harold Schnitzer and Alvin Locke desire to bid on the construction of the Wherry Housing Project at Deseret Chemical Depot, Deseret, Utah;

And, whereas Harold Schnitzer is to provide certain capital for the construction of subject project;

And, whereas, Alvin Locke is to supervise the construction and completion of the Deseret Project in consideration for a percentage of profits as agreed below:

Now therefore, it is agreed by Harold Schnitzer and Alvin Locke that they shall form a joint venture to construct the Deseret Housing project, and this joint venture shall guarantee to Harold Schnitzer from profits of the venture a minimum sum of One hundred fifty thousand Dollars (\$150,000.), in addition to one half of all profits earned above this amount. Any profits in excess of one hundred fifty thousand dollars shall be divided equally between Harold Schnitzer and Alvin Locke.

This agreement shall supersede any prior agreements entered into by the undersigned parties with respect to the Deseret Housing bid. This agreement shall be binding between the undersigned, Harold Schnitzer and Alvin Locke in the event that they are the successful bidders on the Deseret Housing Project and after they are authorized to start construction.

Accepted at Salt Lake City, July 24, 1951.

/s/ Alvin T. Locke

/s/ Harold Schnitzer

PHONE: ATWATER 5000

CABLE ADDRESS: HARSHCO

**HAROLD J. SCHNITZER**

HARSH BUILDING  
209 S.W. 5TH AVENUE  
PORTLAND 4, OREGON

August 29, 1951

**AGREEMENT**

IT IS HEREBY AGREED, between MR. HAROLD SCHNITZER of Portland, Oregon and MR. ALVIN T. LOCKE of Portland, Oregon as follows:

WHEREAS, Mr. Harold Schnitzer and Mr. Alvin T. Locke desire to bid on the construction of certain Wherry Housing Projects;

AND, WHEREAS, Mr. Harold Schnitzer is to provide certain capital required for the construction of such Wherry Housing Projects including the Davis-Monthan Housing Project, the Hill Field Housing Project and the Great Falls Air Force Base Housing Project;

AND, WHEREAS, Mr. Alvin Locke is to provide supervision for the construction and completion of these projects in the event of an award for the construction to the undersigned or their companies.

NOW, THEREFORE, it is agreed, by Harold Schnitzer and Alvin Locke that they shall, in the event that they are successful bidders for such construction as herein discussed, form a company for the purpose of constructing and completing the subject construction program. Any company which shall be so formed by Harold Schnitzer and Alvin Locke for the purpose of constructing Wherry Housing Projects shall guarantee to Harold Schnitzer, from profits of the venture, a minimum sum equal to 10% of the total monies received from the Government for such construction.

In addition to the aforementioned guaranteed profit to Mr. Harold Schnitzer an additional sum shall be paid to Mr. Harold Schnitzer by the joint venture company equal to one-half of all profits earned by the aforementioned above 10% guaranteed amount to

Harold Schnitzer. The balance of one-half of all profits earned in excess to the aforementioned guaranteed profit to Mr. Schnitzer, shall be paid to Mr. Alvin Locke by the joint venture.

Mr. Locke shall, under the terms of this agreement, devote all of his skill, energy, and time to the successful completion of any project which may be awarded to the joint venture as discussed in this agreement.

THIS AGREEMENT, shall remain in full force and effect until December 1, 1951 unless terminated prior thereto in writing by either party. In the event of termination of this agreement by either party two weeks written notice shall be given to either party.

AGREED :

/s/ Alvin T. Locke

Alvin T. Locke, Portland, Oregon

August 29, 1951

AGREED :

/s/ Harold Schnitzer

Harold Schnitzer, Portland, Oregon

August 29, 1951

## AGREEMENT

THIS AGREEMENT, Made and entered into this 4th day of October, 1951, by and between Harsh Investment Corp., an Oregon corporation, hereinafter referred to as "HARSH," Harold J. Schnitzer, hereinafter referred to as "SCHNITZER," and Alvin T. Locke, hereinafter referred to as "LOCKE,"

### WITNESSETH :

WHEREAS Schnitzer and Locke have heretofore entered into different agreements with respect to the bidding and construction of certain Wherry Housing Projects in the States of Arizona, Utah and Montana, and

WHEREAS Harsh, a corporation in which Schnitzer has an interest, heretofore, as sponsor corporation, bid on the Davis-Monthan Housing Project at Tucson, Arizona, the Hill Field Housing Project at Ogden, Utah, and the Great Falls Air Force Base Housing Project at Great Falls, Montana, and

WHEREAS, The parties hereto are desirous of cancelling all agreements between them heretofore made, and superseding said agreements with the agreement between the parties hereto as hereinafter more particularly set forth,

NOW, THEREFORE, it is agreed by and between the parties hereto as follows :

The recitals hereinabove set forth are true and correct.

All agreements between the parties hereto which have heretofore been made with respect to any of the matters herein referred to are hereby cancelled and superseded in the manner as hereinafter more particularly set forth.

In the event that Harsh is awarded by the United States Government the contract for the construction and management of the projects hereinabove mentioned or any of them, Harsh may employ Schnitzer, and/or any other person or corporation, as Harsh may elect, to perform the actual construction of said projects or any of them, and Harsh shall employ Locke as general construction superintendent therefor.

In the event that Harsh shall employ Schnitzer to construct the aforesaid projects or any of them, then Harsh shall pay to Locke for his services as construction superintendent, as aforesaid the sum of One Thousand and no/100 Dollars (\$1,000.00) per month, retroactive to October 1, 1951, for a term of one year thereafter and for such term thereafter as Harsh may require the services of Locke in connection with the completion of the construction of said projects or any of them. Locke agrees that throughout said period of time, he will in the best interests of Harsh devote his full time and attention exclusively to the services of Harsh as aforesaid, and in connection therewith shall perform such services as may be directed by Harsh. In addition to the salary aforesaid, Locke shall, under the circumstances aforesaid, and at the time hereinafter set forth, receive a bonus computed in the following manner:

From the net profit earned by Harsh in connection with the construction of the aforesaid projects, there shall first be retained by Harsh a sum of money equal to ten percent (10%) of the total amount of the bids made by Harsh and accepted by the Government on the aforesaid projects, and from the remaining net profit earned by Harsh as aforesaid there shall be paid to Locke fifty percent (50%) thereof by way of bonus, as aforesaid. For the sake of clarity, it is understood that in the event the construction work is handled in any other manner than contracting the entire job on any or all of said projects as hereinafter set forth, then the foregoing provisions shall be applicable.



In the event that Harsh should elect not to engage the services of Schnitzer to perform the construction work of the aforesaid projects or any of them, and if Harsh should elect to enter into any agreement with any other firm, person or corporation to perform the entire construction work on any or all of said projects on the basis of a guaranteed profit to Harsh, then, in lieu of salary and bonus to be paid to Locke, as hereinbefore set forth, Harsh shall pay to Locke the aforesaid salary of \$1,000.00 per month for a term of one year retroactive to October 1, 1951, and for such additional term as Locke's services may be required by Harsh and all reasonable travel or other expense, together with ten percent (10%) of the guaranteed profit received by Harsh for each of said projects which are contracted to a third party on the basis of a guaranteed profit to Harsh as in this paragraph more particularly set forth, with a minimum of Fifteen Thousand and no/100 Dollars (\$15,000.00) per project, limited, however, to the maximum sum of Twenty-Five Thousand and no/100 Dollars (\$25,000.00) for each of said projects, except that the additional profits if any as hereinafter provided relating to F. H. A. adjustments shall be payable in addition to said \$25,000.00 limit. Locke shall under the circumstances in this paragraph set forth, supervise the construction of the aforesaid projects, in the interests of Harsh, to ascertain that said projects are performed in accordance with plans and specifications agreed to by Harsh, and Locke shall devote his full time and attention in connection therewith.

In addition to the sums otherwise provided in the preceding paragraph, Locke shall receive a sum equal to ten per cent (10%) of all net profits received by Harsh as F. H. A. adjustments, the same being additional compensation to Harsh for changes in plans and specifications, or increased labor costs, from the United States Government for the construction of said projects, or any of them, over and above the profits involved in the original bids of Harsh accepted by the Government.

All sums due to Locke from Harsh under the terms of this agreement, other than monthly salary payments and reimbursement of expenses approved by Harsh shall be paid to Locke after all services to be performed by him, as herein elsewhere set forth, have been performed, and immediately upon completion of the construction of the projects awarded to Harsh and receipt by Harsh of profits earned.

It is understood and agreed between the parties hereto that Locke has and shall have no interest in and to the ownership or the management of the projects hereinbefore mentioned or any of them, or in connection with any profits that may be derived therefrom, it being the intention of the parties that the interest of Locke shall be limited to the construction of said projects or any of them as in the manner hereinbefore set forth.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

/s/ Harold Schnitzer

..... (SEAL)

Harold Schnitzer

/s/ By Harold Schnitzer, Pres.

..... (SEAL)

HARSH INVESTMENT CORP.

/s/ Alvin T. Locke

..... (SEAL)

Alvin T. Locke

**CARD GREAVES**  
**CERTIFIED PUBLIC ACCOUNTANT**  
 317 PUBLIC SERVICE BUILDING  
 PORTLAND 4, OREGON  
 ATWATER 9401

**January 31, 1954**

**Mr. Harold Schnitzer, President**  
**Marsh Investment Corporation**  
**1428 S. W. 12th Avenue**  
**Portland, Oregon**

**Dear Mr. Schnitzer:**

I have examined the records of the Marsh Investment Corporation and Marsh Utah Corporation from the beginning of the job to the period ending January 31, 1954, to ascertain the construction costs of the Hill Garden Homes Project, Hill Air Force Base, Utah, which was built by Marsh Utah Corporation. In connection therewith, I submit the following statements which conform with the records:

**Construction Costs - Exhibit I**  
**Overhead Costs - Schedule A**

I find that the cost of the job as of January 31, 1954 is \$2,997,581.55.

I am informed that there maybe additional costs on account of controversies with certain contractors. No provisions for these costs are made in the attached statements.

**Yours very truly,**

  
**Card Greaves,**  
**Certified Public Accountant**

**CG:bl**  
**Enc: Exhibit I**  
**Schedule A**

SCHEDULE A

Construction Costs, Hill Garden Homes, Hill Air Force Base, Utah  
built by Marsh Investment Corporation for Marsh Utah Corporation

Overhead CostsCOST CLASSIFICATION

Salaries	\$ 82,818.10
Professional Fees	8,645.00
Legal and Auditing	7,709.65
Telephone and Telegraph	9,966.68
Payroll Taxes	1,264.58
Depreciation	2,404.26
Insurance	1,084.42
Interest	349.79
Dues and Subscriptions	21.00
Donations	69.00
Travel and Entertainment	20,413.62
Heat, Light & Water	289.08
Leasehold Improvement	1,244.77
Repairs	491.42
Express, Freight	326.15
Advertising	927.92
Licenses	100.08
Office Supplies	5,781.60
Postage	322.87
Photostates	899.52
Rent	1,174.00
Public Stenographer	25.85
Unclassified	63.19
Miscellaneous	41.13
Engineering	69.65

**TOTAL CARRIED TO EXHIBIT I**

**\$ 147,303.33**

EXHIBIT IConstruction Costs, Hill Garden Homes, Hill Air Force base, Utah  
built by Harsh Investment Corporation for Harsh Utah CorporationCOST CLASSIFICATION

Site Work - Grading Excavation	\$ 64,894.77
Engineering	64,468.95
Concrete	276,096.39
Carpentry - Labor	280,086.93
Supervision	75,100.00
Plumbing	218,007.10
Electrical	73,606.85
Heating, Installation, Furnaces	144,532.00
Sewer, Water	62,209.48
Kitchen Cabinets, Sinks	60,720.23
Masonry	56,632.20
Asphalt Tile	45,525.00
Wood Flooring	56,584.29
Lumber - Framing, Sheathing	241,948.10
Doors	22,504.60
Metal Sash	13,641.20
Glass - Glazing	25,613.38
Millwork	130,208.26
Rough Hardware	28,055.14
Finish Hardware	20,441.50
Roofing	115,215.29
Siding	87,089.68
Painting	155,482.26
Insulation	25,655.56
Landscaping	31,000.00
Stoves	27,932.25
Refrigerators	48,671.21
Wall Board and Tops	125,427.01
Bath Tile	23,500.00
Playground Equipment	8,614.11
Blinds	10,547.15
Garages	29,872.96
Streets	403.41
Doors - Sliding	25,395.25
Stair Treads	2,787.51
Garbage Cans	4,118.40
Plywood Sheathing	26,012.54
Plaster	143.82
Gas Distribution	8,620.83
Loan Fee	6,592.00
Recording, Title, Legal	9,206.57
Insurance	8,139.67
Contingency	1,811.55
Architect	45,091.09
Bonds	19,090.43
Mortgage Placement Fee	3,296.00

Exhibit I continued

Interest	\$ 64,023.34
F. H. A. Mortgage Insurance	15,381.33
F. H. A. Inspection Fee	<u>13,184.00</u>
	2,903,181.59

ADDITION

Overhead Charges - Schedule A	<u>147,303.33</u>
	3,050,484.92

DEDUCTION

Purchasing commission reduced by agreement between Harsh Investment Corporation and Pacific Coast Equipment Co.	<u>52,903.37</u>
--	------------------

## COST OF CONSTRUCTION

	<u><u>\$ 2,997,581.55</u></u>
--	-------------------------------

Sales were made to Marsh Construction Company from the said Pacific Coast Equipment Company for these materials, in the amount of \$938,899.79, a difference of \$99,154.24. Pacific Coast Equipment Company issued a credit to Marsh Construction for \$63,142.82, which amount is reflected on books and in the report of Card Greaves, C.F.A.

The net profit on the construction of the project, Lincoln Garden Court Apartments, Great Falls, Montana, as constructed by the Marsh Construction Company, in our opinion, amounts to \$409,530.37, as reflected in Exhibit "A" of this report.

Mill Garden Homes Project, Mill Air Force Base, Utah

Marsh Utah Corporation, a corporation, hereinafter described as the "Owner-Management Corporation", entered into a contract with Marsh Investment Corporation, hereinafter described as the "Construction Company", dated July 21, 1952, for the construction of Mill Garden Homes Project, Mill Air Force Base, Utah, for the contract price of \$2,995,205.00. As of December 15, 1953, the approved change orders amounted to \$167,864.00, and Mr. Harold Schnitzer advised us that there would be approximately an additional \$10,000.00 in change orders. However, the total of the change orders must be further approved for the increase in mortgage to the "Owner-Management Corporation" by the lending agency. The total adjusted contract, providing the change orders are so approved, will approximate \$3,173,069.00.

We have examined the cost records and supporting vouchers of Marsh Investment Corporation and the detailed records making up the report of Card Greaves, Certified Public Accountant, dated January 31, 1954. In our opinion, the costs, as reflected in Exhibit "B", are correct construction costs, subject, however, to any additional amounts that may be paid as a result of liens filed and pending litigation by subcontractors and any reduction in costs as a result of counterclaims.

The costs, as shown in Exhibit "B", show an amount of \$5,597.25 in excess of those shown in the report of Card Greaves, C.F.A., dated January 31, 1954, for painting of \$3,000.00 and heating installation furnaces of \$2,597.25. These amounts were paid or accrued in March, 1954.

The following items, in our opinion, are not proper construction costs and are considered as costs to Marsh Utah Corporation, "Owner-Management Corporation". These items were considered part of replacement costs upon which the amount of the mortgage was determined, in agreement between mortgagor corporation, Marsh Utah Corporation, and the lending agency.

a) FMA Examination and Inspection	\$ 13,184.00
b) Loan Fees	6,592.00
c) Mortgage Placement Fee	3,296.00
d) Architect	45,091.09
e) FMA Mortgage Insurance	15,381.33
f) Interest on Mortgage Advances	64,023.34
g) Recording, Title, Legal	9,875.00
	<u>\$157,442.76</u>

ELIMINATION OF INTERCOMPANY PROFIT -  
PACIFIC COAST EQUIPMENT COMPANY

\$ 95,547.30

The Pacific Coast Equipment Company, a corporation owned by Harold Schnitzer, purchased materials for this project, in the amount of \$528,368.64, and sales were made by said Pacific Coast Equipment Company to Marsh Investment Corporation of these purchases for the sum of \$623,915.94, a difference of \$95,547.30. The report of Card Greaves, C.F.A., shows a credit of \$52,903.37 of this difference of \$95,547.30.

OVERHEAD EXPENSES

Included in the overhead expenses of Marsh Investment Corporation, and part of the report of Card Greaves, C.F.A., is an amount of \$26,250.00, salary of Harold Schnitzer. In our opinion, this is not part of construction cost.

From an examination of the books and records of Marsh Investment Corporation, Marsh Construction Company, a corporation, Marsh Utah Corporation, Marsh Montana Corporation, and Pacific Coast Equipment Company, a corporation, it is our opinion that said books and records do not clearly reflect the income and costs and expenses of the respective entities.

Respectfully submitted,

*Milton D. Goldberg*  
MILTON D. GOLDBERG  
CERTIFIED PUBLIC ACCOUNTANT  
*Milton I. Berman*  
MILTON I. BERMAN  
CERTIFIED PUBLIC ACCOUNTANT

HARSH INVESTMENT CORPORATIONHILL GARDEN HOMES PROJECT  
HILL AIR FORCE BASE, UTAHEXHIBIT "B"STATEMENT OF INCOME AND CONSTRUCTION COSTSGROSS INCOME

Contract Price

\$2,995,205.00

Extras

177,864.00

TOTAL GROSS INCOME\$3,173,069.00CONSTRUCTION COSTS

Site Work - Grading, Excavation

\$ 64,894.77

Engineering

64,468.95

Concrete

276,096.39

Carpentry Labor

280,086.93

Supervision

75,100.00

Plumbing

218,007.10

Electrical

73,606.85

Heating, Installation, Furnaces

147,129.25

Sewer, Water

62,209.48

Kitchen Cabinets, Sinks

60,720.23

Masonry

56,632.20

Asphalt Tile

45,525.00

Wood Flooring

56,584.29

Lumber - Framing, Sheathing

241,948.10

Doors

22,504.60

Metal Sash

13,641.20

Glass - Glazing

25,613.38

Millwork

130,208.26

Rough Hardware

28,055.14

Finish Hardware

20,441.50

Roofing

115,215.29

Siding

87,089.68

Painting

158,482.26

Insulation

25,655.56

Landscaping

31,000.00

Stoves

27,932.25

Refrigerators

48,671.21

Wall Board and Tops

125,427.01

Bath Tile

23,500.00

Playground Equipment

8,614.11

Blinds

10,547.15

Garages

29,872.96

Streets

403.41

Doors - Sliding

25,395.25

Stair Treads

2,787.51

Garbage Cans

4,118.40

Plywood Sheathing

26,012.54

Plaster

143.82

Gas Distribution

8,620.83Sub-Total Forward \$2,722,962.86



EXHIBIT "B" (CONTINUED)\$3,173,069.00CONSTRUCTION COSTS

Sub-total Forward

\$2,722,962.86

Insurance

8,139.67

Contingency

1,811.55

Bonds

19,090.43

TOTAL\$2,752,004.51LESS

Intercompany Profit -

Pacific Coast Equipment Company

95,547.30TOTAL DIRECT CONSTRUCTION COSTS\$2,656,457.21ADD - INDIRECT COSTS, GENERAL OVERHEAD

Salaries

\$ 56,568.10

Professional Fees

8,645.00

Legal and Auditing

7,041.22

Telephone and Telegraph

9,966.68

Payroll Taxes

1,264.58

Depreciation

2,404.26

Insurance

1,884.42

Interest

349.79

Dues and Subscriptions

21.00

Donations

69.00

Travel and Entertainment

20,413.62

Heat, Light and Water

289.08

Leasehold Improvement

1,244.77

Repairs

491.42

Express, Freight

326.15

Advertising

927.92

Licenses

100.08

Office Supplies

5,781.60

Postage

322.87

Photostats

899.52

Rent

1,174.00

Public Stenographer

25.85

Unclassified

63.19

Miscellaneous

41.13

Engineering

69.65TOTAL INDIRECT COSTS, GENERAL OVERHEAD120,384.90TOTAL CONSTRUCTION CONTRACT COSTS2,776,842.11NET PROFIT ON CONSTRUCTION CONTRACT

(Subject to comments herein contained)

\$ 396,226.89

**MILTON D. GOLDBERG**  
**CERTIFIED PUBLIC ACCOUNTANT**  
 240 SOUTH BEVERLY DRIVE  
 BEVERLY HILLS, CALIFORNIA  
 CRESTVIEW 5-3468

TAX CONSULTANT

BUSINESS MANAGEMENT

May 14, 1954

Mr. John M. Sherman  
 Suite 212  
 Union National Bank Building  
 Pasadena 1, California.

Dear Mr. Sherman:

I am returning herewith the Card Greaves reports on the Montana and Utah projects.

The additional information you requested with regard to accruals included in costs of Utah project but not paid as of March 31, 1954, is as follows:

<u>Description</u>	<u>Total Cost Per Report</u>	<u>Sub-Contractor</u>	<u>Accrued Amount</u>
Site Work	\$ 64,894.77	Moulding Bros.	\$ 475.71
Concrete	276,096.39	Vitt Construction	8,023.83
		Waterfall	26,672.39
		Columbia Concrete	15,700.93
			50,397.15
Supervision	75,100.00	Vitt Construction	53,000.00
Plumbing	218,007.10	H. G. Blumenthal	4,350.94
Electrical	73,606.85	Cascade Electric	7,305.00
Masonry	56,632.20	Levitt & Pulspher	5,843.12
Asphalt Tile	45,525.00	R. & W. Floor Covering	5,475.00
Wood Flooring	56,584.29	Thayer Floor Co.	5,658.00
Roofing	115,215.29	Bresham Roofing Co.	13,022.53
Insulation	25,655.56	Parker Insulation	1,467.00
Landscaping	31,000.00	Justine Dunn	11,500.00
Wall Boards & Tops	125,427.01	W. J. Thompson	14,886.82
Bath Tile	23,500.00	Elias Morris & Sons	2,350.00
Blinds	10,547.15	Edmondson Venetian	
		Blind & Shade Co.	1,050.00
<u>Total Accruals included in Costs</u>			<u>\$176,781.27</u>

Respectfully submitted,

  
Milton D. Goldberg, C.P.A.

## PEAT, MARWICK, MITCHELL &amp; CO.

CERTIFIED PUBLIC ACCOUNTANTS

AMERICAN BANK BUILDING

PORTLAND 5, OREGON

NEW YORK  
 ATLANTA  
 BALTIMORE  
 BILLINGS  
 BOSTON  
 BUFFALO  
 CHARLOTTE  
 CHICAGO  
 CINCINNATI  
 CLEVELAND  
 COLUMBUS  
 DALLAS  
 DENVER  
 DETROIT  
 GREENSBORO  
 HOUSTON  
 INDIANAPOLIS  
 KANSAS CITY  
 LINCOLN  
 LOS ANGELES  
 LOUISVILLE

MEMPHIS  
 MILWAUKEE  
 MINNEAPOLIS  
 NASHVILLE  
 NEWARK  
 NEW ORLEANS  
 OKLAHOMA CITY  
 OMAHA  
 PHILADELPHIA  
 PITTSBURGH  
 PORTLAND  
 RICHMOND  
 ST. LOUIS  
 SAN FRANCISCO  
 SAN JOSE  
 SEATTLE  
 SHREVEPORT  
 TULSA  
 WASHINGTON  
 WATERBURY

AFRICA  
 AUSTRALIA  
 CANADA  
 CONTINENTAL EUROPE  
 CUBA  
 GREAT BRITAIN  
 HONG KONG  
 INDIA  
 JAPAN  
 MEXICO  
 SOUTH AMERICA

ACCOUNTANTS' REPORT

Mr. Harold Schnitzer  
 Portland, Oregon:

We have examined certain records of Marsh Investment Corporation, Marsh Utah Corporation, and Pacific Coast Equipment Company for the purpose of determining the cost, and cost after deducting net rentals during construction of the Hill Garden Homes Project, Hill Air Force Base, Utah. Our examination, which did not include the net rental income received during the period of construction by the Marsh Utah Corporation, was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

The net rentals received during the period of construction, which are deducted from project costs in this report, were examined by other independent public accountants.

Net rentals as used herein mean gross rentals received during the construction period less related operating expenses except depreciation, management fees and interest on mortgage loan.

In our opinion, based on our examination and on the reports of other independent public accountants, the accompanying statement of cost of Hill Garden Homes Project presents fairly the cost of such project in conformity with generally accepted accounting principles, and the cost after deduction of certain rentals as defined in the preceding paragraph.

In respect of this project, the Federal Housing Administration and the Irving Trust Company, mortgagee, have confirmed directly to us the amount of the revised bid and the total of the mortgage loan as \$3,101,410.00 and \$2,791,200.00, respectively.

Portland, Oregon

September 15, 1955

*Peat, Marwick, Mitchell & Co.*

STATEMENT OF COST OF HILL GARDEN HOMES PROJECT  
Hill Air Force Base, Utah

Direct on site costs:

Site work - grading and excavation	\$ 133,718.24
Engineering	63,625.00
Carpentry labor	347,683.64
Concrete	271,005.55
Supervision	75,100.00
Plumbing	232,162.82
Electrical	73,606.85
Heating installation	158,656.07
Sewer and water	52,112.36
Kitchen cabinets and sinks	60,739.38
Masonry	56,443.30
Asphalt tile	45,050.00
Wood flooring	56,584.29
Lumber framing and sheathing	258,046.16
Doors	29,538.82
Metal sash	21,943.04
Glass and glazing	25,172.38
Millwork	133,021.08
Rough hardware	28,147.24
Finish hardware	20,761.00
Roofing	116,325.26
Siding	82,224.08
Painting	160,558.82
Insulation	25,655.56
Landscaping	31,150.00
Stoves	27,932.25
Refrigerators	48,671.21
Wallboard	127,133.66
Bath tile	23,500.00
Playground equipment	8,614.11
Blinds	10,497.15
Garage	29,872.96
Streets	403.41
Doors - sliding	25,395.25
Stair treads	2,787.51
Garbage cans	3,868.50
Plywood sheathing	26,012.54
Plaster	143.82
Gas distribution	14,015.92
Insurance	8,139.67
Contingency	27,047.05
Bonds	21,622.30

Sub-total, carried forward

\$ 2,964,688.25

STATEMENT OF COST OF HILL GARDEN HOMES PROJECT, CONTINUED  
Hill Air Force Base, Utah

Direct on site costs, continued:

Sub-total, brought forward		\$ 2,964,688.25
Deduct:		
Storm and fire damage recoveries (net)	\$ 6,986.14	
Cancellation of a portion of purchasing fee by Pacific Coast Equipment Company - portion not cancelled, \$15,610.66, included herein		
	<u>52,781.07</u>	<u>59,767.21</u>
Total direct on site costs		2,904,921.04
Other direct costs:		
F. H. A. inspection fee	13,184.00	
Interest on mortgage advances	44,247.35	
Loan fees	40,543.00	
Mortgage placement fee	3,296.00	
Architect	45,101.09	
F. H. A. mortgage insurance	15,381.33	
Recording, title and legal expenses	<u>14,928.57</u>	<u>176,681.34</u>
Total direct costs		3,081,602.38
Indirect costs:		
Salaries (includes salary of Harold Schnitzer, \$26,250.00)	83,145.35	
Professional fees	8,645.00	
Legal and auditing	709.65	
Telephone and telegraph	9,978.68	
Payroll taxes	1,598.77	
Depreciation	2,404.26	
Insurance	1,701.49	
Interest	326.91	
Dues and subscriptions	21.00	
Donations	69.00	
Travel and entertainment	19,916.11	
Heat, light and water	289.08	
Leasehold improvement	1,119.84	
Repairs	456.42	
Express and freight	326.15	
Advertising	927.92	
Licenses	100.08	
Office supplies	5,738.20	
Postage	322.87	
Photostats	899.52	
Rent	<u>1,174.00</u>	
Sub-totals, carried forward	\$ <u>139,870.30</u>	<u>3,081,602.38</u>

STATEMENT OF COST OF HILL GARDEN HOMES PROJECT, CONTINUED  
Hill Air Force Base, Utah

Total direct costs, brought forward		\$ 3,081,602.38
Indirect costs, continued:		
Sub-total, brought forward	\$ 139,870.30	
Public stenographer	25.85	
Engineering expense	69.65	
Unclassified	86.07	
Miscellaneous	<u>41.13</u>	<u>140,093.00</u>
Total project costs		3,221,695.38
Deduct net rentals received during the construction period before deduction of depreciation, management fees and interest on mortgage loan		<u>149,026.06</u>
Total project costs less net rental as defined above		<u>\$ 3,072,669.32</u>

HILL GARDEN HOMES PROJECT  
Comparison of Project Costs

	<u>Goldberg report as adjusted by the Court</u>	<u>Peat, Marwick, Mitchell &amp; Co. Report</u>	<u>Peat, Marwick, Mitchell &amp; Co. over or (under) Difference</u>
Direct costs:			
On site:			
Site work	\$ 64,894.77	133,718.24	68,823.47 (1)
Engineering	64,468.95	63,625.00	(843.95) (2)
Concrete	276,096.39	271,005.55	(5,090.84) (3)
Carpentry labor	280,086.93	347,623.64	67,536.71 (4)
Supervision	75,100.00	75,100.00	-
Plumbing	218,007.10	232,162.82	14,155.72 (5)
Electrical	75,606.85	73,606.85	-
Heating, installa- tion, furnaces	147,129.25	158,656.07	11,526.82 (6)
Sewer, water	62,209.48	52,112.36	(10,097.12) (7)
Kitchen cabinets, sinks	60,720.23	60,739.38	19.15 (8)
Masonry	56,632.20	56,443.30	(188.90) (9)
Asphalt tile	45,525.00	45,050.00	(475.00) (10)
Wood flooring	56,584.29	56,584.29	-
Lumber - framing, sheathing	241,948.10	258,046.16	16,098.06 (11)
Doors	22,504.60	29,538.82	7,034.22 (12)
Metal sash	13,641.20	21,943.04	8,301.84 (13)
Glass - glazing	25,613.38	25,172.38	(441.00) (14)
Millwork	130,208.26	133,021.08	2,812.82 (15)
Rough hardware	28,055.14	28,147.24	92.10 (16)
Finish hardware	20,441.50	20,761.00	319.50 (17)
Roofing	115,215.29	116,325.26	1,109.97 (18)
Siding	87,089.68	82,224.08	(4,865.60) (19)
Painting	158,482.26	160,558.82	2,076.56 (20)
Insulation	25,655.56	25,655.56	-
Landscaping	31,000.00	31,150.00	150.00 (21)
Stoves	27,932.25	27,932.25	-
Refrigerators	48,671.21	48,671.21	-
Wall board and tops	125,427.01	127,133.66	1,706.65 (22)
Bath tile	23,500.00	23,500.00	-
Playground equipment	8,614.11	8,614.11	-
Blinds	10,547.15	10,497.15	(50.00) (23)
Garages	29,872.96	29,872.96	-
Streets	403.41	403.41	-
Doors - sliding	25,395.25	25,395.25	-
Stair treads	2,787.51	2,787.51	-
Garbage cans	4,118.40	3,868.50	(249.90) (24)
Total, carried forward	\$ <u>2,688,185.67</u>	<u>2,867,706.95</u>	<u>179,521.28</u>

## HILL GARDEN HOMES PROJECT

## Comparison of Project Costs, Continued

	Goldberg report as adjusted by the Court	Peat, Marwick, Mitchell & Co. Report	Peat, Marwick, Mitchell & Co. over or (under) Difference
Direct costs, continued:			
On site, continued:			
Total, brought forward	\$ 2,682,185.67	2,867,706.95	179,521.28
Plywood sheathing	26,012.54	26,012.54	-
Plaster	143.82	143.82	-
Gas distribution	8,620.83	14,015.92	5,395.09 (25)
Insurance	8,139.67	8,139.67	-
Contingency	1,811.55	27,047.05	25,235.50 (26)
Bonds	19,090.43	21,622.30	2,531.87 (27)
Inter-company profit	(95,547.30)	(52,781.07)	42,766.23 (28)
Fire and storm damages	-	(6,986.14)	(6,986.14) (29)
Total on site costs	\$ 2,656,457.21	2,904,921.04	248,463.83
Other direct costs:			
F.H.A. examination and inspection	13,184.00	13,184.00	-
Interest on mortgage advances	64,023.34	44,247.35	(19,775.99) (30)
Loan fees	6,592.00	40,543.00	33,951.00 (31)
Mortgage placement fee	3,296.00	3,296.00	-
Architect	45,091.09	45,101.09	10.00 (32)
F.H.A. mortgage insurance	15,381.33	15,381.33	-
Recording, title, legal	9,875.00	14,928.57	5,053.57 (33)
Total other direct costs	157,442.76	176,681.34	19,238.58
Total direct costs	2,813,899.97	3,081,602.38	267,702.41
Indirect costs:			
Salaries	56,568.10	83,145.35	26,577.25 (34)
Professional fees	8,645.00	8,645.00	-
Legal and auditing	7,041.22	709.65	(6,331.57) (35)
Telephone and telegraph	9,966.68	9,978.68	12.00 (36)
Payroll taxes	1,264.58	1,598.77	334.19 (37)
Depreciation	2,404.26	2,404.26	-
Insurance	1,884.42	1,701.49	(182.93) (38)
Total indirect costs, carried forward	\$ 87,774.26	108,183.20	20,408.94



## HILL GARDEN HOMES PROJECT

## Comparison of Project Costs, Continued

	Goldberg report as adjusted by the Court	Peat, Marwick, Mitchell & Co. Report	Peat, Marwick, Mitchell & Co. over or (under) Difference
Total direct costs, brought forward \$	<u>2,813,899.97</u>	<u>3,081,602.38</u>	<u>267,702.41</u>
Indirect costs, continued:			
Total, brought forward	87,774.26	108,183.20	20,408.94
Interest	349.79	326.91	(22.88) * (39)
Dues and subscriptions	21.00	21.00	-
Donations	69.00	69.00	-
Travel and entertain- ment	20,413.62	19,916.11	(497.51) (40)
Heat, light and water	289.08	289.08	-
Leasehold improvement	1,244.77	1,119.84	(124.93) (41)
Repairs	491.42	456.42	(35.00) (42)
Express, freight	326.15	326.15	-
Advertising	927.92	927.92	-
Licenses	100.08	100.08	-
Office supplies	5,781.60	5,738.20	(43.40) (43)
Postage	322.87	322.87	-
Photostats	899.52	899.52	-
Rent	1,174.00	1,174.00	-
Public stenographer	25.85	25.85	-
Unclassified	63.19	86.07	22.88 * (44)
Miscellaneous	41.13	41.13	-
Engineering	<u>69.65</u>	<u>69.65</u>	<u>-</u>
Total indirect costs	<u>120,384.90</u>	<u>140,093.00</u>	<u>19,708.10</u>
Total costs	<u>2,934,284.87</u>	<u>3,221,695.38</u>	<u>287,410.51</u>
Deduct:			
Other direct costs not considered as con- struction costs by "Goldberg" or the "Court"	157,442.76	-	-
Eliminate overhead ex- pense of this project disallowed by the "Court"	120,384.90	-	-
Arbitrary amount of overhead allowed by the "Court"	<u>(45,631.34)</u>	<u>-</u>	<u>-</u>
	<u>232,196.32</u>	<u>-</u>	<u>(232,196.32) (45)</u>
Total construction costs, carried forward \$	<u>2,702,088.55</u>	<u>3,221,695.38</u>	<u>519,606.83</u>

## HILL GARDEN HOMES PROJECT

Comparison of Project Costs, Continued

	<u>Goldberg report as adjusted by the Court</u>	<u>Peat, Marwick, Mitchell &amp; Co. Report</u>	<u>Peat, Marwick, Mitchell &amp; Co. over or (under) Difference</u>
Total construction costs, brought forward	\$ 2,702,088.55	3,221,695.38	519,606.83
Less net rentals during the construction period, before deduction of management fees, interest and depreciation	<u>165,986.47</u>	<u>149,026.06</u>	<u>(16,960.41)</u> (46)
Total costs for computation of fee	\$ <u>2,536,102.08</u>	<u>3,072,669.32</u>	<u>536,567.24</u>

3527  
HILL GARDEN HOMES PROJECT  
Comparison of Project Costs  
Explanation of Differences

(1) Payments to Moulding Bros. per award		\$ 70,294.04
Deduct:		
Cancellation of voucher No. 248 to Moulding Bros. being a duplicate charge to expense	\$ 994.86	
Unidentified amount included as an accrual in "Goldberg" report	<u>475.71</u>	<u>1,470.57</u>
Difference (debit)		\$ <u>68,823.47</u>
(2) Cancellation of check No. 1012 on journal entry 54-3-3		95.52
Transfer to carpentry labor		839.48
Sale of salvage		202.83
Refund of insurance premium by the State of Utah		92.18
Peat, Marwick, Mitchell correcting entries:		
Eliminate costs not pertaining to this project		1,077.75
Duplication of vouchers T-44 and P-30		5.27
Duplication of December balance on January vouchers of Builders Survey Co.		49.50
Duplication of charges voucher T-62 in January, 1953		<u>21.42</u>
		2,383.95
Correction of Journal voucher 54-1-6 which incorrectly recorded sale of pickup truck	1,000.00	
Cancellation of amount previously set up as receivable from Justice-Dunn Co.	40.00	
Payment to A. Miller Sams for survey work	<u>500.00</u>	<u>1,540.00</u>
Difference (credit)		\$ <u>843.95</u>
(3) Estimate of amounts due contractors as included in "Goldberg" report		50,397.15
Cancellation of duplication of voucher No. T-81		<u>460.30</u>
		50,857.45
Payments by the Court:		
Waterfall Construction Co.	24,080.80	
Vitt & Vitt	10,523.83	
Cancellation of amounts previously charged to contractors not allowed by the Court:		
Waterfall Construction Co.	7,039.92	
Cancellation of amount previously charged to Columbia Concrete Placement Co.	2,878.14	
Voucher No. 1167 to Swender Blue Print	20.94	
Cancellation of voucher 1077	(117.76)	
Eliminate duplicate charge to Waterfall Construction Co. on J. E. 53-10-9	<u>1,340.74</u>	<u>45,766.61</u>
Difference (credit)		\$ <u>5,090.84</u>

## HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

## Explanation of Differences, Continued

(4) Payment of final settlement with contractors:		
Vitt & Vitt (\$125,000.00 less \$63,523.83 charged to other accounts)		\$ 61,476.17
Paid to Harold Horsley for travel expenses on voucher 1172 in May, 1954		267.12
Cancellation of receivable from Vitt & Vitt previously set up from this account		5,842.45
Swender Blue Print Co. - photostats in connection with "Vitt" settlement		<u>10.97</u>
Difference (debit)		\$ <u>67,596.71</u>
(5) Cancellation of receivable from H. G. Blumenthol previously set up from this account		
Final settlement with H. G. Blumenthol	\$ 15,400.16	3,106.50
Less amount estimated and included in "Goldberg" report	<u>4,350.94</u>	<u>11,049.22</u>
Difference (debit)		\$ <u>14,155.72</u>
(6) Final settlement with Columbia Aluminum Products Co. for heating installation		
Less amount accrued in "Goldberg" report	15,265.32	
Payment to Pacific Coast Equipment Co. for furnaces and parts voucher 1124	<u>2,597.25</u>	12,668.07
		<u>1,510.97</u>
		14,179.04
Less:		
Cancellation of voucher 372 payable to Pacific Coast Equipment Co.	214.26	
Credit memo - overcharge of furnaces by Pacific Coast Equipment Co.	<u>2,437.96</u>	<u>2,652.22</u>
Difference (debit)		\$ <u>11,526.82</u>
(7) Unexplained accrual by "Goldberg"		
Cancellation of accounts receivable previously credited to this account:		11,741.08
Moulding Bros. (Jack Henly)	207.36	
Moulding Bros.	1,436.20	
Unreconciled difference	<u>.40</u>	<u>1,643.96</u>
Difference (credit)		\$ <u>10,097.12</u>

## HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

## Explanation of Differences, Continued

(8) Payments to W. H. Bintz Co. on voucher No. 1242	\$	20.94
Cancellation of account receivable from W. H. Bintz Co.		<u>1.30</u>
		22.24
Credit memo allowed by "Bintz"		<u>3.09</u>
Difference (debit)	\$	<u>19.15</u>
(9) Amount set up as accrued liability by "Goldberg"		5,843.12
Actual liability as paid to Leavitt & Pulsipher on voucher 1428		<u>5,654.22</u>
Difference (credit)	\$	<u>188.90</u>
(10) Amount set up as accrued liability by "Goldberg"		5,475.00
Actual liability as paid to R & W Floor Covering, Inc., on voucher 1256		<u>5,000.00</u>
Difference (credit)	\$	<u>475.00</u>
(11) Cancellation of receivable from Utah-Idaho Roofing and Siding Co. previously set up from this account		275.76
Peat, Marwick, Mitchell correcting entries: Charges from Harsh Construction not previously entered	\$	17.90
Invoices from Pacific Coast Equipment Co. which had not been entered but which were billed in January, 1953	<u>15,904.40</u>	<u>15,922.30</u>
		16,198.06
Sale of scrap lumber credited to this account		<u>100.00</u>
Difference (debit)	\$	<u>16,098.06</u>
(12) Peat, Marwick, Mitchell correcting entry for charges from Pacific Coast Equipment Co. which had not been entered. Billed in January, 1953		<u>7,034.22</u>
Difference (debit)	\$	<u>7,034.22</u>

HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

Explanation of Differences, Continued

(13) Voucher 1091 payment to Ceco Steel Co.	\$ 21.00
Peat, Marwick, Mitchell correcting entry for charges from Pacific Coast Equipment Co. which had not been entered. Billed in January, 1953	<u>8,372.00</u>
	8,393.00
Cancellation of voucher 1068 to Pacific Coast Equipment Co. for erroneous charge	<u>91.16</u>
Difference (debit)	\$ <u>8,301.84</u>
(14) Peat, Marwick, Mitchell correcting entry for amount voucher charges exceeded actual payment (Nos. 246, 296, 604, 722, 838)	<u>441.00</u>
Difference (credit)	\$ <u>441.00</u>
(15) Peat, Marwick, Mitchell correcting entry for charges from Pacific Coast Equipment Co. which had not been recorded. Billed in January, 1953	<u>2,812.82</u>
Difference (debit)	\$ <u>2,812.82</u>
(16) Peat, Marwick, Mitchell correcting entry to reverse erroneous credit made on J. E. 53-5-7	331.50
Cancellation of invoice from Gilbert Brothers which was recorded in 1952 but merchandise returned for credit	<u>239.40</u>
Difference (debit)	\$ <u>92.10</u>
(17) Payment to Irving Jacobsen Co. on voucher 1180 for old balance due	<u>319.50</u>
Difference (debit)	\$ <u>319.50</u>
(18) Payment to Gresham Roofing Co. by court for final settlement	\$ 18,141.63
Cancellation of receivable from Gresham Roofing Co. previously set up from this account	<u>4,139.25</u>
	22,280.88
Cancellation of vouchers to Gresham Roofing Co. which were included in final court settlement	<u>3,317.19</u>
Total carried forward	\$ <u>18,963.69</u>

HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

Explanation of Differences, Continued

## (18) Continued:

Total brought forward	\$ 18,963.69	
Less amount estimated and included in "Goldberg" report	<u>13,022.53</u>	5,941.16
Payment to Leavitt and Pulsipher for balance of contract on voucher 1211		<u>189.90</u>
		6,131.06
Peat, Marwick, Mitchell correcting entry taking up credit memo issued by Pacific Coast Equipment for duplication of charges		<u>5,021.09</u>
Difference (debit)	\$	<u>1,109.97</u>

- (19) Peat, Marwick, Mitchell correcting entries:  
To take up credit memo from Pacific Coast  
Equipment Co. for credit allowed by  
Alta Lumber Co. but not previously  
recorded on Harsh Investment books  
Correction of erroneous entry made to  
record sale of surplus material to Bob  
Wright Wholesale Lumber Co.

11,395.33

1,706.58  
13,101.91

Charges from Pacific Coast Equipment Co.  
which had not been recorded. Billed  
in January, 1953

8,236.31  
\$ 4,865.60

- (20) Payment to Jacob, Jones, and Brown regarding  
Anderson case made on voucher 1160  
(included in credit below)

28.90

Payment to Rawlings, Wallace, Roberts & Black  
to settle judgment awarded to painters for  
disputed expenses

994.15

Peat, Marwick, Mitchell correcting entry to  
correct erroneous entry made to cancel  
check No. 3065. Entry cancelling check  
credited to construction costs in error.

1,292.14  
2,315.19

Peat, Marwick, Mitchell correcting entry dis-  
allowing as construction costs legal ex-  
penses re Anderson case.

238.63  
\$ 2,076.56

## HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

## Explanation of Differences, Continued

(21) Payments to Justice-Dunn Co. for land-scaping on voucher 1427, 1258, and 1202	\$ 8,550.00	
Accrual of balance due Justice-Dunn Co. on contract	<u>3,100.00</u>	11,650.00
Less estimated accrual included in "Goldberg" report		<u>11,500.00</u>
Difference (debit)	\$	<u>150.00</u>
(22) Payments made by court to W. J. Thompson	15,796.82	
Less amount estimated and included in "Goldberg" report	<u>14,886.82</u>	910.00
Cancellation of account receivable from W. J. Thompson previously set up from this account		<u>796.65</u>
Difference (debit)	\$	<u>1,706.65</u>
(23) Estimated amount due contractor and included in "Goldberg" report		1,050.00
Payment to Edmundson's Venetian Blind and Shade for final amount owing on voucher 1254		<u>1,000.00</u>
Difference (credit)	\$	<u>50.00</u>
(24) Peat, Marwick, Mitchell correcting entry to record allowance made on damaged garbage cans		<u>249.90</u>
Difference (credit)	\$	<u>249.90</u>
(25) Payments to The Lang Co. for interest on past due account made on voucher 1154 and 1092		3.09
Accrual of an invoice from Portland Engineering Co. which has not been paid to date		<u>5,392.00</u>
Difference (debit)	\$	<u>5,395.09</u>
(26) Payments made to Irving Trust Co. for expenses regarding mortgage increase on voucher 1552		3,463.20
Construction costs carried in Harsh Utah Corp. loan account and transferred to construction expense by cancellation of the loan receivable		20,106.32
Construction costs paid by Harsh Utah Corp. and billed to Harsh Investment		<u>1,544.00</u>
Total carried forward	\$	<u>25,113.52</u>



## HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

## Explanation of Differences, Continued

(26) Continued:

Total brought forward		\$ 25,113.52
Purchasing fee for period of July 1, 1953 through March 31, 1954 charged by Pacific Coast Equipment and set up as an accrual on J. E. 54-3-10		<u>1,297.18</u> 26,410.70
Cancel voucher 1022 charged in error	\$ 54.52	
Cancel voucher 966 for water service payable to The Treasurer of the U. S. Settlement otherwise made	<u>1,120.68</u>	<u>1,175.20</u>
Difference (debit)		\$ <u>25,235.50</u>
(27) Bond for W. J. Thompson paid by Harsh Utah Corp. and charged to Harsh Investment on J. E. 54-3-10		1,200.00
Interest payment made to Semler et al on bonds they furnished as collateral to Mass. Bonding Co. on voucher 1604		<u>2,319.55</u> 3,519.55
Insurance refund	100.00	
Bond premium refund	<u>887.68</u>	<u>987.68</u>
Difference (debit)		\$ <u>2,531.87</u>
(28) "Goldberg" eliminated \$27,155.57 more intercompany profit than was ever charged Portion still remaining in construction costs per Peat, Marwick, Mitchell report - estimated to be equivalent to Pacific Coast Equipment Company cost of pur- chasing for Hill Garden Home Project		27,155.57      <u>15,610.66</u>
Difference (debit)		\$ <u>42,766.23</u>
(29) Net storm and fire damage recoveries not credited by "Goldberg" (credit)		\$ <u>6,986.14</u>
(30) Loan fee paid First National Bank of Portland included in interest on mortgage advances by "Goldberg" (credit)		\$ <u>19,775.99</u>

HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

Explanation of Differences, Continued

(31) Loan fee per contra above	\$ 19,775.99
Fee to Federal National Mortgage Ass'n.	14,175.00
Unreconciled	<u>.01</u>
Difference (debit)	\$ <u>33,951.00</u>
(32) Unable to reconcile - apparently error in "Goldberg" report (debit)	\$ <u>10.00</u>
(33) Legal fees and costs in connection with final closing	5,989.50
C. E. Nulph - voucher 1247	7.50
Frank L. Whitaker voucher 1252	<u>100.00</u>
	6,097.00
Less unknown difference between "Goldberg" report and the books	\$ 668.43
Correction of charge by W. G. Herron and Associates made by Peat, Marwick, Mitchell & Co.	<u>375.00</u>
Difference (debit)	\$ <u>5,053.57</u>
(34) Salary of Harold Schnitzer not included as a cost by "Goldberg"	26,250.00
Peat, Marwick, Mitchell & Co. entry correct- ing charges from Harsh Construction Corp.	<u>327.25</u>
Difference (debit)	\$ <u>26,577.25</u>
(35) Peat, Marwick, Mitchell & Co. entry reverse fee accrued to Walter E. Hutchison but paid by Harsh Utah Corp.	7,000.00
Less unreconciled difference between "Goldberg's" report and the books	<u>668.43</u>
Difference (credit)	\$ <u>6,331.57</u>
(36) Peat, Marwick, Mitchell & Co. adjusting entry taking up charges not previously taken up through error (debit)	\$ <u>12.00</u>
(37) Payroll taxes and medical aid on Utah job previously charged in error to loss and gain account rather than construction costs (net) (debit)	\$ <u>334.19</u>

## HILL GARDEN HOMES PROJECT

## Comparison of Project Costs

Explanation of Differences, Continued

(38) Peat, Marwick, Mitchell & Co. entry eliminating costs not applicable to Hill Field project (credit)	\$ <u>182.93</u>
(39) Bank charges included in No. (44) below (credit)	\$ <u>22.88</u>
(40) Peat, Marwick, Mitchell & Co. entry disallowing costs applicable to another project (credit)	\$ <u>497.61</u>
(41) Peat, Marwick, Mitchell & Co. entry adjusting for merchandise returned (credit)	\$ <u>124.93</u>
(42) Peat, Marwick, Mitchell & Co. entry to correct for duplicate charge (credit)	\$ <u>35.00</u>
(43) Peat, Marwick, Mitchell & Co. entries for:	
Duplicate costs	11.10
Cost not applicable to Hill project	<u>32.30</u>
Difference (credit)	\$ <u>43.40</u>
(44) See number (39) above (debit)	\$ <u>22.88</u>
(45) Other direct costs and overhead eliminated by "Goldberg" and/or the Court (credit)	\$ <u>232,196.32</u>
(46) Error in operating expenses of Harsh Utah Corp. for the construction period as approved by the Court	17,086.73
Less error in gross rentals as determined by the Court	<u>126.32</u>
Difference (credit)	\$ <u>16,960.41</u>

No	Item	Allowed	Bid
1.	Clearing and Grading (no finish grade)	\$ 12,000.00	Complete by rental of Equipment
2.	Concrete Work ( Includes slabs paper, steel, forms, form labor fill, insulation, misc. Iron)	180,000.00	No bid as yet
3.	Carpentry Labor ( Includes all framing, install all trim siding and ext. trim, install sheetrock, lay oak floors, hang doors, install sash)	<del>6.00</del> <i>Carpentry Labor</i> <del>6.00</del> <i>Plow Labor</i> <del>6.00</del> <i>S. Rod Labor</i> 250,000.00	This work we do ourselves
4.	Lumber Framing	140,000.00	No bid as yet
5.	Ext. and Int. Trim	50,000.00	No bid as yet
6.	Interior and Exterior Doors	32,000.00	No bid as yet
7.	Metal Sash	20,000.00	22,035.10
8.	Glas and Glazing	5,000.00	No Bid
9.	Siding	45,000.00	No Bid
10.	Masonry	70,000.00	No Bid
11.	Asphalt Tile	45,500.00	51,000.00
12.	Tile Baths	10,500.00	No Bid
13.	Wallboard Material ( Includes taping, <del>and installation</del> )	56,000.00	Claude Petty
14.	Insullation	12,000.00	13,062.00
15.	Rough Hardware	10,000.00	No bid
16.	Finish Hardware	10,000.00	Tentive Bids
17.	Electrical	63,000.00	No bid
18.	Electrical Distrubtion	42,000.00	No Bid
19.	Plumbing	175,000.00	Tentive
20.	Heating	175,000.00	Tentive
21.	Roofing and Sheetmetal	80,000.00	Tentive
22.	Painting	100,000.00	Tentive
23.	Cabinets	60,000.00	70,000.00
24.	Lawns ( Includes finish grade)	30,000.00	34,000.00
25.	Ref. and Stove	60,000.00	Tentive
26.	Interest	14,000.00	Very Safe
27.	Taxes	17,500.00	Very safe
28.	Equipment	8,500.00	Should cover
29.	Water Mains	35,000.00	38,000.00
30.	Sewer Mains	35,000.00	36,000.00
31.	Sidewalks, Streets, curbs, drives	90,000.00	Tentive
32.	Overhead	60,000.00	very safe
33.	bonds	17,500.00	very safe
Allowed cost no to exceed		1,920,500.00	
34.	Arch.	41,500.00	
35.	Guarrentee	250,000.00	
36.	F.E.A. Fees 1 1/3 %	33,000.00	
37.	Insurance ( Fire )	8,500.00	
38.	Legal, Recording, Title	5,000.00	
		2,258,500.00	
39.	Contengency	50,000.00	
Total cost		2,308,500.00	
Mortgage Loan		2,490,300.00	
Profit		181,800.00	

RECEIVED.....copies of the within Brief  
of Appellants this.....day of November, 1955.

.....

.....

*Counsel for Intervening Plaintiff  
and Respondent.*