

2004

VESTIN MORTGAGE, INC., Appellant/
Petitioner and Plaintiff, vs. FIRST AMERICAN
TITLE INSURANCE COMPANY, Appellee and
Respondent and Defendant : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

VESTIN MORTGAGE, INC.,

Appellant/Petitioner and Plaintiff,

vs.

FIRST AMERICAN TITLE
INSURANCE COMPANY,

Appellee/Respondent and Defendant.

No. 20041132-SC

APPELLANT/PETITIONER'S OPENING BRIEF

On Writ of Certiorari to the Utah Court of Appeals, Case No. 20030941-CA

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ORAL ARGUMENT REQUESTED

Supreme Court

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ORAL ARGUMENT REQUESTED

PARTIES TO THE PROCEEDINGS

Appellant/Petitioner Vestin Mortgage, Inc. is a Nevada corporation formerly known as Capsource, Inc., doing business as Del Mar Mortgage.

Appellee/Respondent First American Title Insurance Company is a California corporation.

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(a) because this is a review of a judgment from the Court of Appeals. The Court granted Vestin Mortgage, Inc.'s Petition for Writ of Certiorari on April 19, 2005. (R. 482.) The Court of Appeals' decision is designated as 2004 UT App 379, reported at 101 P.3d 398, and submitted herewith as Exhibit 1 to the Addendum.

ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals incorrectly conclude on a motion to dismiss that the title insurance policies at issue provide no coverage for damage caused to Vestin, even though First American failed to disclose the Eagle Mountain Special Improvement District and its intention to levy assessments, which was a recorded exercise of governmental police power that came within the scope of coverage?

STANDARD OF REVIEW

Because the district court received and did not exclude relevant evidence outside the pleadings, First American's motion to dismiss "shall" be treated as a motion for summary judgment. Utah R. Civ. P. 12(b). Summary judgment is appropriate only when the record indicates there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Utah R. Civ. P. 56(c); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1039 (Utah 1991).

This Court reviews a grant of summary judgment for correctness, according no deference to the lower court's legal conclusions. *Id.* at 1039-40. In reviewing the lower court's ruling, this Court accepts the facts and inferences in the light most favorable to

the moving party. *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1243 (Utah 1990). If a genuine issue of material fact exists, this Court will reverse the grant of summary judgment and remand that issue for trial. *Atlas Corp. v. Clovis National Bank*, 737 P.2d 225, 229 (Utah 1989).

Under a Rule 12(b)(6) standard, alternatively, this Court accepts the factual allegations in the Complaint as true and considers them, along with all reasonable inferences to be drawn from those facts, in the light most favorable to the non-moving party. *Krouse v. Bower*, 2001 UT 28, ¶ 2, 20 P.3d 895, 897. Under this liberal standard, dismissal is only appropriate if it appears to a certainty that the plaintiff can prove no set of facts to make out a claim for relief. *Christensen v. Lelis Automatic Transmission Serv.*, 467 P.2d 605, 607 (Utah 1970); *Ivie v. Hickman*, 2004 UT App 469, ¶ 7, 105 P.3d 946. Because the propriety of a motion to dismiss is a question of law, this Court reviews a dismissal for correctness, giving no deference to the decision below. *Hebertson v. Willow Creek Plaza*, 923 P.2d 1389, 1392 (Utah 1996).

Questions of contract interpretation are questions of law for which this Court accords no deference to the conclusions reached below. *See Meadow Valley Contractors v. Transcon Ins. Co.* 2001 UT App 190, ¶ 13, 27 P.3d 594, 597. Whether a contract contains an ambiguity is a question of law reviewed for correctness. *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 22, 54 P.3d 1139, 1145 (Utah 2002). If an ambiguity exists, the parties' intent is a factual issue for resolution by the trier of fact. *See id.*

PRESERVATION OF ISSUE BELOW

The issue presented in this appeal was preserved in the district court in Plaintiff's Memorandum in Opposition to Motion to Dismiss filed on August 13, 2003. (R. 234-244.) The issue was renewed in the Court of Appeals in the Brief of Appellant filed on March 2, 2004, at 14-33.

GROUND FOR REVIEW OF THE ALTERNATIVE "ENCUMBRANCE" ISSUE

In this appeal, Vestin presents, in the alternative, an argument that the recording of special improvement districts creates an "encumbrance" affecting the real property to be assessed. *See* Argument, *infra*, part I.A.1. Specifically, the Utah Legislature referred to it as an "encumbrance" in the Utah Municipal Improvement Act, Utah Code Ann. § 17A-3-307(6)(c). Vestin did not present this argument below. Pursuant to Utah R. App. P. 24(a)(5)(B), Vestin respectfully submits that the Court should consider this argument in this appeal for three reasons.

First, the Court of Appeals' decision directly conflicts with the Utah statute, calling for review by this Court to resolve an inconsistency between Utah statutory and case law. This Court has plenary power to consider those issues necessary to assure the correct application of Utah law. *See, e.g., State v. Marvin*, 964 P.2d 313, 318 (Utah 1998); *cf. State v. Irwin*, 924 P.2d 5, 7-11 (Utah App. 1996). Since no deference is given to the decision below, this Court undertakes a de novo review of the law. First American will have a full opportunity to brief and respond to this point. This Court should have the ability to consider all matters that affect the correct outcome of this case.

Second, this argument provides not only an independent alternative basis for Vestin's position but also a supportive basis for Vestin's primary position, which *was* briefed extensively below. Consequently, the Court's consideration of this argument is not in and of itself outcome determinative.

Third, the Legislature's reference to the recording of the notice as an "encumbrance" is not contained in the provision that was most directly at issue in this case (subsection (a) of Utah Code Ann. § 17A-3-307(6)) but rather in a corollary provision (subsection (c)). Vestin first noted the existence of the "encumbrance" language in its Petition for Writ of Certiorari, which was filed at the end of last year. Consequently, First American has had many months to prepare a response to this argument and is not prejudiced procedurally in any way.

In sum, Vestin respectfully suggests that this Court should consider all relevant law when deciding this important case, including the Legislature's reference to the recording at issue as an "encumbrance."

CONTROLLING PROVISIONS

One statutory provision and two rules of civil procedure are of substantial significance in this appeal: (1) The Utah Municipal Improvement Act, Utah Code Ann. § 17A-3-301 *et seq.*; and (2) Rules 12(b) and 56 of the Utah Rules of Civil Procedure.

First, the Utah Municipal Improvement Act provides, in pertinent part:

(a)(i)(A) If [a] governing body creates [a] special improvement district, it shall, within five days from the date of creating the district, record the original or a certified copy of the final approved resolution creating the district in the recorder's office of the county in which the district is located.

. . .

(c) If the governing body deletes any property to be assessed within the district after the district has been created, it shall issue and record a release and discharge of the recorded encumbrance created as a result of the recording required by this section in a form that includes the legal description and tax identification number of the property and otherwise complies with the recording statutes.

Utah Code Ann. § 17A-3-307(6) (emphasis added). A copy of the entire Utah Municipal Improvement Act is included in the Addendum hereto as Exhibit 9.

Second, Utah Rule of Civil Procedure 12(b) provides, in pertinent part:

[T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah R. Civ. P. 12(b)(6) (emphasis added).

Third, Utah Rule of Civil Procedure 56 provides, in pertinent part:

A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. . . .

. . . The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Utah R. Civ. P. 56(b), (c).

STATEMENT OF THE CASE

Nature of the Case

This case is in this Court on a writ of certiorari to the Court of Appeals. This Court is called upon to review a claim for coverage under title insurance policies that failed to identify or exclude a special improvement district and its intent to levy assessments.

Course of Proceedings

On May 30, 2003, Vestin Mortgage, Inc. (“Vestin”) filed its Complaint in this action alleging breach of two title insurance policies issued by First American Title Insurance Company (“First American”) that insured Vestin’s title in two separate trust deeds. *See* Addendum Exhibits 3-5. (R. 1-52.)

On July 11, 2003, First American filed a Motion to Dismiss (sometimes hereafter “the Motion”) pursuant to Utah Rule of Civil Procedure 12(b)(6), asserting that Vestin’s Complaint failed to state a claim upon which relief could be granted. (R. 55-58.)

On August 13, 2003, Vestin filed Plaintiff’s Memorandum in Opposition to Motion to Dismiss. (R. 226-244.) In connection with Vestin’s opposition, Vestin filed the Affidavit of Daniel R. Stubbs (Addendum Ex. 6; R. 355-394) and the Affidavit of Thomas E. Lea (Addendum Ex. 7; R. 396-403). These Affidavits contained evidence relevant to First American’s Motion: they demonstrated that (a) it is industry practice for title insurance companies to identify special improvement districts, and (b) it was First American’s practice in other instances to identify the very special improvement district it failed to identify for Vestin.

On September 29, 2003, First American filed its Reply Memorandum in Support of Motion to Dismiss. (R. 412-432.)

Disposition Below

On October 17, 2003, the district court heard oral argument on the Motion. (R. 433.) The court did not exclude the evidence submitted by Vestin. Nevertheless, on November 5, 2003, the court entered an order granting the Motion and dismissing the Complaint with prejudice. (Addendum Ex. 2; R. 434-436.)

On November 12, 2003, Vestin timely filed its Notice of Appeal. (R. 439-440.)

On October 28, 2004, the Court of Appeals issued an opinion, affirming the ruling of the district court. (Addendum Ex. 1.)

This Court then granted Vestin's Petition for a Writ of Certiorari to review the Court of Appeals' Opinion (cited hereafter as "Ct. App. Op."). (R. 482.)

Statement of Facts Relevant to the Issues Presented for Review

1. The Title Insurance Policies.

Vestin, or its predecessor, made two separate loans to The Ranches, L.C., a Utah limited liability company. (R. 227.) One loan was made on or about April 14, 2000, in the amount of \$1,965,000; a second loan was made on or about August 18, 2000, in the amount of \$1,800,000 (jointly the "Loans"). (R. 227.) The Loans were secured by two trust deeds (jointly referred to as the "Trust Deeds"). (R. 227.)

In connection with the Loans, First American issued two separate policies of title insurance: (i) Policy of Title Insurance No. 2701-A-49, dated April 26, 2000 ("Policy No. 2701"), insuring the title of Vestin (then known as Capsource, Inc. d/b/a Del Mar

Mortgage), and its successors and assigns, in the other of the Trust Deeds; and (ii) Policy of Title Insurance No. 3192-A-49, dated August 28, 2000 (“Policy No. 3192”), insuring the title of Vestin, its successors and assigns, in one of the Trust Deeds. (R. 247-287.) The Trust Deeds encumbered real property (the “Property”) located within the boundaries of the City of Eagle Mountain in Utah County. (R. 228.)

2. The Insuring Clauses of the Title Insurance Policies.

Three separate insuring clauses in the Policies and its endorsements are at issue in this matter.

The first is contained in the body of the Policies. It provides that First American insures against loss or damage incurred by Vestin based on any of the following:

- a. [a] defect in or lien or encumbrance on the title;
- b. unmarketability of the title; or,
- c. the priority of any lien or encumbrance over the Trust Deeds.

(R. 247, 267) (emphasis added).

The second relevant insuring clause is contained in an endorsement to the two Policies. First American issued Endorsement F.A., ALTA Form 31, containing the following insuring clause:

[First American] hereby insures against loss which [Vestin] shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurances which [First American] hereby gives:

(a) There are no covenants, conditions, or restrictions under which the lien of the mortgage [of Vestin] can be cut off, subordinated, or otherwise impaired.

(R. 256, 276) (emphasis added).

Third, First American issued Endorsement CLTA Form 104 to both Policies. This Endorsement contains the third relevant insuring clause:

[First American] hereby insures [Vestin] against loss or damage which such insured shall sustain by reason of any of the following: ... The existence of any subsisting tax or assessment lien which is prior to the insured mortgage . . . , [and] the existence of other matters affecting the validity or priority of the lien of the insured mortgage....

(R. 259, 278) (emphasis added).

3. The Recorded “Police Power” Exception.

In addition to the three insuring clauses just identified, one exception to the Policies’ exclusions is directly relevant. Paragraph 1(b) of the “Exclusions From Coverage” in the Policies provides an exclusion from coverage for the exercise of governmental police power – and an exception to that exclusion if the police power exercise is recorded. The exclusion and exception are as follows:

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorney’s fees or expenses which arise by reason of:

....

(b) Any governmental police power not excluded by (a) above [which addressed zoning and land use issues], except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

(R. 248, 268) (emphasis added). The exception to the “police power” exclusion expressly provides that an exercise of governmental police power that is recorded comes within the coverage provided under the Policies.

4. The Creation of the Eagle Mountain Special Improvement District.

On June 20, 2000, Eagle Mountain City adopted a resolution declaring its intention to create a special improvement district to be known as The Eagle Mountain, Utah Special Improvement District No. 2000-1 (“Eagle Mountain SID” or “SID”). (R. 230, 289.) The expressed purpose of the Eagle Mountain SID was to construct certain improvements and assess the real property situated within its boundaries. (R. 230, 289.)

On August 1, 2000, Eagle Mountain City adopted Resolution No. 14-00, creating Eagle Mountain SID. (R. 230, 304-06.) The Property is located within the boundaries of the Eagle Mountain SID. (R. 231, 335-353.)

On August 4, 2000, in accordance with Utah Code Ann. § 17A-3-307, Eagle Mountain City caused to be filed in the Office of the County Recorder of Utah County a “Notice of Intention.” (R. 230, 309; Addendum Ex. 8.) The Notice of Intention gave notice that on June 20, 2000, the Town Council of Eagle Mountain City adopted a resolution declaring its intention to create the Eagle Mountain SID for the purpose of constructing improvements within the Eagle Mountain SID for a total cost of \$19,350,000, and assessing the real property within the boundaries of the Eagle Mountain SID for the cost of such construction (R. 230, 289.) The Notice of Intention also contained a copy of the Ordinance adopted August 1, 2000, creating the Eagle Mountain SID and proposed assessments. (R. 230, 289.) The Notice of Intention was recorded before the issuance of the second of the Policies and each of the relevant Endorsements to both Policies.

Eagle Mountain City subsequently adopted Assessment Ordinance No. 06-2001 (the “Assessment Ordinance”). (R. 230, 335-52.) Among other things, the Assessment Ordinance had the effect of “confirming the assessment rolls and levying an assessment against certain properties in Eagle Mountain, Utah Special Improvement District, Utah County, Utah, for the purpose of paying” various costs of construction of improvements within the Eagle Mountain SID. (R. 230, 337.) The total amount of the assessment was \$16,799,282 (the “Assessment”). (R. 230, 338.) The Assessment itself took place on April 25, 2001, after the issuance of both Policies and their relevant Endorsements.

Section 5(D) of the Assessment Ordinance provided for the acceleration of the Assessment amount upon the voluntary transfer of title:

To reduce the administrative costs of the District, the Town Council hereby determines that in the event legal title to all or any portion of the property assessed hereunder is voluntarily transferred to another person or entity which is unrelated to the prior owner, the owner of the assessed property shall be required to prepay that portion of the assessment applicable to the transferred parcel.

(R. 231, 340-341.)

Despite the fact the creation of the Eagle Mountain SID and the recording of the Notice of Intention occurred before the issuance of the second Policy or any relevant Endorsement, First American did not disclose to Vestin or except from Vestin’s coverage the Eagle Mountain SID, the Notice of Intention, or the intended assessment. (R. 231.) Vestin had no knowledge or information regarding the Eagle Mountain SID or the assessment prior to the execution of the Trust Deeds. (R. 231.)

5. The Effect of First American's Failure to Disclose and Except the Eagle Mountain SID from Coverage Under the Policies.

As a result of a default in the payment of indebtedness owed to Vestin and secured by the Trust Deeds, Vestin caused the Trustee of the Trust Deeds to conduct a Trustees' Sale of the Property and purchased the Property. (R. 231.) Vestin acquired title to the Property by Trustees' Deed. (R. 231.)

Vestin subsequently entered into an agreement to sell the Property to a third party. (R. 231.) In connection with Vestin's attempted sale of the Property to a third party, Vestin obtained a title report regarding the Property and discovered for the first time that the Property is located within the boundaries of the SID and subject to the Assessment. (R. 231.) Vestin also discovered at this time that upon the voluntary sale of the Property, an assessment of \$2,241,348.70 against the Property became immediately due and payable. (R. 232.) As a result of Vestin's disclosure to the third party that the Property is located within the boundaries of the Eagle Mountain SID and subject to the Assessment which would become immediately due and payable upon sale of the Property, the third party refused to proceed with the purchase of the Property. (R. 232.)

First American's failure to disclose the Eagle Mountain SID runs contrary to industry practice and its own practice. As a general industry practice, a preliminary title report and title policy will disclose as exceptions to coverage all actions by governmental entities or agencies that are empowered to assess or levy liens against the property, such as special improvement districts. (R. 232, 359.) In the case of a title insurance policy issued for protection of a lender's title interest, as in this case, this is especially important

because such an assessment can and does reduce the available equity in the property securing a loan. (R. 232, 359.)

Consistent with industry practice, First American, in a different transaction, issued a title insurance policy to Integrated Financial Associates prior to the Assessment Ordinance adopted by Eagle Mountain City regarding real property within the Eagle Mountain SID. In that policy, unlike the subject Policies, First American in fact specifically disclosed and excepted from coverage the Eagle Mountain SID that is the subject of this litigation. (R. 234, 396-397.)

Finally, First American disclosed to Vestin and excepted in the Policies a different Special Improvement District of Eagle Mountain City that had been created in 1998. (R. 18.) It did not, however, disclose or except the SID at issue.

6. Vestin's Complaint Against First American.

In its Complaint Vestin alleged, in pertinent part, that "First American agreed to insure Vestin and its assignees against loss or damage as a result of the title to the [Property] being encumbered or unmarketable, or otherwise subject to an assessment or other matters affecting the validity or priority of the lien of the Trust Deeds, but subject to the exceptions and exclusions in the Policy." (R. 9.)

The Complaint also alleged that First American insured Vestin against loss or damage "by reason of any defect in or lien or encumbrance on the title, the unmarketability of the title, the priority of any lien or encumbrance over the lien of the Del Mar Trust Deed, among other things; but subject to the exclusions and exceptions from coverage provided in" the Policies. (R. 5-6.)

Finally, the Complaint alleged “[t]he Special Improvement District and the Assessment issued in connection therewith is an encumbrance against the Parcels, renders the title unmarketable, and affects the priority of the Trust Deeds, contrary to the assurance and guaranties of First American in the Policies of Title Insurance” (R. 9.)

The Complaint alleged damage to Vestin as a result of First American’s breach of the covenants in the Policies. (R. 10.) The Policies were attached as exhibits to the Complaint. (R. 12-52.) Vestin demanded a jury in its Complaint. (R. 10.)

SUMMARY OF THE ARGUMENTS

First American is liable to Vestin under the Policies and their relevant Endorsements. The Complaint should not have been dismissed. The Policies provide coverage based on First American’s failure to identify or except the recorded Eagle Mountain SID.

Three main insuring clauses each independently provide Vestin with coverage.

First, Vestin was covered under a clause providing insurance against loss sustained as a result of a “defect in or lien or encumbrance on the title” or “unmarketability of the title.” Vestin does not argue that the recording of the Eagle Mountain SID created a “lien.” Nevertheless, it did create a “defect” in Vestin’s title. This is a broad term that encompasses even minor matters that might affect title. The Eagle Mountain SID’s recorded Notice of Intention specifically expressed an intent to levy assessments directly against property within its boundaries. This is a “defect” that affected Vestin’s title in a significant way and should have been disclosed.

Moreover, the Utah Legislature refers to the recording of the Notice of Intention as an “encumbrance.” While Vestin did not argue below that the SID created an “encumbrance,” the Legislature’s own reference should not be ignored by this Court on plenary review. The legislative reference to this “encumbrance” at the least provides further support that this constitutes a “defect,” which is a general term that includes but is not limited to other more specific terms. The SID also created “unmarketability of the title.” The Court of Appeals erred in holding otherwise under the first insuring clause.

The second insuring clause protected Vestin against any “incorrectness” in the assurances given by First American. One of these assurances was that there were no conditions or restrictions under which Vestin’s Trust Deed liens could be cut off, subordinated, or otherwise impaired. This assurance was incorrect because the SID had already expressed its intent to levy an assessment taking priority over Vestin’s Trust Deeds.

The third insuring clause provided coverage for any “other matters” affecting the validity or priority of Vestin’s Trust Deeds. Given the record in this case and the damage suffered by Vestin when it was blindsided without prior notice about the existence of the SID, Vestin has certainly made out a claim that the SID was just such a matter. Dismissal of Vestin’s Complaint was wholly inappropriate.

The existence of coverage is confirmed by an important exception to the Policies’ exclusions. The Policies specifically provide coverage for a governmental exercise of police power that is recorded. Here, the Notice of Intention was filed with the Utah County Recorder’s office. It was a matter of record at the time First American issued the

second of the Policies and both of the relevant Endorsements. Thus, it falls within coverage and/or should have been disclosed.

This Court should reverse regardless of whether it chooses to review the decision below under a Rule 56 or Rule 12(b)(6) standard. Review is properly undertaken under a Rule 56 summary judgment standard because relevant evidence was presented to and not excluded by the district court. This evidence shows that First American acted inconsistently with both industry standards and its own practices when it failed to tell Vestin about the SID and its assessment intentions. A reasonable jury could, and probably would, find for Vestin in light of this compelling evidence.

Even if a Rule 12(b)(6) standard were employed, reversal is still mandated because Vestin clearly makes out an appropriate claim for relief under the law. Insurance contracts are liberally construed in favor of the insured and against the insurer, with any doubts resolved in favor of the insured. Moreover, a contract must be construed to give effect to all its provisions. The Court of Appeals misapplied these fundamental rules of construction in analyzing this contract, as it explicitly declined to consider the effect of the recorded police power exception. At the very least, an ambiguity exists that makes summary disposition inappropriate, regardless of the reviewing standard this Court employs.

Finally, the decision below deprives Vestin of the benefit of its bargain. Vestin purchased title insurance to protect itself against matters that could impair its Trust Deeds. That is the very purpose of title insurance. The Eagle Mountain SID documents were matters of public record that materially and significantly affected Vestin's title.

First American failed to identify and disclose publicly recorded documents that a reasonable purchaser would have taken into consideration in protecting itself. Because First American failed to make the disclosure, Vestin suffered significant damages despite contracting with First American for protection. The Court of Appeals' decision improperly shifts the contractual risk of loss.

For these reasons, as more fully discussed below, the decision of the Court of Appeals should be reversed and the case remanded for further factual development and trial.

ARGUMENT

I. THE POLICIES AND ENDORSEMENTS PROVIDE COVERAGE FOR FIRST AMERICAN'S FAILURE TO IDENTIFY THE RECORDED EAGLE MOUNTAIN SID.

The Court of Appeals incorrectly determined that the Policies do not provide coverage for Vestin's claims. The Policies demonstrate the intent of the parties that Eagle Mountain's recorded notice of the exercise of its police power come expressly within the coverage provided by the Policies.

A. Coverage is Provided in the Policies and Endorsements Under Three Separate Insuring Clauses.

An "insuring clause" in an insurance policy defines the scope of coverage or the perils insured against. *National Hills Shopping Center, Inc. v. Liberty Mut. Ins. Co.*, 551 F.2d 655, 658 (5th Cir. 1977). "An insuring clause or perils clause may broadly define the perils to be assumed by the underwriters. If, within the parameters thus set out there are specific perils not to be covered, or particular circumstances under which protection is

not to be provided, those refinements are made by exclusion.” *Id.*; see also *Elysian Investment Group v. Stewart Title Guaranty Co.*, 129 Cal. Rptr. 2d 372, 376, 105 Cal. App. 4th 315, 320 (Cal. App. 2002) (“The insuring clauses of an insurance policy define and limit coverage.”).

In this case, three primary insuring clauses are implicated along with one exception to exclusions to be discussed hereafter.

1. The Existence of the Eagle Mountain SID Created at Least a “Defect” in Title That Should Have Been Disclosed.

The Eagle Mountain SID created a “defect” in the title taken by Vestin and thus comes within the scope of coverage. (R. 247, 267.) “The plain and ordinary meaning of a ‘defect’ is broad, including more than the interest that might make a title unmarketable in the vendor-purchaser context” Barlow Burke, *Law of Title Insurance* § 3.05, at 3-76.1 (3rd ed. 2000). The courts construe this broad term to refer to any “fault or shortcoming or failing” or “imperfection” in the title. *United Fire & Cas. Co. v. Fid. Title Ins. Co.*, 258 F.3d 714, 719 (8th Cir. 2001). “Defect is the general word for any kind of shortcoming, imperfection, or deficiency, whether hidden or visible.” Random House Webster’s College Dictionary 347 (2nd ed. 1999). “While courts use many terms to describe flawed titles, and the various types of flaws in title (i.e., ‘cloud on title,’ ‘encumbrance,’ ‘defective title,’ ‘unmarketable title’), the term ‘defect’ itself is typically used in a broader sense that encompasses all the other terms.” *United Fire & Cas. Co.*, 258 F.3d at 719 (emphasis added).

The Policies use the general term “defect” as well as other specific terms such as “unmarketability” and “encumbrance.” (R. 247, 267.) This fact emphasizes that the parties intended the broadest possible construction of the types of matters that would impact Vestin’s title. A lien or encumbrance was not necessary before disclosure was required. The case law makes this point clear: using multiple terms would be unnecessary if they had the same meaning.

A “defect” in title is: “the want or absence of something necessary for completeness or perfection; a lack or absence of something essential to completeness; a deficiency in something essential to the proper use for the purpose for which a thing is to be used.” *McMinn v. Damurjian*, 105 N.J. Super. 132, 139, 251 A.2d 310 (1969) (quoting Black’s Law Dictionary (4th ed.) 509). This definition makes clear that a “defect” is something less than “unmarketability.” Moreover, if defect was synonymous with “unmarketability,” there would be no reason for the policy to list both terms. That is, unless there are defects that do not render a title unmarketable, the inclusion of the word “defect” in the list of coverage would be superfluous.

Stewart Title Guar. Co. v. Greenlands Realty L.L.C., 58 F. Supp. 2d 370, 382 (D.N.J. 1999).

Thus, even if title is “marketable,” it may still contain a “defect.” *See id.* (holding title had defect even though it was marketable). Indeed, defects may include minor imperfections that do not affect marketability, since “a title can be burdened with some defects so minimal or trivial that title is ‘relatively,’ although not perfectly, free from doubt.” *Id.* These are title insurance “defects” nonetheless, for which title insurance provides coverage. *See id.*

The Court of Appeals erred in holding that the recorded Eagle Mountain SID documents did not create a “defect” in the Policies. Here, they clearly put a cloud on

Vestin's title, resulted in harm to Vestin, and ultimately prevented Vestin from passing title to an otherwise willing third party purchaser.

Indeed, in determining whether the undisclosed existence of the Eagle Mountain SID was a "defect" in Vestin's title, this Court should consider that the Utah Legislature has itself referred to the recording of the creation of the SID as an "encumbrance." In the Utah Municipal Improvement Act (cited in Vestin's briefings in both the district court and the Court of Appeals), the Legislature provided:

(a)(i)(A) If [a] governing body creates [a] special improvement district, it shall, within five days from the date of creating the district, record the original or a certified copy of the final approved resolution creating the district in the recorder's office of the county in which the district is located.

(a)(i)(B) Each original or certified copy of the resolution recorded under Subsection 6(a)(i)(A) shall contain the legal description and tax identification number of each property to be assessed.

...

(c) If the governing body deletes any property to be assessed within the district after the district has been created, it shall issue and record a release and discharge of the recorded encumbrance created as a result of the recording required by this section in a form that includes the legal description and tax identification number of the property and otherwise complies with the recording statutes.

Utah Code Ann. § 17A-3-307(6) (emphasis added). Thus, the Utah Legislature itself has defined the recording of the final approved resolution creating a special improvement district as an "encumbrance" against property located in the district.

This Court has plenary power to interpret Utah law, including the impact of the language of the Utah Municipal Improvement Act, even if the issue was not adequately addressed by the parties or courts below. *See, e.g., Covington v. Board of Review*, 737

P.2d 207, 209 (Utah 1987) (Supreme Court has plenary review “on most questions of statutory construction”). Where the Utah Legislature itself has referred to the recording of the SID as an “encumbrance,” the Court of Appeals’ decision holding it was not a “defect, lien, or encumbrance” is demonstrably wrong. At the very least, it was error to dismiss Vestin’s Complaint without allowing Vestin the chance to fully develop the record and litigate this question to a conclusion.

This is true for two reasons. First, if (as the Legislature says) the recording of the SID creates an “encumbrance,” then the Policies provide coverage. “[A]ssessable benefits which have not yet become liens” have been held to be “encumbrances.” *Leh v. Burke*, 331 A.2d 755, 762 (Penn. 1974) (citing *Ritter v. Hill*, 127 A. 455 (Penn. 1925)); *see also Lafferty v. Milligan*, 30 A. 1030, 1031 (Penn. 1895) (act that authorized assessments constituted “encumbrance” on property even though levy not yet assessed against subject property and lien did not yet exist). Here, that case law supports the Utah Legislature’s express determination that the recorded SID created an “encumbrance.”

Second, the Legislature’s reference to the creation of the SID as an “encumbrance” supports the conclusion that it is *at least* a “defect.” As already demonstrated, the term “defect” is a broad term that encompasses other more specific terms, including “encumbrance.” *See United Fire & Casualty Co.*, 258 F.3d at 719.

Lastly, on this point, the Policies also insure against loss as a result of the title to the Property being “unmarketab[le].” (R. 247, 267.) Under facts similar to the instant case, the court in *Bel-Air Motel Corp. v. Title Ins. Corp. of Penn.*, 444 A.2d 1119 (N.J. Sup. Ct. 1981), held that the title in question was unmarketable:

Bel-Air's property was subject to a definite liability. It *would* be assessed for part of the cost of the local improvement. The assessment, when confirmed, would become a lien against the property. These circumstances prevented the title to the property from being "relatively free from doubt."

Id. at 1122-23. That same analysis applies here.

The question of whether title is unmarketable is a question of fact for the jury and not appropriate for summary disposition. *See Mellinger v. Ticor Title Ins. Co. of Ca.*, 113 Cal. Rptr. 2d 357, 360 (Cal. App. 2001) (question of marketability is a question of fact to be decided by a jury and not by a trial court as matter of law). The SID created *at least* a "defect" in title that is covered, since a defect is something short of outright unmarketability. *See Stewart Title Guar. Co.*, 58 F. Supp. 2d at 382.

In sum, the Court of Appeals' decision holding the recorded creation of the SID did not create a "defect, lien, or encumbrance" or "unmarketable title" is erroneous as a matter of law. The dismissal of Vestin's Complaint should be reversed and the case remanded to the lower court for further proceedings.

2. The Eagle Mountain SID Documents Make "Incorrect" First American's Representation That There Existed No Conditions or Restrictions Under Which Vestin's Trust Deeds Could Be Cut Off, Subordinated, or Otherwise Impaired.

In Endorsement F.A. Form 31, First American assured Vestin: "[t]here are no covenants, conditions, or restrictions under which the lien of the mortgage [of Vestin] can be cut off, subordinated, or otherwise impaired." (R. 256, 276.) This assurance was **incorrect**. First American specifically insured against loss Vestin might sustain as a result of the "incorrectness" of this assurance. (R. 256, 276.) In this case, an incorrectness in the assurances existed because there was a condition or restriction that

could cut off, subordinate, or otherwise impair the priority of the Trust Deeds: the existence of the Eagle Mountain SID and its stated intention to assess the property with a lien that by operation of law would be superior to Vestin's Trust Deeds.

a. The SID was a Condition or Restriction.

That the existence of the SID and the intent to assess were existing "conditions" can hardly be debated. They were already created and of record. (R. 256, 276.)

Moreover, they created "restrictions" on Vestin. The Endorsement specifically provides that a "restriction" does not refer to a lease and does not relate to environmental protection. (R. 256, 276.) Except for those narrow limitations, the term "restriction" has its ordinary meaning: "something that restricts," "a regulation that restricts or restrains," and "a limitation on the use or enjoyment of property." Merriam-Webster Dictionary, definition of "restriction" (2003). These definitions are clearly apparent in the form of the SID and the intended assessment.

b. "Can" Means "May," Not "Must."

Endorsement F.A. Form 31 provides that any restriction under which Vestin's interest "can be" impaired is insured by the Policies. (R. 256, 276.) Even if the exact amount of the SID levy was uncertain when the second of the Policies went into effect, what was known was that Eagle Mountain planned to assess property owners within the SID for millions of dollars to make infrastructure improvements. Certainly, then, Vestin's interest was in a position where it "could be" impaired when the second of the Policies was issued. In fact, the only thing left to determine was the amount of the

impairment; there was no question that the SID was in existence and planned to assess the Property.

The word “can,” given its plain and ordinary meaning, means “may perhaps,” or “made possible or probable by circumstances to.” Webster’s New Collegiate Dict. 160 (1977). When used in a contract, “the word ‘can’ ordinarily means may, not must.” *Enterprise Fin. Corp. v. Ross White Enters., Inc.*, 441 S.E.2d 805, 807 (Ga. App. 1994). Thus, the ordinary meaning of the phrase “can be cut off, subordinated, or otherwise impaired” means “may perhaps” or “may possibly” be subordinated or impaired.

The Court of Appeals ignored this plain meaning and instead concluded that the endorsement does not apply unless the lien of the mortgage will, for certain, be subordinated or impaired as a result of “conditions or restrictions.” In paragraph 15 of its opinion, the lower court specifically distinguished Vestin’s case law on grounds that assessments there “were ‘a certainty,’” while “the assessments in this case may or may not have been inevitable.” *See* Ct. App. Op. ¶ 15 (distinguishing *Bel Air*, 444 A.2d at 1122.).

The Court of Appeals’ recognition that the creation of the SID “may or may not have” resulted in subordination or impairment of Vestin’s trust deeds should have led the Court to conclude that the endorsement covered the creation of the SID, because plainly Vestin’s Trust Deeds *could have* been impaired. Thus, the Court of Appeals failed to give the “can be” language of the policy its plain and ordinary meaning, as expressly required under Utah law. *See Holmes Dev. LLC v. Cook*, 2002 UT 38, ¶ 24, 48 P.3d 895, 902.

c. The Trust Deeds Were Subject to Subordination and Impairment by the SID.

The SID created a condition under which Vestin's Trust Deeds could be "cut off, subordinated, or otherwise impaired." In fact, as evidenced by this case, that is actually what happened.

By operation of law, the SID's assessment has priority over the interest of Vestin in the Property and the Trust Deeds. *See* Utah Code Ann. § 17A-3-323. The assessment lien "shall be superior to the lien of any trust deed, mortgage, mechanic's or materialman's lien or other encumbrance." (R. 343.) Accordingly, the lien of the Trust Deeds would be subordinated to any assessment levied for improvements under Eagle Mountain SID. That the assessment should therefore have been identified and disclosed in the Policies is apparent.

Like the term "defect," the general term "impair" is broader than the specific terms "cut off" or "subordinate." The term "impair" has been defined to mean "to weaken, make worse, lessen in power, diminish, relax, or otherwise affect in an injurious manner." *Humana, Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999). Without question, the existence of the Eagle Mountain SID and its stated intent to assess could be – and were – used to diminish and injure Vestin's interests.

In sum, the Court of Appeals' decision on this independent point reached the wrong conclusion and should be reversed.

3. The Eagle Mountain SID Documents Were "Other Matters" Affecting the Validity or Priority of Vestin's Trust Deeds.

Endorsement CLTA Form 104 provides:

[First American] hereby insures [Vestin] against loss or damage which such insured shall sustain by reason of any of the following: . . . The existence of any subsisting tax or assessment lien which is prior to the insured mortgage . . . , [and] **the existence of other matters affecting the validity or priority of the lien of the insured mortgage**

(R. 259-64, 277-85) (emphasis added). The recorded notice of the existence of a special improvement district and the stated intention to assess were “other matters” affecting the priority of the insured Trust Deeds that should have been disclosed.

This is evidenced by the record. First American disclosed in the Policies the existence of a separate improvement district. (R. 253.) In another policy, First American disclosed the Eagle Mountain SID to another insured. (R. 396-97.) First American argued in the courts below, however, that only existing liens are covered under the Policies. This position is inconsistent with the language of the Endorsement. If coverage were limited to existing liens, the additional “other matters” language would not be necessary. *See Stewart Title Guar. Co.*, 58 F. Supp. 2d at 382. Clearly, the rules of contract construction dictate that the Policies and Endorsements cover more than existing liens. Thus, even if a lien does not exist, the existence of the recorded Eagle Mountain SID documents constitutes “other matters” affecting title.

B. The Police Power Exception Specifically and Expressly Confirms Coverage for First American’s Failure to Identify a Recorded Exercise of Police Power.

The exercise of police power is generally excluded from title insurance coverage because notice of the exercise of police powers is often not recorded in the public records where title insurance companies examine the records. I Joyce Palomar 6-13, *Title Insurance Law* (2002); *New England Fed. Credit Union v. Stewart Title Guar. Co.*, 765

A.2d 450, 452 n.1 (Vt. 2000) (“The reason for the exclusion is because notice of such matters is not routinely recorded in the public records....”). However, if the governmental action is recorded in the public records prior to the issuance of the policy, the insurer is liable under the policy (unless the notice is otherwise specifically excluded from coverage):

Title policies do cover insured’s losses resulting from governmental police powers to the extent that a notice of the exercise thereof . . . was recorded in the public records prior to the policy date.

Palomar at 6-13; *see also* Barlow Burke, *Law of Title Insurance* § 4.02[B], at 4-27 (3rd ed. 2000) (“However, notwithstanding the exclusion, the insurer is liable when a notice of the exercise of police power either “‘has been recorded’ (the 1990 version) or ‘appears’ (the 1970 version) in the public records at the Date of Policy.”).

Clearly the creation of the Eagle Mountain SID was an exercise of the governmental police power. (R. 435.) The exception to the police power exclusion in the Policies is broader even than general industry standards. The standard Exclusions from Coverage of the American Land Title Association (“ALTA”) Standard Title Insurance Policy provide:

The following matters are expressly excluded from the coverage of this policy

- (a) Any law, ordinance or governmental regulation . . . except to the extent that a notice of the enforcement thereof . . . has been recorded in the public records at Date of Policy.

See ALTA Loan Policy, Section II-1, Exclusions from Coverage,

www.titlelawannotated.com (Revised Oct. 17, 1992) (emphasis added). If this language

were at issue, only the “enforcement,” i.e., the actual placing of a lien upon property for property assessments, would be covered. However, the Policies issued by First American do not contain this restriction. Rather, the Policies provide that any exercise of police power recorded in the public records is covered. (R. 248, 268.)

In this case, there can be no dispute that the Eagle Mountain SID documents constituted the recorded exercise of police power.

1. The Creation of the Eagle Mountain SID is Indisputably an Exercise of Police Power.

Actions undertaken pursuant to express statutory authority constitute the exercise of police power. *See, e.g., Rupp v. Grantsville City*, 610 P.2d 338, 340 (Utah 1980). It is settled law that the creation of a special improvement district constitutes the exercise of governmental police power. *See, e.g., State ex rel. Becker v. Wellston Sewer*, 58 S.W.2d 988, 991 (Mo. 1933) (“That [improvement districts] are governmental agencies created through an exercise of the police power is well established . . .”) (citations omitted); *Banker v. Jefferson County Water Control & Improvement Dist.*, 277 S.W.2d 130, 133 (Tex. Civ. App. 1955) (“In discharging their governmental functions, such [improvement] districts, as agents of the State, are essentially exercising the State’s and their own police power, which has been defined as a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public”) (citations omitted); Palomar at 6-13 (defining term “police power” as “actions of state and local governments that place restraints on private property rights for the protection of the public health, safety, and welfare or the promotion of the public

convenience and general prosperity”) (quoting Black’s Law Dictionary (5th ed.) 1041)).

The adoption of a local improvement ordinance, prior to the confirmation of the assessments, constitutes the exercise of police power under a policy of title insurance. 13 Title Management Today, No. 10 (October 2003), www.titlelawannotated.com, at 5.

Clearly, the Eagle Mountain SID was an exercise of governmental police power.

2. The Eagle Mountain SID Documents Were Indisputably Recorded.

There is no dispute in this case that the Eagle Mountain SID documents were recorded prior to First American’s issuance of the second of the Policies and either of the relevant Endorsements. (R. 251-309.)

3. The Court of Appeals Improperly Declined to Consider the Police Power Exception.

Courts addressing the application of the “police power” exclusion and the exception regarding recorded notice have held that the exception is a part of the coverage. The recorded notice must be disclosed by the insurer to avoid liability under the policy.

The reported decision most directly on point is *Bel-Air Motel Corp. v. Title Ins. Corp. of Penn.*, 444 A.2d 1119 (N.J. Sup. Ct. 1981). In *Bel-Air*, the court held that a recorded notice of a planned assessment constituted the exercise of police power creating liability under a title policy. *See id.* at 1122. In that case, the court considered an exclusion similar to the one at bar and found that the insured was covered against an exercise of police power that appeared in the public records.

The insured purchased property after a township had authorized infrastructure improvements. *See id.* at 1120. Although an estimate of the costs was available when

the title policy was issued, the actual amount of the assessment was not confirmed until after the policy was issued. *See id.* The policy excluded “Governmental rights of police power . . . unless notice of the exercise of such rights appears in the public records at the date hereof.” *Id.* at 1121. The policy did not, however, specifically mention or exclude the assessment from coverage. *See id.* Interpreting the policy “liberally in favor of the insured,” *id.* at 1121, the court found that the policy “insures against loss occasioned by the governmental exercise of police power when notice of its exercise may be found in a public record.” *Id.* at 1122.

In addressing whether the coverage under the title insurance policy existed, the *Bel-Air* court first noted that the policy did not merely insure against “liens,” but also against title “defects.” *See id.* In construing the meaning of the word “defect,” the court held that a “defect” in title is something different from a “lien or encumbrance.” *Id.* The court held that the exception to the exclusion supported the position that the insurer was liable for losses resulting from the assessment. *See id.* The court reasoned:

The insurance policy also excludes “loss or damage” resulting from governmental rights of police power . . . unless notice of the exercise of such rights appears in the public records at the date hereof. Here, the policy language does not refer to “defects, liens or encumbrances”; it insures against loss occasioned by the governmental exercise of police power when notice of its exercise may be found in a public record. The adoption of a local improvement ordinance is an exercise of the police power, conferred upon municipalities by the state legislature. *Munn v. Illinois*, 94 U.S. 113, 145-46, 24 L. Ed. 77 (1876). The exercise of that right did appear in the public records of the municipality at the time the title insurance policy was issued. Information concerning the ordinance was available, on request, under N.J.S.A. 54:5-18.1. These policy exclusions must therefore be read as providing coverage with respect to the assessment liability to which the property was subject at the time of its purchase.

Id. at 1122 (emphasis added).

The facts of *Bel-Air* are on point with the current case. In both cases, the properties faced an assessment, but the amount of the assessment was unknown. In both cases, the policy insured against defects independently of liens and encumbrances. And in both cases, the police power exception was within a so-called “exclusion” to the property. As in *Bel-Air*, the policy should be construed liberally in favor of Vestin to insure it against the creation of the SID by Eagle Mountain.

Similarly, in *New England Fed. Credit Union v. Stewart Title Guarantee Co.*, 765 A.2d 450 (Vt. 2000), the court discussed the application of the public record exception to the police power exclusion. *See id.* at 452. In that case, the lender made a loan secured by property on which the borrower planned to construct a home but did not yet have the necessary subdivision permit. *See id.* at 451. When the lender foreclosed, the lender alleged that the title company should have disclosed the lack of a permit in the title policy and that failure to do so resulted in a decrease in the value of the property. The court agreed, concluding that if the violation was a matter of public record, as defined in the policy, the fact of recording constituted an exception to the police power exclusion and created an “encumbrance”:

Thus, read in its entirety, the policy evinces a clear intent to include violations of land-use regulations within the meaning of “encumbrance,” and within the scope of coverage, to the extent that they had been recorded in the public records on the date of the policy.

Id. at 453; *see also Radovanov v. Land Title Co.*, 545 N.E. 2d 351, 354-55 (Ill. App. 1989) (holding title insurer liable for housing code violation which was of public record, but not reported, at date of issuance of the title insurance policies).

In sum, the recorded police power exception to the exclusions applies in this case and confirms the existence of coverage in favor of Vestin. The Court of Appeals erred in holding to the contrary.

II. GIVEN THIS RECORD, THE COURT OF APPEALS INCORRECTLY AFFIRMED DISMISSAL OF VESTIN’S COMPLAINT.

The decision below should be reversed regardless of whether this Court undertakes review of First American’s Motion under Rule 56 or Rule 12(b)(6).

A. The Record Evidence Precludes Summary Judgment Under a Rule 56 Standard.

Vestin believes that this case should be reviewed under Rule 56. The record evidence precludes summary judgment.

1. The Motion “Shall” Be Treated As One For Summary Judgment Since Relevant Evidence Outside the Pleadings Was Presented and Not Excluded.

First American filed its Motion to Dismiss under Utah Rule of Civil Procedure 12(b)(6). In response to the Motion, Vestin submitted documents outside the pleadings, including the Affidavits of Daniel B. Stubbs (Addendum Ex. 6; R. 355-94) and Thomas E. Lea (Addendum Ex. 7; R. 396-97). The affidavits explain, among other things, the circumstances surrounding the issuance of the Policies and the practice of First American regarding the disclosure and exception of the Eagle Mountain SID. The district’s court’s Order of Dismissal notes that the dismissal was based upon “the record herein,” which

includes the affidavits. (R. 434.) Accordingly, the Motion should have been treated as one for summary judgment.

Utah Rule of Civil Procedure 12(b) provides, in pertinent part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, **the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56**, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah R. Civ. P. 12(b) (emphasis added). The district court did not exclude Vestin's evidence and First American never asked that it do so.

Despite the fact that materials outside the pleadings were "presented and not excluded by the court," neither the district court nor the Court of Appeals treated the motion as a Rule 56 motion for summary judgment. Indeed, the Court of Appeals held that it "need not consider Vestin's claim that First American's motion to dismiss should have been treated as a motion for summary judgment." (Ct. App. Op., footnote 9.)

The courts are not at liberty to ignore Rule 12(b)'s *mandatory* provisions. The failure to convert a motion to one for summary judgment under these circumstances absent justification is "**reversible error.**" *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 12, 104 P.3d 1226 (emphasis added). Here, where relevant evidence was adduced, not objected to, and made part of the record in deciding the Motion, it was prejudicial error not to consider that evidence.

2. The Record Demonstrates a Genuine Issue of Material Fact.

Vestin's evidence, when viewed in the light most favorable to Vestin, demonstrates a genuine issue of material fact on the question of coverage. The evidence shows that, "as a general industry practice, a title commitment and title policy will disclose as exceptions to coverage all governmental entities or agencies that are empowered to assess or levy liens against the property such as special improvement districts." (R. 359.) The evidence also shows that First American itself has construed its policy language to apply to the creation of a special improvement district and, in practice, disclosed and excepted such districts, including the very district at issue here. (R. 396-97.) This evidence demonstrates a genuine dispute of material fact as to whether a reasonable purchaser of title insurance would have understood the policies at issue to require disclosure of the creation of the SID. *See, e.g., Mellinger v. Ticor Title Ins. Co.*; 113 Cal. Rptr. 2d 357 (Cal. App. 2001); *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123, 1127 (Mass. 1995) ("pertinent custom and usage are, by implication, incorporated into a policy and are admissible to aid in policy interpretation").

3. Vestin Could Easily Prevail at Trial on this Evidence.

Not only does Vestin's evidence present a genuine issue of material fact, but this is evidence from which Vestin could readily prevail in front of a jury. The question in this case is whether First American should have disclosed and excepted the existence of the special improvement district. Once the jury hears evidence that it is the industry standard to do so; that First American's practice was to do so; that First American in fact did so with respect to this very special improvement district with another insured; and

that First American disclosed a different SID to Vestin but not the one at issue, a verdict in favor of Vestin is a very real possibility. This evidence flies directly in the face of First American's untenable litigation position.

The premature dismissal of this case has prevented Vestin from developing the record more fully or presenting its evidence to a fact finder, however. This Court should reverse that erroneous decision.

In sum, summary judgment cannot be granted against Vestin on this record.

B. The Well-Pleaded Allegations in the Complaint Preclude Dismissal Under a Rule 12(b)(6) Standard.

If the Court chooses to analyze this appeal under a Rule 12(b)(6) standard, dismissal was inappropriate under that standard as well.

1. Even if Evidence Outside the Pleadings Were Not Considered, the Complaint Clearly States a Claim for Relief.

Utah law holds that a title insurance company may be liable for an undisclosed defect in title. *See, e.g., Espinoza v. Safeco Title Ins. Co.*, 598 P.2d 346, 347 (Utah 1979). A complaint should not be dismissed if a plaintiff can prove any set of facts that would make out its claim. *See Christensen*, 467 P.2d at 168. That is the case here. Applying legal standards established by this Court, Vestin can readily prove its claim.

2. The Decision Below Ignores Rules of Contract Construction Established by this Court.

Utah's standards of insurance contract construction are firmly established in the jurisprudence of this Court. They were not followed below.

a. Insurance Policies are Liberally Construed in Favor of the Insured.

Insurance policies should be construed liberally in favor of the insured and against the insurer so as to promote and not defeat the purpose of insurance. *See United States Fidelity & Guar. Co. v. Sandt*, 854 P.2d 519, 521 (Utah 1993). A policy of insurance is strictly construed against the insurer and in favor of the insured. *Id.* at 522.

If an insurance policy is ambiguous, doubts are resolved in favor of the insured. *Utah Farm Bur. Ins. Co. v. Crook*, 1999 UT 47, ¶ 6, 980 P.2d at 686-87. A contract is ambiguous if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence. *Id.* at 686.

In the instant case, Vestin gets the benefit of the doubt, both as a matter of procedure and substance. The Court should not ignore relevant evidence or focus on some provisions to the exclusion of others. All doubts go in favor of Vestin. The record here – including evidence both intrinsic and extrinsic to the Policies – favors Vestin’s position.

b. The Contract Must Be Construed to Give Effect to All its Provisions.

A contract should be construed to give meaning to all provisions of the agreement. *See Big Cottonwood Tanner Ditch Co. v. Salt Lake City*, 740 P.2d 1357, 1359 (Utah App. 1987). Individual provisions of an insurance policy are construed in light of the whole policy. *See Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶ 24, 48 P.3d 895, 902.

Additionally, policy terms are harmonized and given effect if possible. *Utah Farm Bureau*, 1999 UT 47, at ¶ 5. Unless ambiguous or unclear, or unless defined in the

policy, the words of a policy are generally given their plain and ordinary meanings.

Holmes, 2002 UT 38, ¶ 24, 48 P.3d at 902.

In this case, as demonstrated in part I *supra*, the plain language of the Policies provides coverage. Furthermore, the exception to the exclusion for the recorded exercise of police power would be rendered meaningless unless it is construed to provide coverage. The Court of Appeals failed to construe the contract in a way that would harmonize the terms of the Policies and give proper meaning to the exclusion to the police power exception.

c. The Exceptions to Exclusions are Part of the Coverage.

The Court of Appeals ruled that if Vestin's claims are not otherwise covered by the Policies, the Exclusions to the policies are irrelevant. (Ct. App. Op. ¶ 9.) However, a plain reading of the Policies demonstrates that the exceptions to the exclusions are an integral part of Vestin's coverage; they do not simply narrow an exclusion from coverage. *See Nielsen v. O'Reilly*, 848 P.2d 664, 665 (Utah 1992) (Utah courts must give effect to all contract provisions); *Travelers Cas. & Sur. Co. v. Rage Admin. & Mktg. Servs., Inc.*, 42 F. Supp. 2d 1159, 1171 (D. Kan 1999) (noting that "exclusions limit coverage created by insuring clauses"). In other words, recorded exercises of the governmental police power are unequivocally included in the scope of coverage provided by the Policies. Because notice of the exercise of police power – the creation of the Eagle Mountain SID – was recorded in the public records before the issuance of Policy 3192, it is not excluded from coverage.

The Court of Appeals created a nonexistent distinction between the exception to the police power exclusion and the other coverage provided under the Policies. (Ct. App. Op. ¶ 18.) The Policies do not contain such a distinction. Indeed, the plain language of the policies demonstrates that the exceptions to the exclusions are a part of the coverage provided under the Policies, not merely a “limitation on a limitation” of coverage.

The exception is broader than the other insuring clauses in the Policies. Like them, the exception covers defects, liens, and encumbrances. (R. 247, 248, 267, 268.) However, the exception also specifically covers *any* recorded notice of the exercise of police power. (R. 247, 248, 267, 268.) The Court of Appeals failed to recognize that the broad language in the exceptions provides additional coverage and does not merely mimic the language of the other insuring clauses in the Policies.

The Oxford English Dictionary defines “except” as: “1. To take or leave out (of any aggregate or collective whole) . . . exclude (from an enumeration, the scope of a statement or enactment, a privilege, etc.); to leave out of account or consideration.” Oxford Engl. Dict. 543 (2nd ed. 1991). To these definitions, Black’s Law Dictionary adds “not including” and “other than.” Black’s 665 (4th ed.). To except something, then, means not to include it in a list, enumeration, or scope of something else. That is exactly the usage of the word in the Exclusions section of the Policies.

The Court of Appeals’ decision does not find support in the language of the Policies and should be reversed.

3. At the Very Least, an Ambiguity Exists that Makes Summary Disposition Inappropriate.

The Court of Appeals held that the Policies were unambiguous. (Ct. App. Op. ¶¶ 19-20.) Vestin maintains that the plain language of the Policies provides coverage. *See supra* part I. If, however, there is any question about the conflicting arguments raised by First American, at the very least the parties' divergent constructions create an ambiguity that should be resolved by the trier of fact.

Differing reasonable constructions of a contract evidence an ambiguity. *See Utah Farm Bur. Ins. Co. v. Crook*, 1999 UT 47, ¶ 6, 980 P.2d at 686-87. "[A]n ambiguity in a contract may [also] arise . . . because two or more contract provisions, when read together, give rise to different or inconsistent meanings, even though each provision is clear when read alone." *United States Fid. & Guar. Co. v. Sandt*, 854 P.2d 519, 523 (Utah 1993). When evaluating whether an ambiguity exists, "the policy must be construed in light of how the average, reasonable purchaser of insurance would understand the language of the policy as a whole." *Id.*

The Court of Appeals declined to consider the insuring clauses of the Policies in light of the police power exclusion and recording exception. In fact, the Court of Appeals deemed the police power exclusion and exception to be "irrelevant" in its review of the district court's decision unless it first concluded that the insuring clauses themselves provided coverage. (Ct. App. Op. ¶ 9; *see also id.* ¶ 18 ("If Vestin's claims are not covered, then we need not reach the exclusions").) In so holding, the Court of Appeals dismissed Vestin's argument that the exception to the exclusion addressing

recorded exercises of police powers must be considered in determining whether such exercise was covered under the policies.

The Court of Appeals could not have construed the policy as a whole, giving effect to all its provisions, while admittedly ignoring this key policy provision. The exception to the exclusion for the exercise of police power is rendered meaningless unless that exception is construed, in conjunction with the policies' insuring clauses, to provide coverage to Vestin. *See LDS Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 858-59 (Utah 1988) (policy provisions excluding coverage strictly construed against insurer); *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990); *National Union Fire Ins. Co. v. Lynette C.*, 279 Cal. Rptr. 394, 399 (Cal. App. 1991) (treating exceptions to exclusions like coverage provisions and construing them "broadly in favor of the insured").

Moreover, in conducting an ambiguity analysis, the courts are to look to any evidence presented inside or outside the contract to aid in their analysis. *See Ward v. Intermountain Farmers Ass'n.*, 907 P.2d 264, 269 (Utah 1995). This Court has specifically held that "[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered," and "[a] judge should consider any credible evidence offered to show the parties' intention." *Ward*, 907 P.2d at 268. "[O]therwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the "extrinsic evidence of the judge's own linguistic education and experience." *Id.* (citations omitted). Thus, even if a Rule 12(b)(6) analysis rather than a Rule 56 analysis is appropriate, Vestin's evidence submitted below cannot be ignored in the analysis. The

intrinsic and extrinsic evidence clearly provide a reasonable construction that favors Vestin.

If the contract is ambiguous, the analysis becomes a factual one and the jury resolves the issue. *See Colonial Leasing Co. of New England, Inc. v. Larsen Bros. Const. Co.*, 731 P.2d 483, 488 (Utah 1986); *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 19, 54 P.3d 1139, 1145. The Court may not take this determination away from a jury when evidence supports the non-moving party's factual interpretation. *See, e.g., Smith v. Four Corners Mental Health Ctr.*, 2003 UT 23, ¶ 40, 70 P.3d 904, 915. "A motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended." *Novell v. Canopy Group*, 2004 UT App 162, ¶ 20 (citing *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 17, 54 P.3d 1139). The same is true of a motion to dismiss. *See Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 14, 48 P.3d 918 (reversing lower court's order granting mixed relief of dismissing a claim and granting summary judgment). Because the intermediate court improperly determined that the Policies do not provide coverage to Vestin, its decision should be reversed.

Had First American wanted to except the Notice of the Eagle Mountain SID from coverage, it could easily have included the following standard title insurance policy language providing for such an exclusion:

The Company assumes no liability for loss or damage by reason of the following:

(a) Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

James L. Gosdin, *Title Insurance, A Comprehensive Overview* 336, Section of Real Property, Probate and Trust Law/American Bar Association (1996); *see also Howe v. Professional Maninvest, Inc.*, 829 P.2d 160, 164 (Utah App. 1990) (if parties intended result, they could have said so in their contract). It failed to do so.

Applying this Court's case law to the instant case, the Court of Appeals undoubtedly erred. The evidence submitted by Vestin demonstrates: (a) the industry standard is to interpret such contract provisions as applying to this type of SID; and (b) First American itself has treated just such an SID as a "defect" under a substantively similar policy. (R. 359, 396-97.) The police power exception must also be considered. The only way to reconcile such evidence with the decision below is to ignore it, which is just what the Court of Appeals did.

The Court of Appeals' approach improperly dictated the outcome below. On summary judgment, a reviewing court must examine all evidence in the light most favorable to the nonmoving party. *See Heiner v. Simpson*, 2001 UT 39, n.1, 23 P.3d 1041, 1042. Doing so here, this Court can reach but one reasonable conclusion: a genuine issue of material fact exists regarding the coverage of these provisions.

C. The Court of Appeals’ Decision Unfairly Deprives Vestin of the Benefit of its Bargain.

In this case, Vestin seeks the benefit of its bargain. The Utah courts, like all common law courts, enforce this right. *See, e.g., Kraatz v. Heritage Imps.*, 2003 UT App 201, ¶ 4, 71 P.3d 188, 192 (contracting parties entitled to the benefit of their bargain).

1. The Purpose of Title Insurance is to Protect Purchasers.

Title insurance policies are “contracts whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specific amount against loss through defects of title to, or liens or encumbrances upon realty in which the insured has an interest as purchaser or otherwise.” 1 Holmes’s Appleman on Insurance 2d, §1.31 (West 1998). Title insurance has also been defined as “the opinion of the insurer concerning the validity of the title, backed by an agreement to make that opinion good if it should prove to be mistaken and a loss should result in consequence.” *Id.* (cited in *Laabs v. Chicago Title Ins. Co.*, 241 N.W.2d 434, 438 (Wis. 1976)). “[I]n construing an insurance policy it is presumably the intention of the parties that in the event of loss the insured will be protected to the full extent that any fair interpretation of the contract will allow.” *Hoboken Camera Center, Inc. v. Hartford Acc. & Indem. Co.*, 226 A.2d 439, 444 (N.J. Super. 1967).

“The purpose of title insurance is to protect a transferee of real estate from the possibility of a loss through defects that may cloud the title. One of the reasonable expectations of a policyholder who purchases title insurance is to be protected against the defects in his title which appear of record.” 1 Holmes’s Appleman on Insurance 2d §1.31

(West 1998). “The title insurance policy should operate as an absolute guarantee of the ownership, or other, interest in the land based on the record title, except as to those items clearly excepted by the policy as issued – which, ordinarily, would be mortgages, or other liens, which are matters of record.” *Id.* “The general public in buying insurance (containing frozen, unbargained-for policy limitations) has a right to get the degree of coverage it reasonably envisages.” *Id.* at §4.23.

“A purpose for obtaining title insurance is to guarantee a certain position in the chain of title. Therefore, the title insurance company will defend against adverse claims and indemnify the holders for any loss or damages actually sustained due to problems such as unmarketability of the title.” *Booth v. Attorneys’ Title Guar. Fund*, 2001 UT 13, ¶ 32, 20 P.3d 319 (citation omitted); *see also Bush v. Coult*, 594 P.2d 865, 867 (Utah 1979) (setting forth extended treatment of the purpose of title insurance).

Vestin is entitled to the benefits of this protection. That is why it purchased title insurance from First American in the first place. That is what it seeks to enforce here.

2. The Eagle Mountain SID Documents Were Matters of Public Record that Materially and Significantly Affected Vestin’s Title.

In this case, the Court is not dealing with matters that were obscured or could not readily have been discovered. The Eagle Mountain SID documents were matters of public record. First American needed only to diligently and reasonably review the public records to be able to identify and except the SID. Vestin was entitled to this. This is why Vestin paid premiums to First American. This is what First American and the industry as

a whole generally do. Had Vestin known about the SID it could have taken steps to protect itself.

Instead, Vestin now finds itself with a substantially impaired title. Vestin is entitled to relief because it has been deprived of the benefit of its bargain based on First American's demonstrable failure to live up to its assurances. This Court's case law clearly provides Vestin with a remedy.

3. First American Failed to Identify and Disclose Publicly Recorded Documents that Caused Significant Damage to Vestin when Vestin was Relying on First American for Protection.

First American's failure to identify and disclose these publicly recorded documents has resulted in significant damage to Vestin. (R. 10.) Vestin now holds title to property which it is unable to sell and for which it has a substantial assessment liability. These are matters about which any reasonable owner of property obtaining title insurance would want to know. The Court of Appeals' decision vitiates the purpose of title insurance and leaves Vestin without a remedy in a case where Vestin contracted for and paid for protection. Such an unjustifiable result should not be sustained by this Court on this record.

The decision below is contrary to the law, the facts, and the public policy applicable to First American and Vestin. It should be reversed and remanded.

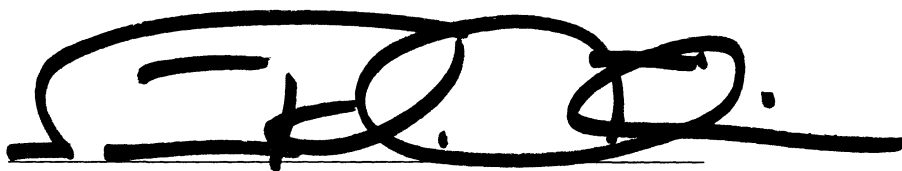
CONCLUSION

For each of the foregoing reasons, independently and collectively, and for all other reasons that appear of record, the Court of Appeals' decision should be reversed and this case remanded for further proceedings.

DATED this 6th day of June, 2005.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By:

A large, bold, handwritten signature in black ink, appearing to be 'J. A. Snow', written over a horizontal line.

John A. Snow

Stephen K. Christiansen

Cassie Wray

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **APPELLANT/PETITIONER'S OPENING BRIEF** to be mailed, postage prepaid, this **6th** day of June, 2005, to the following counsel of record:

Alan L. Sullivan
Brett P. Johnson
SNELL & WILMER
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

A handwritten signature in black ink, appearing to read "A. L. Sullivan", is written over a horizontal line.

Addenda

ADDENDUM

| <u>Exhibit No.</u> | <u>Document</u> |
|--------------------|--|
| 1 | Court of Appeals Opinion |
| 2 | District Court Order of Dismissal with Prejudice |
| 3 | Complaint |
| 4 | Policy of Title Insurance, No. 3192-A-49 |
| 5 | Policy of Title Insurance, No. 2701-A-49 |
| 6 | Affidavit of Daniel B. Stubbs |
| 7 | Affidavit of Thomas E. Lea |
| 8 | Eagle Mountain SID Notice of Intention (without attachments) |
| 9 | Utah Municipal Improvement Act |

EXHIBIT 1

LEXSEE 101 P3D 398

**Vestin Mortgage, Inc., a Nevada corporation, Plaintiff and Appellant, v. First American
Title Insurance Company, a California corporation, Defendant and Appellee.**

Case No. 20030941-CA

COURT OF APPEALS OF UTAH

2004 UT App 379; 101 P.3d 398; 511 Utah Adv. Rep. 28; 2004 Utah App. LEXIS 413

October 28, 2004, Filed

PRIOR HISTORY: [***1] Third District, Salt Lake Department. The Honorable Frank G. Noel.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: Cassie Wray, John A. Snow, and Stephen Christiansen, Salt Lake City, for Appellant.

Alan L. Sullivan and Brett P. Johnson, Salt Lake City, for Appellee.

JUDGES: James Z. Davis, Judge. **WE CONCUR:** Russell W. Bench, Associate Presiding Judge, William A. Thorne Jr., Judge.

OPINIONBY: James Z. Davis

OPINION: [**399] Before Judges Bench, Davis, and Thorne.

DAVIS, Judge:

[*P1] Vestin Mortgage, Inc. (Vestin) appeals from a trial court order dismissing Vestin's claim with prejudice for failure to state a claim upon which relief can be granted. We affirm.

BACKGROUND

[*P2] Capsource, Inc. (Capsource), doing business as Del Mar Mortgage, now known as Vestin, made two separate loans to The Ranches, L.C. (The Ranches). Both loans were secured by real property (the property) located in Eagle Mountain City (Eagle Mountain) pursuant to trust deeds for the benefit of Vestin and its predecessor. Capsource first loaned \$1,965,000 to The Ranches on or about April 14, 2000. On April 26, 2000, First American Title Insurance Company (First [***2]

American) issued Policy No. 2701-A-49 (Policy 2701), insuring Capsource's interest under the first trust deed in the amount of \$1,965,000. On or about August 18, 2000, Vestin loaned The Ranches \$1,800,000, and on August 28, 2000, First American issued Policy No. 3192-A-49 (Policy 3192) in the amount of \$1,800,000 to insure Vestin's interest under the second trust deed. As part of Policy 2701 and Policy 3192 (collectively, the policies), First American also issued Endorsement F.A., ALTA Form 31. Vestin assigned some or all of its right, title, and interest in the trust deeds to various third parties.

[*P3] On June 20, 2000, Eagle Mountain adopted a resolution declaring its intention to create a special improvement district (SID), for the purpose of constructing certain improvements and assessing real property situated within the boundaries of the SID. On August 1, 2000, Eagle Mountain adopted Resolution 14-00, which created the SID. The resolution, however, did not mention assessments, the levy of assessments, or the creation of an assessment lien. Several days later, on August 4, 2000, Eagle Mountain recorded with the Utah County Recorder's Office a "Notice of Intention" [***3] (the notice) to create the SID. In addition to providing notice that Eagle Mountain intended to create the SID and intended to levy assessments to pay for improvements, the notice estimated the total cost of the improvements and the portion of the cost which would be paid for by the SID. However, the notice did not levy an assessment — Eagle Mountain n1 did not levy the assessment until April 25, 2001 when it adopted Ordinance No. 06-2001. The assessment for the entire SID, approved by Ordinance No. 06-2001, totaled \$16,799,282, [**400] approximately \$3,500,000 less than the estimate contained in the notice. In addition to levying the assessment, the ordinance provided for the acceleration of the assessment upon the voluntary transfer of title to property within the SID.

n1 "The governing body of a municipality may:
... levy assessments on the property within the dis-

trict that is benefitted by the improvements"
Utah Code Ann. § 17A-3-304(3)(b) (1999).

[*P4] After the [***4] creation of the SID, First American issued CLTA Form 104 Endorsements to the policies, to insure the interests of the assignees of Vestin's interest in the trust deeds. The endorsements were issued as of the date of the recording of the assignments, and became effective as of the date of issuance.

[*P5] The Ranches eventually defaulted on the loans from Vestin and its predecessor and, on July 25, 2002, Vestin took title to the property through nonjudicial foreclosure of its trust deeds. According to Vestin, it was only when it entered into a contract to sell the property to a third party that Vestin learned from a title report that the property was within the boundaries of the SID. At that point, Vestin realized that Eagle Mountain had levied a \$2,241,348.70 assessment on the property in April 2001, which upon the voluntary sale of the property would become immediately due and payable. Vestin alleges that when the prospective buyer learned of the assessment, it refused to proceed with the purchase. Vestin then filed a claim under the policies, contending that the policies insured against the assessment of the SID. First American, however, denied Vestin's claim.

[*P6] [***5] The policies and endorsements include several clauses relevant to Vestin's claim for coverage. The policy jacket contains the following language:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN . . . insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

. . . .

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

. . . .

6. The priority of any lien or encumbrance over the lien of the insured mortgage

. . . .

The Exclusions From Coverage section provides:

The following matters are expressly excluded from the coverage of this policy and [First American] will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in [***6] the public records at Date of Policy.

. . . .

3. Defects, liens, encumbrances, adverse claims or other matters:

. . . .

(d) attaching or created subsequent to Date of Policy

The CLTA Form 104 Endorsement states:

[First American] hereby insures:

[The assignees of Vestin in the mortgage] . . . against loss or damage which such insured shall sustain by reason of any of the following

. . . .

(B) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage

(C) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy

Finally, the F.A. Form 31 Endorsement provides:

[First American] hereby insures against loss which the Insured shall sustain by reason of any of the following matters:

[**401] 1. Any incorrectness in the assurance which [First American] hereby gives:

(a) That there are no covenants, conditions, or restrictions under which the lien of

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the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired

[*P7] After First American denied Vestin's claim for coverage [***7] under the policies, Vestin sued First American alleging a breach of the insurance contract. First American moved to dismiss the complaint pursuant to Utah Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The trial court granted First American's motion and dismissed Vestin's complaint with prejudice. Vestin appeals the trial court's order of dismissal.

ISSUES AND STANDARDS OF REVIEW

[*P8] Vestin argues that the trial court erred by granting First American's motion to dismiss. The propriety of a motion to dismiss is a question of law, which we review for correctness, giving no deference to the decision of the trial court. See *Wagner v Clifton*, 2002 UT 109, P8, 62 P3d 440. More specifically, Vestin asserts that the trial court erred by concluding as a matter of law that Vestin's claims are not covered under the policies and that the policies are unambiguous. "The trial court's interpretation of a contract presents a question of law, which we review for correctness." *Green River Canal Co. v. Thayne*, 2003 UT 50, P16, 84 P3d 1134.

ANALYSIS

[*P9] We determine the extent of an insurer's [***8] liability by reference to the provisions of the title insurance policy. See *Cummins v. U.S. Life Title Ins. Co. of N.Y.*, 40 N.Y.2d 639, 357 N.E.2d 975, 975, 389 N.Y.S.2d 319 (N.Y. 1976).

When interpreting a contract, a court first looks to the contract's four corners to determine the parties' intentions, which are controlling. If the language within the four corners of the contract is unambiguous, a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law.

Fairbourn Commercial, Inc. v. American House Partners, Inc., 2004 UT 54, P10, 94 P3d 292 (alteration in original) (quotations and citation omitted). "We will attempt to harmonize all of the contract's provisions and all of its terms when determining whether the plain language of the contract is ambiguous." *Wagner*, 2002 UT 109 at P16 (quotations and citation omitted). Vestin's argument that the policies are ambiguous is based upon its reading of the exclusions to the policies, however, before we can

review the exclusions, we must first determine whether Vestin's claims are covered by the insuring clauses of the policies. n2 If [***9] Vestin's claims are not covered by the policies, then the exclusions are not relevant. We, therefore, begin our analysis by determining whether Vestin's claims are covered under the plain language of the coverage sections of the policies. n3

n2 Vestin argues "that in order for First American to avoid liability, First American was required to disclose and except the Eagle Mountain SID from coverage." Additionally, Vestin claims that if it "had been made aware of the Eagle Mountain SID and that the Assessment became immediately due and payable upon voluntary transfer of title[,] Vestin may not have made the loans at all to avoid the issue of acceleration of the Assessment upon voluntary transfer."

The first part of Vestin's argument is illogical since the disclosure would be in the form of an exclusion; Vestin would have no claim even if the claim were otherwise covered. The second part of Vestin's claim suggests a claim sounding in equity grounded on detrimental reliance, rather than the breach of contract claim, which is the subject matter of this action. The real issue in this case is whether Vestin's claim is covered by the policy. The failure of First American to exclude something that would not otherwise be included in the coverage sections of the policies does not equate to coverage for Vestin. If Vestin's claim does not fall within the coverage of the policy, then it must fail.

[***10]

n3 Although we fail to see how anything that occurred after the issuance of Policy 2701 implicates that policy, because of our ruling herein, we need not address that issue separately.

[*P10] Vestin does not claim coverage under either the "lien" or "encumbrance" provisions of the policies, rather, Vestin argues that the "various insuring clauses contained in the policies, when read in conjunction [**402] with the 'governmental police power' provisions, afford coverage to Vestin for 'defects,' n4 'incorrectness' n5 and 'other matters.'" n6 We first determine whether the SID and the recorded notice constitute a "defect" on the property title, "an incorrectness in assurance" or "other matter affecting title." We conclude that they do not.

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n4 The policy jackets insure Vestin against any loss or damage resulting from any defect in the title as of the date of the policies.

n5 The F.A. Form 31 Endorsement insures Vestin against loss which it shall sustain by reason of any of the following matters: "any incorrectness in the assurance which [First American] hereby gives: (a) That there are no covenants, conditions, or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired."

***11]

n6 In the CLTA Form 104 Endorsement, First American insures the assignees of Vestin in the mortgage "against loss or damage which such insured shall sustain by reason of . . . the existence of any subsisting tax or assessment lien which is prior to the insured mortgage," and "the existence of other matters affecting the validity or priority of the lien of the insured mortgage." By its terms, the endorsement insures the assignees and applies to liens prior to the insured mortgage.

[*P11] Because we, like the parties, were unable to find Utah law that directly resolves the dispute, we look to treatises and other jurisdictions for guidance. "Title insurance, as opposed to other types of insurance, does not insure against future events." 43 Am. Jur. 2d Insurance § 529 (2003). Moreover, "a prospective or contingent encroachment or lien does not render the insurer liable." Id. Title insurance policies "generally have been held to include coverage for assessments existing at the time that the insurance is issued, but not to cover assessments which ***12] are rendered after that time, even though the right to levy the assessment existed at the time of the insurance." Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 159:36 (1998). Most importantly for this case, "unpaid future installments of an improvement assessment which have not been decreed as constituting a lien against the property do not constitute an existing 'requirement, lien, encumbrance, or defect.'" Id. § 159:37.

[*P12] In *Edwards v. St. Paul Title Insurance Co.*, 39 Colo. App. 235, 563 P.2d 979 (Colo. Ct. App. 1977), the insured under a title insurance policy sued the insurance company for damages when a tax was levied on his property two years after the date of issuance of the policy. See *id.* at 980. The insurance policy provided coverage for "any defect in or lien or encumbrance on the title."

Id. The insurance company, however, had not mentioned anywhere in the policy that the property was situated within a particular water and sanitation district, which had been formed two years prior to the issuance of the policy. See *id.* At the time the plaintiff bought the property and the policy was issued, "there were no district ***13] taxes or assessments due or payable or certified to the treasurer's office, and thus there was obviously no lien against the property for such taxes." Id. The Colorado Court of Appeals held that "the mere existence of the district and the prospect of taxes in the future was not a lien, encumbrance, or defect as of the date of issuance of the policy." Id.

[*P13] Similarly, in *Strass v. District-Realty Title Insurance Corp.*, 31 Md. App. 690, 358 A.2d 251 (Md. Ct. Spec. App. 1976) the Court of Special Appeals of Maryland concluded that city assessments for the installation of water and sewer lines "were not encumbrances until they were inevitable and that as long as the City had the option to levy them or not, they were not inevitable until they were levied." *Id.* at 258. Therefore, "the potential assessments were neither liens nor encumbrances when the policies of title insurance were issued." n7 Id.

n7 The policy provision insuring against defects in *Strass v. District-Realty Title Insurance Corp.*, 31 Md. App. 690, 358 A.2d 251 (Md. Ct. Spec. App. 1976) was substantially similar to the policies in this case. See *id.* at 253. The policy insured against direct loss or damage by reason of "any defect or defects in the title of the Insured." Id.

***14]

[*P14] Vestin asserts that the term "defect" must be given a broader interpretation than the terms "lien" or "encumbrance," otherwise it would have been unnecessary to use all three terms in the policy if they each had the same meaning. While we hold that neither the SID nor the notice in this case constituted ***403] defects in Vestin's title, we also recognize that "defect" may be defined as something less than a "lien" or "encumbrance." The fact that the SID and notice did not amount to a "defect," "lien," or "encumbrance," does not mean that all three terms are given the same meaning.

[*P15] Vestin has not identified any defect in the title to the property that existed on the effective date of the policies. Both policies were issued to Vestin months before the SID assessments were levied in April 2001 by Eagle Mountain's adoption of Ordinance No. 06-2001. n8 The policies insuring Vestin's title to the property provided

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coverage only for defects that existed as of the effective date of the policies. Prior to the approval of Ordinance No. 06-2001, the assessments were contingencies not covered by the insuring provisions of the policies. Prior to the adoption of Ordinance [***15] No. 06-2001, Eagle Mountain may have decided not to levy any assessment at all. Unlike *Bel Air Motel Corp v Title Insurance Corp of Pennsylvania*, 183 N.J. Super. 551, 444 A.2d 1119, 1122 (N.J. Super. Ct. Law Div. 1981), relied upon by Vestin, where the assessments were "a certainty," the assessments in this case may or may not have been inevitable. As First American pointed out, "The Special Improvement District was simply a means by which the City might levy the intended assessment at some unspecified future date."

n8 First American issued Policy 2701 on April 26, 2000 and Policy 3192 on August 28, 2000

[*P16] Since virtually all private property in the State of Utah lies within the boundaries of a governmental entity which may or may not take an action affecting the property, we are persuaded that the correct rule in this jurisdiction is one that recognizes that mere exposure to a potential assessment does not rise to the level of a defect, lien, or encumbrance. The prospective [***16] nature of the SID and the notice also preclude them from constituting "other matters" affecting title or from rendering First American's assurances incorrect. Neither the SID nor the notice were conditions, or restrictions under which the lien of the mortgage could be cut off, subordinated, or otherwise impaired because there was no impairment until there was a lien.

[*P17] Vestin argues that the police power exception to the exclusions provision is central to both its claim for coverage and to demonstrate that the policies are ambiguous. We conclude that neither of Vestin's applications of the police power exclusion is correct.

[*P18] Vestin claims that "the policies provide coverage for the exercise of any governmental police power that is recorded in the public records" (Third and fourth alterations in original). Therefore, according to Vestin, "First American's acknowledgment that the creation of the Eagle Mountain SID and the Notice of Intention constitute the exercise of police power confirms that Vestin's claim is covered under the police power provision of the policies." This assertion, however, is incorrect. Nowhere do the policies state that [***17] they cover the exercise of any recorded police power. Vestin improperly relies on an exception to the exclusions. The Exclusions From

Coverage section states

The following matters are expressly excluded from the coverage of this policy and [First American] will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of

1

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy

The exclusions, and the exception for the exercise of recorded police power, are applicable only if Vestin's claims are covered by the insuring clauses of the policies. If Vestin's claims are not covered, then we need not reach the exclusions. Vestin fails to demonstrate how an exception to an exclusion is tantamount to coverage. The exclusions and their exceptions are important only as they may apply to something that would otherwise be included in the coverage section of the policies. Because the existence of the SID and the notice [***18] of Eagle Mountain's intention [**404] to levy assessments do not affect Vestin's title and, therefore, are not covered by the policies, the exclusions to the policies and the recorded police power exception to those exclusions are not applicable.

[*P19] Finally, according to Vestin, an ambiguity exists concerning the scope of coverage under the policies "because the insuring clauses of the policies provide coverage to Vestin." Having determined that the police power exception to the exclusions has no application to Vestin's claim, we conclude that the policies are unambiguous. n9

n9 Our conclusion that the police power exception to the exclusions is not applicable to Vestin's claim does not mean that the exception would not apply in other cases — cases in which a particular exercise of recorded police power is first determined to be covered under the policy. Because the exception could have application in other appropriate situations we are able "to harmonize all of the contract's provisions and all of its terms," *Wagner v. Clifton*, 2002 UT 109 P16, 62 P3d 440 (quotations and citation omitted), and contrary to Vestin's claim, the exception is not rendered meaningless.

Furthermore, because we conclude that the policies are unambiguous we need not consider

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Vestin's claim that First American's motion to dismiss should have been treated as a motion for summary judgment. Having determined that the policies are unambiguous, we are not left with a factual question as to the intent of the parties. See *id. at P18* ("A court may only consider extrinsic evidence if, after careful consideration, the contract language is ambiguous or uncertain." (quotations and citation omitted)).

[***19]

CONCLUSION

[*P20] The applicable provisions of the policies are not

ambiguous under the facts of this case, and Vestin's claims are not covered under the policies. Accordingly, the trial court's dismissal of the complaint for failure to state a claim upon which relief can be granted is affirmed.

James Z. Davis, Judge

[*P21] WE CONCUR:

Russell W. Bench,

Associate Presiding Judge

William A. Thorne Jr., Judge

EXHIBIT 2

FILED DISTRICT COURT
Third Judicial District

NOV - 5 2003

By pf SALT LAKE COUNTY
Deputy Clerk

ORDER PREPARED AND SUBMITTED BY:

Alan L. Sullivan (3152)
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Insurance Company*

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

VESTIN MORTGAGE, INC., a Nevada
corporation,

Plaintiff,

vs.

**FIRST AMERICAN TITLE
INSURANCE COMPANY**, a California
corporation,

Defendant.

**ORDER OF DISMISSAL WITH
PREJUDICE**

Case No. 030912242

Honorable Frank G. Noel

Defendant First American Title Insurance Company's ("**First American**") Motion to Dismiss came on for hearing before the Honorable Frank G. Noel on October 17, 2003, at 9:00 a.m. Brett P. Johnson and Alan L. Sullivan of SNELL & WILMER appeared for First American. John A. Snow of VanCott Bagley Cornwall & McCarthy appeared for plaintiff Vestin Mortgage, Inc. ("**Vestin**"). Based upon the written memoranda, the arguments of counsel, the record herein, and for other good cause shown, the Court hereby concludes as a matter of law:

1. The language of the title insurance policies and endorsements at issue in this case is clear and unambiguous.

2. As of the dates of the title insurance policies and endorsements, the Notice of Intention recorded by Eagle Mountain City on August 4, 2000, was a notice of the City's future intent to levy a special assessment. On the policy and endorsement dates the contemplated special assessment was not inevitable and the City had the option not to levy the assessment. Because the special assessment was prospective, indefinite, and contingent on the policy and endorsement dates, the Notice of Intention did not create, nor was it, a defect in or lien or encumbrance on Vestin's title in the property, nor was it an "other matter" affecting the validity or priority of Vestin's mortgage.

3. Similarly, under the policies and endorsements, the Special Improvement District created by Eagle Mountain City on August 1, 2000, was not a defect in or lien or encumbrance on Vestin's title in the property.

4. As the Notice of Intention advised only of the possible future levy of an assessment, the Notice was not a notice of the exercise of a governmental police power.

5. In the policies and endorsements, First American was not required to disclose, nor was it required to except from coverage, the Notice of Intention and the Special Improvement District. First American did not breach the policies or endorsements by not disclosing or excepting from coverage the Notice of Intention and the Special Improvement District. Moreover, the nondisclosure the Notice of Intention and the Special Improvement District is not an incorrectness in the policies, the endorsements, or the representations of First American.

Based upon the foregoing conclusions of law, the Court hereby ORDERS, ADJUDGES, AND DECREES as follows:

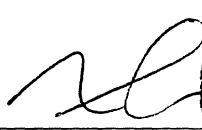
1. Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, Vestin has failed to state a claim upon which relief can be granted.

2. All claims for relief alleged in Vestin's complaint are hereby dismissed with prejudice.

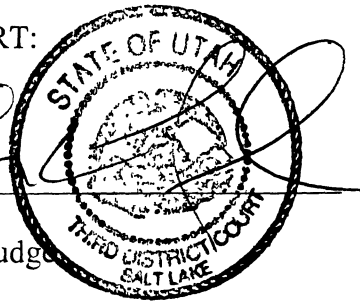
3. First American is hereby awarded its costs of court.

DATED this 5 day of Nov., 2003.

BY THE COURT:



Frank G. Noel
District Court Judge



FILED
CLERK
03 MAY 30 PM 4:50

DISTRICT
COURT
SALT LAKE COUNTY
BY _____
DEPUTY CLERK

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

| | |
|---|---|
| VESTIN MORTGAGE, INC., a Nevada corporation, Plaintiff, vs. FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, Defendants. | COMPLAINT Civil No.: <u>030912242</u> Judge: <u>Noel</u> |
|---|---|

Plaintiff Vestin Mortgage, Inc. ("Vestin"), a Nevada corporation, complains of defendant First American Title Insurance Company ("First American"), a California corporation, and for a cause of action alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Vestin is a corporation duly organized and existing under the laws of the State of Nevada, and has the right to assert the claims in this Complaint on its behalf and on behalf of its assignees and successors, as hereinafter stated. Vestin was formerly known as Capsource, Inc.,

doing business as Del Mar Mortgage. Vestin is in the business of, among other things, making loans secured by real estate.

2. First American is a corporation duly organized and existing under the laws of the state of California, with a place of business in the Salt Lake County, State of Utah. First American is in the business of selling and providing real estate title insurance in the State of Utah.

3. This Court has jurisdiction over this matter and the claims asserted herein pursuant to Utah Code Ann. § 78-3-4.

4. Venue for this action is proper in Salt Lake County, Utah, pursuant to Utah Code Ann. § 78-13-4, on the grounds that first American has a principal office in Salt Lake County.

GENERAL ALLEGATIONS

Title Policy No. 3192-A-49

5. First American issued its Policy of Title Insurance, Policy No. 3192-A-49, dated August 28, 2000 (“Policy No. 3192”), in favor of Vestin, its successors and assigns as their interest may appear. A copy of Policy No. 3192 is attached hereto as Exhibit “A” and incorporated herein by this reference.

6. The interest insured by First American under Policy No. 3192 was Vestin’s interest in a Deed of Trust, dated August 18, 2000 (the “Vestin Trust Deed”), entered into between The Ranches, L.C. (“The Ranches:”), a Utah Limited Liability Company, as Trustor, Century Title Company, as Trustee, and Vestin, as Beneficiary, recorded August 28, 2000 in the office of the Recorder of Utah County, Utah.

7. The Vestin Trust Deed was executed in favor of Vestin, as beneficiary, to secure the payment of the indebtedness owing to Vestin from The Ranches, L.C., in the amount of \$1,800,000, as set forth in the Vestin Trust Deed.

8. The Vestin Trust Deed encumbered real property located within the boundaries of the City of Eagle Mountain, County of Utah, State of Utah, and described as follows:

Beginning at the South quarter corner of Section 30, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence South 89° 57' 05" West 1473.81 feet; thence South 21° 53' 28" West 42.70 feet; thence North 89° 57' 33" West 1063.40 feet; thence North 89° 36' 51" West 563.32 feet; thence North 11° 59' 43" East 1072.13 feet; thence along the arc of a 397.00 foot radius curve to the right 165.44 feet (central angle = 23° 52' 39"), the chord of which bears North 23° 56' 03" East 164.25 feet; thence North 35° 52' 22" East 1515.75 feet; thence along the arc of a 497.00 foot radius curve to the right 413.49 feet (central angle = 47° 40' 06"), the chord of which bears North 59° 49' 25" East 401.67 feet; thence North 83° 32' 28" East 498.77 feet; thence South 39° 41' 56" East 1718.28 feet; thence South 00° 03' 10" West 1327.42 feet to the point of beginning.

(hereinafter "Parcel A").

9. The right, title and interest of Vestin in the Vestin Trust Deed was assigned to various third parties, as set forth in Policy No. 3192.

10. Policy No. 3192 provides that First American insures against loss or damage, not exceeding the "Amount of Insurance," which is \$1,800,000.00, sustained or incurred by Vestin or its successors and assigns by reason of any defect in or lien or encumbrance on the title, the unmarketability of the title, the priority of any lien or encumbrance over the lien of the Vestin Trust Deed, among other things; but subject to the exclusions and exceptions from coverage provided in Policy No. 3192 and its terms and conditions.

11. First American issued various Endorsements to Policy No. 3192, which were incorporated therein. Endorsement F.A. Form 31, which is a part of Policy No. 3192, provides:

[First American] hereby insures against loss which [Vestin] shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurances which [First American] hereby gives:

(a) There are no covenants, conditions, or restrictions under which the lien of the mortgage [of Vestin] can be cut off, subordinated, or otherwise impaired.

Endorsement CLTA Form 104, which is also part of Policy No. 3192, provides:

[First American] hereby insures [the assignees of Vestin in the Mortgage] against loss or damage which such insured shall sustain by reason of any of the following: ... The existence of any subsisting tax or assessment lien which is prior to the insured mortgage . . . , [and] the existence of other matters affecting the validity or priority of the lien of the insured mortgage....

Title Policy No. 2701-A-49

12. First American issued its Policy of Title Insurance, Policy No. 2701-A-49, dated April 26, 2000 ("Policy No. 2701"), in favor of Vestin, then known as Capsource, Inc., doing business as Del Mar Mortgage, a Nevada corporation, and its successors and assigns as their interest may appear. A copy of Policy No. 2701 is attached hereto as Exhibit "B" and incorporated herein by this reference.

13. The interest insured by First American under Policy No. 2701 was Vestin's interest in a Trust Deed, dated April 14, 2000 (the "Del Mar Trust Deed"), entered into between The Ranches as Trustor, Century Title Company, as Trustee, and Vestin, as beneficiary, recorded April 26, 2000 in the office of the Recorder of Utah County, Utah.

14. The Del Mar Trust Deed was executed in favor of Vestin, as beneficiary, to secure the payment of the indebtedness owing to Vestin from The Ranches in the amount of \$1,965,000.00, as set forth in the Del Mar Trust Deed.

15. The Del Mar Trust Deed encumbered real property located within the City of Eagle Mountain, County of Utah, State of Utah, and described as follows:

Beginning at the South quarter corner of Section 25, Township 5 South, Range 2 West, Salt Lake Base and Meridian; thence North 00°50'24" East 2709.61 feet; thence South 89°31'55" East 3356.62 feet; thence South 27°44'23" East 136.00 feet; thence along the arc of a 497.00 foot radius curve to the left 228.89 feet (central angle = 26°23'15"), the chord of which bears South 49°04'00" West 226.87 feet; thence South 35°52'22" West 1515.75 feet; thence along the arc of a 397.00 foot radius curve to the left 165.45 feet (central angle = 23°52'39"), the chord of which bears South 23°56'03" West 164.25 feet; thence South 11°59'43" West 1072.13 feet; thence North 89°36'51" West 2110.51 feet to the point of beginning.

LESS AND EXCEPTING the following: Beginning at a point which is South 5.30 feet and East 648.79 feet from the West quarter corner of Section 30, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence South 35°16'23" East 206.00 feet; thence along the arc of a 597.00 foot radius curve to the left 196.45 feet (central angle = 18°51'15"), the chord of which bears South 45°18'00" West 195.57 feet; thence South 35°52'22" West 1373.17 feet; thence North 38°00'30" West 1820.42 feet; thence South 89°31'55" East 1945.75 feet to the point of beginning.

(hereinafter "Parcel B").

16. The right, title and interest of Vestin in the Del Mar Trust Deed was assigned to various third parties, as set forth in Policy No. 2701.

17. Policy No. 2701 provides that First American insures against loss or damage, not exceeding the "Amount of Insurance," which is \$1,965,000.00, sustained or incurred by Vestin or its successors and assigns by reason of any defect in or lien or encumbrance on the title, the unmarketability of the title, the priority of any lien or encumbrance over the lien of the Del Mar

Trust Deed, among other things; but subject to the exclusions and exceptions from coverage provided in Policy No. 2701 and its terms and conditions.

18. After the issuance of Policy No. 2701, First American issued various Endorsements to it which were incorporated therein. Endorsement CLTA Form 104, which is also part of the Policy, provides:

[First American] hereby insures [the assignees of Vestin in the Del Mar Trust Deed] against loss or damage which such insured shall sustain by reason of any of the following: ... The existence of any subsisting tax or assessment lien which is prior to the insured mortgage . . . , [and] the existence of other matters affecting the validity or priority of the lien of the insured mortgage....

19. Vestin holds all of the right, title and interest to assert the claims in this Complaint on its behalf and on behalf of its assignees and successors.

Eagle Mountain Special Improvement District 2000-1

20. On or about June 20, 2000, the Town Council of Eagle Mountain adopted a resolution declaring its intention to create a special improvement district to be known as Eagle Mountain, Utah Special Improvement District No. 2000-1 (“Special Improvement District”), for the purpose of constructing certain improvements within the Special Improvement District and assessing the real property within the boundaries of the Special Improvement District for the cost of such construction.

21. On or about August 1, 2000, the Town Council of Eagle Mountain adopted Resolution No. 14-00, which created the Special Improvement District.

22. On or about August 4, 2000, Eagle Mountain caused to be filed in the Office of the County Recorder of Utah County, Utah, a “Notice of Intention” which gave notice that on

June 20, 2000, the Town Council of Eagle Mountain adopted a resolution declaring its intention to create the Special Improvement District for the purpose of constructing certain improvements within the Special Improvement District for a total cost of \$19,350,000 and assessing the real property within the boundaries of the Special Improvement District for the cost of such construction.

23. The Town Council of Eagle Mountain, Utah County, Utah, adopted an Assessment Ordinance No. 06-2001, which among other things, had the effect of “confirming the assessment rolls and levying an assessment against certain properties in Eagle Mountain, Utah Special Improvement District, Utah County, Utah, for the purpose of paying” various costs of construction of improvements within the Special Improvement District, for a total sum assessment of \$16,799.232 (the “Assessment”).

24. Parcels A and B (jointly, the “Parcels”) lie within the boundaries of the Special Improvement District, and have purportedly been duly assessed. The Parcels have been assessed \$2,241,348.70 of the total amount of the Assessment.

25. The Assessment Ordinance No. 06-2001, Section 5(D) provides for the acceleration of the Assessment amount upon the voluntary transfer of title as follows:

To reduce the administrative costs of the District, the Town Council hereby determines that in the event legal title to all or any portion of the property assessed hereunder is voluntarily transferred to another person or entity which is unrelated to the prior owner, the owner of the assessed property shall be required to prepay that portion of the assessment applicable to the transferred parcel.

26. Neither the Special Improvement District, the Assessment or the levy of the assessment against the Parcels was disclosed in the Policy No. 3192 or disclosed at the time of

the issuance of certain of the Endorsements, CLTA Form 104 of and to Policy No. 2701, or otherwise excepted or excluded from coverage of the Policies and said Endorsements, and Vestin had no knowledge or information regarding the same prior to the execution of the Deed of Trust.

Vestin's Title, Notice and Demand

27. As a result of a default in the payment of the indebtedness secured by the Vestin Trust Deed and the Del Mar Trust Deed (jointly, the "Trust Deeds"), Vestin caused the Trustee of the Trust Deeds to conduct Trustee's Sales for the sale of the Parcels, and, as the purchaser at the Trustee's Sales, Vestin acquired title to the Parcels in its own name and on behalf of said assignees of Vestin. Vestin acquired such title to the Parcels by Trustees' Deed.

28. After acquiring title to the Parcels, Vestin entered into an agreement to sell the Parcels to a third party.

29. In connection with Vestin's sale of said real property to a third party, Vestin obtained a title report regarding the Parcels, and, from such title report Vestin discovered for the first time that the Parcels were within the boundaries of the Special Improvement District and subject to the Assessment. Vestin also discovered at this time that upon the voluntary sale of the Parcels to a third party the entire Assessment of \$2,241,348.70 against the Parcels becomes immediately due and payable.

30. As a result of Vestin's disclosure to the third party that the Parcels were within the boundaries of the Special Improvement District and subject to the Assessment, and that the Assessment against the Property became immediately due and payable, the third party refused to proceed with the purchase of the Property.

31. As a result of the Property being subject to the Special Improvement District and the Assessment, the assurances and guaranties given by First American in the Policies of Title Insurance (Exhibits "A" and "B" hereto), and the Endorsements thereto, are incorrect and in error because there were conditions and restrictions under which the lien of the Trust Deeds were subordinate and otherwise impaired, among other things.

32. All conditions precedent to the Policy have been performed and satisfied or waived, and Vestin has duly made demand on First American under the Policy.

FIRST CAUSE OF ACTION

33. Pursuant to the Policies of Title Insurance (Exhibits "A" and "B" hereto), First American agreed to insure Vestin and its assignees against loss or damage as a result of the title to the Parcels being encumbered or unmarketable, or otherwise subject to an assessment or other matters affecting the validity or priority of the lien of the Trust Deeds, but subject to the exceptions and exclusions in the Policy, as more fully set forth above.

34. The Special Improvement District and the Assessment issued in connection therewith is an encumbrance against the Parcels, renders the title unmarketable, and affects the priority of the Trust Deeds, contrary to the assurance and guaranties of First American in the Policies of Title Insurance as set forth above.

35. Vestin and the assignees have been damaged as a result of the Assessment in an amount of not less than \$2,241,348.70, the amount of the Assessment against the Parcels, or such additional sums as may be duly assessed against the Parcels, and consequential and incidental

damages relating to the costs and expenses incurred by Vestin in connection with said anticipated sale and related matters.

36. Despite demand, First American has refused to pay the claim of Vestin owing under the Policies of Title Insurance, which constitutes a breach of the Policy by First American.

37. As a result of the breach of the Policy by First American, Vestin and its assignees have been damaged in an amount of not less than total amount of not less than \$2,241,348.70.

DEMAND FOR JURY TRIAL

Vestin hereby makes a demand for a trial by jury on all issues triable as a matter of right by a jury, as provided in Utah R. Civ. P. 38.

REQUEST FOR RELIEF

WHEREFORE, Vestin requests judgment in its favor against First American for a sum of not less than \$2,241,348.70, together with interest thereon, and judgment for such further and additional relief as may be just and equitable.

Dated this 30th day of May, 2003.

VANCOTT, BAGLEY, CORNWALL & McCARTHY



John A. Snow

Cassie Wray

Attorneys for Plaintiff

EXHIBIT 4

Form No. 1056.92
(10/17/92)
ALTA Loan Policy
Form 1



POLICY OF TITLE INSURANCE

ISSUED BY
CENTURY TITLE COMPANY
290 EAST 930 SOUTH
OREM, UTAH 84058
(801) 222-9292 • FAX (801) 222-0820

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

- 1 Title to the estate or interest described in Schedule A being vested other than as stated therein;
 - 2 Any defect in or lien or encumbrance on the title
 3. Unmarketability of the title
 - 4 Lack of a right of access to and from the land;
- The invalidity or unenforceability of the lien of the insured mortgage upon the title,
The priority of any lien or encumbrance over the lien of the insured mortgage,
Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material
(a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
(b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
Any assessments for street improvements under construction or completed at Date of Policy which now have gained or hereafter may gain priority over the insured mortgage; or
The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

First American Title Insurance Company

Garret L. Keruett PRESIDENT

ATTEST *Mark A. ...* SECRETARY

CW 3481202

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
 - (a) created, suffered, assumed or agreed to by the insured claimant;
 - (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
 - (c) resulting in no loss or damage to the insured claimant;
 - (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material or the extent
4. Unenforceability of the lien of the insured mortgage because of the insolvency or failure of the insured at Date of Policy, or the inability or failure of a subsequent owner of the indebtedness, to comply with applicable business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection law.
6. Any statutory lien for services, labor or materials (or the claim of payment of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.
7. Any claim, which arises out of the transaction creating the interest in the insured mortgage insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
 - (i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
 - (ii) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
 - (iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
 - (a) to timely record the instrument of transfer; or
 - (b) of such recordation to impart notice to a purchaser for value or judgment or lien creditor.

CONDITIONS AND STIPULATIONS

DEFINITIONS OF TERMS.

The following terms when used in this policy mean:

(a) "insured" the insured named in Schedule A. The term "insured" also includes

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty policy or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations

(b) "insured claimant" an insured claiming loss or damage

(c) "knowledge" or "known" actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of public records as defined in this policy or any other records which reflect constructive notice of matters affecting the land

(d) "land" the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or interest in abutting streets, roads, avenues, alleys, lanes, ways or easements, but nothing herein shall modify or limit the extent to which a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy affecting title to the estate or interest in the land is insured by this policy.

(e) "mortgage" mortgage, deed of trust, trust deed, or other security instrument

(f) "public records" records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge except to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the files of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title" an alleged or apparent matter relating to the title to the land, not excluded or excepted from coverage

or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

insurance is afforded herein as to assessments for street improvements under construction or completed at Date of Policy); or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, except payments for costs, attorneys' fees and expenses, shall reduce the amount of insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of insurance afforded under this policy except to the extent that the payment reduces the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may be increased by accruing interest and advances made to protect the insured mortgage and secured thereby, with interest thereon provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. LIABILITY NONCUMULATIVE.

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is heretofore executed by an insured and which is a charge or lien on the estate interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy and endorsement of the payment unless the policy has been lost or destroyed in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations loss or damage shall be payable within 30 days thereafter.

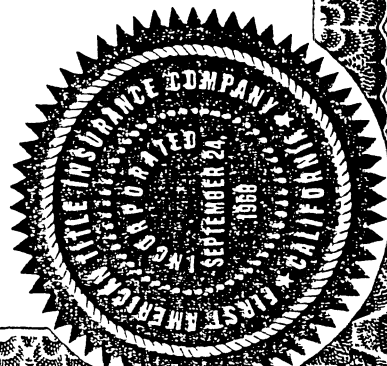
All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at 114 East Fifth

FIRST AMERICAN



First American Title Insurance Company

**POLICY
OF
TITLE
INSURANCE**



First American Title Insurance Company
The Ranches L.C., A Utah Limited Liability Company

Schedule A

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

AMOUNT OF INSURANCE:

\$ 1,800,000.00

PREMIUM AMOUNT: \$ 2,275.00

DATE OF POLICY:

August 28, 2000 at 04:49 PM

1. NAME OF INSURED:

Vestin Mortgage, Inc., a Nevada corporation, its successors and/or assigns as their respective interests may appear.

2. The estate or interest in the land which is encumbered by the insured mortgage is:

Fee Simple

3. Title to the estate or interest in the land is vested in:

The Ranches, L.C., a Utah Limited Liability Company

4. The insured mortgage and assignments thereof, if any, are described as follows:

Deed of Trust in the amount of \$1,800,000.00, dated August 18, 2000 by and between The Ranches, L.C., a Utah Limited Liability Company, as Trustor, Century Title Company, as Trustee, and Vestin Mortgage, Inc., a Nevada corporation, as Beneficiary, recorded August 28, 2000 as Entry No. 67691:2000, Utah County Recorder's Office, Utah.

Assigned to Arthur K. Brown and Loretta Brown, Trustees of the Arthur K. Brown and Loretta Brown Revocable Living Trust dated 9/3/91 as to an undivided 15,000/1,800,000th interest and Daniel M. Tabas, a married man as his sole and separate property as to an undivided 100,000/1,800,000th interest and Joel T. Jacobs and Barbara Jacobs, Trustees of the Barbara and Joel Jacobs Trust dated 7/31/96 as to an undivided 25,000/1,800,000th interest and Raymond Mossman and Laura Irene Mossman, Trustees of the Raymond Mossman Family Trust dated 3/21/91 as to an undivided 10,000/1,800,000th interest and C. E. Langford, Trustee under a Declaration of Trust dated 10/25/97 as to an undivided 12,500/1,800,000th interest and Ronald Boris Severin, Trustee of the Severin Living Trust dated 1/19/00 as to an undivided 20,000/1,800,000th interest and Gerald Robert Gerard and Shirley Gerard, Co-Trustees of the Gerald Robert Gerard and Shirley Gerard Revocable Trust dated 9/24/98 as to an undivided 25,000/1,800,000th interest and Sunderland Corporation, a Delaware Corporation as to an undivided 1,192,500/1,800,000th interest and Steve Cottrell and Nancy Cottrell, husband and wife as joint tenants as to an undivided 50,000/1,800,000th interest and Alivce V. McConnell, an unmarried woman as to an undivided 25,000/1,800,000th interest and Daniel M. Tabas, Trustee for the Linda Jane Tabas Stempel Trust as to an undivided 100,000/1,800,000th interest and David John Wall, an unmarried man as to an undivided 25,000/1,800,000th interest and Glenn P. Hofmann and Ramona D. Hofmann, Trustees of the Glenn P. Hofmann and Ramona D. Hofmann Revocable Living Trust dated 3/7/97 as to an undivided 100,000/1,800,000th interest and Michael R. Sparks or Muriel S. Sparks, Trustees of the Sparks Family Trust dated 2/26/93 as to an undivided 25,000/1,800,000th interest and Robert Byron Lundberg and Marilyn T. Lundberg, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and William H. Frater, a single man as to an undivided 25,000/1,800,000th interest and Yolan Lipscher, Trustee of the Lipscher Living Trust dated 11/22/91 as to an undivided 25,000/1,800,000th interest, by Assignment of Deed of Trust, dated August 18, 2000 and recorded August 28, 2000 as Entry No. 67692:2000, Utah County Recorder's Office, Utah.

Assignment of Deed of Trust, dated September 2, 2000, wherein Sunderland Corporation, a Delaware Corporation assigns and transfers all beneficial interest to Kenneth H. Wyatt and Phyllis P. Wyatt, Trustees of the Kenneth H. Wyatt and Phyllis P. Wyatt Revocable Trust dated 6/4/86 as to an undivided 125,000/1,800,000th interest and Terrence B. Gleeson and Penny S. Gleeson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest Daniel L. Larson and Erin E. Larson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and Thomas r. Fischer and Cindy L. Fischer, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest, recorded October 4, 2000 as Entry No. 78343:2000, Utah County Recorder's Office, Utah.

Assignment of Deed of Trust, dated September 27, 2000, wherein Arthur K. Brown and Loretta Brown, Trustees of the Arthur K. Brown and Loretta Brown Revocable Living Trust dated 9/3/91 as to an undivided 15,000/1,800,000th interest and Daniel M. Tabas, a married man as his sole and separate property as to an undivided 100,000/1,800,000th interest and Joel T. Jacobs and Barbara Jacobs, Trustees of the Barbara and Joel Jacobs Trust dated 7/31/96 as to an undivided 25,000/1,800,000th interest and Kenneth H. Wyatt and Phyllis P. Wyatt, Trustees of the Kenneth H. Wyatt and Phyllis P. Wyatt Revocable Trust dated 6/4/86 as to an undivided 125,000/1,800,000th interest and Raymond Mossman and Laura Irene Mossman, Trustees of the Raymond Mossman Family Trust dated 3/21/91 as to an undivided 10,000/1,800,000th interest and Terrence B. Gleeson and Penny S. Gleeson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and C.E. Langford, Trustee under a Declaration of Trust dated 10/25/97 as to an undivided 12,500/1,800,000th interest and Ronald Boris Severin, Trustee of the Severin Living Trust dated 1/19/00 as to an undivided 20,000/1,800,000th interest and Steve Cottrell and Nancy Cottrell, husband and wife as joint tenants as to an undivided 50,000/1,800,000th interest and Alice V. McConnell, an unmarried woman as to an undivided 25,000/1,800,000th interest and Daniel M. Tabas, Trustee Linda Jane Tabas Stempel Trust as to an undivided 100,000/1,800,000th interest and Glenn P. Hofmann and Ramona D. Hofmann, Trustees of the Glenn P. Hofmann and Romana D. Hofmann Revocable Living Trust dated 3/7/97 as to an undivided 100,000/1,800,000th interest and Michael R. Sparks or Muriel S. Sparks, Trustees of the Sparks Family Trust dated 2/26/93 as to an undivided 25,000/1,800,000th interest and Robert Byron Lundberg and Marilyn T. Lundberg, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and William H. Frater, a single man as to an undivided 25,000/1,800,000th interest and Yolanda Lipscher, Trustee of the Lipscher Living Trust dated 11/22/91 as to an undivided 25,000/1,800,000th interest and Thomas R. Fischer and Cindy L. Fischer, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest, assigns and transfers all beneficial interest to DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 732,500/1,800,000th interest, recorded October 16, 2000 as Entry No. 81529:2000, Utah County Recorder's Office, Utah.

Assignment of Deed of Trust, dated September 27, 2000, wherein Sunderland Corporation, a Delaware Corporation assigns and transfers all beneficial interest to DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 992,500/1,800,000th interest, recorded October 16, 2000 as Entry No. 81530:2000, Utah County Recorder's Office, Utah.

Assigned of Deed of Trust, dated September 27, 2000, wherein Gerald Robert Gerard and Shirley Gerard, Co-Trustees of The Gerald Robert Gerard and Shirley Gerard Revocable Trust dated 9/24/98 transfers and assigns to DM Mortgage Investors, LLC, a Nevada Liability Company as to an undivided 25,000/1,800,000th interest, recorded October 16, 2000 as Entry No. 81531:2000, Utah County Recorder's Office, Utah.

Assignment of Deed of Trust wherein David John Wall assigns and transfers to DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 25,000/1,800,000th interest, by Assignment of Deed of Trust, dated September 27, 2000 and recorded October 26, 2000 as Entry No. 84685:2000, Utah County Recorder's Office, Utah.

5. The land referred to in this policy is located in Utah and is described as follows:

Beginning at the South quarter corner of Section 30, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence South 89° 57' 05" West 1473.81 feet; thence South 21° 53' 28" West 42.70 feet; thence North 89° 57' 33" West 1063.40 feet; thence North 89° 36' 51" West 563.32 feet; thence North 11° 59' 43" East 1072.13 feet; thence along the arc of a 397.00 foot radius curve to the right 165.44 feet (central angle = 23° 52' 39"), the chord of which bears North 23° 56' 03" East 164.25 feet; thence North 35° 52' 22" East 1515.75 feet; thence along the arc of a 497.00 foot radius curve to the right 413.49 feet (central angle = 47° 40' 06"), the chord of which bears North 59° 49' 25" East 401.67 feet; thence North 83° 32' 28" East 498.77 feet; thence South 39° 41' 56" East 1718.28 feet; thence South 00° 03' 10" West 1327.42 feet to the point of beginning.

SCHEDULE B - PART I

EXCEPTIONS FROM COVERAGE

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) which arise by reason of:

PART I

1. General Property Taxes for the year 2000 and subsequent years. Taxes for the year 1999 have been paid in the amount of \$93.76 for Tax Serial No. 58:048:0002. New Tax Serial No. will be 58:048:0033 and 58:040:0149 (Said property lies within Greenbelt.) (Current - None now due and payable.)
2. This property lies within the boundaries of Eagle Mountain City and is subject to all charges and assessments levied thereunder. (A check was made and none were found.)
3. Special Improvement District dated August 11, 1998, in favor of The Town of Eagle Mountain, recorded August 18, 1998, as Entry No. 82982, in Book 4742, at Page 281, and revised in Resolution No. 02-99 as The Eagle Mountain Special Improvement District No. 98-1, recorded May 7, 1999 as Entry No. 53845, in Book 5078, at Page 854, Utah County Recorder's Office, Utah. (Current - None now due and payable.)
4. No liability is assumed for any review and change in the assessment of subject property for agricultural use pursuant to Chapter 80, Laws of Utah 1969 (Greenbelt Act) not of record in the Office of the County Recorder.
5. Excepting all oil, gas and mineral rights.
6. No liability is assumed for the loss or damage arising from the exercise of the mining and drilling rights and any other privileges and immunities of the owner of the mineral estate not covered by this report and subsequent policy.
7. Easement dated March 17, 1980, wherein Utah Power and Light Company, a corporation, its successors in interest and assigns are granted a perpetual easement and right-of-way for the erection, operation, and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission and distribution circuits on and over said property, recorded March 4, 1981, as Entry No. 6227, in Book 1898, at Page 545, Utah County Recorder's Office, Utah.
8. That portion lying within the bounds of The Pony Express Parkway.

9. Easement dated September 23, 1991, wherein U. S. West Communications, Inc., a Colorado Corporation, its successors, assigns, lessees, licensees and agents, is granted a perpetual easement to construct, reconstruct, operate, maintain and remove such telecommunications facilities upon, over, under and across said property, recorded October 17, 1991, as Entry No. 41119, in Book 2844, at Page 695, Utah County Recorder's Office, Utah.

SCHEDULE B - PART II

EXCEPTIONS FROM COVERAGE

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

1. Deed of Trust in the amount of \$5,000.00, dated August 18, 2000 by and between The Ranches, L.C., a Utah Limited Liability Company, as Trustor, Century Title Company, as Trustee, and Vestin Mortgage, Inc., a Nevada corporation, as Beneficiary, recorded August 28, 2000 as Entry No. 67473:2000, Utah County Recorder's Office, Utah.
2. Subordination Agreement dated September 1, 2000, wherein Vestin Mortgage, inc, a Nevada corporation as Beneficiary on Trust Deed (Entry No. 67473:2000 subordinates their lien to the lien of Vestin Mortgage, Inc., a Nevada corporation shown as Trust Deed (Entry No. 67691:2000, said Subordination Agreement recorded October 13, 2000 as Entry No. 80996:2000, and corrected by that certain Affidavit to Correct recorded October 26, 2000 as Entry No. 84680:2000, Utah County Recorder's Office, Utah.
3. Personal Specific Guaranty, dated August 15, 2000 by and between Vestin Mortgage, Inc., a Nevada Corporation and The Ranches, L.C., a Utah limited liability company, recorded August 28, 2000 as Entry No. 67474:2000, Utah County Recorder's Office, Utah.
4. Agreement Regarding Hazardous Materials, dated August 15, 2000, by and between The Ranches, L.C., a Utah limited liability company, as Borrower, and Scott F. Kirkland and Phillip W. Nolen, as Guarantors, and Vestin Mortgage, Inc., a Nevada corporation, as Lender, recorded August 28, 2000 as Entry No. 67475:2000, Utah County Recorder's Office, Utah.

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$228.00

The Company hereby insures against loss which the Insured shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurance which the Company hereby gives:
 - (a) That there are no covenants, conditions, or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired;
 - (b) That there are no present violations on the land of any enforceable covenants, conditions, or restrictions;
 - (c) That, except as shown in Schedule B, there are no present encroachments onto the land of buildings, structures, or improvements located on adjoining lands.
2. Any future violations on the land of any covenants, conditions or restrictions occurring prior to acquisition of title to the estate or interest by the Insured, provided such violations result in impairment or loss of the lien of the mortgage referred to in Schedule A, or result in impairment or loss of title to the estate or interest if the Insured shall acquire the title in satisfaction of the indebtedness secured by the mortgage;
3. Any final court order or judgment requiring removal from any land adjoining said land of any encroachment shown in Schedule B.

Wherever in this endorsement any or all the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or restrictions contained in any lease.

No coverage is provided under this endorsement as to any covenants, condition, restriction or other provision relating to environmental protection.

The total liability of the Company under the policy and any endorsements therein shall not exceed, in the aggregate, the face amount of the policy and costs which the Company is obligated under the conditions and stipulations thereof to pay.

This endorsement is made a part of the policy and is subject to the schedules, conditions and stipulations therein, except as modified by the provisions hereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

The Ranches L.C., A Utah Limited Liability Company
CLTA Form 103.7 - Land Abuts Street

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$50.00

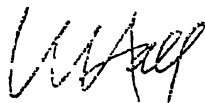
The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land to abut upon a physically open street known as

Ridge Route Road
Eagle Mountain, UT 84043

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____



Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

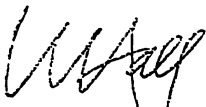
FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$228.00

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason for the failure of the land described as Parcel 58:048:0033, 58:040:0149, in Schedule A, Item No. 5 to constitute a lawfully created parcel according to the Subdivision Map Act (Section 66410, et seq., of the California Government Code) and local ordinances adopted pursuant thereto.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures:

Arthur K. Brown and Loretta Brown, Trustees of the Arthur K. Brown and Loretta Brown Revocable Living Trust dated 9/3/91 as to an undivided 15,000/1,800,000th interest and Daniel M. Tabas, a married man as his sole and separate property as to an undivided 100,000/1,800,000th interest and Joel T. Jacobs and Barbara Jacobs, Trustees of the Barbara and Joel Jacobs Trust dated 7/31/96 as to an undivided 25,000/1,800,000th interest and Raymond Mossman and Laura Irene Mossman, Trustees of the Raymond Mossman Family Trust dated 3/21/91 as to an undivided 10,000/1,800,000th interest and C. E. Langford, Trustee under a Declaration of Trust dated 10/25/97 as to an undivided 12,500/1,800,000th interest and Ronald Boris Severin, Trustee of the Severin Living Trust dated 1/19/00 as to an undivided 20,000/1,800,000th interest and Gerald Robert Gerard and Shirley Gerard, Co-Trustees of the Gerald Robert Gerard and Shirley Gerard Revocable Trust dated 9/24/98 as to an undivided 25,000/1,800,000th interest and Sutherland Corporation, a Delaware Corporation as to an undivided 1,192,500/1,800,000th interest and Steve Cottrell and Nancy Cottrell, husband and wife as joint tenants as to an undivided 50,000/1,800,000th interest and Alivce V. McConnell, an unmarried woman as to an undivided 25,000/1,800,000th interest and Daniel M. Tabas, Trustee for the Linda Jane Tabas Stempej Trust as to an undivided 100,000/1,800,000th interest and David John Wall, an unmarried man as to an undivided 25,000/1,800,000th interest and Glenn P. Hofmann and Ramona D. Hofmann, Trustees of the Glenn P. Hofmann and Ramona D. Hofmann Revocable Living Trust dated 3/7/97 as to an undivided 100,000/1,800,000th interest and Michael R. Sparks or Muriel S. Sparks, Trustees of the Sparks Family Trust dated 2/26/93 as to an undivided 25,000/1,800,000th interest and Robert Byron Lundberg and Marilyn T. Lundberg, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and William H. Frater, a single man as to an undivided 25,000/1,800,000th interest and Yolan Lipscher, Trustee of the Lipscher Living Trust dated 11/22/91 as to an undivided 25,000/1,800,000th interest

against loss or damage which such insured shall sustain by reason of any of the following

4. The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
5. The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: NONE
6. The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: NONE
7. The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: NONE

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures:

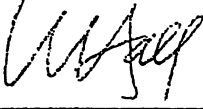
Kenneth H. Wyatt and Phyllis P. Wyatt, Trustees of the Kenneth H. Wyatt and Phyllis P. Wyatt Revocable Trust dated 6/4/86 as to an undivided 125,000/1,800,000th interest and Terrence B. Gleeson and Penny S. Gleeson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest Daniel L. Larson and Erin E. Larson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and Thomas r. Fischer and Cindy L. Fischer, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest

against loss or damage which such insured shall sustain by reason of any of the following

- (a) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (b) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (c) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (d) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

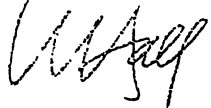
The Company hereby insures:

DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 732,500/1,800,000th interest
against loss or damage which such insured shall sustain by reason of any of the following

- (a) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (b) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (c) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (d) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

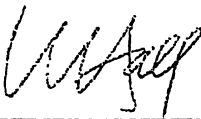
The Company hereby insures:

DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 992,500/1,800,000th interest
against loss or damage which such insured shall sustain by reason of any of the following

- (a) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (b) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (c) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (d) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

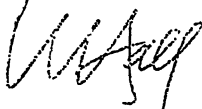
The Company hereby insures:

DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 25,000/1,800,000th interest
against loss or damage which such insured shall sustain by reason of any of the following

8. The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
9. The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
10. The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
11. The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

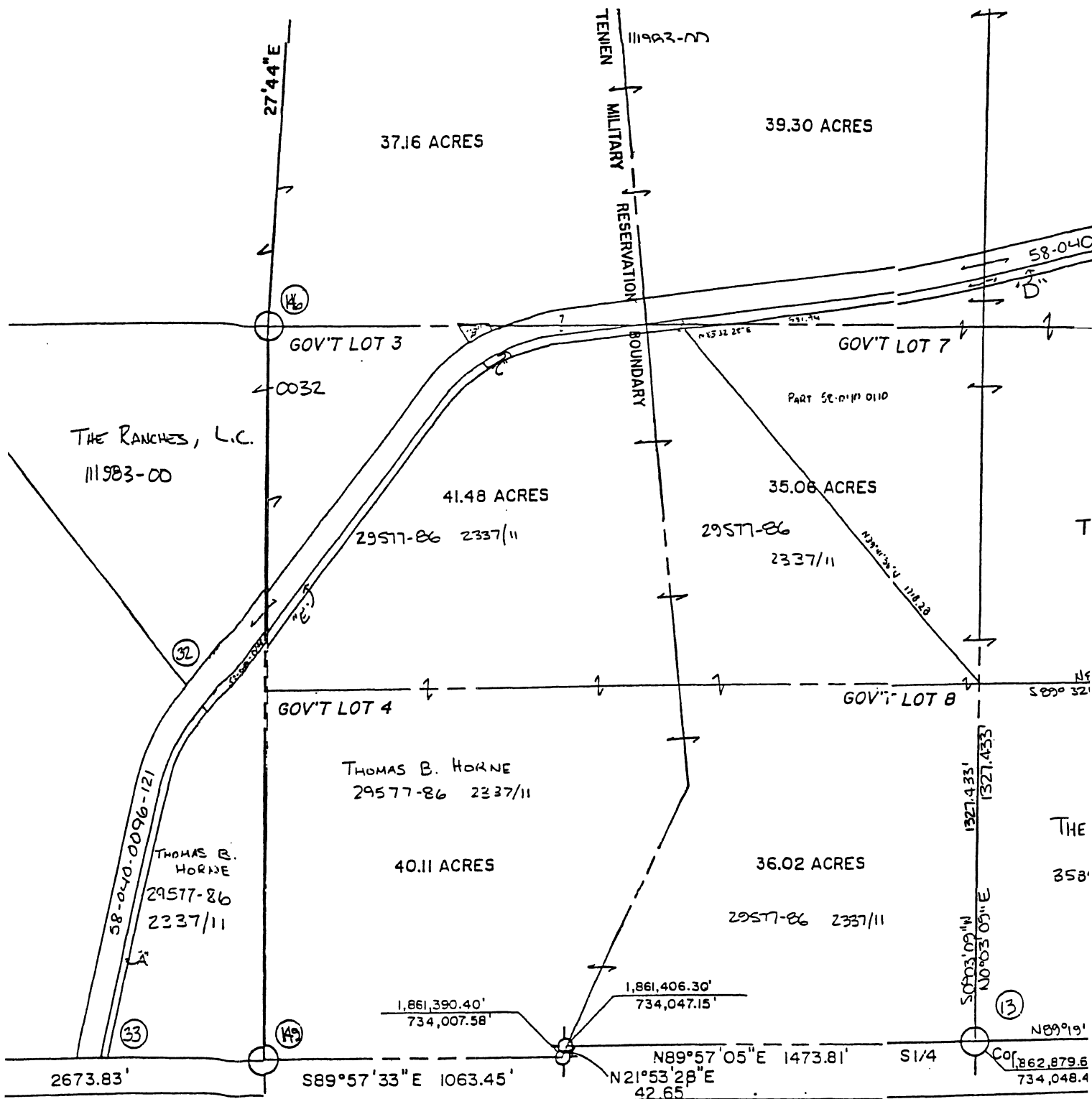
This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

Parcel 5



RDC TO MEET THE JULY 1, 1978
SECTION 59-5-(112,113,114;115)
STATE CODE AS INTERPRETED
PLAT STANDARDS COMMITTEE (SPSC)

NOTES: "A" (12) THOMAS, B HORNE 29-77-86
 "B" (33) THE RANCHES, L.C. 32339-00
 "C" (40) THE RANCHES, L.C. 32339-00
 "D" (47) THE RANCHES, L.C. 11/9/83-99

THIS MAP IS FURNISHED AS PART OF AN ENDORSEMENT
AND DOES NOT REPRESENT A SURVEY OF THE LAND OR
IMPLY ANY REPRESENTATIONS AS TO THE SIZE, AREA, OR
ANY OTHER FACTS RELATED TO THE LAND SHOWN
THEREON. IT IS FURNISHED STRICTLY FOR THE
PURPOSES OF THE ABOVE-ENTITLED MAP.

THIS DOCUMENT COPY IS FURNISHED AS AN ACCOMMODATION. THE COMPANY MAKES NO REPRESENTATIONS AS TO ITS EFFECT, SUFFICIENCY, COMPLETENESS OR ANY OTHER MATTERS THAT MIGHT BE REFERRED TO OR IMPLIED THEREIN. SHOULD YOU

EXHIBIT 5

Form No. 1056.92
(10/17/92) •
ALTA Loan Policy
Form 1



POLICY OF TITLE INSURANCE

ISSUED BY
CENTURY TITLE COMPANY
290 EAST 930 SOUTH
OREM, UTAH 84058
(801) 222-9292 • FAX (801) 222-0820

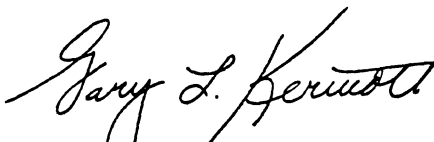

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
 - (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
 - (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
8. Any assessments for street improvements under construction or completed at Date of Policy which now have gained or hereafter may gain priority over the insured mortgage; or
9. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

First American Title Insurance Company

BY  PRESIDENT
ATTEST  SECRETARY

CW 3470452

following matters are expressly excluded from coverage of this policy: the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

- (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

Defects, liens, encumbrances, adverse claims or other matters:

- (a) created, suffered, assumed or agreed to by the insured claimant;
- (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
- (c) resulting in no loss or damage to the insured claimant;
- (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material or the extent

insurance is provided herein as to assessments for street improvements under construction or completed at Date of Policy); or
(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.
7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
 - (i) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
 - (ii) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
 - (iii) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
 - (a) to timely record the instrument of transfer; or
 - (b) of such recordation to impart notice to a purchaser for value or judgment or lien creditor.

CONDITIONS AND STIPULATIONS

DEFINITIONS OF TERMS.

The following terms when used in this policy mean:

(a) "insured" the insured named in Schedule A. The term "insured" also includes:

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving however, all rights and defenses as to any successor that the Company would have had against predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty binding or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations

(b) "insured claimant" an insured claiming loss or damage

(c) "knowledge" or "known" actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of public records as defined in this policy or any other records which impart constructive notice of matters affecting the land

(d) "land" the land described or referred to in Schedule A, and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or highways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy

(e) "mortgage" mortgage, deed of trust, trust deed, or other security instrument

(f) "public records" records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "marketability of the title" an alleged or apparent matter

or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage or any voluntary partial satisfaction or release of the insured mortgage to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may there be increased by accruing interest and advances made to protect the value of the insured mortgage and secured thereby, with interest thereon provided in no event shall the amount of insurance be greater than the amount of insurance stated in Schedule A

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations

10. LIABILITY NONCUMULATIVE.

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so reduced shall be deemed a payment under this policy.

11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy and endorsement of the payment unless the policy has been lost or destroyed in which case proof of loss or destruction shall be furnished to the satisfaction of the Company

(b) When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions and Stipulations, loss or damage shall be payable within 30 days thereafter

inveynance in lieu of foreclosure or other legal manner which
ies the lien of the insured mortgage, (ii) a transferee of the estate
st so acquired from an insured corporation, provided the transferee
rent or wholly-owned subsidiary of the insured corporation, and
orporate successors by operation of law and not by purchase,
to any rights or defenses the Company may have against any
sor insureds and (iii) any governmental agency or governmental
nality which acquires all or any part of the estate or interest
to a contract of insurance or guaranty insuring or guaranteeing
tedness secured by the insured mortgage

(c) After Conveyance of Title. The coverage of this policy shall
in force as of Date of Policy in favor of an insured only so long
insured retains an estate or interest in the land, or holds an
ness secured by a purchase money mortgage given by a
r from the insured, or only so long as the insured shall have
y reason of covenants of warranty made by the insured in any
r conveyance of the estate or interest. This policy shall not
in force in favor of any purchaser from the insured of either (i)
or interest in the land, or (ii) an indebtedness secured by a
money mortgage given to the insured

Amount of Insurance. The amount of insurance after the
n or after the conveyance shall in neither event exceed the least

The amount of insurance stated in Schedule A

(i) the amount of the principal of the indebtedness secured by
d mortgage as of Date of Policy, interest thereon, expenses of
; amounts advanced pursuant to the insured mortgage to assure
e with laws or to protect the lien of the insured mortgage prior
of acquisition of the estate or interest in the land and secured
d reasonable amounts expended to prevent deterioration of
nts but reduced by the amount of all payments made, or
l the amount paid by any governmental agency or govern-
mentality, if the agency or instrumentality is the insured
l the acquisition of the estate or interest in satisfaction of its
ontract or guaranty

ICE OF CLAIM TO BE GIVEN BY INSURED MANT.

nsured shall notify the Company promptly in writing (i) in case
tion as set forth in Section 4(a) below, (ii) in case knowledge
to an insured hereunder of any claim of title or interest which
o the title to the estate or interest or the lien of the insured
s insured, and which might cause loss or damage for which
y may be liable by virtue of this policy, or (iii) if title to the
rest or the lien of the insured mortgage as insured is rejected
able. If prompt notice shall not be given to the Company, then
ured all liability of the Company shall terminate with regard
r or matters for which prompt notice is required provided,
t failure to notify the Company shall in no case prejudice the
r insured under this policy unless the Company shall be
y the failure and then only to the extent of the prejudice

USE AND PROSECUTION OF ACTIONS, DUTY OF IED CLAIMANT TO COOPERATE.

on written request by the insured and subject to the options
Section 6 of these Conditions and Stipulations the Company,
ist and without unreasonable delay shall provide for the
insured in litigation in which any third party asserts a claim
title or interest as insured but only as to those stated causes
ying a defect, lien or encumbrance or other matter insured
policy. The Company shall have the right to select counsel
subject to the right of the insured to object for reasonable
esent the insured as to those stated causes of action and
able for and will not pay the fees of any other counsel. The
not pay any fees, costs or expenses incurred by the insured
of those causes of action which allege matters not insured
policy.

Company shall have the right at its own cost to institute
any action or proceeding or to do any other act which in
be necessary or desirable to establish the title to the estate
re lien of the insured mortgage, as insured, or to prevent
or damage to the insured. The Company may take any
ion under the terms of this policy, whether or not it shall
nder and shall not thereby concede liability or waive any
s policy. If the Company shall exercise its rights under this
all do so diligently

never the Company shall have brought an action or
fense as required or permitted by the provisions of this
pany may pursue any litigation to final determination by
etent jurisdiction and expressly reserves the right, in its
to appeal from any adverse judgment or order

cases where this policy permits or requires the Company
provide for the defense of any action or proceeding, the
cure to the Company the right to so prosecute or provide
ction or proceeding, and all appeals therein, and permit
use, at its option, the name of the insured for this purpose
sted by the Company, the insured, at the Company's
ive the Company all reasonable aid (i) in any action or
uring evidence, obtaining witnesses, prosecuting or
hon or proceeding, or effecting settlement and (ii) in any
which in the opinion of the Company may be necessary

policy together with any costs, attorneys fees and expenses incurred by
the insured claimant, which were authorized by the Company, up to the
time of payment or tender of payment and which the Company is obligated
to pay, or

(ii) to purchase the indebtedness secured by the insured
mortgage for the amount owing thereon together with any costs, attorneys'
fees and expenses incurred by the insured claimant which were authorized
by the Company up to the time of purchase and which the Company is
obligated to pay.

If the Company offers to purchase the indebtedness as herein
provided the owner of the indebtedness shall transfer, assign, and convey
the indebtedness and the insured mortgage, together with any collateral
security, to the Company upon payment therefor

Upon the exercise by the Company of either of the options provided
for in paragraphs a(i) or (ii) all liability and obligations to the insured under
this policy other than to make the payment required in those paragraphs,
shall terminate including any liability or obligation to defend, prosecute,
or continue any litigation, and the policy shall be surrendered to the
Company for cancellation

**(b) To Pay or Otherwise Settle With Parties Other than the Insured
or With the Insured Claimant**

(i) to pay or otherwise settle with other parties for or in the name
of an insured claimant any claim insured against under this policy together
with any costs, attorneys' fees and expenses incurred by the insured
claimant which were authorized by the Company up to the time of payment
and which the Company is obligated to pay, or

(ii) to pay or otherwise settle with the insured claimant the loss
or damage provided for under this policy together with any costs,
attorneys' fees and expenses incurred by the insured claimant which were
authorized by the Company up to the time of payment and which the
Company is obligated to pay

Upon the exercise by the Company of either of the options provided
for in paragraphs b(i) or (ii), the Company's obligations to the insured
under this policy for the claimed loss or damage other than the payments
required to be made, shall terminate including any liability or obligation
to defend, prosecute or continue any litigation

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss
or damage sustained or incurred by the insured claimant who has suffered
loss or damage by reason of matters insured against by this policy and
only to the extent herein described

**(a) The liability of the Company under this policy shall not exceed
the least of**

(i) the amount of insurance stated in Schedule A, or, if
applicable the amount of insurance as defined in Section 2(c) of these
Conditions and Stipulations,

(ii) the amount of unpaid principal indebtedness secured by the
insured mortgage as limited or provided under Section 8 of these
Conditions and Stipulations or as reduced under Section 9 of these
Conditions and Stipulations at the time the loss or damage insured against
by this policy occurs, together with interest thereon, or

(iii) the difference between the value of the insured estate or
interest as insured and the value of the insured estate or interest subject
to the defect, lien or encumbrance insured against by this policy

**(b) In the event the insured has acquired the estate or interest in
the manner described in Section 2(a) of these Conditions and Stipulations
or has conveyed the title, then the liability of the Company shall continue
as set forth in Section 7(a) of these Conditions and Stipulations**

**(c) The Company will pay only those costs, attorneys' fees and
expenses incurred in accordance with Section 4 of these Conditions and
Stipulations**

8. LIMITATION OF LIABILITY.

**(a) If the Company establishes the title, or removes the alleged
defect, lien or encumbrance, or cures the lack of a right of access to or
from the land, or cures the claim of unmarketability of title, or otherwise
establishes the lien of the insured mortgage, all as insured, in a reasonably
diligent manner by any method including litigation and the completion of
any appeals therefrom, it shall have fully performed its obligations with
respect to that matter and shall not be liable for any loss or damage caused
thereby**

**(b) In the event of any litigation, including litigation by the Company
or with the Company's consent, the Company shall have no liability for loss
or damage until there has been a final determination by a court of
competent jurisdiction, and disposition of all appeals therefrom, adverse
to the title or to the lien of the insured mortgage, as insured**

**(c) The Company shall not be liable for loss or damage to any
insured for liability voluntarily assumed by the insured in settling any claim
or suit without the prior written consent of the Company**

(d) The Company shall not be liable for

**(i) any indebtedness created subsequent to Date of Policy except
for advances made to protect the lien of the insured mortgage and secured
thereby and reasonable amounts expended to prevent deterioration of
improvements, or**

**(ii) construction loan advances made subsequent to Date of
Policy, except construction loan advances made subsequent to Date of
Policy for the purpose of financing in whole or in part the construction of
an improvement to the land which at Date of Policy were secured by the
insured mortgage and which the insured was and continued to be subject to**

person or property in respect to the claim had this policy not been issued
If requested by the Company, the insured claimant shall transfer to the
Company all rights and remedies against any person or property
necessary in order to perfect this right of subrogation. The insured
claimant shall permit the Company to sue, compromise or settle in the
name of the insured claimant and to use the name of the insured claimant
in any transaction or litigation involving these rights or remedies

If a payment on account of a claim does not fully cover the loss
of the insured claimant, the Company shall be subrogated to all rights and
remedies of the insured claimant after the insured claimant shall have
recovered its principal, interest, and costs of collection

(b) The Insured's Rights and Limitations.

Notwithstanding the foregoing the owner of the indebtedness
secured by the insured mortgage, provided the priority of the lien of the
insured mortgage or its enforceability is not affected, may release or
substitute the personal liability of any debtor or guarantor, or extend or
otherwise modify the terms of payment, or release a portion of the estate
or interest from the lien of the insured mortgage, or release any collateral
security for the indebtedness

When the permitted acts of the insured claimant occur and the
insured has knowledge of any claim of title or interest adverse to the title
to the estate or interest or the priority or enforceability of the lien of the
insured mortgage as insured the Company shall be required to pay only
that part of any losses insured against by this policy which shall exceed
the amount if any lost to the Company by reason of the impairment by
the insured claimant of the Company's right of subrogation

(c) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors
shall exist and shall include without limitation, the rights of the insured
to indemnities, guarantees other policies of insurance or bonds,
notwithstanding any terms or conditions contained in those instruments
which provide for subrogation rights by reason of this policy

The Company's right of subrogation shall not be avoided by
acquisition of the insured mortgage by an obligor (except an obligor
described in Section 1(a)(ii) of these Conditions and Stipulations) who
acquires the insured mortgage as a result of an indemnity guarantee, other
policy of insurance or bond and the obligor will not be an insured under
this policy, notwithstanding Section 1(a)(i) of these Conditions and
Stipulations

13. ARBITRATION.

Unless prohibited by applicable law, either the Company or the
insured may demand arbitration pursuant to the Title Insurance Arbitration
Rules of the American Arbitration Association. Arbitrable matters may
include but are not limited to, any controversy or claim between the
Company and the insured arising out of or relating to this policy, any
service of the Company in connection with its issuance or the breach of
a policy provision or other obligation. All arbitrable matters when the
Amount of Insurance is \$1,000,000 or less shall be arbitrated at the option
of either the Company or the insured. All arbitrable matters when the
Amount of Insurance is in excess of \$1,000,000 shall be arbitrated only
when agreed to by both the Company and the insured. Arbitration pursuant
to this policy and under the Rules in effect on the date the demand for
arbitration is made or, at the option of the insured, the Rules in effect at
Date of Policy shall be binding upon the parties. The award may include
attorneys' fees only if the laws of the state in which the land is located
permit a court to award attorneys' fees to a prevailing party. Judgment
upon the award rendered by the Arbitrator(s) may be entered in any court
having jurisdiction thereof

The laws of the situs of the land shall apply to an arbitration under
the Title Insurance Arbitration Rules

A copy of the Rules may be obtained from the Company upon
request

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

**(a) This policy together with all endorsements, if any, attached
hereto by the Company is the entire policy and contract between the
insured and the Company. In interpreting any provision of this policy, this
policy shall be construed as a whole**

**(b) Any claim of loss or damage, whether or not based on
negligence and which arises out of the status of the lien of the insured
mortgage or of the title to the estate or interest covered hereby or by any
action asserting such claim, shall be restricted to this policy**

**(c) No amendment of or endorsement to this policy can be made
except by a writing endorsed hereon or attached hereto signed by either
the President, a Vice President, the Secretary, an Assistant Secretary, or
validating officer or authorized signatory of the Company**

15. SEVERABILITY.

In the event any provision of this policy is held invalid or
unenforceable under applicable law, the policy shall be deemed not to
include that provision and all other provisions shall remain in full force
and effect

16. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement
in writing required to be furnished the Company shall include the number
of this policy and shall be addressed to the Company at 114 East Fifth
Street, Santa Ana, California 92701, or to the office which issued this
policy

FIRST AMERICAN



First American Title Insurance Company

POLICY
OF
TITLE
INSURANCE



Schedule A

POLICY NO.: 2701-A-49 JACKET NO.: CW3470452 FILE NO.: 7603
AMOUNT OF INSURANCE: \$ 1,965,000.00 PREMIUM AMOUNT: \$ 2,440.00
DATE OF POLICY: April 26, 2000 at 08:32 AM

1. NAME OF INSURED:

Capsource, Inc. dba Del Mar Mortgage, a Nevada Corporation, its successors and/or assigns as their interest may appear, its successors and/or assigns as their respective interests may appear.

2. The estate or interest in the land which is encumbered by the insured mortgage is:

Fee Simple

3. Title to the estate or interest in the land is vested in:

The Ranches, L.C., a Utah Limited Liability Company

4. The insured mortgage and assignments thereof, if any, are described as follows:

See Exhibit "A" attached hereto and by this reference made a part hereof.

5. The land referred to in this policy is located in Utah and is described as follows:

Beginning at the South quarter corner of Section 25, Township 5 South, Range 2 West, Salt Lake Base and Meridian; thence North 00° 50' 24" East 2709.61 feet; thence South 89° 31' 55" East 3356.62 feet; thence South 27° 44' 23" East 136.00 feet; thence along the arc of a 497.00 foot radius curve to the left 228.89 feet (central angle = 26° 23' 15"), the chord of which bears South 49° 04' 00" West 226.87 feet; thence South 35° 52' 22" West 1515.75 feet; thence along the arc of a 397.00 foot radius curve to the left 165.45 feet (central angle = 23° 52' 39"), the chord of which bears South 23° 56' 03" West 164.25 feet; thence South 11° 59' 43" West 1072.13 feet; thence North 89° 36' 51" West 2110.51 feet to the point of beginning.

LESS AND EXCEPTING the following: Beginning at a point which is South 5.30 feet and East 648.79 feet from the West quarter corner of Section 30, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence South 35° 16' 23" East 206.00 feet; thence along the arc of a 597.00 foot radius curve to the left 196.45 feet (central angle = 18° 51' 15"), the chord of which bears South 45° 18' 00" West 195.57 feet; thence South 35° 52' 22" West 1373.17 feet; thence North 38° 00' 30" West 1820.42 feet; thence South 89° 31' 55" East 1945.75 feet to the point of beginning.

Exhibit "A"

4. The insured mortgage and assignments thereof, if any are described as follows: (Cont'd)

Trust Deed in the amount of \$1,965,000.00, dated April 14, 2000, by and between The Ranches, L.C., a Utah Limited Liability Company, as Trustor, Century Title Company, as Trustee, and Capsource, Inc., dba Del Mar Mortgage, a Nevada Corporation, as Beneficiary, recorded April 26, 2000, as Entry No. 32340:2000, Utah County Recorder's Office, Utah.

Assignment of Deed of Trust dated April 25, 200, wherein the above Trust Deed (Entry No. 32340:2000) was assigned to: James Douglas Joslin, a single man as to an undivided \$28,000.00/\$1,965,000.00th interest and, William F. Knight, Jr., a married man as his sole and separate property as to an undivided \$30,000.00/\$1,965,000.00th interest and, Daniel M. Tabas, a married man as his sole and separate property as to an undivided \$250,000.00/\$1,965,000.00th interest and, David Lawrence, Trustee of the Diane Joyce Lawrence Trust dated 8/23/96 as to an undivided \$20,000.00/\$1,965,000.00th interest and, David W. Brown and Patsy B. Brown, husband and wife as joint tenants as to an undivided \$19,957.98/\$1,965,000.00th interest, and Eleanor T. Brown, a widow and Deborah M. Brown, a single woman as joint tenants as to an undivided \$11,051.26/\$1,965,000.00th interest and, Erwin F. Mueller and Diane Mueller, husband and wife as community property as to an undivided \$10,000.00/\$1,965,000.00th interest and, Fred Scott ITF Manfred Wolf as to an undivided \$5,000.00/\$1,965,000.00th interest and, Gregg B. Colton and Cindy H. Colton, husband and wife as joint tenants as to an undivided \$10,000.00/\$1,965,000.00th interest and, George J. Riesz and Ann L. Riesz, Trustees of the Riesz Family Trust as to an undivided \$10,000.00/\$1,965,000.00th interest and, John T. Swaine, Trustee of the John T. Swaine and J. Marilyn Swaine Revocable Family Trust dated 7/11/97 as to an undivided \$12,000.00/\$1,965,000.00th interest and, Maxine Thornblad, Trustee of the Maxine Thornblad Trust dated 10/25/89 as to an undivided \$22,692.30/\$1,965,000.00th interest and, Richard Fifield and Margaret Fifield, husband and wife as community property as to an undivided \$20,000.00/\$1,965,000.00th interest and, Robert Brown, an unmarried man and Janice Fae Brown-Tucker, a married woman as her sole and separate property as joint tenants as to an undivided \$10,000.00/\$1,965,000.00th interest and, Romolo R. Fusco, a widower as to an undivided \$20,000.00/\$1,965,000.00th interest, and Spectrum Capital, LLC, a California Limited Liability Company as to an undivided \$52,000.00/\$1,965,000.00th interest, and Bernard F. Pincus and Sally D. Pincus, Co-Trustees of the Bernard F. Pincus and Sally D. Pincus 1985 Family Trust Agreement as to an undivided \$12,000.00/\$1,965,000.00th interest, and Ronald O. Dixon, a married man as his sole and separate property and Estella O. Dixon, a widow, as joint tenants as to an undivided \$25,000.00/\$1,965,000.00th interest, and Michael J. Newel, Trustee of the John Kevin Baldwin Revocable Trust UTD 7/14/94 as to an undivided \$300,000.00/\$1,965,000.00th interest, and Clarence E. McDonnell, Trustee of the McDonnell Family Trust dated 1/22/92 as to an undivided \$34,000.00/\$1,965,000.00th interest, and Richard Bohn and Alice Bohn, Trustees of The Bohn Family Trust as to an undivided \$10,000.00/\$1,965,000.00th interest, and Harvey D. Ader and Marjorie M. Ader, Co-Trustees of the Ader Family Trust dated 1/8/98 as to an undivided \$5,000.00/\$1,965,000.00th interest, and Rosemary Carole Swan, Trustee of the Rosemary C. Swan Separate Property Trust dated 7/30/99 as to an undivided \$58,909.21/\$1,965,000.00th interest, and Leighton E. Gendron, Jr., an unmarried man and Nancy I. Dumais, a married woman as her sole and separate property as joint tenants as to an undivided \$32,750.00/\$1,965,000.00th interest, and Anthony J. Parzanese, Sr. and Anna V. Parzanese, husband and wife as joint tenants as to an undivided \$10,000.00/\$1,965,000.00th interest, and Milton Grossberg, a widower as to an undivided \$35,000.00/\$1,965,000.00th interest. Said Assignment of Trust Deed recorded May 8, 2000, as Entry No. 36185:2000, Utah County Recorder's Office, Utah

Assignment of Deed of Trust dated May 10, 2000, wherein the above Trust Deed (Entry No. 32340:2000) was assigned to: Mary Jean Ignacio, Trustee of the MJI Trust dated 2/24/99 as to an undivided 20,000/1,965,000th interest, and Joseph Dawson and Verla Dawson, Trustees of the Dawson Family Trust as to an undivided 22,000/1,965,000th interest, and Bruce L. Dawson, a single man as to an undivided 20,000/1,965,000th interest and Tom Townsend, an unmarried man as to an undivided 18,764.31/1,965,000th interest, and William R. Howell and Joyce M. Howell, Trustees of the Howell 1993 Trust dated 7/19/93 as to an undivided 25,000/1,965,000th interest and Les W. Olerich and Leslie E. Olerich, husband and wife as joint tenants as to an undivided 10,000/1,965,000th interest and Eleanor T. Brown, a widow and Deborah M. Brown, a single woman as joint tenants as to an undivided 169.91/1,965,000th interest, and Calvin Bettencourt and Mabel Bettencourt, husband and wife as community property as to an undivided 11,003.20/1,965,000th interest, and Robert A. Fitzner, Jr., a married man as his sole and separate property as to an undivided 40,505.77/1,965,000th interest and Norman E. McKenney and Ilene D. McKenney, husband and wife as joint tenants as to an undivided 10,172.32/1,965,000th interest and Louella K. Hitchcock, a widow as to an undivided

Exhibit "A"

4. The insured mortgage and assignments thereof, if any are described as follows: (Cont'd)

30,000/1,965,000th interest, and John E. Edwards, Trustee of the John E. Edwards Trust dated 2/21/91 as to an undivided 8,802.56/1,965,000th interest, and First Trust Company of Onaga, N.A. FBO Imogene M. Jones, IRA as to an undivided 23,500/1,965,000th interest, and Stephen T. Lydon, a single man as to an undivided 30,000/1,965,000th interest, and Robert W. O'Krakel and Terry K. O'Krakel, husband and wife as joint tenants as to an undivided 25,000/1,965,000th interest, and Richard Donovan and Mieko Donovan, husband and wife as joint tenants as to an undivided 20,000/1,965,000th interest and First Trust Company of Onaga, N.A. FBO Robert H. Jones, IRA as to an undivided 50,000/1,965,000th interest, and Dale C. Frosch and Christine Frosch, husband and wife as joint tenants as to an undivided 50,000/1,965,000th interest. Said Assignment of Deed of Trust recorded June 13, 2000 as Entry No. 46506:2000, Utah County Recorder's Office, Utah.

Assignment of Deed of Trust dated June 9, 2000, wherein the above Trust Deed (Entry 32340:2000) was assigned to: Frank P. Oeschger, Trustee of the Oeschger Survivor Trust dated 1/24/85 as to an undivided 50,000/1,965,000th interest, and Spectrum Capital, LLC, a California Limited Liability Company as to an undivided 50,000/1,965,000th interest and Gerald Verchick and Tamilyn Verchick, husband and wife as joint tenants as to an undivided 30,000/1,965,000th interest, and Steven F. Miller and Margaret E. Miller, husband and wife as joint tenants as to an undivided 20,000/1,965,000th interest, and John V. Bilello, a single man as to an undivided 15,000/1,965,000th interest, and Eleanor T. Brown, a widow and Deborah M. Brown, a single woman as joint tenants as to an undivided 1,212.35/1,965,000th interest, and James Anderson, a single man as to an undivided 45,000/1,965,000th interest and John E. Edwards, Trustee of The John E. Edwards Trust dated 2/21/91, as to an undivided 1,197.44/1,965,000th interest, and Gary K. Andersen, a single man as to an undivided 15,000/1,965,000th interest. Said Assignment of Deed of Trust recorded June 13, 2000, as Entry No. 46507:2000, Utah County Recorder's Office, Utah.

SCHEDULE B - PART I

EXCEPTIONS FROM COVERAGE

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) which arise by reason of:

PART I

1. General Property Taxes for the year 2000 and subsequent years. Taxes for the year 1999 have been paid in the amount of \$93.76 under Base No. 58:048:0002 which includes this and other lands. New Tax Serial No. will be 58:048:0026 and 58:048:0027. (Current - None now due and payable.)
2. This property lies within the boundaries of Eagle Mountain City and is subject to all charges and assessments levied thereunder. (A check was made and none were found.)
3. No liability is assumed for any review and change in the assessment of subject property for agricultural use pursuant to Chapter 80, Laws of Utah 1969 (Greenbelt Act) not of record in the Office of the County Recorder.
4. Easement dated September 23, 1991, wherein U. S. West Communications, Inc., a Colorado Corporation, its successors, assigns, lessees, licensees and agents, is granted a perpetual easement to construct, reconstruct, operate, maintain and remove such telecommunications facilities upon, over, under and across said property, recorded October 17, 1991, as Entry No. 4119, in book 2844, at Page 695, Utah County Recorder's Office, Utah. (Affects the Southerly boundary line.)
5. Excepting all oil, gas and mineral rights.
6. No liability is assumed for the loss or damage arising from the exercise of the mining and drilling rights and any other privileges and immunities of the owner of the mineral estate not covered by this report and subsequent policy.
7. That portion within the bounds of The Poly Express Parkway.

SCHEDULE B - PART II

EXCEPTIONS FROM COVERAGE

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

1. Personal Specific Guaranty, dated April 14, 2000, by and between Capsource, Inc., dba Del Mar Mortgage, a Nevada Corporation, as Lender, and The Ranches, L.C., a Utah Limited Liability Company, as Borrower, recorded April 26, 2000, as Entry No. 32342:2000, Utah County Recorder's Office, Utah.
2. Agreement Regarding Hazardous Materials, dated April 14, 2000, by and between The Ranches, L.C., a Utah Limited Liability Company, as Borrower, Phillip W. Nolen and Scott F. Kirkland, as Guarantors, in favor of Del Mar Mortgage Inc., a Nevada Corporation, as Lender, recorded April 26, 2000, as Entry No. 32343:2000, Utah County Recorder's Office, Utah.

ENDORSEMENT

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$20.00

The Company hereby insures against loss which the Insured shall sustain by reason of any of the following matters:

- (E) Any incorrectness in the assurance which the Company hereby gives:
 - (a) That there are no covenants, conditions, or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired;
 - (B) That there are no present violations on the land of any enforceable covenants, conditions, or restrictions;
 - (C) That, except as shown in Schedule B, there are no present encroachments onto the land of buildings, structures, or improvements located on adjoining lands.
- (F) Any future violations on the land of any covenants, conditions or restrictions occurring prior to acquisition of title to the estate or interest by the Insured, provided such violations result in impairment or loss of the lien of the mortgage referred to in Schedule A, or result in impairment or loss of title to the estate or interest if the Insured shall acquire the title in satisfaction of the indebtedness secured by the mortgage;
- (G) Any final court order or judgment requiring removal from any land adjoining said land of any encroachment shown in Schedule B.

Wherever in this endorsement any or all the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or restrictions contained in any lease.

No coverage is provided under this endorsement as to any covenants, condition, restriction or other provision relating to environmental protection.

The total liability of the Company under the policy and any endorsements therein shall not exceed, in the aggregate, the face amount of the policy and costs which the Company is obligated under the conditions and stipulations thereof to pay.

This endorsement is made a part of the policy and is subject to the schedules, conditions and stipulations therein, except as modified by the provisions hereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

ENDORSEMENT

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures:

James Douglas Joslin, a single man as to an undivided \$28,000.00/\$1,965,000.00th interest and, William F. Knight, Jr., a married man as his sole and separate property as to an undivided \$30,000.00/\$1,965,000.00th interest and, Daniel M. Tabas, a married man as his sole and separate property as to an undivided \$250,000.00/\$1,965,000.00th interest and, David Lawrence, Trustee of the Diane Joyce Lawrence Trust dated 8/23/96 as to an undivided \$20,000.00/\$1,965,000.00th interest and, David W. Brown and Patsy B. Brown, husband and wife as joint tenants as to an undivided \$19,957.98/\$1,965,000.00th interest, and Eleanor T. Brown, a widow and Deborah M. Brown, a single woman as joint tenants as to an undivided \$11,051.26/\$1,965,000.00th interest and, Erwin F. Mueller and Diane Mueller, husband and wife as community property as to an undivided \$10,000.00/\$1,965,000.00th interest and, Fred Scott ITF Manfred Wolf as to an undivided \$5,000.00/\$1,965,000.00th interest and, Gregg B. Colton and Cindy H. Colton, husband and wife as joint tenants as to an undivided \$10,000.00/\$1,965,000.00th interest and, George J. Riesz and Ann L. Riesz, Trustees of the Riesz Family Trust as to an undivided \$10,000.00/\$1,965,000.00th interest and, John T. Swaine, Trustee of the John T. Swaine and J. Marilyn Swaine Revocable Family Trust dated 7/11/97 as to an undivided \$12,000.00/\$1,965,000.00th interest and, Maxine Thornblad, Trustee of the Maxine Thornblad Trust dated 10/25/89 as to an undivided \$22,692.30/\$1,965,000.00th interest and, Richard Fifield and Margaret Fifield, husband and wife as community property as to an undivided \$20,000.00/\$1,965,000.00th interest and, Robert Brown, an unmarried man and Janice Fae Brown-Tucker, a married woman as her sole and separate property as joint tenants as to an undivided \$10,000.00/\$1,965,000.00th interest and, Romolo R. Fusco, a widower as to an undivided \$20,000.00/\$1,965,000.00th interest, and Spectrum Capital, LLC, a California Limited Liability Company as to an undivided \$52,000.00/\$1,965,000.00th interest, and Bernard F. Pincus and Sally D. Pincus, Co-Trustees of the Bernard F. Pincus and Sally D. Pincus 1985 Family Trust Agreement as to an undivided \$12,000.00/\$1,965,000.00th interest, and Ronald O. Dixon, a married man as his sole and separate property and Estella O. Dixon, a widow, as joint tenants as to an undivided \$25,000.00/\$1,965,000.00th interest, and Michael J. Newel, Trustee of the John Kevin Baldwin Revocable Trust UTD 7/14/94 as to an undivided \$300,000.00/\$1,965,000.00th interest, and Clarence E. McDonnell, Trustee of the McDonnell Family Trust dated 1/22/92 as to an undivided \$34,000.00/\$1,965,000.00th interest, and Richard Bohn and Alice Bohn, Trustees of The Bohn Family Trust as to an undivided \$10,000.00/\$1,965,000.00th interest, and Harvey D. Ader and Marjorie M. Ader, Co-Trustees of the Ader Family Trust dated 1/8/98 as to an undivided \$5,000.00/\$1,965,000.00th interest, and Rosemary Carole Swan, Trustee of the Rosemary C. Swan Separate Property Trust dated 7/30/99 as to an undivided \$58,909.21/\$1,965,000.00th interest, and Leighton E. Gendron, Jr., an unmarried man and Nancy I. Dumais, a married woman as her sole and separate property as joint tenants as to an undivided \$32,750.00/\$1,965,000.00th interest, and Anthony J. Parzanese, Sr. and Anna V. Parzanese, husband and wife as joint tenants as to an undivided \$10,000.00/\$1,965,000.00th interest, and Milton Grossberg, a widower as to an undivided \$35,000.00/\$1,965,000.00th interest. Said Assignment of Trust Deed recorded May 8, 2000, as Entry No. 36185:2000, Utah County Recorder's Office, Utah

against loss or damage which such insured shall sustain by reason of any of the following

- (A) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments; *
- (B) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (C) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (D) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

ENDORSEMENT

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures:

Mary Jean Ignacio, Trustee of the MJI Trust dated 2/24/99 as to an undivided 20,000/1,965,000th interest, and Joseph Dawson and Verla Dawson, Trustees of the Dawson Family Trust as to an undivided 22,000/1,965,000th interest, and Bruce L. Dawson, a single man as to an undivided 20,000/1,965,000th interest and Tom Townsend, an unmarried man as to an undivided 18,764.31/1,965,000th interest, and William R. Howell and Joyce M. Howell, Trustees of the Howell 1993 Trust dated 7/19/93 as to an undivided 25,000/1,965,000th interest and Les W. Olerich and Leslie E. Olerich, husband and wife as joint tenants as to an undivided 10,000/1,965,000th interest and Eleanor T. Brown, a widow and Deborah M. Brown, a single woman as joint tenants as to an undivided 169.91/1,965,000th interest, and Calvin Bettencourt and Mabel Bettencourt, husband and wife as community property as to an undivided 11,003.20/1,965,000th interest, and Robert A. Fitzner, Jr., a married man as his sole and separate property as to an undivided 40,505.77/1,965,000th interest and Norman E. McKenney and Ilene D. McKenney, husband and wife as joint tenants as to an undivided 10,172.32/1,965,000th interest and Louella K. Hitchcock, a widow as to an undivided 30,000/1,965,000th interest, and John E. Edwards, Trustee of the John E. Edwards Trust dated 2/21/91 as to an undivided 8,802.56/1,965,000th interest, and First Trust Company of Onaga, N.A. FBO Imogene M. Jones, IRA as to an undivided 23,500/1,965,000th interest, and Stephen T. Lydon, a single man as to an undivided 30,000/1,965,000th interest, and Robert W. O'Krakel and Terry K. O'Krakel, husband and wife as joint tenants as to an undivided 25,000/1,965,000th interest, and Richard Donovan and Mieke Donovan, husband and wife as joint tenants as to an undivided 20,000/1,965,000th interest and First Trust Company of Onaga, N.A. FBO Robert H. Jones, IRA as to an undivided 50,000/1,965,000th interest, and Dale C. Frosch and Christine Frosch, husband and wife as joint tenants as to an undivided 50,000/1,965,000th interest. Said Assignment of Deed of Trust recorded June 13, 2000 as Entry No. 46506:2000, Utah County Recorder's Office, Utah.

against loss or damage which such insured shall sustain by reason of any of the following

- (A) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (B) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (C) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (D) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

The Ranches L C., A Utah Limited Liability Company
CLTA Form 104 - Assignment of Trust Deed

ENDORSEMENT

POLICY NO.: 2701-A-49 JACKET NO.: CW3470452 FILE NO.: 7603

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures

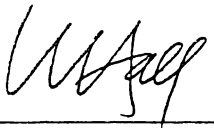
Assignment of Deed of Trust dated June 9, 2000, wherein the above Trust Deed (Entry 32340 2000) was assigned to Frank P Oeschger, Trustee of the Oeschger Survivor Trust dated 1/24/85 as to an undivided 50,000/1,965,000th interest, and Spectrum Capital, LLC, a California Limited Liability Company as to an undivided 50,000/1,965,000th interest and Gerald Verchick and Tamilyn Verchick, husband and wife as joint tenants as to an undivided 30,000/1,965,000th interest, and Steven F Miller and Margaret E Miller, husband and wife as joint tenants as to an undivided 20,000/1,965,000th interest, and John V Bilello, a single man as to an undivided 15,000/1,965,000th interest, and Eleanor T Brown, a widow and Deborah M Brown, a single woman as joint tenants as to an undivided 1,212 35/1,965,000th interest, and James Anderson, a single man as to an undivided 45,000/1,965,000th interest and John E Edwards, Trustee of The John E Edwards Trust dated 2/21/91, as to an undivided 1,197 44/1,965,000th interest, and Gary K Andersen, a single man as to an undivided 15,000/1,965,000th interest Said Assignment of Deed of Trust recorded June 13, 2000, as Entry No 46507 2000, Utah County Recorder's Office, Utah

against loss or damage which such insured shall sustain by reason of any of the following

- (A) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments,
- (B) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except **NONE**
- (C) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except **NONE**
- (D) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

Part: 58-040-0098-111

GOV'T LOT 2

THIS DOCUMENT COPY IF FURNISHED AS AN ACCOMMODATION THE COMPANY MAKES NO REPRESENTATIONS AS TO ITS EFFECT, SUFFICIENCY, COMPLETENESS OR ANY OTHER MATTERS THAT MIGHT BE REFERRED TO OR IMPLIED THEREIN. SHOULD YOU HAVE QUESTIONS REGARDING ITS EFFECT OR IMPACT YOU SHOULD CONSULT INDEPENDENT LEGAL COUNSEL.

37.16 ACRES

THIS DOCUMENT COPY IF FURNISHED AS AN ACCOMMODATION THE COMPANY MAKES NO REPRESENTATIONS AS TO ITS EFFECT, SUFFICIENCY, COMPLETENESS OR ANY OTHER MATTERS THAT MIGHT BE REFERRED TO OR IMPLIED THEREIN. SHOULD YOU HAVE QUESTIONS REGARDING ITS EFFECT OR IMPACT YOU SHOULD CONSULT INDEPENDENT LEGAL COUNSEL.

Part: 58-040-0098-111

GOV'T LOT 3

41.48 ACRES

29577-86 2337/11

Part: 58-040-0111-111

GOV'T LOT 4

THOMAS B. HORNE
29577-86 2337/11

40.11 ACRES

THOMAS B. HORNE
29577-86
2337/11

58-040-0096-121

THOMAS B. HORNE

29577-86 2337/11

Parcel #5

SE 1/4

857,654.30'
734,026.34'

(054) S89°36'51"E

2673.83'

S89°57'33"E 1063.45'

N89°5'
N21°53'28"
42.65'

RDC TO MEET THE JULY 1, 1978
SECTION 59-5-(112, 113, 114, 116)
STATE CODE AS INTERPRETED
PLAT STANDARDS COMMITTEE (SPSC)

NOTE:

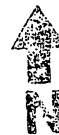


(W1/2 NE)

(E1/2 NE)



THIS MAP IS FURNISHED AS PART OF AN ENDORSEMENT AND DOES NOT REPRESENT A SURVEY OF THE LAND OR IMPLY ANY REPRESENTATIONS AS TO THE SIZE, AREA, OR ANY OTHER FACTS RELATED TO THE LAND SHOWN THEREON. IT IS FURNISHED STRICTLY FOR THE PURPOSES OF GENERALLY LOCATING THE LAND. THE DESCRIPTION FURNISHED IN SCHEDULE A OF TITLE POLICY SHOULD BE REFERRED TO FOR THE DESCRIPTION OF THE LAND COVERED THEREBY.



ORT
CRITTENDEN
MILITARY
RESERVATION
BOUNDARY

2°

(27)

(111)

1,861,390.40'
734,007.58'

1,861,406.36'
734,047.11'

irm No 1056 92
0/17/92)
LTA Loan Policy
orm 1



POLICY OF TITLE INSURANCE

ISSUED BY
CENTURY TITLE COMPANY
290 EAST 930 SOUTH
OREM, UTAH 84058
(801) 222-9292 • FAX (801) 222-0820

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
 - (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
 - (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance,
8. Any assessments for street improvements under construction or completed at Date of Policy which now have gained or hereafter may gain priority over the insured mortgage, or
9. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

First American Title Insurance Company

BY  PRESIDENT

ATTEST  SECRETARY

CW 3481202

Acquisition of Title. The coverage of this policy shall be as of Date of Policy in favor of (i) an insured who acquires the estate or interest in the land by foreclosure, trustee's sale in lieu of foreclosure or other legal manner which cures the insured mortgage; (ii) a transferee of the estate acquired from an insured corporation, provided the transferee is wholly-owned subsidiary of the insured corporation, and its successors by operation of law and not by purchase, or rights or defenses the Company may have against any insureds; and (iii) any governmental agency or governmental entity which acquires all or any part of the estate or interest by contract of insurance or guaranty insuring or guaranteeing coverage secured by the insured mortgage.

[illegible]

(c) **Amount of Insurance.** The amount of insurance required by this section or after the conveyance shall in neither event exceed the least amount stated in Schedule A.

(ii) the amount of the principal of the indebtedness secured by insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage prior to maturity, with laws or to protect the lien of the insured mortgage prior to time of acquisition of the estate or interest in the land and secured improvements, but reduced by the amount of all payments made; or

(iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured owner of the estate or interest in satisfaction of its insurance contract or guaranty.

3. NOTICE OF CLAIM TO BE GIVEN BY THE CLAIMANT.

The claimant shall notify the Company promptly in writing (i) in case of loss or damage to goods, (ii) in case of knowledge of a defect in goods, (iii) in case of knowledge of a defect in services, (iv) in case of knowledge of a defect in the quality of goods, (v) in case of knowledge of a defect in the quality of services, (vi) in case of knowledge of a defect in the quality of workmanship, (vii) in case of knowledge of a defect in the quality of materials, (viii) in case of knowledge of a defect in the quality of components, (ix) in case of knowledge of a defect in the quality of parts, (x) in case of knowledge of a defect in the quality of accessories, (xi) in case of knowledge of a defect in the quality of packaging, (xii) in case of knowledge of a defect in the quality of labeling, (xiii) in case of knowledge of a defect in the quality of documentation, (xiv) in case of knowledge of a defect in the quality of instructions, (xv) in case of knowledge of a defect in the quality of manuals, (xvi) in case of knowledge of a defect in the quality of software, (xvii) in case of knowledge of a defect in the quality of hardware, (xviii) in case of knowledge of a defect in the quality of firmware, (xix) in case of knowledge of a defect in the quality of drivers, (xx) in case of knowledge of a defect in the quality of utilities, (xxi) in case of knowledge of a defect in the quality of applications, (xxii) in case of knowledge of a defect in the quality of games, (xxiii) in case of knowledge of a defect in the quality of tools, (xxiv) in case of knowledge of a defect in the quality of equipment, (xxv) in case of knowledge of a defect in the quality of machinery, (xxvi) in case of knowledge of a defect in the quality of vehicles, (xxvii) in case of knowledge of a defect in the quality of aircraft, (xxviii) in case of knowledge of a defect in the quality of ships, (xxix) in case of knowledge of a defect in the quality of spacecraft, (xxx) in case of knowledge of a defect in the quality of satellites, (xxxi) in case of knowledge of a defect in the quality of rockets, (xxxii) in case of knowledge of a defect in the quality of missiles, (xxxiii) in case of knowledge of a defect in the quality of weapons, (xxxiv) in case of knowledge of a defect in the quality of explosives, (xxxv) in case of knowledge of a defect in the quality of chemicals, (xxxvi) in case of knowledge of a defect in the quality of biological agents, (xxxvii) in case of knowledge of a defect in the quality of nuclear material, (xxxviii) in case of knowledge of a defect in the quality of radioactive waste, (xxxix) in case of knowledge of a defect in the quality of hazardous waste, (xl) in case of knowledge of a defect in the quality of toxic substances, (xli) in case of knowledge of a defect in the quality of infectious agents, (xlii) in case of knowledge of a defect in the quality of pathogens, (xliii) in case of knowledge of a defect in the quality of viruses, (xliv) in case of knowledge of a defect in the quality of bacteria, (xlv) in case of knowledge of a defect in the quality of fungi, (xlvi) in case of knowledge of a defect in the quality of parasites, (xlvii) in case of knowledge of a defect in the quality of insects, (xlviii) in case of knowledge of a defect in the quality of animals, (xlix) in case of knowledge of a defect in the quality of plants, (l) in case of knowledge of a defect in the quality of foodstuffs, (li) in case of knowledge of a defect in the quality of beverages, (lii) in case of knowledge of a defect in the quality of medicines, (liii) in case of knowledge of a defect in the quality of cosmetics, (liv) in case of knowledge of a defect in the quality of toiletries, (lv) in case of knowledge of a defect in the quality of clothing, (lvi) in case of knowledge of a defect in the quality of footwear, (lvii) in case of knowledge of a defect in the quality of jewelry, (lviii) in case of knowledge of a defect in the quality of watches, (lx) in case of knowledge of a defect in the quality of clocks, (lxi) in case of knowledge of a defect in the quality of calculators, (lxii) in case of knowledge of a defect in the quality of cameras, (lxiii) in case of knowledge of a defect in the quality of telephones, (lxiv) in case of knowledge of a defect in the quality of radios, (lxv) in case of knowledge of a defect in the quality of record players, (lxvi) in case of knowledge of a defect in the quality of television sets, (lxvii) in case of knowledge of a defect in the quality of video cassette recorders, (lxviii) in case of knowledge of a defect in the quality of stereo systems, (lxix) in case of knowledge of a defect in the quality of hi-fi systems, (lxx) in case of knowledge of a defect in the quality of home appliances, (lxxi) in case of knowledge of a defect in the quality of office equipment, (lxxii) in case of knowledge of a defect in the quality of industrial machinery, (lxxiii) in case of knowledge of a defect in the quality of agricultural machinery, (lxxiv) in case of knowledge of a defect in the quality of construction equipment, (lxxv) in case of knowledge of a defect in the quality of mining equipment, (lxxvi) in case of knowledge of a defect in the quality of transportation equipment, (lxxvii) in case of knowledge of a defect in the quality of communication equipment, (lxxviii) in case of knowledge of a defect in the quality of electronic equipment, (lxxix) in case of knowledge of a defect in the quality of computer equipment, (lxxx) in case of knowledge of a defect in the quality of scientific equipment, (lxxxi) in case of knowledge of a defect in the quality of medical equipment, (lxxxii) in case of knowledge of a defect in the quality of dental equipment, (lxxxiii) in case of knowledge of a defect in the quality of veterinary equipment, (lxxxiv) in case of knowledge of a defect in the quality of laboratory equipment, (lxxxv) in case of knowledge of a defect in the quality of research equipment, (lxxxvi) in case of knowledge of a defect in the quality of development equipment, (lxxxvii) in case of knowledge of a defect in the quality of production equipment, (lxxxviii) in case of knowledge of a defect in the quality of testing equipment, (lxxxix) in case of knowledge of a defect in the quality of inspection equipment, (lxxxx) in case of knowledge of a defect in the quality of measurement equipment, (lxxxxi) in case of knowledge of a defect in the quality of calibration equipment, (lxxxxii) in case of knowledge of a defect in the quality of maintenance equipment, (lxxxxiii) in case of knowledge of a defect in the quality of repair equipment, (lxxxxiv) in case of knowledge of a defect in the quality of replacement parts, (lxxxxv) in case of knowledge of a defect in the quality of spare parts, (lxxxxvi) in case of knowledge of a defect in the quality of consumables, (lxxxxvii) in case of knowledge of a defect in the quality of accessories, (lxxxxviii) in case of knowledge of a defect in the quality of optional equipment, (lxxxxvix) in case of knowledge of a defect in the quality of upgrades, (lxxxxx) in case of knowledge of a defect in the quality of extensions, (lxxxxxi) in case of knowledge of a defect in the quality of add-ons, (lxxxvii) in case of knowledge of a defect in the quality of plug-ins, (lxxxviii) in case of knowledge of a defect in the quality of modules, (lxxxvix) in case of knowledge of a defect in the quality of components, (lxxxv) in case of knowledge of a defect in the quality of parts, (lxxxvi) in case of knowledge of a defect in the quality of sub-assemblies, (lxxxvii) in case of knowledge of a defect in the quality of assemblies, (lxxxviii) in case of knowledge of a defect in the quality of units, (lxxxvix) in case of knowledge of a defect in the quality of systems, (lxxxv) in case of knowledge of a defect in the quality of products, (lxxxvi) in case of knowledge of a defect in the quality of services, (lxxxvii) in case of knowledge of a defect in the quality of support, (lxxxviii) in case of knowledge of a defect in the quality of training, (lxxxvix) in case of knowledge of a defect in the quality of documentation, (lxxxv) in case of knowledge of a defect in the quality of manuals, (lxxxvi) in case of knowledge of a defect in the quality of instructions, (lxxxvii) in case of knowledge of a defect in the quality of guides, (lxxxviii) in case of knowledge of a defect in the quality of tutorials, (lxxxvix) in case of knowledge of a defect in the quality of help files, (lxxxv) in case of knowledge of a defect in the quality of user interfaces, (lxxxvi) in case of knowledge of a defect in the quality of controls, (lxxxvii) in case of knowledge of a defect in the quality of displays, (lxxxviii) in case of knowledge of a defect in the quality of inputs, (lxxxvix) in case of knowledge of a defect in the quality of outputs, (lxxxv) in case of knowledge of a defect in the quality of errors, (lxxxvi) in case of knowledge of a defect in the quality of warnings, (lxxxvii) in case of knowledge of a defect in the quality of messages, (lxxxviii) in case of knowledge of a defect in the quality of notifications, (lxxxvix) in case of knowledge of a defect in the quality of alerts, (lxxxv) in case of knowledge of a defect in the quality of logs, (lxxxvi) in case of knowledge of a defect in the quality of reports, (lxxxvii) in case of knowledge of a defect in the quality of statistics, (lxxxviii) in case of knowledge of a defect in the quality of analytics, (lxxxvix) in case of knowledge of a defect in the quality of insights, (lxxxv) in case of knowledge of a defect in the quality of trends, (lxxxvi) in case of knowledge of a defect in the quality of patterns, (lxxxvii) in case of knowledge of a defect in the quality of anomalies, (lxxxviii) in case of knowledge of a defect in the quality of outliers, (lxxxvix) in case of knowledge of a defect in the quality of deviations, (lxxxv) in case of knowledge of a defect in the quality of variances, (lxxxvi) in case of knowledge of a defect in the quality of fluctuations, (lxxxvii) in case of knowledge of a defect in the quality of instabilities, (lxxxviii) in case of knowledge of a defect in the quality of inconsistencies, (lxxxvix) in case of knowledge of a defect in the quality of contradictions, (lxxxv) in case of knowledge of a defect in the quality of conflicts, (lxxxvi) in case of knowledge of a defect in the quality of disputes, (lxxxvii) in case of knowledge of a defect in the quality of controversies, (lxxxviii) in case of knowledge of a defect in the quality of debates, (lxxxvix) in case of knowledge of a defect in the quality of arguments, (lxxxv) in case of knowledge of a defect in the quality of claims, (lxxxvi) in case of knowledge of a defect in the quality of demands, (lxxxvii) in case of knowledge of a defect in the quality of requests, (lxxxviii) in case of knowledge of a defect in the quality of suggestions, (lxxxvix) in case of knowledge of a defect in the quality of recommendations, (lxxxv) in case of knowledge of a defect in the quality of advice, (lxxxvi) in case of knowledge of a defect in the quality of opinions, (lxxxvii) in case of knowledge of a defect in the quality of views, (lxxxviii) in case of knowledge of a defect in the quality of beliefs, (lxxxvix) in case of knowledge of a defect in the quality of attitudes, (lxxxv) in case of knowledge of a defect in the quality of behaviors, (lxxxvi) in case of knowledge of a defect in the quality of actions, (lxxxvii) in case of knowledge of a defect in the quality of decisions, (lxxxviii) in case of knowledge of a defect in the quality of choices, (lxxxvix) in case of knowledge of a defect in the quality of preferences, (lxxxv) in case of knowledge of a defect in the quality of interests, (lxxxvi) in case of knowledge of a defect in the quality of desires, (lxxxvii) in case of knowledge of a defect in the quality of needs, (lxxxviii) in case of knowledge of a defect in the quality of wants, (lxxxvix) in case of knowledge of a defect in the quality of requirements, (lxxxv) in case of knowledge of a defect in the quality of specifications, (lxxxvi) in case of knowledge of a defect in the quality of standards, (lxxxvii) in case of knowledge of a defect in the quality of norms, (lxxxviii) in case of knowledge of a defect in the quality of rules, (lxxxvix) in case of knowledge of a defect in the quality of regulations, (lxxxv) in case of knowledge of a defect in the quality of laws, (lxxxvi) in case of knowledge of a defect in the quality of decrees, (lxxxvii) in case of knowledge of a defect in the quality of orders, (lxxxviii) in case of knowledge of a defect in the quality of commands, (lxxxvix) in case of knowledge of a defect in the quality of directives, (lxxxv) in case of knowledge of a defect in the quality of instructions, (lxxxvi) in case of knowledge of a defect in the quality of guidelines, (lxxxvii) in case of knowledge of a defect in the quality of policies, (lxxxviii) in case of knowledge of a defect in the quality of procedures, (lxxxvix) in case of knowledge of a defect in the quality of protocols, (lxxxv) in case of knowledge of a defect in the quality of processes, (lxxxvi) in case of knowledge of a defect in the quality of workflows, (lxxxvii) in case of knowledge of a defect in the quality of routines, (lxxxviii) in case of knowledge of a defect in the quality of habits, (lxxxvix) in case of knowledge of a defect in the quality of customs, (lxxxv) in case of knowledge of a defect in the quality of traditions, (lxxxvi) in case of knowledge of a defect in the quality of customs, (lxxxvii) in case of knowledge of a defect in the quality of mores, (lxxxviii) in case of knowledge of a defect in the quality of manners, (lxxxvix) in case of knowledge of a defect in the quality of etiquette, (lxxxv) in case of knowledge of a defect in the quality of social norms, (lxxxvi) in case of knowledge of a defect in the quality of cultural values, (lxxxvii) in case of knowledge of a defect in the quality of ethical principles, (lxxxviii) in case of knowledge of a defect in the quality of moral codes, (lxxxvix) in case of knowledge of a defect in the quality of religious doctrines, (lxxxv) in case of knowledge of a defect in the quality of philosophical theories, (lxxxvi) in case of knowledge of a defect in the quality of scientific theories, (lxxxvii) in case of knowledge of a defect in the quality of mathematical models, (lxxxviii) in case of knowledge of a defect in the quality of physical laws, (lxxxvix) in case of knowledge of a defect in the quality of biological principles, (lxxxv) in case of knowledge of a defect in the quality of chemical reactions, (lxxxvi) in case of knowledge of a defect in the quality of geological formations, (lxxxvii) in case of knowledge of a defect in the quality of astronomical observations, (lxxxviii) in case of knowledge of a defect in the quality of meteorological data, (lxxxvix) in case of knowledge of a defect in the quality of climatological records, (lxxxv) in case of knowledge of a defect in the quality of oceanographic studies, (lxxxvi) in case of knowledge of a defect in the quality of paleontological findings, (lxxxvii) in case of knowledge of a defect in the quality of archaeological excavations, (lxxxviii) in case of knowledge of a defect in the quality of historical documents, (lxxxvix) in case of knowledge of a defect in the quality of literary works, (lxxxv) in case of knowledge of a defect in the quality of artistic creations, (lxxxvi) in case of knowledge of a defect in the quality of musical compositions, (lxxxvii) in case of knowledge of a defect in the quality of theatrical performances, (lxxxviii) in case of knowledge of a defect in the quality of cinematic productions, (lxxxvix) in case of knowledge of a defect in the quality of television broadcasts, (lxxxv) in case of knowledge of a defect in the quality of radio transmissions, (lxxxvi) in case of knowledge of a defect in the quality of newspaper articles, (lxxxvii) in case of knowledge of a defect in the quality of magazine features, (lxxxviii

The insured shall not be liable in Section 4(a) or otherwise for any litigation as set forth in Section 4(a) or otherwise, shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION INSURED CLAIMANT TO COOPERATE.

(a) Upon written demand by the insured, the Company shall provide for the defense of the insured in any action or suit brought against it, at its own cost and without unreasonable delay, shall provide a claim defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right to investigate, defend, settle or compromise, and prosecute any action or proceeding brought against it by or on behalf of insureds, and its opinion may be necessary or desirable to establish the time for payment of any claim, and its interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or defense, it shall be permitted by the provisions of this policy to compromise or settle the same, subject to the approval of the Board of Directors.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide for the defense of any action or proceeding, and all appeals therein, and permit the Company to appear in the action or proceeding in the name of the insured for this purpose.

(i) to pay or tender payment of the amount or amounts of any policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which ~~was~~ authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or to purchase the indebtedness secured by the insured together with any costs, attorneys' fees and expenses authorized

(ii) to purchase the mortgage for the amount owing thereon together with interest, fees and expenses incurred by the insured claimant which were advanced by the Company up to the time of purchase and which the Company is obligated to pay.

provided, the owner of the indebtedness shall be deemed to have assigned to the Company, as security, to the Company upon payment therefor, the indebtedness and the insured mortgage, together with any consideration or proceeds of the mortgage, and the Company shall be deemed to have accepted such assignment.

Upon the exercise of (i) or (ii), all liability and damages for which the Insured is or may be held liable shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

or With the Insured Claimant.

(i) to pay or reimburse the insured or insured claimant the loss of an insured claimant, attorneys' fees and expenses incurred by the insured or insured claimant with all costs, attorneys' fees and expenses incurred by the insured or insured claimant which were authorized by the Company up to the time of payment or reimbursement; or

(ii) to pay or otherwise settle with the insured claimant or claimants, together with any costs, or damage provided for under this policy, together with any costs, or attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Under this policy for the claimed loss or damage, other than the policy required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. **DETERMINATION AND EXTENT OF LIABILITY.** This policy is a contract of indemnity against actual loss sustained by the insured claimant.

or damage sustained or incurred by the insured against any third party for liability only to the extent herein described.

the least of:

(i) the amount of insurance as determined by the applicable Conditions and Stipulations;

(iii) the difference between the value of the insured estate or interest subject to this policy and the value of the insured estate or interest subject to the policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations and the title, then the liability of the Company shall continue

(c) The Company will pay only those costs, attorneys fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY.

(a) If the Company

comprance, or cu

from the land, or cures the claim of unmarketable title, or establishes the lien of the insured mortgage, all as insured, in a diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

or with the Company's consent, the Company shall not be liable for loss or damage to any property insured hereunder, or damage until there has been a final determination by a competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for any claim against it for damages or compensation for loss of or injury to property or for death or personal injury or for liability voluntarily assumed by the insured or for suit without the prior written consent of the Company.

(i) any indebtedness created subsequent to the Date of the mortgage and secured for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or

Policy, except construction loan advances made for the purpose of financing in whole or in part the construction of a building or other structure which at Date of Policy were secured by the mortgagor and which at Date of Policy continued to be obligated

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

Notwithstanding the foregoing, the priority of the mortgage secured by the insured mortgage, provided the priority of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds to the extent of the loss or damage caused by reason of this policy.

The Company's right of subrogation (except an oblig acquisition of the insured mortgage by an obligor (notwithstanding Section 1(a)(ii) of these Conditions and Stipulations) * described in Section 1(a)(ii) of these Conditions and Stipulations) * acquires the insured mortgage as a result of an indemnity, guarantee, or policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. Witnesses prohibited

Unless prohibited by applicable law, the insured may demand arbitration pursuant to the Rules of the American Arbitration Association. Arbitrable matters include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to the issuance or the service of the Company in connection with its insurance or the amount of insurance is \$1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters in excess of \$1,000,000 shall be arbitrated by both the Company and the insured, when agreed to by both the Company and the insured, under the Rules of arbitration is made or, at the option of the insured, the Rules of arbitration shall be binding upon the parties. The award of attorneys' fees only if the laws of the state in which the claim is pending permit a court to award attorneys' fees to a prevailing party upon the award rendered by the Arbitrator(s) may be entered by the court having jurisdiction thereof.

A copy of the Rules may be obtained from the ()
request.

14. **LIABILITY LIMITED TO THE POLICY ENTIRE CONTRACT.**
This policy together with all endorsements and attachments constitute the entire policy and contract.

(a) This policy, together with the policy or policies hereto by the Company is the entire policy, contract, agreement, and understanding between the insured and the Company. In interpreting any provision of this policy shall be construed as a whole.

negligence, and which arises out of a mortgage or of the title to the estate or interest covered by such claim, shall be restricted to action asserting such claim, shall be restricted to this action asserting such claim, shall be restricted to this action asserting such claim, shall be restricted to this

except by a writing endorsed hereon by the President, a Vice President, the Secretary, an authorized officer or authorized signatory of the Corporation.

is the event and

In the event any provision of this agreement is held to be unenforceable under applicable law, the parties agree that the provision shall be severed and the agreement shall survive and include that provision and all other provisions in full force and effect.

10. All notices required to be furnished

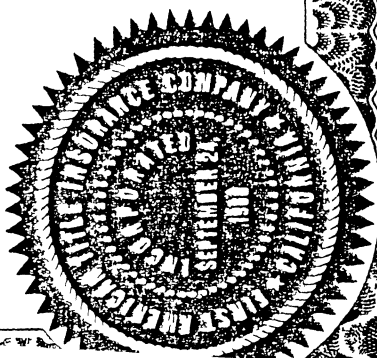
in writing required to be furnished to the insured under the terms of this policy and shall be addressed to the
Street, Santa Ana, California 92701, or to the
policy.

FIRST AMERICAN



First American Title Insurance Company

POLICY
OF
TITLE
INSURANCE



First American Title Insurance Company
The Ranches L.C., A Utah Limited Liability Company
Schedule A

FILE NO.: 8285

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

AMOUNT OF INSURANCE:

\$ 1,800,000.00

DATE OF POLICY:

August 28, 2000 at 04:49 PM

PREMIUM AMOUNT: \$ 2,275.00

1. NAME OF INSURED

Vestin Mortgage, Inc, a Nevada corporation, its successors and/or assigns as their respective interests may appear

2.

The estate or interest in the land which is encumbered by the insured mortgage is:
Fee Simple

3.

Title to the estate or interest in the land is vested in:

The Ranches, L C, a Utah Limited Liability Company

4.

The insured mortgage and assignments thereof, if any, are described as follows:

Deed of Trust in the amount of \$1,800,000 00, dated August 18, 2000 by and between The Ranches, L C, a Utah Limited Liability Company, as Trustor, Century Title Company, as Trustee, and Vestin Mortgage, Inc, a Nevada corporation, as Beneficiary, recorded August 28, 2000 as Entry No 67691 2000, Utah County Recorder's Office, Utah

Assigned to Arthur K Brown and Loretta Brown, Trustees of the Arthur K Brown and Loretta Brown Revocable Living Trust dated 9/3/91 as to an undivided 15,000/1,800,000th interest and Daniel M Tabas, a married man as his sole and separate property as to an undivided 100,000/1,800,000th interest and Joel T Jacobs and Barbara Jacobs, Trustees of the Barbara and Joel Jacobs Trust dated 7/31/96 as to an undivided 25,000/1,800,000th interest and Raymond Mossman and Laura Irene Mossman, Trustees of the Raymond Mossman Family Trust dated 3/21/91 as to an undivided 10,000/1,800,000th interest and C E Langford, Trustee under a Declaration of Trust dated 10/25/97 as to an undivided 12,500/1,800,000th interest and Ronald Boris Severin, Trustee of the Severin Living Trust dated 1/19/00 as to an undivided 20,000/1,800,000th interest and Shirley Gerard and Shirley Gerard, Co-Trustees of the Gerald Robert Gerard and Shirley Gerard Revocable Trust dated 9/24/98 as to an undivided 25,000/1,800,000th interest and Alivce V Sunderland Corporation, a Delaware Corporation as to an undivided 50,000/1,800,000th interest and and Nancy Cottrell, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and David John Wall, an unmarried McConnell, an unmarried woman as to an undivided 100,000/1,800,000th interest and Ramona D Hofmann, Trustees of the Linda Jane Tabas Stempel Trust as to an undivided 25,000/1,800,000th interest and Glenn P Hofmann and Ramona D Hofmann Revocable Living Trust dated 3/7/97 as to an undivided man as to an undivided 25,000/1,800,000th interest and Muriel S Sparks, Trustees of the Sparks Family Trust dated 100,000/1,800,000th interest and Michael R Sparks or Muriel S Sparks, Trustees of the Sparks Family Trust dated 2/26/93 as to an undivided 25,000/1,800,000th interest and Robert Byron Lundberg and Marilyn T Lundberg, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and William H Frater, a single man as to an undivided 25,000/1,800,000th interest and Yolana Lipscher, Trustee of the Lipscher Living Trust dated 11/22/91 as to an undivided 25,000/1,800,000th interest, by Assignment of Deed of Trust, dated August 18, 2000 and recorded August 28, 2000 as Entry No 67692 2000, Utah County Recorder's Office, Utah

Assignment of Deed of Trust, dated September 2, 2000, wherein Sunderland Corporation, a Delaware Corporation assigns and transfers all beneficial interest to Kenneth H Wyatt and Phyllis P Wyatt, Trustees of the Kenneth H Wyatt and Phyllis P Wyatt Revocable Trust dated 6/4/86 as to an undivided 125,000/1,800,000th interest and Terrence B Gleeson and Penny S Gleeson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and L Larson and Erin E Larson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and Thomas r Fischer and Cindy L Fischer, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest, recorded October 4, 2000 as Entry No 78343 2000, Utah County Recorder's Office, Utah

Assignment of Deed of Trust dated September 27, 2000, wherein Arthur K. Brown and Loretta Brown, Trustees of the Arthur K. Brown and Loretta Brown Revocable Living Trust dated 9/3/91 as to an undivided 15,000/1,800,000th interest and Daniel M. Tabas, a married man as his sole and separate property as to an undivided 100,000/1,800,000th interest and Joel T. Jacobs and Barbara Jacobs, Trustees of the Barbara and Joel Jacobs Trust dated 7/31/96 as to an undivided 25,000/1,800,000th interest and Kenneth H. Wyatt and Phyllis P. Wyatt, Trustees of the Kenneth H. Wyatt and Phyllis P. Wyatt Revocable Trust dated 6/4/86 as to an undivided 125,000/1,800,000th interest and Raymond Mossman and Laura Irene Mossman, Trustees of the Raymond Mossman Family Trust dated 3/21/91 as to an undivided 10,000/1,800,000th interest and Terrence B. Gleeson and Penny S. Gleeson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and C. E. Langford, Trustee under a Declaration of Trust dated 10/25/97 as to an undivided 12,500/1,800,000th interest and Ronald Boris Severin, Trustee of the Severin Living Trust dated 1/19/00 as to an undivided 20,000/1,800,000th interest and Steve Cottrell and Nancy Cottrell, husband and wife as joint tenants as to an undivided 50,000/1,800,000th interest and Alice V. McConnell, an unmarried woman as to an undivided 25,000/1,800,000th interest and Daniel M. Tabas, Trustee Linda Jane Tabas Stempel Trust as to an undivided 100,000/1,800,000th interest and Glenn P. Hofmann and Ramona D. Hofmann, Trustees of the Glenn P. Hofmann and Romana D. Hofmann Revocable Living Trust dated 3/7/97 as to an undivided 100,000/1,800,000th interest and Michael R. Sparks or Muriel S. Sparks, Trustees of the Sparks Family Trust dated 2/26/93 as to an undivided 25,000/1,800,000th interest and Robert Byron Lundberg and Marilyn T. Lundberg, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and William H. Frater, a single man as to an undivided 25,000/1,800,000th interest and Yolan Lipscher, Trustee of the Lipscher Living Trust dated 11/22/91 as to an undivided 25,000/1,800,000th interest and Thomas R. Fischer and Cindy L. Fischer, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest, assigns and transfers all beneficial interest to DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 732,500/1,800,000th interest, recorded October 16, 2000 as Entry No 81529 2000, Utah County Recorder's Office, Utah

Assignment of Deed of Trust, dated September 27, 2000, wherein Sunderland Corporation, a Delaware Corporation assigns and transfers all beneficial interest to DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 992,500/1,800,000th interest, recorded October 16, 2000 as Entry No 81530 2000, Utah County Recorder's Office, Utah

Assigned of Deed of Trust, dated September 27, 2000, wherein Gerald Robert Gerard and Shirley Gerard, Co-Trustees of The Gerald Robert Gerard and Shirley Gerard Revocable Trust dated 9/24/98 transfers and assigns to DM Mortgage Investors, LLC, a Nevada Liability Company as to an undivided 25,000/1,800,000th interest, recorded October 16, 2000 as Entry No 81531 2000, Utah County Recorder's Office, Utah

Assignment of Deed of Trust wherein David John Wall assigns and transfers to DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 25,000/1,800,000th interest, by Assignment of Deed of Trust, dated September 27, 2000 and recorded October 26, 2000 as Entry No 84685 2000, Utah County Recorder's Office, Utah

5. The land referred to in this policy is located in Utah and is described as follows:

Beginning at the South quarter corner of Section 30, Township 5 South, Range 1 West, Salt Lake Base and Meridian; thence South 89° 57' 05" West 1473.81 feet; thence South 21° 53' 28" West 42.70 feet; thence North 89° 57' 33" West 1063.40 feet; thence North 89° 36' 51" West 563.32 feet; thence North 11° 59' 43" East 1072.13 feet; thence along the arc of a 397.00 foot radius curve to the right 165.44 feet (central angle = 23° 52' 39"), the chord of which bears North 23° 56' 03" East 164.25 feet; thence North 35° 52' 22" East 1515.75 feet; thence along the arc of a 497.00 foot radius curve to the right 413.49 feet (central angle = 47° 40' 06"), the chord of which bears North 59° 49' 25" East 401.67 feet; thence North 83° 32' 28" East 498.77 feet; thence South 39° 41' 56" East 1718.28 feet; thence South 00° 03' 10" West 1327.42 feet to the point of beginning.

SCHEDULE B - PART I

EXCEPTIONS FROM COVERAGE

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) which arise by reason of:

PART I

1. General Property Taxes for the year 2000 and subsequent years. Taxes for the year 1999 have been paid in the amount of \$93.76 for Tax Serial No. 58:048:0002. New Tax Serial No. will be 58:048:0033 and 58:040:0149 (Said property lies within Greenbelt.) (Current - None now due and payable.)
2. This property lies within the boundaries of Eagle Mountain City and is subject to all charges and assessments levied thereunder. (A check was made and none were found.)
3. Special Improvement District dated August 11, 1998, in favor of The Town of Eagle Mountain, recorded August 18, 1998, as Entry No. 82982, in Book 4742, at Page 281, and revised in Resolution No. 02-99 as The Eagle Mountain Special Improvement District No. 98-1, recorded May 7, 1999 as Entry No. 53845, in Book 5078, at Page 854, Utah County Recorder's Office, Utah. (Current - None now due and payable.)
4. No liability is assumed for any review and change in the assessment of subject property for agricultural use pursuant to Chapter 80, Laws of Utah 1969 (Greenbelt Act) not of record in the Office of the County Recorder.
5. Excepting all oil, gas and mineral rights.
6. No liability is assumed for the loss or damage arising from the exercise of the mining and drilling rights and any other privileges and immunities of the owner of the mineral estate not covered by this report and subsequent policy.
7. Easement dated March 17, 1980, wherein Utah Power and Light Company, a corporation, its successors in interest and assigns are granted a perpetual easement and right-of-way for the erection, operation, and continued maintenance, repair, alteration, inspection, relocation and replacement of the electric transmission and distribution circuits on and over said property, recorded March 4, 1981, as Entry No. 6227, in Book 1898, at Page 545, Utah County Recorder's Office, Utah.
8. That portion lying within the bounds of The Pony Express Parkway.

9. Easement dated September 23, 1991, wherein U. S. West Communications, Inc., a Colorado Corporation, its successors, assigns, lessees, licensees and agents, is granted a perpetual easement to construct, reconstruct, operate, maintain and remove such telecommunications facilities upon, over, under and across said property, recorded October 17, 1991, as Entry No. 41119, in Book 2844, at Page 695, Utah County Recorder's Office, Utah.

SCHEDULE B - PART II

EXCEPTIONS FROM COVERAGE

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

1. Deed of Trust in the amount of \$5,000.00, dated August 18, 2000 by and between The Ranches, L.C., a Utah Limited Liability Company, as Trustor, Century Title Company, as Trustee, and Vestin Mortgage, Inc., a Nevada corporation, as Beneficiary, recorded August 28, 2000 as Entry No. 67473:2000, Utah County Recorder's Office, Utah.
2. Subordination Agreement dated September 1, 2000, wherein Vestin Mortgage, inc, a Nevada corporation as Beneficiary on Trust Deed (Entry No. 67473:2000 subordinates their lien to the lien of Vestin Mortgage, Inc., a Nevada corporation shown as Trust Deed (Entry No. 67691:2000, said Subordination Agreement recorded October 13, 2000 as Entry No. 80996:2000, and corrected by that certain Affidavit to Correct recorded October 26, 2000 as Entry No. 84680:2000, Utah County Recorder's Office, Utah.
3. Personal Specific Guaranty, dated August 15, 2000 by and between Vestin Mortgage, Inc., a Nevada Corporation and The Ranches, L.C., a Utah limited liability company, recorded August 28, 2000 as Entry No. 67474:2000, Utah County Recorder's Office, Utah.
4. Agreement Regarding Hazardous Materials, dated August 15, 2000, by and between The Ranches, L.C., a Utah limited liability company, as Borrower, and Scott F. Kirkland and Phillip W. Nolen, as Guarantors, and Vestin Mortgage, Inc., a Nevada corporation, as Lender, recorded August 28, 2000 as Entry No. 67475:2000, Utah County Recorder's Office, Utah.

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$228.00

The Company hereby insures against loss which the Insured shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurance which the Company hereby gives:
 - (a) That there are no covenants, conditions, or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired;
 - (b) That there are no present violations on the land of any enforceable covenants, conditions, or restrictions;
 - (c) That, except as shown in Schedule B, there are no present encroachments onto the land of buildings, structures, or improvements located on adjoining lands.
2. Any future violations on the land of any covenants, conditions or restrictions occurring prior to acquisition of title to the estate or interest by the Insured, provided such violations result in impairment or loss of the lien of the mortgage referred to in Schedule A, or result in impairment or loss of title to the estate or interest if the Insured shall acquire the title in satisfaction of the indebtedness secured by the mortgage;
3. Any final court order or judgment requiring removal from any land adjoining said land of any encroachment shown in Schedule B.

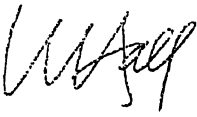
Wherever in this endorsement any or all the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or restrictions contained in any lease.

No coverage is provided under this endorsement as to any covenants, condition, restriction or other provision relating to environmental protection.

The total liability of the Company under the policy and any endorsements therein shall not exceed, in the aggregate, the face amount of the policy and costs which the Company is obligated under the conditions and stipulations thereof to pay.

This endorsement is made a part of the policy and is subject to the schedules, conditions and stipulations therein, except as modified by the provisions hereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$50.00

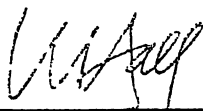
The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land to abut upon a physically open street known as

Ridge Route Road
Eagle Mountain UT 84043

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____



Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

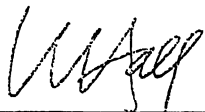
CHARGE: \$228.00

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason for the failure of the land described as Parcel 58:048:0033, 58:040:0149, in Schedule A, Item No. 5 to constitute a lawfully created parcel according to the Subdivision Map Act (Section 66410, et seq., of the California Government Code) and local ordinances adopted pursuant thereto.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____



Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures:

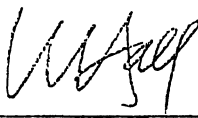
Arthur K. Brown and Loretta Brown, Trustees of the Arthur K. Brown and Loretta Brown Revocable Living Trust dated 9/3/91 as to an undivided 15,000/1,800,000th interest and Daniel M. Tabas, a married man as his sole and separate property as to an undivided 100,000/1,800,000th interest and Joel T. Jacobs and Barbara Jacobs, Trustees of the Barbara and Joel Jacobs Trust dated 7/31/96 as to an undivided 25,000/1,800,000th interest and Raymond Mossman and Laura Irene Mossman, Trustees of the Raymond Mossman Family Trust dated 3/21/91 as to an undivided 10,000/1,800,000th interest and C. E. Langford, Trustee under a Declaration of Trust dated 10/25/97 as to an undivided 12,500/1,800,000th interest and Ronald Boris Severn, Trustee of the Severn Living Trust dated 1/19/00 as to an undivided 20,000/1,800,000th interest and Gerald Robert Gerard and Shirley Gerard, Co-Trustees of the Gerald Robert Gerard and Shirley Gerard Revocable Trust dated 9/24/98 as to an undivided 25,000/1,800,000th interest and Sutherland Corporation, a Delaware Corporation as to an undivided 1,192,500/1,800,000th interest and Steve Cottrell and Nancy Cottrell, husband and wife as joint tenants as to an undivided 50,000/1,800,000th interest and Alivce V. McConnell, an unmarried woman as to an undivided 25,000/1,800,000th interest and Daniel M. Tabas, Trustee for the Linda Jane Tabas Stempel Trust as to an undivided 100,000/1,800,000th interest and David John Wall, an unmarried man as to an undivided 25,000/1,800,000th interest and Glenn P. Hofmann and Ramona D. Hofmann, Trustees of the Glenn P. Hofmann and Ramona D. Hofmann Revocable Living Trust dated 3/7/97 as to an undivided 100,000/1,800,000th interest and Michael R. Sparks or Murel S. Sparks, Trustees of the Sparks Family Trust dated 2/26/93 as to an undivided 25,000/1,800,000th interest and Robert Byron Lundberg and Marilyn T. Lundberg, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and William H. Frater, a single man as to an undivided 25,000/1,800,000th interest and Yolan Lipscher, Trustee of the Lipscher Living Trust dated 11/22/91 as to an undivided 25,000/1,800,000th interest

against loss or damage which such insured shall sustain by reason of any of the following

4. The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
5. The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
6. The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
7. The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures:


Kenneth H. Wyatt and Phyllis P. Wyatt, Trustees of the Kenneth H. Wyatt and Phyllis P. Wyatt Revocable Trust dated 6/4/86 as to an undivided 125,000/1,800,000th interest and Terrence B. Gleeson and Penny S. Gleeson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest Daniel L. Larson and Erin E. Larson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest and Thomas r. Fischer and Cindy L. Fischer, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest

against loss or damage which such insured shall sustain by reason of any of the following

- (a) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (b) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (c) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (d) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

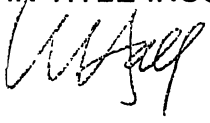
The Company hereby insures:

DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 732,500/1,800,000th interest
against loss or damage which such insured shall sustain by reason of any of the following

- (a) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (b) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (c) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (d) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures.

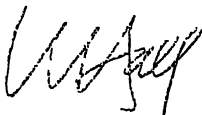
DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 992,500/1,800,000th interest
against loss or damage which such insured shall sustain by reason of any of the following

- (a) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments,
- (b) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except **NONE**
- (c) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except **NONE**
- (d) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____



Authorized Signatory

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

The Company hereby insures:

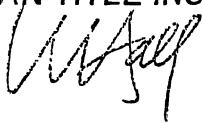
DM Mortgage Investors, LLC, a Nevada Liability Company as to an undivided 25,000/1,800,000th interest

against loss or damage which such insured shall sustain by reason of any of the following

- (a) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (b) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (c) The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
- (d) The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

[illegible]

NOTES: A" (12) THOMAS B HORNE 29377-86 233
 B" (32) THE RANCHES, L.C. 32339-00
 C" (40) THE RANCHES, L.C. 32339-00
 D" (47) THE RANCHES, L.C. 119A3-99



THIS DOCUMENT COPY IS FURNISHED AS AN ACCOMMODATION. THE COMPANY MAKES NO REPRESENTATIONS AS TO ITS EFFECT, SUFFICIENCY, COMPLETENESS OR ANY OTHER MATTERS THAT MIGHT BE REFERRED TO OR IMPLIED THEREIN. SHOULD YOU

ENDORSEMENT

POLICY NO.: 3192-A-49

JACKET NO.: CW3481202

FILE NO.: 8285

ISSUED BY

FIRST AMERICAN TITLE INSURANCE COMPANY

CHARGE: \$00.00

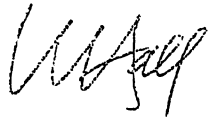
The Company hereby insures:

DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 25,000/1,800,000th interest
against loss or damage which such insured shall sustain by reason of any of the following

8. The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
9. The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
10. The existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy except: **NONE**
11. The existence of any federal tax lien or bankruptcy proceeding affecting the title to the estate or interest referred to in Schedule A shown by the public records, other than those shown in the policy, except: **NONE**

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

Authorized Signatory

EXHIBIT 6

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
John A. Snow (3025)
Cassie Wray (8290)
50 South Main Street, Suite 1600
Post Office Box 45340
Salt Lake City, Utah 84145-0340
Telephone: (801) 532-3333
Facsimile: (801) 534-0058
Attorneys for Plaintiff

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

| | |
|---|--|
| VESTIN MORTGAGE, INC., a Nevada corporation, Plaintiff, vs. FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, Defendants. | AFFIDAVIT OF DANIEL B. STUBBS Civil No.: 030912242 Judge: Frank G. Noel |
|---|--|

STATE OF NEVADA)
 ss
COUNTY OF CLARK)

Daniel B. Stubbs, being first duly sworn, deposes and says as follows:

1. I am over the age of 21 years, a resident of Clark County, Nevada, and I have personal knowledge of and involvement in the matters set forth hereafter.
2. I am Executive Vice President of Vestin Mortgage, Inc. ("Vestin"), the plaintiff in the above-captioned action, and I have been employed by Vestin since the beginning of the year 2000.

3. Vestin is in the business of making business and commercial loans, including loans to real estate developers located primarily in the western United States. The loans made by Vestin are always secured by real estate.

4. As part of my responsibilities at Vestin, I am directly involved in the documentation of loan transactions, and I am specifically involved in addressing and resolving title defects or issues with the real estate which will be used to secure the loans made by Vestin. In connection with all of the loans which Vestin makes, Vestin obtains a commitment for title insurance prior to the closing of a loan transaction, and a policy of title insurance subsequent to closing of the loan transaction. A loan policy is issued to a lender making a loan secured by a mortgage on a parcel of land. The policy insures against the invalidity or unenforceability of the lien of the mortgage and against loss or damage should the priority of the mortgage be other than is shown in the policy. The policy designates the vested owner of the estate or interest insured and excepts to those defects, liens and encumbrances which in the judgment of the insurer should appear in the policy. The insured is indemnified against loss or damage should matters exist which are not shown in the policy.

5. I have been employed in the title insurance industry in excess of 15 years as a title officer with various title insurance companies. As a result of my experience in the title insurance industry and my position with Vestin, I am familiar with title insurance industry practices and procedures. As a title officer, I regularly examined the public records that contain information affecting the title to real estate, and I prepared title commitments and title policies. The title commitment is prepared prior to the issuance of

a policy of title insurance. The company issuing the commitment conducts a search of the public records in order to determine the vesting of the subject real property and what liens encumbrances or other matters affect the property. This information is reduced to writing in the title commitment.

6. During the first part of the year 2000, Vestin was considering making a loan or loans to The Ranches, L.C. ("The Ranches"), which would be secured by real estate situated in the City of Eagle Mountain, Utah ("Eagle Mountain"). Vestin ultimately made loans to The Ranches. One of those loans was made on or about April 26, 2000, in the amount of \$1,965,000, and a second loan was made on or about August 28, 2000, in the amount of \$1,800,000 (jointly the "Loans"). The Loans were secured by trust deeds covering real property within the boundaries of Eagle Mountain.

7. As part of the documentation of the Loans and due diligence by Vestin, Vestin obtained title commitments, and subsequently title policies, issued by Century Title Company, located in Orem, Utah, on behalf of First American Title Insurance Company ("First American"). The title commitments set forth exceptions to title that would be included in the title policies, unless the title exception can be eliminated from the policies by means acceptable to the insurer.

8. In connection with the Loan, First American issued its ALTA Loan Policy of Title Insurance, Policy No. 3192-A-49, dated August 28, 2000 ("Policy No. 3192"), and ALTA Loan Policy of Title Insurance, Policy No. 2701-A-49, dated April 26, 2000 ("Policy No. 2701") (jointly the "Policies"). The Policies were based upon the title commitments previously provided to Vestin by Century Title Company, as explained

above. A copy of the Policies are attached hereto as Exhibit "A" and "B." The interest insured by First American under the Policies was Vestin's interest in the trust deeds securing the Loans.

9. To further protect the interest of Vestin in the trust deeds securing the Loans and to protect Vestin's assignees who participate in the Loans and who were assigned an interest in the trust deeds, Vestin obtained from First American Endorsement CLTA Form 104.

10. The CLTA Form 104 Endorsements were issued by First American after the Policies were issued. The CLTA Form 104 Endorsements are obtained by a lender which assigns an interest in or to a trust deed securing a loan. The endorsement provides the assignee of a mortgage or a deed of trust insured under an ALTA Loan Policy with assurances concerning (a) the validity of the assignment to evidence the transfer of the beneficial interest to the named assignee (b) subsisting real property tax or assessment liens (c) matters affecting the validity or priority of the insured mortgage or deed of trust lien; and (d) federal tax liens or bankruptcy proceedings affecting title to the estate or interest covered by the policy. The CLTA Form 104 Endorsement is effective as of the date of recordation of the assignment, or otherwise the assignee would not be afforded the specific assurances as provided for in the endorsement as of the recorded date.

Accordingly, as a general industry practice, a CLTA Form 104 Endorsement (which is a standard title insurance form) is dated as of the date they are issued. However, the CLTA Form 104 Endorsements issued by First American through Century Title Company and

incorporated as part of the Policies were not dated. Vestin has logged the date of issuance of each CLTA Form 104 endorsement issued in connection with the Policies.

11. As a general industry practice, a title commitment and title policy will disclose as exceptions to coverage all governmental entities or agencies that are empowered to assess or levy liens against the property, such as special improvement districts. In the case of a lender title insurance policy, this is especially important because such an assessment can reduce the available equity in the property securing a loan.

12. If the title commitment and Policies issued by First American to Vestin had disclosed the existence of the Eagle Mountain Special Improvement District 2000-1 ("Eagle Mountain SID"), and that the property securing the Loans was affected by Eagle Mountain SID, Vestin could have made an investigation to determine the potential assessments and obligations associated with the assessment. At the time the Loans were made, a special improvement district was disclosed in a title commitment, and Vestin did investigate the disclosure to determine that such special improvement district did not apply to the property securing the Loans.

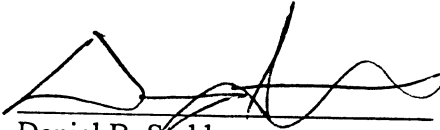
13. It is my understanding that Eagle Mountain adopted Assessment Ordinance No. 06-2001, which provides that in the event legal title to all or any portion of the property assessed by the Eagle Mountain SID is voluntarily transferred to another person or entity which is unrelated to the prior owner, the owner of the assessed property shall be required to prepay that portion of the assessment applicable to the transferred parcel. Accordingly, if Vestin obtained title to the property securing the Loans as a result

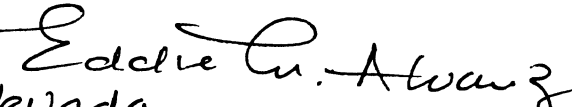
of a foreclosure, then when Vestin attempted to liquidate its interest in the property by selling the same, the assessment applicable to the property would become due and payable.

14. If Vestin had been aware of the Eagle Mountain SID and that the assessments by the Eagle Mountain SID became immediately due and payable upon a voluntary transfer of title (as opposed to an “involuntary” transfer by foreclosure), Vestin would have had the opportunity to structure the Loans to avoid the potential for Vestin acquiring title to the property in the event of a default and foreclosure. Alternatively, if Vestin had been aware of the Eagle Mountain SID, it may not have made the Loans at all to avoid the issue of acceleration of the assessment upon voluntary transfer.

15. Likewise, at the time of the default on the Loans and the subsequent trustee’s sale, if Vestin had known of the acceleration of the payment of the assessment by the Eagle Mountain SID upon voluntary transfer, Vestin would have attempted to structure the trustee’s sale in a manner to avoid Vestin taking title to the property securing the loans. For example, Vestin could have marketed the property and attempted to have a developer purchase the property at the trustee’s sale. However, because Vestin was not aware of the Eagle Mountain SID, Vestin caused a trustee’s sale under the trust deeds securing the Loans and Vestin acquired title to the property. Vestin cannot now sell the property without paying the full assessment applicable to the property, which is in excess of \$2,241,348.70.

Dated this 9th day of August, 2003.


Daniel B. Stubbs

Nevada Notary Public:  Aug 9, 2003
State of Nevada
COUNTY OF CLARK

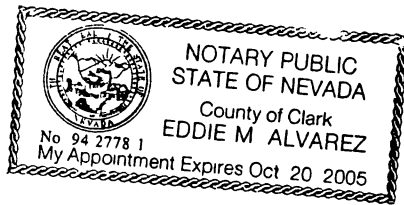


EXHIBIT 7

AFFIDAVIT OF THOMAS E. LEA

STATE OF NEVADA)

ss

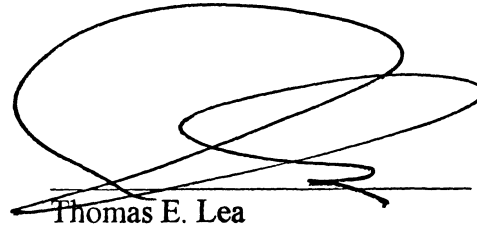
COUNTY OF CLARK)

Thomas E. Lea, being first duly sworn, deposes and says as follows:

1. I am over the age of 21 years, a resident of Clark County, Nevada, and I have personal knowledge of and involvement in the matters set forth hereafter.
2. I am President of Integrated Financial Associates, a Nevada corporation ("IFA"). IFA is in the business of making business and commercial loans, including loans to real estate developers. The loans made by IFA to real estate developers are generally secured by real property.
3. On or about December 29, 2000, IFA made a loan to The Ranches, L.C. ("The Ranches"). The loan was secured by a trust deed covering real property that The Ranches was developing in the City of Eagle Mountain, Utah.
4. In connection with said loan by IFA to The Ranches, IFA obtained a preliminary title report, and subsequently a title policy dated December 29, 2000, regarding the real property securing the loan by IFA to The Ranches. The title policy was issued by First American Title Insurance Company ("First American"), through Century Title Company, located in Orem, Utah. A copy of the title insurance policy issued by First American is attached hereto as Exhibit "A" (the "Policy").
5. In Schedule B, Part I of the Policy, the existence of a special improvement district known as Eagle Mountain Special Improvement District 2000-1 (the "Eagle Mountain SID") was

disclosed as an exception to title, together with the other matters.

Dated this 6th day of August, 2003.



Thomas E. Lea

ACKNOWLEDGEMENT

STATE OF Nevada)
) ss.
COUNTY OF Clark)

On the 6th day of August, 2003 personally appeared before me, the undersigned Notary Public, DARLENE GUILBAULT, proved to me to be the person whose name is subscribed to the foregoing Affidavit who swore that the same was true to the best of his knowledge.

Notary Public in and for Said County and State

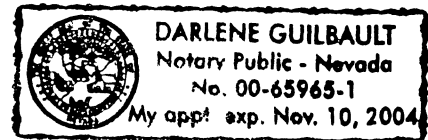
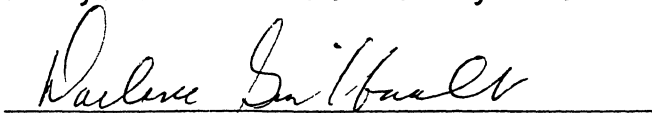


EXHIBIT 8

NOTICE OF INTENTION

ENT 61362;2000 PG 1 of 15
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
2000 Aug 04 4:38 pm FEE 144.00 BY JW
RECORDED FOR TOWN OF EAGLE MOUNTAIN

PUBLIC NOTICE IS HEREBY GIVEN that on the 20th day of June, 2000, the Town Council of Eagle Mountain, Utah County, Utah (the "Town") adopted a resolution declaring its intention to create a special improvement district to be known as Eagle Mountain, Special Improvement District No. 2000-1 (the "District"). It is the intention of the Town Council to make the improvements described herein within the District and to levy special assessments as provided in Title 17A, Chapter 3, Part 3, Utah Code Annotated 1953, as amended, on the real estate lying within the District for the benefit of which such assessments are to be expended in the making of such improvements.

DESCRIPTION OF DISTRICT

The boundaries of the proposed District shall coincide with the legal description set forth in Exhibit "A", all being located within the boundaries of the Town. Certain properties within the District will not be assessed because the original developer of said properties has agreed to pay that portion of the costs of the improvements herein described attributable to said properties.

INTENDED IMPROVEMENTS

For purposes of equitably assessing properties for the benefit received by the improvements proposed to be installed and constructed within the District, the District will be divided into two zones—Zone I and Zone II. The properties included within each zone are described in Exhibit "A". The intended improvements to be constructed within each zone will consist of those improvements described in Exhibit "B", and all related engineering and land planning (the "Improvements"), all being located within the boundaries of the District.

ESTIMATED COST OF IMPROVEMENTS

The total cost of Improvements in the District as estimated is \$19,350,000 of which approximately \$3,800,000 will be paid with respect to those properties that will not be assessed, leaving a remainder of \$15,550,000, which shall be paid by special assessments to be levied against the property abutting upon the streets to be improved or upon property which may be affected or specifically benefitted by such Improvements. The Town Council has determined that only those parcels within the boundaries of the proposed District, the owners of which have a present intent to develop said parcels, shall be benefitted by the proposed Improvements. The property owners' portion of the total estimated cost of the Improvements to be assessed may be financed during the construction period by the use of interim warrants, in which case the interest on said warrants will be assessed to the property owners. In lieu of utilizing a guaranty fund, the Town intends to create a special reserve fund to secure payment of the special assessment bonds (the "Bonds") that the Town anticipates issuing to finance the proposed Improvements. The reserve fund will be initially funded with proceeds of the Bonds in an amount equal to approximately ten percent of the total amount of Bonds to be issued. The Town anticipates applying any monies remaining in the reserve fund to the final payment on the Bonds which, in turn, would offset the final assessment payments to be made by the owners of property benefitted by such Improvements, all of which will be further described in the assessment ordinance to be adopted by the Town. In addition, the estimated costs of assessment will

include estimated overhead costs that the Town projects to incur in the creation and administration of the District. The estimated cost to be assessed against the properties within each zone within the District and the method of assessment shall be as follows:

ZONE I

| <u>Improvements</u> | <u>Estimated Assessment</u> | <u>Method of Assessment</u> |
|---|-----------------------------|-----------------------------|
| All Zone I improvements described in <u>Exhibit "B"</u> | \$12,400 | Per acre |

ZONE II

| <u>Improvements</u> | <u>Estimated Assessment</u> | <u>Method of Assessment</u> |
|---|-----------------------------|-----------------------------|
| All Zone I and Zone II improvements described in <u>Exhibit "B"</u> | \$13,400 | Per acre |

LEVY OF ASSESSMENTS

It is the intention of the Town Council to levy assessments as provided by the laws of Utah on all parcels and lots of real property to be benefitted by the proposed Improvements within the District. The purpose of the assessment and levy is to pay those costs of the Improvements that the Town will not assume and pay. The method of assessment shall be by acre as set forth herein.

The assessments may be paid by property owners in not more than twenty (20) annual installments with interest on the unpaid balance at a rate or rates fixed by the Town Council, or the whole or any part of the assessment may be paid without interest within fifteen (15) days after the ordinance levying the assessment becomes effective. The assessments shall be levied according to the benefits to be derived by each property within the District. Other payment provisions and enforcement remedies shall be in accordance with Title 17A, Chapter 3, Part 3, Utah Code Annotated 1953, as amended.

A map of the proposed District, copies of plans, profiles and specifications of the proposed Improvements and other related information are on file in the office of the Engineer who will make such information available to all interested persons.

TIME FOR FILING PROTESTS

Any person who is the owner of record of property to be assessed in the District described in this Notice of Intention shall have the right to file in writing a protest against the creation of the District or to make any other objections relating thereto. Protests shall describe or otherwise identify the property owned of record by the person or persons making the protest and shall indicate the total acreage represented by said protest. Protests shall be filed with the Town Clerk of Eagle Mountain, Utah, on or before 4:00 p.m. the 31st day of July, 2000. Thereafter at 7:00 p.m. on the 1st day of August, 2000, the Town Council will meet in public meeting offices of the Town Council at 1680 East Heritage Drive, Eagle Mountain, Utah, to consider all protests so filed and hear all objections relating to the proposed District.

After such consideration and determination, the Town Council shall adopt a resolution either abandoning the District or creating the District either as described in this Notice of Intention or with deletions and changes made as authorized by law; but the Town Council shall abandon the District and not create the same if the necessary number of protests as provided herein have been filed on or before the time specified in this Notice of Intention for the filing of protests after eliminating from such filed protests: (i) protests relating to property or relating to a type of Improvement which has been deleted from the District and (ii) protests which have been withdrawn in writing prior to the conclusion of the hearing. The necessary number of protests shall mean protests representing one-half of the acreage to be assessed.

BY ORDER OF THE TOWN COUNCIL OF EAGLE MOUNTAIN, UTAH

Janet Valentine
Town Clerk

Published in the New Utah

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EXHIBIT 9

provement bonds and special improvement refunding bonds of all special improvement districts of the governing entity outstanding during the preceding three-year period, the governing body may by resolution transfer all amounts in excess of this percentage to the general fund of the governing entity. This transfer may not reduce the amount in the guaranty fund to less than 25% of the amount of all special improvement bonds and special improvement refunding bonds of all special improvement districts of the governing entity which are outstanding at the time of the proposed transfer. For the purposes of this section, special improvement refunding bonds are not deemed to be outstanding until the principal of, interest, and any redemption premiums on the special improvement bonds which are refunded by the special improvement refunding bonds are fully paid. 1990

17A-3-240. Other methods for making improvements unaffected.

This part is intended to afford an alternative method for the making of improvements by a governing entity, the creation of special improvement districts, the levy of assessments, the issuance of special improvement bonds, the issuance of interim warrants, and the creation of special improvement guaranty funds by governing entities. It shall not be construed so as to deprive any governing entity of the right to make improvements, create special improvement districts, levy assessments or other special taxes, create guaranty funds, or issue special improvement bonds and interim warrants under authority of any other law of this state now in effect or hereafter enacted. This part shall constitute full authority for the making of improvements, creation of special improvement districts, levy of assessments or other special taxes, creation of special improvement guaranty funds, issuance of special improvement bonds, and issuance of interim warrants by governing entities. No act hereafter passed by the Legislature amending other acts relating to the same subject matter as covered by this part shall be construed to affect the authority to proceed under this part in the manner provided in this part unless this future statute amends this part and specifically provides that it is to be applicable to proceedings taken and to special improvement bonds or interim warrants issued under this part. 1990

17A-3-241. Validation of prior proceedings, bonds and warrants.

(1) All special improvement bonds or interim warrants issued by any governing entity prior to March 20, 1979, and all proceedings had in the authorization and issuance of them and all proceedings taken prior to or in connection with the levy of assessments out of which these bonds or warrants are payable or in the creation, maintenance, and use of the special improvement guaranty fund of the governing entity issuing these bonds or warrants are hereby validated, ratified, and confirmed; and these special improvement bonds or warrants are declared to constitute legally-binding obligations in accordance with their terms, and all such assessments are declared to be legal and valid assessments. Nothing in this section shall be construed to affect or validate any bonds, warrants, assessments, or special improvement guaranty fund, the legality of which is being contested at the time this part takes effect.

(2) This part shall apply to all assessments levied and to all special improvement bonds and interim warrants issued after March 20, 1979, even though proceedings prior to the levy or issue were taken under the provisions of a law repealed by this part; and these proceedings are validated, ratified, and confirmed, subject to question only as provided in Section 17A-3-229. This part shall not affect or invalidate any improvement district bonds or warrants issued and outstanding under a law repealed by this part. 1990

17A-3-242. Separability clause.

If any one or more sentences, clauses, phrases, provisions, or sections of this part or the application thereof to any set of circumstances shall be held by final judgment of any court of competent jurisdiction to be invalid, the remaining sentences, clauses, phrases, provisions and sections of this part and the application of this part to other sets of circumstances shall, nevertheless, continue to be valid and effective, the Legislature hereby declaring that all provisions of this part are severable. 1990

17A-3-243. Release of assessment.

When an assessment has been paid in full with respect to any property, the county or Title 17A, Chapter 2, Part 3 district, as applicable, shall deliver to the owner for recordation in the office of the county recorder a release and discharge of the lien of any assessment in a form that includes the legal description of the property released and otherwise complies with the state recording statutes as then applicable. 1992

17A-3-244. Dissolution of districts — Payment of claims.

Any special improvement district created under this part may be dissolved by order of the district court of the county in which it was created, upon a hearing had upon a petition to the court signed by the governing body of the district. Said petition shall recite the reasons for the dissolution, that a resolution has been adopted to dissolve the district, that all claims and demands against the district have been paid or that provision has been made for the payment thereof.

The court shall fix a day for the hearing thereon, not less than 30 or more than 60 days after the petition is filed, and shall order that the clerk publish a notice of the said petition and hearing in a newspaper of general circulation once a week for four successive weeks prior to such hearing. Such notice shall specify the district to be dissolved, the date, time and place of said hearing, and shall provide that all persons who have any objections to the dissolution of said district shall file such objections in the office of said clerk of said court at or prior to the date of said hearing, and all persons who have any claim against said district must present the same duly itemized and verified by the affidavit of the claimant at or prior to the time of said hearing or be forever barred from thereafter asserting said claims, and said notice shall be signed by the clerk of said court. No district shall be ordered dissolved until said claims shall have been paid or until provision has been made for the payment thereof, either by the levying and collecting of assessments or by other means approved by the court. 2001

PART 3

MUNICIPAL IMPROVEMENT DISTRICTS

17A-3-301. Short title.

This part shall be known and may be cited as the Utah Municipal Improvement District Act. 1990

17A-3-302. Purpose.

The purpose of this part is to revise, codify and improve existing laws relating to municipal special improvement districts, to recognize existing practices relating to these districts, and to modernize and improve these laws in the light of these practices and in recognition of new needs of municipalities and the inhabitants of them. 1990

17A-3-303. Definitions.

As used in this part:

- (1) (a) "Assessment" means a special tax levied against property within a special improvement district to pay

all or a portion of the costs of making improvements in the district

(b) "Assessment" or "assessments" in Subsection 17A-3-321 (3) and Sections 17A-3-322, 17A-3-324, 17A-3-325, 17A-3-326, 17A-3-331, 17A-3-332, 17A-3-333, 17A-3-338, and 17A-3-340, include any reduced payment obligations

(2) (a) "Bonds" or "special improvement bonds" means bonds issued under this part payable from assessments, improvement revenues, and from the special improvement guaranty fund, or reserve fund, as applicable, established as provided in this part

(b) "Bonds" or "special improvement bonds" in the following provisions include any special improvement refunding bonds

(i) Subsection 17A-3-304(3)(d),

(ii) Sections 17A-3-321, 17A-3-322, 17A-3-325, 17A-3-326, 17A-3-327, 17A-3-331, 17A-3-332, and 17A-3-333,

(iii) Section 17A-3-336, except the reference in that section to "bond fund", and

(iv) Sections 17A-3-337, 17A-3-339, and 17A-3-342

(3) (a) "Connection fee" means a fee

(i) charged by the governing body to connect onto the municipal sewer, water, gas, or electrical system, and

(ii) used to finance special improvements in a special improvement district or to pay for the privilege of using existing improvements of the municipality

(b) "Connection fee" includes a fee charged by the governing body to pay for the costs of connecting onto the municipal sewer, water, gas, or electrical system even though the improvements are installed on the assessed owner's property

(4) "Contract price" means the amount payable to one or more contractors for the designing, engineering, inspection, and making of improvements in a special improvement district. The costs of improvements, other than designing, engineering, and inspection costs, shall be incurred under any contract let to the lowest responsible bidder as required by this part, including amounts payable for extra or additional work when authorized by the governing body or in accordance with the terms of the contract, less appropriate credit for work deleted from the contract when authorized by the governing body, or in accordance with the contract

(5) "Economic promotion activities" means promotion and developmental activities such as sponsoring festivals and markets in the downtown area, promoting business investment in the downtown area, helping to coordinate public and private actions in the downtown area, and developing and issuing publications on the downtown area designed to improve the economic well-being of the downtown area

(6) "Governing body" means the board of commissioners or city council of a city or the town council of a town

(7) "Improvement revenues" means any charges, fees, or other revenues received by a municipality from improvements described in Section 17A-3-304

(8) "Incidental refunding costs" means any costs of issuing special improvement refunding bonds and of calling, retiring, or paying prior bonds, including legal fees, accounting fees, charges of fiscal agents, escrow agents, and trustees, underwriting discount, printing costs, giving of notices, any premium necessary in the calling or retiring of the prior bonds, any other costs that the governing body determines are necessary or desirable in

connection with the issuance of special improvement refunding bonds, and any interest on the prior bonds that is required to be paid in connection with the issuance of the special improvement refunding bonds

(9) "Installment payment date" means the date on which installment payments of assessments are payable

(10) "Municipality" means a city or town of this state

(11) (a) "Net improvement revenues" means all improvement revenues received by a municipality since the last installment payment date minus all amounts payable by the municipality from those improvement revenues for items other than the payment of interim warrants and special improvement bonds

(b) "Net improvement revenues" shall be calculated as of any installment payment date

(12) "Optional improvements" means improvements in a special improvement district that may be conveniently installed at the same time as other improvements in the district and that the governing body provides may be installed at the option of the property owner on whose property or for whose particular benefit the improvements are made, including private driveways, irrigation ditches, and water turnouts

(13) "Overhead costs" means the actual costs incurred by a municipality in connection with a special improvement district for appraisals, legal fees, financial advisory charges, escrow and trustee fees, publishing and mailing notices, levying assessments, and all other incidental costs relating to the district

(14) "Prior bonds" means the outstanding special improvement bonds that are refunded by an issue of special improvement refunding bonds

(15) "Prior ordinance" means the ordinance levying the assessments from which the prior bonds and the interest on those bonds are payable

(16) "Property" means real property or any interest in real property

(17) "Property price" means the purchase or condemnation price of property acquired in order to make improvements in a special improvement district

(18) "Reduced payment obligations" means the reduced amounts of the assessments levied, the interest on assessments established in the prior ordinance, or both, as set forth in the amending ordinance described in Section 17A-3-329

(19) "Special improvement district" or "district" means a district created for the purpose of making improvements under this part

(20) "Special improvement fund" means the fund established under Section 17A-3-326

(21) "Special improvement refunding bonds" means any obligations issued to refund any special improvement bonds

2000

17A-3-304. Powers of municipality.

(1) The governing body of any municipality may make or cause to be made any one or more or combination of the following improvements

(a) establish grades and lay out, establish, open, extend, and widen any street, sidewalk, alley, or off-street parking facility,

(b) improve, repair, light, grade, pave, repave, curb, gutter, sewer, drain, park, and beautify any street, sidewalk, alley, or off-street parking facility,

(c) construct, reconstruct, extend, maintain, or repair bridges, sidewalks, crosswalks, driveways, culverts, sewers, storm sewers, drains, flood barriers, and channels,

(d) construct, reconstruct, extend, maintain, or repair lines, facilities, and equipment, other than generating equipment, for street lighting purposes or for the expansion

sion or improvement of a previously established, municipally owned electrical distribution system, to a district within the boundaries of the municipality;

(e) plant or cause to be planted, set out, cultivate, and maintain lawns, shade trees, or other landscaping;

(f) (i) cover, fence, safeguard, or enclose reservoirs, canals, ditches, and watercourses; and

(ii) construct, reconstruct, extend, maintain, and repair waterworks, reservoirs, canals, ditches, pipes, mains, hydrants, and other water facilities for the purpose of supplying water for domestic and irrigation purposes or either, regulating, controlling, or distributing water for domestic and irrigation purposes and regulating and controlling water and watercourses leading into the municipality;

(g) acquire, construct, reconstruct, extend, maintain, or repair parking lots or other facilities for the parking of vehicles off streets;

(h) acquire, construct, reconstruct, extend, maintain, or repair any of the improvements authorized in this section for use in connection with an industrial or research park;

(i) acquire, construct, reconstruct, extend, maintain, or repair parks, recreational facilities, and libraries;

(j) remove any nonconforming existing improvements in the areas to be improved;

(k) construct, reconstruct, extend, maintain, or repair optional improvements;

(l) acquire any property necessary or advisable in order to make any of these improvements;

(m) make any other improvements authorized by any other law, the cost of which may, in whole or in part, properly be determined to be of particular benefit to a particular area within the municipality;

(n) (i) construct and install all structures, equipment, and other items; and

(ii) do any other work that is necessary or appropriate to complete any of these improvements;

(o) conduct economic promotion activities; and

(p) subject to Subsection (5), acquire, construct, reconstruct, extend, maintain, or repair lines, facilities, and equipment for providing cable television service or public telecommunications service, as defined in Section 10-18-102.

(2) In a district created for economic promotion activities, the governing body of the municipality shall:

(a) spend at least 70% of any funds generated on economic promotion activities; and

(b) spend no more than 30% of any funds generated on administrative costs, including salaries, benefits, rent, travel, and costs incidental to publications.

(3) For the purpose of making and paying for all or a part of the cost of any improvements or optional improvements, the governing body of a municipality may:

(a) create special improvement districts within the municipality;

(b) levy assessments on the property within the district that is benefited by the improvements;

(c) collect improvement revenues from those improvements; and

(d) issue interim warrants and special improvement bonds as provided in this part.

(4) A governing body may not use the procedures outlined in this part to pay the cost of buildings or structures used for industry or research.

(5) (a) A district created to make the improvements set forth in Subsection (1)(p):

(i) may include only the property of an owner who has voluntarily consented to include the owner's

property in the district and to subject the property to an assessment of the district; and

(ii) notwithstanding Title 10, Chapter 18, Municipal Cable Television and Public Telecommunications Services, may not provide cable television service or public telecommunications service, as defined in Section 10-18-102.

(b) Notwithstanding any other provision of law, a municipality that creates a district to make the improvements set forth in Subsection (1)(p) may not use municipal funds, other than those derived from an assessment levied under this part on property within that district, to pay for those improvements.

(c) Notwithstanding any other provision of this part, funds derived from an assessment levied under this part on property within a district created to make the improvements set forth in Subsection (1)(p) may be used only for the purpose of making those improvements. 2003

17A-3-305. Notice of intent to create special improvement district — Contents.

(1) Before a special improvement district is created, the governing body shall give notice of its intention to make the improvements and to levy assessments to pay all or a part of the cost of the improvements.

(a) The notice shall state the purpose for which the assessments are to be levied.

(b) The notice shall state the method or methods under which the assessments are proposed to be levied, that is, according to frontage, according to area, according to taxable value, according to lot, according to number of connections, or by any combination of these methods.

(c) The notice shall describe the district. The description may be by metes and bounds, by reference to streets or extensions of streets, or by any other means reasonably describing the district so as to permit owners of property in the district to ascertain that their property is within the district. All property to be assessed shall be included within the district, but it is not a defect if property which is not to be assessed is included. Different areas that are not connected or contiguous may be included in a single special improvement district and separate boundaries for each of these areas may be established, or all or one or more of these areas may be included within a single boundary.

(d) In a general way, the notice shall describe the improvements proposed to be made showing the places the improvements are proposed to be made and the general nature of the improvements. The improvements may be described by type or kind and the places these improvements are proposed to be made may be described by reference to streets or portions of streets or extensions of streets or by any other means the governing body may choose that reasonably describes the improvements proposed to be made.

(e) The notice shall state the estimated cost of the improvements as determined by the engineer of the municipality. If the actual cost of the improvements exceeds the estimated cost, the governing body shall nevertheless have the right to levy assessments in excess of the estimated cost.

(f) The notice shall state that it is proposed to levy assessments on property in the district to pay all or a portion of the cost of the improvements according to the benefits to be derived by the property.

(g) The notice shall designate the time within which and the place where protests shall be filed and the time and place at which the governing body will conduct a public hearing to consider these protests.

(h) The notice shall state the method for determining the necessary number of protests required to be filed under Subsection 17A-3-307(3).

(i) If the governing body elects to create and fund from assessments a separate reserve fund for the proposed bond issue as provided in Section 17A-3-335, the notice shall describe how the reserve fund would be funded and how the remaining moneys on deposit in the reserve fund would be disbursed with payment in full of the bonds.

(j) If the governing body desires to create a special improvement district wherein only properties are assessed, the owners of which voluntarily consent to an assessment, the notice shall include a consent form to be used to obtain the consent of each owner of property to be assessed that:

(i) estimates the total assessment to be levied against the particular piece of property;

(ii) describes the additional benefits, if any, to be received from the improvements by the owners of properties to be assessed; and

(iii) designates a time and date by which the fully executed consent form shall be received by the recorder of the governing body.

(2) The notice may contain other information the governing body determines to be appropriate, including the amount or proportion of the cost of the improvements to be paid for by the municipality or from sources other than assessments, the estimated amount of each type of assessment for the various improvements to be made according to the method of assessment chosen by the governing body, and provisions for any optional improvements. The failure to include this information may not be deemed jurisdictional or a defect preventing the municipality from proceeding with the special improvement district. The inclusion of any permitted information is not considered a limitation on the municipality from subsequently changing its plans in regard to any of the information.

1990

17A-3-306. Notice of intention to create district — Publication — Mailing.

(1) (a) The notice of intention shall be published in a newspaper published in the municipality, or if there is no newspaper published in the municipality, then in a newspaper having general circulation in the municipality.

(b) In a city of the third, fourth, or fifth class or a town where there is no newspaper published or of general circulation in the city or town, the governing body may provide that the notice of intention be given by posting in lieu of publication of this notice.

(2) If the notice is published, it shall be published once during each week for four successive weeks, the last publication to be at least five days and not more than 20 days prior to the time fixed in the notice as the last day for filing of protests.

(3) If the notice is posted, it shall be posted in at least three public places in the municipality at least 20 and not more than 35 days prior to the time fixed in the notice as the last day for the filing of protests.

(4) (a) No later than ten days after the first publication or posting of the notice, it shall be mailed, postage prepaid:

(i) addressed to each owner of property to be assessed within the special improvement district at the last-known address of that owner using for this purpose the names and addresses appearing on the last completed real property assessment rolls of the county in which the property is located; and

(ii) addressed to "owner" at the street number of each piece of improved property to be assessed.

(b) If a street number has not been assigned, then the post office box, rural route number, or any other mailing address of the improved property shall be used for the mailing of the notice under Subsection (4)(a)(ii). 2003

17A-3-307. Protests by property owners — Hearing — Alteration of proposal by resolution — Conditions for adding property to district — Deletion of protesters' property from district — Recording requirements — Waiver of objections.

(1) (a) Any person who is the owner of property to be assessed in the special improvement district described in the notice of intention may, within the time designated in the notice, file, in writing, a protest to the creation of the special improvement district or make any other objections relating to it.

(b) The protest shall describe or otherwise identify the property owned by the person making the protest.

(2) (a) On the date and at the time and place specified in the notice of intention, the governing body shall, in open and public session, consider all protests filed and hear all objections relating to the proposed special improvement district.

(b) The governing body may adjourn the hearing from time to time to a fixed future time and place.

(c) After the hearing has been concluded and after all persons desiring to be heard have been heard, the governing body shall consider the arguments and the protests made.

(d) The governing body may:

(i) make deletions and changes in the proposed improvements; and

(ii) make deletions and changes in the area to be included in the special improvement district as desirable or necessary to assure adequate benefits to the property in the district.

(e) The governing body may not provide for the making of any improvements that are not stated in the notice of intention nor for adding to the district any property not included within the boundaries of the district unless a new notice of intention is given and a new hearing held.

(3) (a) (i) After this consideration and determination, the governing body shall adopt a resolution either abandoning the district or creating the district either as described in the notice of intention or with deletions and changes made as authorized in this section.

(ii) The governing body shall abandon the district and not create it if the necessary number of protests as provided in Subsection (3)(b) have been filed on or before the time specified in the notice of intention for the filing of protests after eliminating from the filed protests:

(A) protests relating to property or relating to a type of improvement that has been deleted from the district; and

(B) protests that have been withdrawn in writing before the conclusion of the hearing.

(b) For purposes of this section, the necessary number of protests means the aggregate of the following:

(i) protests representing $\frac{1}{2}$ of the front footage of property to be assessed in cases where an assessment is proposed to be made according to frontage;

(ii) protests representing $\frac{1}{2}$ of the area of the property to be assessed where an assessment is to be made according to area;

(iii) protests representing $\frac{1}{2}$ of the taxable value of the property to be assessed where an assessment is proposed to be made according to taxable value;

(iv) protests representing $\frac{1}{2}$ of the lots to be assessed where an assessment is proposed to be made according to lot; or

(v) protests representing $\frac{1}{2}$ of connections to be assessed where an assessment is proposed to be made according to number of connections.

(c) If less than the necessary number of protests are filed by the owners of the property to be assessed, the governing body may create the special improvement district and begin making improvements.

(4) Before the completion of construction of the proposed improvements, the governing body may add additional properties to be improved and assessed to a created district, but only after:

(a) the governing body finds that the inclusion of the additional property within the district will not adversely affect the owners of properties already included within the district;

(b) the governing body obtains a written consent from each owner of the property to be added and improved that includes the legal description and tax identification number of the property, a waiver of any right to protest against the creation of the district, consent to being included within the district, and consent to the making of the proposed improvements with respect to the property to be added; and

(c) the governing body approves for recording an addendum to the resolution that created the district.

(5) (a) If the proposed special improvement district is structured to include only properties whose owners have voluntarily consented to an assessment, all properties of owners that have not consented to an assessment by the date specified in the notice of intention shall be deleted from the district.

(b) The governing body shall then determine whether or not to create the special improvement district considering:

(i) the amount of the proposed assessment to be levied against the remaining properties within the district; and

(ii) the benefits to be received by those properties from the improvements proposed to be constructed within the district.

(6) (a) (i) (A) If the governing body creates the special improvement district, it shall, within five days from the date of creating the district, record the original or a certified copy of the final approved resolution creating the district in the recorder's office of the county in which the district is located.

(B) Each original or certified copy of the resolution recorded under Subsection (6)(a)(i)(A) shall contain the legal description and tax identification number of each property to be assessed.

(ii) The governing body may include the filing fee as part of the overhead costs authorized by Section 17A-3-313.

(b) If, after the district has been created, the governing body adds additional properties to be assessed to the district under this section, it shall, within five days from the date of adding these properties, record in the county recorder's office the original or a certified copy of the addendum required by Subsection (4) that includes the legal description and tax identification number of the added property.

(c) If the governing body deletes any property to be assessed within the district after the district has been created, it shall issue and record a release and discharge of the recorded encumbrance created as a result of the recording required by this section in a form that includes the legal description and tax identification number of the property and otherwise complies with the recording statutes.

(7) (a) Any person who fails to file a protest within the time specified, or having filed, withdraws his protest, is consid-

ered to have waived any objection to the creation of the district, the making of the improvements, and the inclusion of his property in the district.

(b) A waiver does not preclude a person's right to object to the amount of the assessment at the hearing provided for in Section 17A-3-317.

2003

17A-3-308. Contracting for improvements — Bids, publication, and notice — Improvements for which contracts need not be let.

(1) As used in this section, the word "sealed" does not preclude acceptance of electronically sealed and submitted bids or proposals in addition to bids or proposals manually sealed and submitted.

(2) (a) Except as otherwise provided in this section, improvements in a special improvement district shall be made only under contract duly let to the lowest responsible bidder for the kind of service or material or form of construction which may be determined upon. The improvements may be divided into parts and separate contracts let for each part or several such parts may be combined in the same contract. A contract may be let on a unit basis. A contract shall not be let until a notice to contractors that sealed bids for the construction of the improvements will be received by the governing body at a specified time and place and such notice has been published at least one time in a newspaper having general circulation in the municipality at least 15 days before the date specified for the receipt of bids.

(b) If by inadvertence or oversight, the notice is not published or is not published for a sufficient period of time prior to the receipt of bids, the governing body may still proceed to let a contract for the improvements if at the time specified for the receipt of bids it has received not less than three sealed and bona fide bids from contractors.

(c) The notice to contractors may be published simultaneously with the notice of intention.

(d) The governing body shall in open session at the time specified in the notice, open, examine and publicly declare the bids and may reject any or all bids when considered for the public good and, at such or a later meeting, shall reject all bids other than the lowest and best bid of a responsible bidder.

(e) If the price bid by the lowest and best responsible bidder exceeds the estimated costs as determined by the engineer of the municipality, the governing body may nevertheless award a contract for the price so bid.

(f) The governing body may in any case refuse to award a contract and may obtain new bids after giving a new notice to contractors or may determine to abandon the district or not to make some of the improvements proposed to be made.

(3) A contract need not be let for any improvement or part of any improvement the cost of which or the making of which is donated or contributed by any individual, corporation, the municipality, this state, or the United States or any political subdivision of this state or of the United States. All such donations or contributions may be accepted by the municipality, but no assessments shall be levied against the property in the district for the amount of such donations or contributions.

(4) A contract need not be let as provided in this section where the improvements consist of the furnishing of utility services or maintenance of improvements. The work may be done by the municipality itself. Assessments may be levied for the actual cost incurred by the municipality for the furnishing of the services or maintenance or, in case the work is done by the municipality, to reimburse the municipality for the reasonable cost of supplying the services or maintenance.

(5) A contract need not be let as provided in this section where any labor, materials or equipment to make any of the

improvements are supplied by the municipality. Assessments may be levied to reimburse the municipality for the reasonable cost of supplying the labor, materials, or equipment.

2000

17A-3-309. Payment of contracts.

- (1) (a) Any contract for work in any special improvement district, and any contract for the purchase of property that must be acquired in order to make improvements in any special improvement district, may provide that the contract price or property price shall be paid, or, at the option of the municipality, may be paid, in whole or in part, from:

- (i) proceeds of the sale of special improvement bonds issued as provided in this part; or
- (ii) proceeds of the sale of interim warrants issued as authorized by this part.

(b) If any contract is not paid from those sources in whole or in part or, if paid in part, to the extent that it is not paid from those sources, the municipality shall advance funds for payment of the contract price or property price from the general fund of the municipality or from other funds legally available, according to the requirements of the contract.

(c) The municipality may reimburse itself for the amount paid from its general fund or other funds from:

- (i) the proceeds of the sale of interim warrants;
- (ii) the proceeds of the sale of special improvement bonds;
- (iii) funds paid on assessments that are not pledged for the payment of the bonds or warrants; or
- (iv) improvement revenues not pledged for the payment of the bonds or warrants.

(d) The municipality may not reimburse itself for any of the costs of making the improvements that are properly chargeable to the municipality or for which assessments may not be levied.

- (2) (a) Any contract for work in a special improvement district may provide for payments to the contractor as the work progresses.

(b) When the contract provides for periodic payments, payments may be made as follows:

- (i) periodic payments not to exceed 95% of the value of the work done to the date of payment as determined by estimates of the engineer for the municipality; and
- (ii) a final payment to be made only after completion of the work by the contractor and acceptance of the work by the municipality.

(c) Any payment on a contract that is retained shall be retained or withheld and released as provided in Section 13-8-5.

1999

17A-3-310. Interim warrants.

- (1) (a) As work proceeds in a special improvement district, the governing body may issue interim warrants against the district:

- (i) as portions of the work are completed, for not more than 90% of the value of the completed work as estimated by the engineer of the municipality;
- (ii) after completion of the work and acceptance of the work by the engineer of the municipality and by the governing body, for 100% of the value of the work completed; and
- (iii) where improvements in the district require the acquisition of property, for not more than the property price.

(b) Subject to the provisions of Section 17A-3-309, the governing body may issue warrants to:

- (i) a contractor, to apply at par value on the contract price for the improvements; or
- (ii) to the owner of the property, to apply at par value on the property price.

(c) The governing body may also issue and sell the warrants at not less than par value in a manner determined by the governing body and apply the proceeds of the sale towards payment of the contract price and property price.

- (2) (a) Interim warrants shall bear interest from date of issue until paid.

(b) The governing body shall specify the interest rate or rates, which may be a fixed rate or rates, a variable rate or rates, or a combination of fixed and variable rates. In the case of a variable interest rate or rates, the governing body shall specify the basis upon which the rate or rates shall be determined from time to time, the manner in which and schedule upon which the rate or rates shall be adjusted, and a maximum rate that the interim warrants may bear.

(c) The governing body may fix a maturity date for each interim warrant. If a warrant matures before the governing body has available to it the sources of payment itemized in Subsections (3)(a), (b), or (c), it may authorize the issuance of a new warrant to pay the principal and interest on the warrant falling due.

(d) Interest accruing on interim warrants shall be included as a cost of the improvements in the special improvement district.

(3) The governing body shall pay interim warrants and interest on the warrants from one or more of the following sources:

- (a) proceeds from the sale of special improvement bonds issued against the district;
- (b) cash received from the payment of assessments not pledged to the payment of the bonds;
- (c) improvement revenues not pledged to the payment of the bonds; or
- (d) proceeds of an interim warrant.

2002

17A-3-311. Connections of public utilities — Service owned or provided by municipality, power to assess cost of connection.

The governing body may require in any special improvement district before paving or repaving is done within it that all water, gas, sewer, and underground electric and telephone connections be made under such regulations and at such distances from the street mains to the line of the property abutting upon the street to be paved or repaved as may be prescribed by resolution. The governing body may require that any waterworks company owning the water pipe main, any gas company owning the gas pipe main, and any electric or telephone company owning any underground electric or telephone main make these connections. Upon the neglect or failure of the company to do the same, the governing body may cause the same to be done; and the cost of this shall be deducted from any indebtedness of the municipality to the company, and no bills shall be paid to the company by the municipality until all such expense for pipe laying shall have been liquidated. The governing body shall also have the power at any time to assess for reasonable connection fees or for the cost of any sewer, water, gas, or electric connections when the municipality owns or supplies these services and owns the mains, to such depth as it shall deem just and equitable, upon the property benefited.

1990

17A-3-312. When assessments may be levied.

Assessments for improvements in a special improvement district may be levied:

(1) at any time after all contracts for the making of the improvements have been let, the property price for all property acquired to make the improvements has been finally determined, and the reasonable cost of any work to be done by the municipality has been determined;

(2) for light service or park maintenance, at any time after the light service or park maintenance has commenced;

(3) at any time after all of the improvements in the special improvement district are entirely completed and accepted; or

(4) for economic promotion activities, at any time after the district has been created. 1991

17A-3-313. Amount and payment of assessment.

(1) Assessments for improvements in a special improvement district may not in the aggregate be greater than the sum of:

(a) the contract price;

(b) (i) the reasonable cost of:

(A) utility services, maintenance, and operation to the extent permitted by Section 17A-3-314; and

(B) labor, materials, or equipment supplied by the municipality; or

(ii) the reasonable cost of economic promotion activities.

(c) the property price, if any;

(d) the connection fees, if any;

(e) interest on interim warrants issued against the special improvement district;

(f) overhead costs not to exceed 15% of the sum of Subsections (a), (b), (c), and (d);

(g) if the assessment is levied before all of the improvements in the district are entirely completed and accepted, an amount for contingencies of not more than 10% of the sum of Subsections (a) and (b); and

(h) if the governing body has elected to create and fund a separate reserve fund for the bond issue as provided in Section 17A-3-335, an amount sufficient to fund the reserve fund.

(2) The municipality shall pay the following costs from its general fund, from improvement revenues not pledged to the payment of special improvement bonds, or from other sources legally available for those purposes:

(a) that part of the overhead costs for which an assessment cannot be levied;

(b) if assessments are levied before all improvements in the district are entirely completed, all costs of making the improvements for which an assessment was not levied; and

(c) the cost of making improvements for the benefit of property against which an assessment may not be levied. 1991

17A-3-314. Costs not payable by assessments.

(1) Nothing in this part shall permit the levy of assessments to pay for the cost of ordinary repairs to pavement, sewers, drains, curbing, gutters or sidewalks, but such levies may be made for extraordinary repairs to such items. The cost of ordinary repairs shall be borne by the municipality. The governing body by ordinance or resolution may define what constitutes ordinary repairs and what constitutes extraordinary repairs.

(2) Where improvements in a special improvement district involve changing the grade of a street, alley or sidewalk, one-half of the cost of bringing the street, alley or sidewalk to the established grade shall be paid by the municipality.

(3) Where improvements in a special improvement district involve improvements to the intersections of streets or spaces opposite alleys, assessments may be levied for the cost of such improvements. 1990

17A-3-315. Property of public agencies not assessable — Charges for services or materials permitted — Property acquired after creation of district.

(1) Except as provided in Subsection (2), a municipality may not levy an assessment against property owned by the federal government, the state of Utah, any county, school district, municipality or other political subdivision of the state of Utah or by any department or division of any such public agency even though such property is benefited by improvements made, but each such public agency is authorized to contract with the municipality for the making of such improvement and for the payment of the cost thereof to the municipality. Nothing in this section shall prevent a municipality from imposing or a public agency from paying reasonable charges for any services or materials actually rendered or supplied by the municipality to the public agency, including, by way of example and not in limitation, charges for water, lighting, or sewer services.

(2) An assessment may be levied and enforced against property acquired by a public agency which is within a special improvement district created prior to the acquisition. Property acquired by a public agency which is subject to the lien of an assessment at the time of acquisition shall continue to be subject to such lien and to enforcement of the same against the property if the assessment and interest accruing thereon is not paid when due. 1990

17A-3-316. Areas subject to assessment — Methods of assessment.

(1) Assessments shall be levied on all blocks, lots, parts of blocks and lots, tracts, or parcels of property bounding, abutting upon, or adjacent to, the improvements or that may be affected or specially benefited by the improvements to the extent of the benefits to the property by reason of the improvements. These benefits may be indirect and need not actually increase the fair market value of the property.

(2) In special improvement districts where only properties are assessed, the owners of which have voluntarily consented to an assessment, assessments may be levied only on these properties without violating any of the requirements of this section.

(3) Assessments may be to the full depth of the property or to the depth provided by the governing body.

(4) Assessments shall be equal and uniform according to the benefits received.

(5) Assessments may be according to area, frontage, taxable value, lot, number of connections, or any combination of these methods, all as the governing body may consider fair and equitable. Different improvements in a special improvement district may be assessed according to different methods. An allowance shall be made for corner lots so that they are not assessed at full rate on both streets. 1990

17A-3-317. Assessment list — Board of equalization and review — Hearings — Appeal — Corrections — Report — Waiver of objections.

(1) Before an assessment is levied, an assessment list shall be prepared designating each parcel of property proposed to be assessed and the amount of the assessment apportioned to this property as provided in this part.

(2) (a) Upon completion of the assessment list, the governing body shall:

(i) appoint a board of equalization and review consisting of three or more of the members of the governing body or, at the option of the governing body of any municipality, consisting of the municipal recorder or a designee, the municipal engineer or public works director or a designee, or the municipal attorney or a designee; and

(ii) give public notice of the completion of the assessment list and of the time and place of the holding of public hearings relating to the proposed assessments.

(b) If the board of equalization and review consists of other than members of the governing body of the municipality, appeal from a decision of the board of equalization and review shall be taken to the governing body of the municipality by filing a written notice of appeal in the offices of the city or town recorder within 15 days from the date the board's final report to the governing body is mailed to the affected property owners as provided in Subsection (7).

(3) (a) The notice shall be published in a newspaper published in the municipality or, if there is no newspaper published in the municipality, in a newspaper having general circulation in the municipality. In a city of the third, fourth, or fifth class or a town where there is no newspaper published, the governing body may provide that the notice be given by posting in lieu of publication.

(b) The notice shall be published at least one time or, if posted, shall be posted in at least three public places in the municipality. In either case, the first publication or posting shall be at least 20 and not more than 35 days prior to the date the board will begin its hearings.

(4) Not later than ten days after the first publication or posting of the notice, the notice shall be mailed, postage prepaid:

(a) addressed to each owner of property to be assessed within the special improvement district at the last-known address of the owner, using for this purpose the names and addresses appearing on the last completed real property assessment rolls of the county in which the property is located; and

(b) addressed to "owner" at the street number of each piece of improved property to be assessed. If a street number has not been assigned, then the post office box, rural route number, or any other mailing address of the improved property shall be used for the mailing of the notice.

(5) The board of equalization and review shall convene at the time and place specified in the notice. Hearings shall be held on not less than three consecutive days for at least one hour between 9 a.m. and 9 p.m. as specified in the notice. The hearings may be adjourned or recessed from time to time to a specific place and a specific hour and day until the work of the board shall have been completed. At each hearing the board shall hear arguments from any person who believes himself to be aggrieved, including arguments relating to the benefits accruing to any tract, block, lot, or parcel of property in the district or relating to the amount of the proposed assessment against that tract, block, lot, or parcel.

(6) (a) After the hearings have been completed, the board shall consider all facts and arguments presented and shall make those corrections in any proposed assessment as it may consider just and equitable. These corrections may eliminate one or more pieces of property or may increase or decrease the amount of the assessment proposed to be levied against any piece of property.

(b) If the corrections result in an increase of any proposed assessment, before approving the corrected assessment list, the board shall cause to be mailed, to each owner of property whose assessment is to be increased, a notice stating that the assessment will be increased, the amount of the proposed new assessment, that a hearing will be held at which the owner may appear and make any objections to the increase, and the time and place of the hearing. The notice shall be mailed to the last known address of the owner, using for this purpose the names

and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. A copy of the notice shall be addressed to "owner" and shall be so mailed addressed to the street number of each piece of improved property to be affected by the increased assessment. If a street number has not been assigned, then the post office box, rural route number, or any other mailing address of the improved property shall be used for the mailing of the notice. The notice shall be mailed at least 15 days prior to the date stated in the notice for the holding of the new hearing.

(7) (a) After all corrections have been made and all hearings, including hearings under Subsection (6), have been held, the board shall report to the governing body its findings that each piece of property within the special improvement district will be benefited in an amount not less than the assessment to be levied against the property, and that no piece of property listed on the assessment will bear more than its proportionate share of the cost of the improvement.

(b) The board shall cause to be mailed a copy of the board's final report to each owner of property who objected at the hearings of the board to the assessment proposed to be levied against his property.

(c) The findings of the board, when approved by the governing body or after passage of time for appeal and review by the governing body of the city, shall be final and, except as provided in Subsection (2)(b), no appeal may be taken from them.

(d) After receipt of the report from the board and the running of the appeal period provided in Subsection (2)(b), if applicable, the governing body may proceed with the levy of the assessments.

(8) Each person whose property is subject to assessment and who fails to appear before the board of equalization and review to raise his objections to the levy of the assessment shall be deemed to have waived all objections to the levy except the objection that the governing body failed to obtain jurisdiction to order the making of the improvements which the assessment is intended to pay. 2003

17A-3-318. Assessment ordinance — Publication — Assessment list incorporated by reference.

(1) Notwithstanding any other law concerning the publication, posting, or effective date of ordinances, any ordinance levying assessments shall be published one time in a newspaper published in the municipality or, if there is no newspaper published in the municipality, in a newspaper having general circulation in the municipality. The ordinance shall be effective on the date of the publication or at a later date as provided in the ordinance. No other publication and no posting of the ordinance is required nor is it necessary to declare that the immediate preservation of the peace, health, or safety of the municipality requires the ordinance to be effective on the date of publication or at the later date.

(2) An ordinance levying assessments need not describe each block, lot, part of block or lot, tract, or parcel of property to be assessed. It is sufficient if the ordinance incorporates by reference the corrected assessment list that describes the list of properties assessed by tax identification number and a valid legal description of property within the district. 1990

17A-3-319. Supplemental assessment.

In case of any deficiencies, omissions, errors, or mistakes in making any assessment or levy in respect to the total cost of the improvements or in respect to any tract, lot, block, or parcel in the special improvement district which has not been fully assessed or which has been assessed in an incorrect amount, the governing body may make a supplemental assess-

ment and levy to supply such deficiencies, omissions, errors, or mistakes after the holding of a hearing and giving notice as provided in Section 17A-3-317. 1990

17A-3-320. Payment of assessments in installments — Frequency — Interest.

(1) An assessment shall be levied at one time upon the property. The governing body may provide in the ordinance levying the assessment that all or such portion of the assessment as is designated in the ordinance may be paid in installments over a period of time not exceeding 20 years from the effective date of the ordinance levying the assessment, except that in any case where the installments are to be payable over a period of time exceeding ten years from the effective date, the governing body shall find and determine that the improvements for which the assessment are made have a reasonable useful life for the full period during which the installments are payable or that it would otherwise be in the best interests of the municipality and of the owners of property to be assessed to provide for payment of the assessments over a period in excess of ten years.

(2) Installments shall be payable at least annually but may be payable at more frequent intervals as provided by the ordinance levying the assessment, except that if the ordinance provides for payment of the assessment over a period in excess of ten years from the effective date of the same, the ordinance may also provide that no installments of these assessments shall be payable during all or any portion of the period ending three years after this effective date.

(3) Where the assessment is payable in installments, the ordinance shall provide that the unpaid balance of the assessment shall bear interest at a rate or rates, which may be a fixed rate or rates, a variable rate or rates, or a combination of fixed and variable rates, determined by the governing body from the effective date of the ordinance or from such other date as may be specified in the ordinance until due for the purpose of paying the costs relating to the special improvement district as the governing body may specify, including interest on any bonds issued under Section 17A-3-328 or 17A-3-329, ongoing costs of the municipality incurred with respect to administration of the special improvement district, and costs, if any, incurred with respect to securing a letter of credit or other instrument to secure payment or repurchase of any bonds or retaining a remarketing agent or an indexing agent; except that where the assessment is for light service or park maintenance, interest shall be charged only from the due date of each installment, and the first installment for any assessment shall be due 15 days after the effective date of the ordinance. If interest is to accrue on any assessment at a variable rate or rates, the governing body shall specify in the ordinance the basis upon which the rate or rates shall be determined from time to time, the manner in which and schedule upon which the rate or rates shall be adjusted, and a maximum rate that the assessments may bear. Interest shall be paid in addition to the amount of each installment annually or at more frequent intervals as provided in the ordinance levying the assessment. 2002

17A-3-321. Prepayment of assessment installments.

(1) Assessments payable in installments may be paid prior to the due date of any such installment as provided in this section but not otherwise.

(2) The whole or any part of the assessment may be paid without interest within 15 days after the ordinance levying the assessment becomes effective. If the assessment is paid in part, the unpaid balance may, at the discretion of the governing body, be payable either in substantially equal installments of principal or in substantially equal installments of principal and interest over the period of time installments are payable as provided in the assessment ordinance.

(3) After this 15-day period, and if the ordinance levying the assessment so provides, all unpaid installments of assessments levied against any piece of property (but only in their entirety) may be paid prior to the dates on which they become due. Any such prepayment may include an additional amount equal to the interest that would accrue on the assessment to the next succeeding date on which interest is payable on any special improvement bonds issued in anticipation of the collection of the assessments, plus such additional amount as, in the opinion of the governing body or of any officer of the municipality designated by the governing body, is necessary to assure the availability of money to pay interest on the special improvement bonds as interest becomes due and payable or interest may be charged to the date of prepayment plus any premiums which may become payable on redeemable bonds which may be called in order to utilize the assessments thus paid in advance. 1990

17A-3-322. Default in payment of assessment installment.

(1) When an assessment is payable in installments and a default occurs in the payment of any installment when due, the governing body may declare the unpaid amount to be delinquent, immediately due, and subject to collection as provided in this part. In addition, the governing body may accelerate payment of the total unpaid balance of the assessment and declare the whole of the unpaid principal and the interest then due to be immediately due and payable. Interest shall accrue and be paid on all amounts declared to be delinquent or accelerated and immediately due and payable and shall bear interest at a rate determined by the governing body until the next succeeding date after payment or collection on which interest is payable on any bonds issued. Costs of collection as approved by the governing body or required by law shall be charged and paid on all amounts declared to be delinquent or accelerated and immediately due and payable.

(2) Any interest assessed for or costs of collection charged under the authority of this section on delinquent balances of principal and interest shall be the same as are applied to delinquent real property taxes for the year in which the balance of the fee or charge became delinquent. This subsection does not apply to assessments securing special improvement district bonds issued before April 23, 1990.

(3) Notwithstanding the provisions of Subsection (1), if before the final date that payment may be legally made under a final sale or foreclosure of property to collect delinquent assessment installments, the owner pays the amount of all unpaid installments that are past due and delinquent with interest at the rate determined by the governing body to date of payment plus all approved or required costs, the owner shall then be restored to the right to pay in installments in the same manner as if default had not occurred. 1990

17A-3-323. Lien for assessment — Priority.

An assessment or any part or installment of it, any interest accruing, and the penalties and costs of collection as provided in Title 59, Chapter 2, Part 13 shall constitute a lien against the property upon which the assessment is levied on the effective date of the ordinance levying the assessment. This lien shall be superior to the lien of any trust deed, mortgage, mechanic's or materialman's lien, or other encumbrance and shall be equal to and on a parity with the lien for general property taxes. The lien shall apply without interruption, change in priority, or alteration in any manner to any reduced payment obligations and shall continue until the assessments, reduced payment obligations, and any interest, penalties, and costs on them are paid, notwithstanding any sale of the property for or on account of a delinquent general property tax, special tax, or other assessment or the issuance of a tax deed, an assignment of interest by the county, or a sheriff's certificate of sale or deed. 1990

17A-3-324. Sale of property to collect assessment.

(1) All assessments made under this part or any part or installment of same shall be paid and collected when due or the property charged with the assessment shall be sold for the amount due, plus interest, penalties, and costs, in such manner as may be provided by ordinance of the municipality or in the manner provided by Title 59, Chapter 2, Part 13 for the sale of property for delinquent general property taxes. All pertinent provisions of Title 59, Chapter 2, Part 13 shall apply under this part, including the foreclosure of lien provisions, unless this part shall modify these provisions and except that the wording of Title 59, Chapter 2, Part 13 shall be changed as appropriate to mean the assessments permitted to be imposed by this part rather than general property taxes so as to accomplish the purposes of this part.

(2) The governing body may also provide for the summary sale of any property assessed under this part after a delinquency shall have occurred in the payment of any assessment or part or installment of it. The sale shall be in the manner provided for actions to foreclose mortgage liens or trust deeds, except that if at the sale no person or entity shall bid and pay the municipality the amount due on the assessment plus interest and costs, the property shall be deemed sold to the municipality for these amounts. The municipality shall be permitted to bid at the sale.

(3) The remedies provided in this part for the collection of assessments and the enforcement of liens shall be deemed and construed to be cumulative and the use of any one method or means of collection or enforcement shall not deprive the municipality of the use of any other method or means. 1990

17A-3-325. Payments from guaranty fund or reserve fund to avoid default — Recovery from sale proceeds.

(1) If any assessment or any part or installment of it becomes delinquent, redemption of the property shall be the same as provided in Title 59, Chapter 2, Part 13 relating to general property tax delinquencies. In order to avoid default in the payment of any outstanding bonds or interim warrants issued under this part, the municipality may determine to pay any delinquent amounts due, plus the interest, penalties, and costs, or it may pay these amounts and the full balance of the assessment, if accelerated, or any parts or installments that may become due during the period of redemption. All amounts paid by the municipality for the delinquency may be paid out of the guaranty fund or reserve fund, as applicable, and charged against the delinquent property.

(2) Upon the tax sale of the property so charged, all amounts paid by the municipality shall be included in the sale price of the property recovered in the sale, and the guaranty fund or reserve fund, as applicable, reimbursed for it. If the property so charged is sold to the municipality at the tax sale and additional assessment installments will become due, the municipality shall pay the additional installments out of the guaranty fund or reserve fund, as applicable, recover its amount in any sale of the property, and reimburse the guaranty fund or reserve fund, as applicable, when the property is sold. 1995

17A-3-326. Special improvement fund.

(1) (a) Subject to Section 17A-3-327, when a municipality levies any assessment authorized by this part, the governing body shall establish a special improvement fund.

(b) All monies paid into the municipal treasury in payment of the assessment and interest on it shall be deposited in the special improvement fund.

(c) The monies deposited in the special improvement fund may be expended only for:

(i) the payment of the costs and expenses of making, operating, and maintaining the local improve-

ments to the extent permitted by Section 17A-3-314; and

(ii) the payment of interim warrants, special improvement bonds, and the interest on them that are issued against the special improvement district created to make the improvements.

(2) (a) The treasurer of the municipality shall:

(i) have custody of the special improvement fund;

(ii) keep the special improvement fund intact and separate from all other funds and monies of the municipality; and

(iii) pay moneys out of the special improvement fund only for the purposes specified in this part.

(b) (i) The treasurer shall invest any monies in the special improvement fund by following the procedures and requirements of Title 51, Chapter 7, State Money Management Act.

(ii) The treasurer shall pay any interest received from the investment of special improvement fund monies into the special improvement fund to be used exclusively for the same purposes for which the special improvement fund was established.

(3) When all bonds or interim warrants or both have been paid or redeemed in full, the governing body shall transfer any money remaining in the fund as provided in Section 17A-3-336. 1992

17A-3-327. Improvement revenues account.

(1) The governing body shall deposit all improvement revenues in a separate account in the special improvement fund.

(2) The treasurer of the municipality shall:

(a) have custody of the improvement revenues account in the special improvement fund;

(b) keep it intact and separate from all other funds and monies of the municipality; and

(c) pay monies out of the account only for the purposes specified in this part.

(3) (a) The treasurer shall invest any monies in the account by following the procedures and requirements of Title 51, Chapter 7, State Money Management Act.

(b) The treasurer shall:

(i) pay any interest received from the investments into the account exclusively; and

(ii) expend the interest for the same purposes for which the account was established.

(4) When all bonds or interim warrants or both have been paid or redeemed in full, the governing body shall transfer any money remaining in the account to the Special Improvement Guaranty Fund or to the General Fund of the municipality. 1992

17A-3-328. Special improvement bonds.

(1) Fifteen days or more after the effective date of any ordinance levying an assessment in a special improvement district, the governing body of the municipality levying the assessment, by ordinance or resolution, may authorize the issuance of special improvement bonds to pay the costs of the improvements in the district against the funds created by the assessment. The aggregate principal amount of the special improvement bonds so authorized shall not exceed the unpaid balance of the assessments at the end of this 15-day period. The special improvement bonds shall be fully negotiable for all purposes, shall mature at such time or times not exceeding the period of time over which installments of the assessments are due and payable plus one year, shall bear interest at the lowest rate or rates reasonably obtainable, shall be payable at such place or places, shall be in such form, and generally shall be issued and shall be sold in such manner and with such details as may be provided by ordinance or resolution. All

these bonds shall be dated no earlier than the effective date of the ordinance levying the assessment.

(2) Except for special improvement bonds issued for lighting service or park maintenance purposes (which bonds shall bear interest only from the due date), interest shall be paid semiannually, annually, or at such other intervals or upon such other schedule as may be specified by the governing body and may be evidenced by interest coupons attached to the bonds.

(3) The governing body may provide that the bonds shall be callable for redemption prior to maturity and fix the terms and conditions of redemption, including the notice to be given and the premium, if any, to be paid. No bonds are callable for redemption unless the terms and conditions of redemption are stated on the face of the bonds.

(4) The bonds shall be signed and may be countersigned by any officials of the municipality (including a member or members of the governing body) as designated by the governing body of the municipality. If so provided by the governing body, the signatures on the bonds and interest coupons, if any, may be by facsimile signature if at least one signature required or permitted to be placed on the face of the bond is manually signed. Bonds or interest coupons bearing the signatures (manual or facsimile) of officers in office on the date of execution of them shall be valid and binding obligations notwithstanding that before the delivery of the bonds any or all of the persons whose signatures appear on them shall have ceased to be officers of the municipality.

(5) The governing body may provide that the bonds shall bear interest at a fixed rate or rates, a variable rate or rates, or a combination of fixed and variable rates. In the case of a variable interest rate or rates, the governing body shall specify the basis upon which the rate or rates shall be determined from time to time, the manner in which and schedule upon which the rate or rates shall be adjusted, and a maximum rate that the bonds may bear.

(6) The governing body may specify terms and conditions under which the bonds bearing interest at a variable interest rate may be converted to bear interest at a fixed interest rate.

(7) The governing body may specify terms and conditions under which the municipality agrees to repurchase the bonds. The governing body may secure a letter of credit or other instrument to secure payment or repurchase of any bonds. The governing body may engage a remarketing agent and indexing agent, subject to terms and conditions agreed to by the governing body. The governing body may cause the special improvement district to pay the costs of the foregoing and any similar costs with respect to the bonds. 2002

17A-3-329. Special improvement refunding bonds.

(1) (a) The governing body may issue special improvement refunding bonds to refund special improvement bonds issued under authority of this part.

(b) The governing body may adopt a resolution refunding the special improvement bonds in whole or in part, at or in advance of their maturity, whether at stated maturity or upon redemption or declaration of maturity.

(2) In issuing the special improvement refunding bonds, the governing body shall comply with:

- (a) the requirements of this part;
- (b) the provisions of Title 11, Chapter 27, Utah Refunding Bond Act, as provided in Subsection (13); and
- (c) the requirements of this section.

(3) Special improvement refunding bonds shall:

- (a) be payable solely from the sources described in Subsection (7)(a);
- (b) mature not later than the date of final maturity of the prior bonds;
- (c) not mature or bear interest at any time in amounts that cannot be paid when due from the payments of the

assessments, interest on assessments, and improvement revenues, or the reduced payment obligations, as applicable, assuming that payments of these assessments, improvement revenues, reduced payment obligations, and interest are paid when due, together with the amounts of any prior payments or prepayments of these assessments, improvement revenues, reduced payment obligations, and interest previously made and that remain available for payment of the special improvement refunding bonds; and

(d) bear interest as determined by the governing body in accordance with Subsections 17A-3-328(2) and (5).

(4) Special improvement refunding bonds may:

(a) be issued in bearer form, with or without interest coupons attached, or in registered form in accordance with Title 15, Chapter 7, Registered Public Obligations Act, as determined by the governing body;

(b) as determined by the governing body:

(i) be in a form and contain details consistent with this part;

(ii) be payable at a place or places;

(iii) be delivered in exchange for the prior bonds; or

(iv) be sold in a manner, at terms, and with details consistent with this part, and at a price or prices above, at, or below par;

(c) be callable for redemption prior to maturity upon terms, conditions, and notice, and premium, if any, to be paid, as the governing body determines, but no special improvement refunding bonds are callable for redemption unless the terms and conditions of redemption are stated on their face; and

(d) be issued for the purpose of refunding one or more issues of prior bonds of a municipality and, if issued to refund two or more issues of prior bonds, be issued in a single series to refund all of the issues of prior bonds to be refunded, or in two or more series to refund one or more of these issues of prior bonds.

(5) The governing body may provide for the payment of incidental refunding costs of the special improvement refunding bonds as follows:

(a) by advancing funds from the general fund or other funds of the municipality, if the governing body:

(i) finds and determines that this advance of municipal funds is in the best interest of the municipality and its citizens, including, without limitation, the owners of property within the district; and

(ii) provides that the assessments, the interest on assessments, and the improvement revenues from which the prior bonds are payable may not be reduced during whatever period is necessary to provide funds from the payment of these assessments, interest on assessments, and improvement revenues with which to reimburse the municipality for all funds advanced by it for the payment of incidental refunding costs, together with interest on these funds at a rate or rates equal to the interest rate or rates payable on these assessments;

(b) from any premium received from the sale of the special improvement refunding bonds;

(c) from any earnings on the investment of the proceeds of the special improvement refunding bonds pending their use to redeem the prior bonds;

(d) from any other sources legally available to the municipality for this purpose; or

(e) from any combination of Subsections (5)(a) through (d).

(6) (a) The governing body of the municipality shall designate an official of the municipality to execute a manual or facsimile signature on special improvement refunding bonds and any interest coupons attached to them.

(b) The governing body of the municipality shall designate another municipal official to attest, by manual or facsimile signature, to the signature of the official executing the special improvement refunding bonds and any interest coupons.

(c) In addition to these signatures, any special improvement refunding bond may include a certificate signed by the manual or facsimile signature of an authenticating agent, registrar, transfer agent, or the like.

(d) At least one signature of an authorized official or other person required or permitted to be placed on the special improvement refunding bonds shall be a manual signature.

(e) Special improvement refunding bonds and interest coupons bearing the signatures, manual or facsimile, of officers in office on the date of execution of the special improvement refunding bonds or coupons are valid and binding obligations, even if before the delivery of the special improvement refunding bonds or interest coupons any or all of the persons whose signatures appear on them have ceased to be officers of the municipality.

(7) (a) Notwithstanding Subsection (7)(b), in issuing special improvement refunding bonds, the governing body shall make the special improvement refunding bonds and the interest on them payable from and secured by:

(i) either the same assessments and interest on assessments from which the prior bonds were payable and were secured or by the reduced assessments and interest on assessments adopted by the governing body pursuant to Subsection (10);

(ii) the special improvement guaranty fund if the prior bonds were payable from and secured by this fund; and

(iii) improvement revenues if the prior bonds were payable from and secured by improvement revenues.

(b) In issuing special improvement refunding bonds, the governing body may make the special improvement refunding bonds and the interest on them payable from and secured by:

(i) the special improvement guaranty fund; and

(ii) improvement revenues.

(c) The governing body shall:

(i) adopt an ordinance amending the prior ordinance, as provided in Subsection (10); and

(ii) give notice of any reduced payment obligations to the owners of properties assessed in the prior ordinance, as provided in Subsection (11).

(d) (i) Neither the amendment of the prior ordinance nor the issuance of special improvement refunding bonds affects the validity of or the continued enforceability of the original or any other prior assessments or the interest on assessments, except for the amounts of any reductions to the original or prior assessments or interest on assessments specified in the amended ordinance.

(ii) Neither this amendment nor the issuance of the special improvement refunding bonds affects the validity of or the enforceability or priority of the lien on the properties upon which the assessments were levied, except for the amounts of any reductions to the original or prior assessments or interest on assessments specified in the amended ordinance.

(iii) All these reductions to the original or prior assessments and the interest on assessments shall continue to exist in favor of the special improvement refunding bonds.

(iv) All these liens and priorities shall continue to exist against these properties to secure the payment of the reduced payment obligations and the special

improvement refunding bonds in the same manner and, except for the amounts of any reductions to the original or prior assessments or interest on assessments, to the same extent as the original and any other prior assessments, interest on assessments, and the prior bonds were secured by the original assessments, interest on assessments, and the original liens and priorities.

(e) It is the intent of the Legislature that there be no impairment of the validity of, or, except with respect to the amounts of these reductions to the original or prior assessments or interest on them, of the enforceability or priority of any of these assessments, interest on them, or liens as a result of the amendment of the prior ordinance or the issuance of the special improvement refunding bonds.

(8) (a) The lien securing any reduced payment obligations from which the special improvement refunding bonds are payable and secured is subordinate to the lien securing the original or prior assessments, interest on assessments, and the prior bonds until the principal of, interest on, and redemption premium, if any, on the prior bonds are fully paid.

(b) Following this payment, this lien shall continue as provided in Section 17A-3-323, as security for the payment of the reduced payment obligations, the penalties and costs of collection of those obligations, and the payment of the principal of, interest on, and redemption premium, if any, on the special improvement refunding bonds.

(9) (a) Unless the principal of, interest on, and redemption premiums, if any, on the prior bonds are paid simultaneously with the issuance of the special improvement refunding bonds, the municipality shall irrevocably set aside the proceeds of the special improvement refunding bonds in an escrow or other separate account.

(b) The governing body shall pledge that account as security for the payment of the principal of, interest on, and redemption premiums, if any, on the special improvement refunding bonds or the prior bonds, or both.

(10) The governing body shall ensure that the amending ordinance required by Subsection (7) meets the following requirements:

(a) (i) Subject to the provisions of Subsection (5)(a), the amount by which the principal or interest, or both, payable on the special improvement refunding bonds is less than the amount of principal or interest, or both, payable on the prior bonds shall be applied to reduce the assessments levied by the prior ordinance or the interest payable on those assessments, or both, as determined by the governing body.

(ii) Any reductions of the assessments levied by the prior ordinance or of interest payable on those assessments, or both, shall be made in such manner that the then unpaid assessments levied against each of the assessed properties and the unpaid interest on these assessments shall receive a proportionate share of the reductions.

(iii) These reductions do not apply to assessments and interest on assessments that have been paid.

(b) The amending ordinance shall either:

(i) state the amounts of the reduced payment obligations for each of the properties assessed in the prior ordinance; or

(ii) incorporate by reference a revised assessment list approved by the governing body that contains these reduced payment obligations.

(c) The amending ordinance need not describe each block, lot, part of block or lot, tract, or parcel of property assessed.

(d) The governing body shall comply with the requirements of Subsection 17A-3-318(1) regarding publication and effective date with respect to the amending ordinance.

(e) (i) The amending ordinance shall state the effective date or dates of any reductions in the assessments and the interest on assessments levied in the prior ordinance.

(ii) The governing body may not set an effective date or dates that is before the date when all of the principal of, interest on, and any redemption premiums on the prior bonds and any advances of funds made under Subsection (5)(a) are fully paid.

(11) (a) The notice to owners of assessed properties of reductions in their assessments and interest payments required by Subsection (7)(c)(ii) shall:

(i) identify the property subject to the assessment; and

(ii) state the amount of the reduced payment obligations that will be payable from and after the applicable date stated in the amending ordinance.

(b) The notice may contain any other information that the governing body considers appropriate.

(12) (a) The governing body shall mail the notice referred to in Subsection (7)(c)(ii), postage prepaid, not less than 21 days before the date the first payment of the reduced assessments becomes due addressed to "owner" at the street number of each piece of improved, assessed property.

(b) If a street number has not been assigned to a piece of improved, assessed property, the notice shall be addressed to "owner" and mailed to the post office box, rural route number, or any other mailing address of the improved property.

(c) The governing body may include the notice with or in any other notices regarding the payment of assessments and interest on assessments sent to the property owners in the district within the time and addressed as stated in this Subsection (12).

(d) Neither the failure to give notice nor any defect in its content or the manner or time in which it is given affects the validity or enforceability of the amending ordinance or the special improvement refunding bonds or the validity, enforceability, or priority of the reduced payment obligations.

(e) Whether or not this notice is given, no other notice is required to be given to the owners of the assessed properties in connection with the issuance of the special improvement refunding bonds.

(13) To the extent it is not inconsistent with this part, Title 11, Chapter 27, Utah Refunding Bond Act, applies to the issuance of special improvement refunding bonds.

(14) The provisions of this part relating to special improvement refunding bonds apply to all special improvement bonds issued and outstanding or which may be issued and outstanding in the future.

(15) This part applies to all special improvement refunding bonds issued under this part even though the prior bonds that were refunded by those special improvement refunding bonds were issued under any other law, including, without limitation, any law that has been repealed. 2002

17A-3-330. Objection to assessment — Actions to enjoin levy or set aside proceedings.

(1) No assessment or proceeding in a special improvement district shall be declared void or set aside in whole or in part in consequence of any error or irregularity which does not go to the equity or justice of the assessment or proceeding. However, any party feeling aggrieved by an assessment or proceeding and who has not waived his objections thereto as

provided in Section 17A-3-307 or 17A-3-317 shall have the right to commence a civil action against the municipality to enjoin the levy or collection of the assessment or to set aside and declare unlawful proceedings.

(2) Any such action must be commenced and summons must be served on the municipality not later than 30 days after the effective date of the ordinance levying assessments in the special improvement district. Such action shall be the exclusive remedy of any aggrieved party. No court shall entertain any complaint which the party was authorized to make but did not make in a protest filed pursuant to Section 17A-3-307 or at hearings held pursuant to Section 17A-3-317 or any complaint that does not go to the equity or justice of the assessment or proceeding.

(3) After the expiration of such 30-day period:

(a) The special improvement bonds issued or to be issued against the district and the assessments levied in the district shall become incontestable as to all persons who have not commenced the action provided for in this section, and

(b) No suit to enjoin the issuance or payment of the bonds, the levy, collection or enforcement of the assessments or in any other manner attacking or questioning the legality of the bonds or assessments may be instituted in this state and no court shall have authority to inquire into such matters. 1990

17A-3-331. Payment of special improvement bonds.

(1) (a) Special improvement bonds are not a general obligation of the municipality.

(b) No municipality may be held liable for the payment of any special improvement bond except to the extent of:

(i) the funds created and received from assessments against which the bonds are issued;

(ii) any improvement revenues; and

(iii) its special improvement guaranty fund or reserve fund, as applicable.

(c) The municipality is responsible for the lawful levy of all assessments, for the collection and application of improvement revenues as provided by law, for the creation and maintenance of the special improvement guaranty fund as provided by law, or the reserve fund, if applicable, and for the faithful accounting, collection, settlement, and payment of the assessments and improvement revenues and for the moneys of the special improvement guaranty fund or reserve fund, as applicable.

(2) (a) If any property is illegally assessed, or if any property that is exempted by law from assessment for local purposes is assessed, the municipality assessing that property is liable to the holders of special improvement bonds issued against the funds created by those assessments.

(b) The municipality shall pay that amount from the general fund of the municipality. 1990

17A-3-332. Total assessments greater than cost of improvements — Surplus to special improvement guaranty fund — Abandonment of improvement.

Where an assessment is levied prior to the time all improvements in the district are entirely completed and accepted, and, on completion and acceptance, the total cost of the improvements for which assessments were levied is less than the total amount of the assessments, the surplus shall be placed in the special improvement guaranty fund. If special improvement bonds have been issued by the district prior to the time the surplus is determined, the surplus shall be held in the guaranty fund and used for payment of the bonds and interest and any penalties and costs. If an improvement project is abandoned after assessments have been levied but before the

improvements have been started, the full amount of the assessments levied, less any damages or costs related to the abandonment, shall be rebated to the property owner at the time the rebate is made of the property assessed at the last known address of the owner, using for this purpose the names and addresses appearing on the last completed real property assessment rolls of the county in which the property is located. If an improvement project is abandoned prior to its completion and acceptance but after assessments have been levied, the amount of the assessments in excess of that required to pay for the improvements to the point of abandonment or termination including any costs and damages, shall be rebated as provided in this section.

1990

17A-3-333. Improvement revenues — Installment payments.

(1) Any municipality may adopt a resolution providing for the pledge and use of improvement revenues, if any, to pay:

(a) all or a portion of the costs and expenses of making, operating, and maintaining improvements to the extent permitted by Section 17A-3-314; and

(b) all or a portion of the principal of and interest on any interim warrants and special improvement bonds issued against the special improvement district created to make the improvements.

(2) If the governing body adopts the resolution described in Subsection (1), it may:

(a) cause assessments to be levied in the full amount of the estimated cost of the improvements as determined by the engineer of the municipality pursuant to Subsection 17A-3-305(1)(e);

(b) agree to use the installment payments from those assessments to pay the costs of the improvements and to pay principal of and interest on any interim warrants and special improvement bonds when due; and

(c) if net improvement revenues have been received and pledged to pay operation and maintenance costs of the improvements to the extent permitted by Section 17A-3-314 and to pay principal of and interest on any interim warrants and special improvement bonds, reduce the installment payments as provided in Subsection (3).

(3) (a) If the governing body adopts the resolution described in Subsection (1), it shall authorize an official of the municipality to:

(i) determine on each installment payment date the amount of net improvement revenues received by the municipality since the last installment payment date; and

(ii) reduce the amount of the installment payment due on the next succeeding installment payment date by an amount not greater than the amount of the net improvement revenues described in Subsection (i) received by the municipality.

(b) The municipality may not reduce installment payments if:

(i) the reduction exceeds the amount of net improvement revenues that have been pledged to pay operation and maintenance costs of the improvements to the extent permitted by Section 17A-3-314 and to pay principal of and interest on interim warrants and special improvement bonds; or

(ii) after the reduction, the sum of the assessment installment payments and the net improvement revenues are insufficient to pay operation and maintenance costs of the improvements to the extent permitted by Section 17A-3-314 and to pay all principal of and interest on all interim warrants and special improvement bonds issued against the special improvement district when due.

(c) The governing body shall require that any reductions of installment payments be made so that the unpaid assessments levied against each of the assessed properties and the unpaid interest on those assessments receive a proportionate share of the reductions.

(d) Reductions do not apply to assessments and interest on assessments that have been paid.

(4) (a) The governing body shall mail notice of the reduction of the installment payments, postage prepaid, not more than 14 days after the determination required by Subsection (3) addressed to "owner" at the street number of each piece of improved assessed property.

(b) If a street number has not been assigned to a piece of improved assessed property, the notice shall be addressed to "owner" and mailed to the post office box, rural route number, or any other mailing address of the improved property.

(c) The governing body may include the notice with or in any other notices, regarding the payment of assessments and interest on assessments, sent to the property owners in the district within the time and addressed as stated in this subsection.

(5) (a) If the owner of assessed property pays more than the amount of the reduced installment payment on the installment payment date after the notice is mailed, the municipality may, by complying with the requirements of Subsection (4), provide additional notice to the owner that:

(i) that owner has overpaid the assessment installment payment; and

(ii) the municipality will either:

(A) credit the amount of the overpayment against the next installment payment due; or

(B) if no further installment payments are due, rebate the amount of the overpayment to the owner upon receipt of a written request for rebate from the owner.

(b) If the municipality receives an overpayment, it shall either:

(i) credit the amount of the overpayment against the next installment payment due; or

(ii) if no further installment payments are due, rebate the amount of the overpayment to the owner upon receipt of a written request for rebate from the owner.

(c) The municipality is not required to pay interest on any overpayments held by it.

1990

17A-3-334. Special Improvement Guaranty Fund — Sources — Uses — Investment — Subaccounts.

(1) (a) Any municipality that has issued or may subsequently issue any special improvement bonds or special improvement refunding bonds shall create a Special Improvement Guaranty Fund.

(b) The fund shall be funded by:

(i) appropriation from the General Fund;

(ii) the levy of a tax of not to exceed .0002 per dollar of taxable value of taxable property in any one year;

(iii) the issuance of general obligation bonds; or

(iv) appropriation from other sources as determined by the governing body.

(c) This fund shall be for the purpose of guaranteeing, to the extent of this fund, the payment of special improvement bonds and special improvement refunding bonds and interest accruing on them issued against special improvement districts for the payment of improvements made in the district.

(2) The municipality may lawfully covenant for the benefit of the holders of special improvement bonds and special improvement refunding bonds that so long as the bonds and special improvement refunding bonds are outstanding and unpaid:

(a) it will create the fund;

(b) it will:

(i) by any of the methods authorized by this section, provide amounts to be transferred to the fund equal each year to the amount that a tax levy of .0002 per dollar of taxable value of taxable property will produce until the fund is equal to not less than 10% of the amount of all outstanding special improvement bonds and special improvement refunding bonds of all special improvement districts of the municipality; and

(ii) subsequently, transfer to the fund at least yearly whatever amounts are required to maintain or replenish the fund to this percentage; and

(c) it will invest the funds on deposit in the guaranty fund by following the procedures and requirements of Title 51, Chapter 7, State Money Management Act.

(3) A municipality may create subaccounts within the Special Improvement Guaranty Fund with respect to each issue of special improvement bonds outstanding in a manner it considers appropriate to allocate among the bond issues the securities held in and interest earnings on the guaranty fund for purposes of complying with federal law.

(4) For purposes of Subsection (2)(b), special improvement refunding bonds are not considered to be outstanding until the principal of, interest, and any redemption premiums on the special improvement bonds that are refunded by the special improvement refunding bonds are fully paid. 1992

17A-3-335. Reserve fund in lieu of Special Improvement Guaranty Fund — Investment.

(1) (a) The municipality may, in lieu of creating and funding a Special Improvement Guaranty Fund with respect to an issue of special improvement bonds, establish a reserve fund to secure the issue.

(b) If the municipality establishes a reserve fund, the special improvement bonds secured by the reserve fund are not secured by the special improvement guaranty fund and the municipality is not required to fund the special improvement guaranty fund for the bond issue.

(c) Unless otherwise provided in this part or in the proceedings authorizing the issuance of the bonds, all provisions in this part with respect to the special improvement guaranty fund have no application with respect to bonds secured by a reserve fund.

(d) The reserve fund shall be funded in amounts and in a manner as provided in the proceedings authorizing the issuance of the bonds.

(e) Upon the retirement of any special improvement bonds secured by a reserve fund, the reserve fund shall be terminated and all remaining moneys on deposit in the fund shall be disbursed in the manner provided in the proceedings authorizing the issuance of the bonds.

(2) The municipality shall invest the funds on deposit in the reserve fund by following the procedures and requirements of Title 51, Chapter 7, State Money Management Act. 1992

17A-3-336. Interest charges, penalties and other collections greater than expenses — Excess transferred to guaranty fund.

All interest money collected or interest received from the investment of the improvement or bond fund, penalties, costs, and other amounts collected by the municipality for the benefit and credit of any special improvement fund and remaining on hand after all special improvement bonds or

interim warrants, together with interest on them, drawn against a special improvement fund shall have been fully paid and cancelled, shall be transferred by the treasurer of the municipality to the special improvement guaranty fund. 1990

17A-3-337. Special improvement fund insufficient to pay bonds.

When any special improvement bond drawn against any special improvement fund is presented to the municipality for payment and there is not a sufficient amount in the special improvement fund to pay the bond, payment shall be made directly from the special improvement guaranty fund or reserve fund, as applicable. If there are insufficient moneys on deposit in the special improvement guaranty fund or reserve fund to make this payment, payment shall be made by warrant drawn against the special improvement guaranty fund or reserve fund, as applicable. 1990

17A-3-338. Assessments on property acquired by municipality at final tax sale paid from guaranty fund or reserve fund — Reimbursement.

If any property is sold to the municipality at final tax sale conducted to collect delinquent property taxes or delinquent assessments levied under this part, the municipality shall, for as long as the municipality retains ownership of the property so sold, pay all annual assessment installments that become due, including the interest on them. The payments shall be made out of the guaranty fund or reserve fund, as applicable, and paid into the special improvement district fund of the district where the property is located. If the municipality sells the property it has received from final tax sale by installments or otherwise, the purchase price for it shall not be less than an amount sufficient to reimburse the guaranty fund or reserve fund, as applicable, for all amounts paid out of the fund on behalf of this property for delinquent assessments or parts or installments of them, plus interest, penalties, and costs. The sales price of the property and any interest on it paid in installments shall be paid into the guaranty fund or reserve fund, as applicable, to the extent of the full reimbursement as required in this section. This section shall be read and interpreted in conjunction with Sections 17A-3-324 and 17A-3-325. 1990

17A-3-339. Subrogation of municipality for payments from guaranty or reserve fund.

If a municipality has paid under its guaranty or reserve fund any sum on account of principal or interest on the special improvement bonds of any special improvement district, it shall be subrogated to the rights of the holders of the bonds or interest coupons paid, and the bonds or coupons and the proceeds from them shall become a part of the special improvement guaranty fund or reserve fund, as applicable. 1990

17A-3-340. Insufficiency of guaranty or reserve fund — Replenishment — Warrants — Tax levy to pay warrants.

If there is insufficient money in the special improvement guaranty fund or reserve fund, as applicable, at any time to make all purchases of property bid on by the municipality at sales of property for delinquent assessments, the governing body may replenish the guaranty fund or reserve fund by transfer or appropriation from the general fund of the municipality or from other available sources as it may determine. Warrants drawing interest at the rate or rates determined by the governing body may be issued against the guaranty fund or reserve fund, as applicable, to meet any financial liabilities accruing against it, but at the time of making its next annual tax levy, the municipality shall provide for the levy of a sum sufficient, with other resources of the guaranty fund or reserve

fund, to pay warrants so issued and outstanding. The tax levied for this purpose may not exceed .0002 per dollar of taxable value of taxable property in any one year. 1990

17A-3-341. Excess amount in guaranty fund — Special improvement refunding bonds.

Whenever the amount in the special improvement guaranty fund exceeds 25% of the average amount of all special improvement bonds and special improvement refunding bonds of all special improvement districts of the municipality outstanding during the preceding three-year period, the governing body of the municipality may by resolution transfer all amounts in excess of this percentage to the general fund of the municipality, except that the transfer may not be made if the amount in the guaranty fund is less than 25% of the amount of all special improvement bonds and special improvement refunding bonds of all special improvement districts of the municipality which are outstanding at the time of the proposed transfer. For the purpose of this section, special improvement refunding bonds are not deemed to be outstanding until the principal of, interest, and any redemption premiums on the special improvement bonds which are refunded by the special improvement refunding bonds are fully paid. 1990

17A-3-342. Intent.

- (1) This part is intended to:
 - (a) afford an alternative method for the making of improvements by a municipality;
 - (b) allow the creation of special improvement districts;
 - (c) allow the levy of assessments;
 - (d) allow the collection of improvement revenues; and
 - (e) allow the issuance of interim warrants and special improvement bonds by municipalities.
- (2) This part may not be construed to deprive any municipality of the right to make improvements, create special improvement districts, levy assessments or other special taxes, or issue special improvement bonds under authority of any other law of this state.
- (3) This part provides full authority for municipalities to:
 - (a) make improvements;
 - (b) create special improvement districts;
 - (c) levy assessments;
 - (d) collect and use improvement revenues; and
 - (e) issue special improvement bonds.
- (4) No statute passed by the Legislature amending other statutes relating to the same subject matter as covered by this part may be construed to affect the authority to proceed under this part in the manner provided in this part unless such statute amends this part and specifically provides that it is to be applicable to proceedings taken and to special improvement bonds issued under this part. 1990

17A-3-343. Repealed. 1995

17A-3-344. Proceedings prior to act validated — Exceptions.

All special improvement bonds issued by any municipality prior to May 13, 1969, and all proceedings had in the authorization and issuance thereof and all proceedings taken prior to or in connection with the levy of assessments out of which such bonds are payable or in the creation, maintenance and use of the special improvement guaranty fund of the municipality issuing such bonds are hereby validated, ratified and confirmed and all such special improvement bonds are declared to constitute legally binding obligations in accordance with their terms and all such assessments are declared to be legal and valid assessments. Nothing in this section shall be construed to affect or validate any bonds, assessments or special improvement guaranty fund, the legality of which is being contested at the time this part takes effect. This act shall apply to all assessments levied and to all special im-

provement bonds and interim warrants issued after May 13, 1969, even though proceedings prior to the levy or issue were taken under the provisions of a law repealed by this part and all of such proceedings are validated, ratified and confirmed subject to question only as provided in Section 17A-3-330. 1990

17A-3-345. Release of assessment.

When an assessment has been paid in full with respect to any property, the municipality shall deliver to the owner for recordation in the office of the county recorder a release and discharge of the lien of any assessment in a form that includes the legal description of the property released and otherwise complies with the state recording statutes as then applicable. 1990

PART 4

PARKING AND BUSINESS IMPROVEMENT DISTRICTS

17A-3-401. Short title.

This act shall be known and may be cited as the "Utah Parking and Business Improvement District Act." 1990

17A-3-402. Purpose.

The purpose of this part is to provide authority for the establishment of parking and business improvement districts within a county or municipality. 1990

17A-3-403. Definitions.

As used in this part:

- (1) "Business" means all types of business including professions.
- (2) "County" means a county of this state and includes any county regardless of the form of government under which it operates.
- (3) "Governing authority" means the board or body, however designated, in which the general legislative powers of a county or municipality are vested and includes the board of commissioners of a county or a city, the city council of a city, and the board of trustees of a town.
- (4) "Municipality" means a city or town of this state.
- (5) "Parking and business improvement district" or "district" means an area created under this part. 1990

17A-3-404. Establishment of improvement district — Tax levy — Parking and business improvement fund.

(1) A county or a municipality may establish a parking and business improvement district for the purpose of general promotion of business activities within the district which may include, but not be limited to, promotion of general business activities within the district, for the benefit of the businesses assessed within the district, which may include, but not be limited to, providing free off-street parking.

(2) A county or a municipality which has established a parking and business improvement district may levy a tax on businesses within said district which is in addition to all other taxes levied upon businesses, and shall not be limited by levy limitations imposed upon counties or municipalities by law. Such tax shall be levied and collected as the governing authority shall determine and shall constitute a special fund to be known as the parking and business improvement fund. All tax monies received from the tax authorized hereunder shall be deposited in the county or municipal treasury to the credit of the parking and business improvement fund and shall be used for no other purpose other than operation and expenses of the district. 1990