

2003

# Vestin Mortgage, Inc. v. First American Title Insurance Company. a California Corporation : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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VESTIN MORTGAGE, INC.,

Plaintiff and Appellant,

vs.

FIRST AMERICAN TITLE  
INSURANCE COMPANY, a  
California Corporation,

Defendants and Appellees.

No. 20030941-CA

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**BRIEF OF APPELLANT**

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Appeal From the Third Judicial District Court, Salt Lake County  
Case No. 20030941-SC, Honorable Frank G. Noel

---

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**ORAL ARGUMENT REQUESTED**

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## **JURISDICTION**

This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) because this case was transferred from the Supreme Court. Original appellate jurisdiction was proper in the Supreme Court under Utah Code Ann. § 78-2-2(3)(j) because this is an appeal from an order of a court of record over which this Court did not have original appellate jurisdiction.

## **ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION BELOW**

The issues presented by this appeal are as follows:

1.     **Issue:** Whether the district court erred in concluding as a matter of law that the title insurance policies at issue in this appeal are unambiguous and that the claims of Vestin Mortgage, Inc. (“Vestin”) are not covered under the policies.

**Standard of Review:** In determining whether a district court properly granted a motion to dismiss, an appellate court accepts 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 (Utah 2001). Because the propriety of a motion to dismiss is a question of law, an appellate court reviews a dismissal for correctness, giving no deference to the decision of the district court. *Hebertson v. Willow Creek Plaza*, 923 P.2d 1389, 1390 (Utah 1996).

Because the district court considered matters outside the pleadings, the Motion to Dismiss should have been treated by the district court as a motion for summary judgment. *See* Utah R. Civ. P. 12(b). Summary judgment is appropriate only when the record indicates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1039 (Utah 1991); *Allen v. Ortez*, 802 P.2d 1307, 1309 (Utah 1990). The appellate court reviews a trial court's order granting summary judgment for correctness, according no deference to the trial court's legal conclusions. *Clover*, 808 P.2d at 1039-40. In reviewing the trial court's ruling, the appellate court accepts the facts and inferences in the light most favorable to the losing party. *Id.*; *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1243 (Utah 1990). If this Court concludes that a genuine issue of material fact exists, it must reverse the district court's grant of summary judgment and remand that issue to the district court for trial. *Atlas Corp. v. Clovis National Bank*, 737 P.2d 225, 229 (Utah 1989).

Whether an ambiguity exists in a contract is a question of law. If a district court reaches a legal conclusion that an ambiguity exists in a contract, a factual issue as to the parties' intent remains and a motion for summary judgment may not be granted. *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 22, 54 P.3d 1139, 1145 (Utah 2002).

**Preservation of Issue in District Court:** This issue was preserved in the district court in Plaintiff's Memorandum in Opposition to Motion to Dismiss filed on August 13, 2003. (R. 234-244).

2. **Issue:** Whether the district court erred in failing to construe the policies to provide coverage to Vestin because First American failed to disclose and exclude from coverage the existence of the Eagle Mountain Special Improvement District in the title insurance policies at issue in this appeal.

**Standard of Review:** Questions of contract interpretation are questions of law for which this Court accords no deference to the conclusions of the district court. *See Meadow Valley Contractors v. Transcon Ins. Co.* 2001 UT App 190 ¶ 13, 27 P.3d 594, 597 (Utah Ct. App. 2001).

**Preservation of Issue in District Court:** This issue was preserved in the district court in Plaintiff's Memorandum in Opposition to Motion to Dismiss filed August 13, 2004. (R. 235-244).

### **DETERMINATIVE PROVISIONS**

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal. Relevant law is discussed as appropriate in the body of this brief.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case, Course of Proceedings, and Disposition Below**

This is an appeal from an Order of Dismissal with Prejudice dismissing Vestin's Complaint. *See* Addendum Exhibit 1. (R. 434-436). The Order was specifically based on "the record" submitted to the district court (R. 434) which included the evidence submitted by Vestin. Judge Noel did not exclude this evidence in considering First American's motion.

On May 30, 2003, Vestin filed its Complaint in this action alleging breach of two title insurance policies issued by First American that insured Vestin's title in two separate trust deeds. *See* Addendum Exhibits 2, 3 and 4. (R. 1-52).

On July 11, 2003, First American filed a Motion to Dismiss ("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 ("Opposition"). In support of Vestin's Opposition, Vestin filed the Affidavit of Daniel R. Stubbs (Addendum Ex. 5; R. 355-394) and the Affidavit of Thomas E. Lea (Addendum Ex. 6; R. 396-403).

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

On November 5, 2003, Honorable Frank G. Noel entered an Order of Dismissal with Prejudice. *See* Addendum Ex. 1. (R. 434-436).

On November 12, 2003, Vestin filed its Notice of Appeal and Notice of Bond for Costs on Appeal with the Third Judicial District Court of Salt Lake County, State of Utah. (R. 439-450).

## **B. 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. ("The Ranches"), a Utah Limited Liability Company. (R. 227). One loan was made on or about April 14, 2000, in the amount of \$1,965,000, and 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, Policy No. 3192-A-49, dated August 28, 2000 (“Policy No. 3192”) (Addendum Ex. 2), insuring the title of Vestin, its successors and assigns, in one of the Trust Deeds, and (ii) Policy of Title Insurance, Policy No. 2701-A-49, dated April 26, 2000 (“Policy No. 2701”) (Addendum Ex. 3), insuring the title of Vestin, then known as Capsource, Inc., doing business as Del Mar Mortgage, and its successors and assigns, in the other of the Trust Deeds. (R. 247-287). The Trust Deeds encumbered real property (“Property”) located within the boundaries of the City of Eagle Mountain in Utah County (“Eagle Mountain City”). (R. 228). Some or all of the right, title and interest of Vestin in the Trust Deeds was assigned to various third parties. (R. 228).

## **2. The Insuring Clauses of the Title Insurance Policies**

The Policies and Endorsements include three separate insuring clauses that are at issue in this appeal. The first of these insuring clauses is contained in the body of the Policies and provides that First American insures against loss or damage, not exceeding the “Amount of Insurance,” sustained or incurred by Vestin or its successors and assigns by reason of any of the following:

- 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).

As part of the Policies, First American also issued Endorsement F.A., ALTA Form 31, which contains an insuring clause that 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.

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

First American also issued Endorsement CLTA Form 104 in connection with the Policies. This Endorsement contains an insuring clause which 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....

(R. 259, 278) (emphasis added).<sup>1</sup>

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<sup>1</sup> The CLTA Form 104 Endorsements to the Policies were issued by First American after the date of the Policies. (R. 232). The CLTA Form 104 Endorsements are obtained by a lender which assigns an interest in or to a trust deed securing a loan to insure the title of the assignee. (R. 232). The Endorsement is issued as of the date of recording the assignment. (R. 232). The CLTA Form 104 Endorsements are effective as of the date of issuance, or otherwise the assignee would not be protected from title defects that may arise between the date of the policy and the date of issuance of the Endorsement. (R. 232). 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. (R. 232). However, the CLTA Form 104 Endorsements issued by First American through Century

### 3. The “Police Power” Exclusions

Paragraph 1(b) of the “Exclusions From Coverage” contained in the Policies provides for an exclusion from coverage regarding the exercise of governmental police power, but also provides an exception to that exclusion. The exception to the “police power” exclusion is the provision relevant to the issues in this appeal. The “police power” 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 addressing 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. 249, 268) (emphasis added). The exception to the “police power” exclusion expressly provides that an exercise of governmental police power that is recorded in the public records is **not** excluded from coverage under the Policies.

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

On or about 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”), for the purpose

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Title Company and part of the Policies were not dated. *See* Addendum Ex. 2 (R. 259-264); Ex. 3 (R. 277-285); (R. 232). Vestin has logged the date of issuance of each CLTA Form 104 issued in connection with the Policies. (R. 232, 355-361). The CLTA Forms were issued after the creation of the Eagle Mountain SID at issue in this matter. (R. 7-8).

of constructing certain improvements and assessing the real property situated within the boundaries of the Eagle Mountain SID. (R. 230). On or about August 1, 2000, Eagle Mountain City adopted Resolution No. 14-00, creating the Eagle Mountain SID. (R. 230).

On or about August 4, 2000, in accordance with Utah Code Ann. § 17A-3-307 (1991), Eagle Mountain City caused to be filed in the Office of the County Recorder of Utah County, Utah, a “Notice of Intention.” (R. 230). 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 certain 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).

Eagle Mountain City adopted an Assessment Ordinance No. 06-2001 (the “Assessment Ordinance”), 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 Eagle Mountain SID, for a total assessment of \$16,799,282 (the “Assessment”). (R. 230).

Section 5(D) of the Assessment Ordinance 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.

(R. 231, 340-341).

The Policies did not disclose or except from coverage the Eagle Mountain SID, the Notice of Intention or the intended Assessment, nor was the foregoing excepted from coverage at the time of issuance of the CLTA Form 104 Endorsements. (R. 231). Further, Vestin had no knowledge or information regarding the Eagle Mountain SID or the intended Assessment prior to the execution of the Trust Deeds. (R. 231). The Property is located within the boundaries of the Eagle Mountain SID and has been assessed \$2,241,348.70 of the total accelerated Assessment amount. (R. 231, 335-353).

**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 the indebtedness secured by the Trust Deeds, Vestin caused the Trustee of the Trust Deeds to conduct a Trustee's Sale of the Property, and, as the purchaser at the Trustee's Sales, Vestin acquired title to the Property in its own name and on behalf of said assignees of Vestin. Vestin acquired title to the Property by Trustees' Deed. (R. 231).

After acquiring title to the Property, Vestin entered into an agreement to sell the Property to a third party. (R. 231). In connection with Vestin's sale of the Property, Vestin obtained a title report regarding the Property, and, from such title report, Vestin discovered for the first time that the Property is located within the boundaries of the

Eagle Mountain SID and subject to the Assessment. (R. 231). Vestin also discovered at that time that upon the voluntary sale of the Property, the entire 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).

If the preliminary title reports and Policies issued by First American to Vestin had disclosed the existence of the Eagle Mountain SID, and that the Property securing the Loans was within the boundaries of the Eagle Mountain SID, Vestin would have made an investigation to determine the potential assessments and obligations associated with the Assessment. (R. 233, 359.) At the time the Loans were made, a special improvement district, different than the Eagle Mountain SID, was disclosed to Vestin by First American in a preliminary title report. As a result of that disclosure, Vestin investigated the disclosure to determine that such special improvement district did not affect the Property. (R. 233, 359).<sup>2</sup>

If Vestin had been made aware of the Eagle Mountain SID and that the Assessment became immediately due and payable upon a voluntary transfer of title (as opposed to an "involuntary" transfer by foreclosure), Vestin may not have made the

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<sup>2</sup> Preliminary title reports or commitments for insurance set forth matters of record which will be excepted from coverage of the title policy. I Joyce Palomar, *Title Insurance Law* (2002) § 12:3. The terms "title report," "preliminary title report," and "commitment" refer to the same type of document. *Rosenberg v. Missouri Title Guaranty Co.*, 764 S.W.2d 684, 687 n.2 (Mo. Ct. App. 1988).

Loans at all to avoid the issue of acceleration of the Assessment upon voluntary transfer. (R. 233, 360). Alternatively, Vestin could have structured the Loans to avoid the potential for Vestin acquiring title to the Property in the event of a default or could have avoided a transaction that involved Vestin taking title to the Property through “involuntary” foreclosure proceedings and subsequently transferring title to a third party through a “voluntary” sale. (R. 233, 360). For example, Vestin could have attempted to structure the trustee’s sale in a manner to avoid Vestin taking title to the Property (R. 233-234, 360), or could have marketed the Property and attempted to have a developer purchase the Property at the trustee’s sale. (R. 233-234, 360). However, because Vestin was not aware of the Eagle Mountain SID, Vestin acquired title to the Property through a trustee’s sale. (R. 233-234, 360). As a result, Vestin cannot now sell the Property without paying the full Assessment applicable to the Property, which is in excess of \$2,241,348.70. (R. 233-234, 360).

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 issued a title insurance policy to Integrated Financial Associates (“IFA”) 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 appeal. (R. 234, 396-397).

### **SUMMARY OF ARGUMENTS**

This action was brought by Vestin to recover under the two Policies issued by First American to insure Vestin's title in two separate Trust Deeds. The Trust Deeds secured the payment of the Loans made by Vestin to The Ranches. The Policies issued by First American did not disclose, or otherwise exclude or except from coverage, a Notice of Intention recorded by the City of Eagle Mountain with the Office of the Utah County Recorder to create the Eagle Mountain SID and assess the real property located within the boundaries of the Eagle Mountain SID. The Property is located within the boundaries of the Eagle Mountain SID. After the loans were in place, the Assessment for the Eagle Mountain SID was levied against the Property in the amount of \$2,241,348.70.

The Policies insure in three separate insuring clauses against defects in title, incorrectness in the representations made by First American in the Policies and other matters affecting title. Because the Policies provide coverage for First American's failure to disclose the Eagle Mountain SID under the insuring clauses, the district court erred in ruling as a matter of law that the Policies are unambiguous and do not provide coverage to Vestin.

The Policies do exclude from coverage the exercise of governmental police powers, such as the creation of the Eagle Mountain SID. However, an exception to the



exclusion provides that the exercise of governmental police power that is recorded in the public records is not part of the exclusion from coverage, and, accordingly, remains covered under the Policies. Because the Policies did not except or exclude from coverage the Eagle Mountain SID, and because notice of the Eagle Mountain SID was recorded in the public records, the existence of the Eagle Mountain SID renders First American liable on the Policies under the insuring clauses. Furthermore, First American's own actions, which are consistent with industry practice, of excluding the Eagle Mountain SID in a policy issued to another insured, and including a different special improvement district in one of the Policies issued to Vestin, demonstrate that in order for First American to avoid liability, First American was required to disclose and exclude from coverage the Eagle Mountain SID. At the very least, the exception to the "police power" exclusion and First American's own actions show that an ambiguity exists regarding the intended coverage under the Policies. This ambiguity creates an issue of fact regarding the intent of the parties. Accordingly, the district court's order was incorrect and should be reversed.

### **ARGUMENT**

On November 5, 2003, the district court entered an Order of Dismissal with Prejudice ("Order"). *See* Addendum Ex. 1. (R. 434-436). In the Order, the district court concluded as a matter of law that the Policies are unambiguous and that Vestin's claims are not covered under the Policies. Because the insuring clauses of the Policies provide coverage to Vestin, and, at the very least, an ambiguity exists concerning the scope of coverage under the Policies, the district court's Order was incorrect and should be reversed.

**I. THE DISTRICT COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT THE POLICIES ARE UNAMBIGUOUS AND THAT VESTIN'S CLAIMS ARE NOT COVERED UNDER THE POLICIES**

The district court incorrectly determined as a matter of law that the pertinent provisions of the Policies are unambiguous and that the Policies do not provide coverage for Vestin claim under the Policies. However, at a minimum, an ambiguity is created when construing the insuring clauses of the Policies and the “police power” exclusion which provides that a notice of the exercise of a police power that is filed in the public records is *not* excluded from coverage. Accordingly, it must be the intent of the parties that a recorded notice of the exercise of the police power, such as the creation of the Eagle Mountain SID, is not excluded from the coverage provided by the Policies as explained hereafter.<sup>3</sup>

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<sup>3</sup> 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. 5; R. 355) and Thomas E. Lea (Addendum Ex. 6; R. 396). 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 affidavits were not excluded by the Court, and, in fact, considered by the court in connection with the Motion. The district’s court’s Order of Dismissal states that the order 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 R. Civ. P. 12(b) (“If ... matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment....”) (emphasis added)). In fact, a court is required to consider matters pertinent to the intent of the parties. In *Ward v. Intermountain Farmers Assoc.*, 907 P.2d 264 (Utah 1995), the court 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.” *Id.* at 268. The *Ward* court further noted that “[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). See also *Nielsen v. Gold’s Gym*, 2003 UT 37, ¶ 7, 78 P.3d 600, 601

**A. Three Insuring Clauses in the Policies Provide Coverage to Vestin**

There are three separate insuring clauses contained in the Policies and Endorsements that are at issue in this matter.<sup>4</sup> The first of these insuring clauses is contained in the body of the Policies. The Policies provide that First American insures against loss or damage, not exceeding the “Amount of Insurance,” sustained or incurred by Vestin or its successors and assigns by reason of any of the following:

- 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).

As part of the Policies, First American issued Endorsement F.A., ALTA Form 31, which contains an insuring clause that 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:

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(Utah Ct. App. 2003) (“When determining whether a contract term is ambiguous, the court is not limited to the contract itself.”).

<sup>4</sup> The “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 (5<sup>th</sup> 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.”); *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”); *Elysian Investment Group v. Stewart Title Guaranty Co.*, 105 Cal. App. 4th 315, 320 (Cal. App., 2002) (“The insuring clauses of an insurance policy define and limit coverage.”).

(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).

First American also issued Endorsement CLTA Form 104<sup>5</sup> in connection with the Policies, which 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....

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

As discussed below in Argument II, III and IV, the insuring clauses of the Policies provide coverage to Vestin. Because the district court found as a matter of law that no coverage exists, the district court's ruling was incorrect and should be reversed.

**B. The Insuring Clauses in the Policies are, at a Minimum, Ambiguous Based on the "Police Power" Exclusion in the Policies**

The Policies provide that the exercise of governmental police powers is excluded from coverage unless the exercise of such power is recorded in the public records. Accordingly, if notice of the exercise of police power, such as the creation of the Eagle Mountain SID, that is recorded in the public records, it is not excluded from coverage. This exception is contained in Paragraph 1(b) of the "Exclusions" to the Policies, which provides:

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<sup>5</sup> See footnote 1 *supra* regarding the purpose and timing of the issuance of the CLTA Form 104 Endorsements.

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 addresses 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.*<sup>6</sup>

(emphasis added).

It is a basic rule of contract construction that a contract must 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 Ct. App. 1987). Individual provisions of an insurance policy are construed in light of the whole policy. *See Holmes Development, LLC v. Cook*, 2002 UT 38 ¶ 24, 48 P.3d 895, 902 (Utah 2002). Additionally, policy

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<sup>6</sup> The exceptions to the police power exclusion in the Policies is broader than general industry standards. The Exclusions from Coverage of the ALTA Standard Title Insurance Policy provide that :

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 American Land Title Association, Loan Policy, Section II-1, Exclusions from Coverage, www.titlelawannotated.com (Revised Oct. 17, 1992).*

If this kind of language contained in the start ALTA policy was 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 (not only the enforcement thereof) recorded in the public records is covered.

terms are harmonized and given effect if possible. *Utah Farm Bureau Ins. Co. v. Cook*, 1999 UT 47, ¶ 5, 980 P.2d 685, 686 (Utah 1999). In this case, the exception to the exclusion for the exercise of police power would be rendered meaningless unless it is construed to provide coverage to Vestin through the various insuring clauses of the Policies. The district court failed to construe the exception to the police power exclusion to provide coverage to Vestin and therefore erred in dismissing Vestin's Complaint.

The exercise of police power is generally excluded from coverage because notice of the exercise of police powers is often not recorded in the public records where title insurance companies examine the records. *Palomar*, at 6-13; *New England*, 765 A.2d at 452 n.1 ("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 specifically excluded from coverage. As noted in *Palomar*:

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* (3<sup>rd</sup> ed. 2000), §4.02[B] at 4-27 ("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.").

In the Order, the district court concluded that the creation of the Eagle Mountain SID was not an exercise of the governmental police power. (R. 434-35). It is well-settled that the creation of a special improvement district requiring owners of property to

pay assessments for the public convenience of constructing improvements constitutes the exercise of governmental police power. *See 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 . . . These have been classified as public corporations and governmental agencies exercising exclusively governmental functions”) (citations omitted); *Amstater v. Andreas*, 273 S.W.2d 95, 102 (Tex. Ct. App. 1954) (“[T]he very foundation of the police power is the control of private interests for the public welfare.”); *Banker v. Jefferson County Water Control and Improvement District*, 277 S.W.2d 130, 134 (Tex. Civ. Ct. 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); *Missouri, K. & T. Ry. Co. of Texas v. Rockwall County Levee Improvement District No. 3*, 266 S.W. 163, 168 (Tex. Ct. App. 1924) (improvement districts “are matters that fall peculiarly within the general police powers of the state”); *Sebastian v. Missouri Pac. R. Co.*, 292 F. 345, 351 (8<sup>th</sup> Cir. 1923) (“[T]he authorization of a public improvement by a state is an exercise of the police power.”); *Teter v. Clark County*, 704 P.2d 1171, 1176 (Wash. 1985) (improvement assessments are valid exercise of the police powers); I Joyce Palomar 6-13, *Title Insurance Law* (2002) (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 (5<sup>th</sup> ed.) 1041)).

The adoption of a local improvement ordinance for improvement, 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](http://www.titlelawannotated.com) at p. 5. Because the creation of a special improvement district constitutes the exercise of governmental police powers, the district court erred in ruling in the Order that the Eagle Mountain SID and the Notice of Intention do not constitute the exercise of governmental police power.

Courts addressing the application of the “police power” exclusion and the exception regarding recorded notice of the exercise of the police power have held that the recorded notice must be disclosed by the insurer to avoid liability under the policy. In *Bel-Air Motel Corp. v. The Title Co.*, 444 A.2d 1119 (N.J. Sup. Ct. 1981), the court held that a recorded notice of an assessment constitutes the exercise of police power creating liability under a title policy. *See id.* at 1122. In *Bel-Air*, the insured asserted a claim under a title insurance policy for an assessment based upon an ordinance providing for a sewer system. *See id.* at 1120. The policy did not mention or exclude the assessment from coverage. *See id.* The assessment in that case, like this one, did not become a lien until after the issuance of the policy. *See id.* at 1121. In addressing whether the coverage under the title insurance policy existed, the 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.* In explaining its decision, the court discussed the



governmental police power exclusion and the exception for recorded notice, and held that the exception to the exclusion supported the position that the insurer was liable for losses resulting from the assessment. 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).

Similarly, in *New England Federal 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 exclusion of the exercise of governmental police power. *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 have the necessary subdivision permit. *See id.* at 451. When the lender foreclosed, the lender claimed 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 concluded that if the violation was a matter of public record, as defined in the policy, the public records exception to the police power exclusion constituted 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 they have been recorded in the public records on the date of the policy.

*Id.* at 453. *Accord Radovanov v. Land Title Co.*, 545 N.E. 2d 351, 354-55 (Ill. Ct. App. 1989) (holding title insurer liable for housing code violation which was of public record at date of issuance of the title insurance policies).

As discussed below, there is a series of cases which addresses whether the prospect of a future assessment that has not been levied at the time a policy is issued, is covered as a “lien” or “encumbrance” under a title insurance policy. These cases were cited by First American in its argument in the district court and the district court seems to have incorrectly relied on this line of cases in ruling that the Notice of Intention was not covered under the policies because the Assessment had not been levied at the time the Policies were issued. (R. 434-36). Because these cases do not address the issue of a recorded notice of the exercise of governmental police power and the relevant exception to the police power exclusion, these cases are irrelevant to the issue presented by Vestin in this appeal.<sup>7</sup>

For instance, in *Strass v. District-Realty Title Ins. Corp.*, 358 A.2d 251 (Md. Ct. Spec. App. 1976), a city ordinance existed which provided that the city may levy improvement assessments against the insured property. *See id.* at 254-55. However, at the time the insurance policy was issued, no assessments had been levied against the

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<sup>7</sup> Because policy language varies, cases interpreting the meaning of specific terms such as “lien” or “encumbrance” may be of limited value. *See New England*, 765 A.2d at 453 n.3. Moreover, Vestin does not claim coverage under either the “lien” or “encumbrance” provisions of the Policies.

property. *See id.* at 256. The court held that because an assessment had not been levied on the insured property at the time the title insurance policy was issued, the assessment did not constitute a lien under the policy and was therefore not covered. *See id.* (emphasis added). The *Strass* court specifically emphasized that the “policies of title insurance afforded no protection against the assessments as liens.” *Id.* (emphasis in original). The court also addressed whether the prospective assessment constituted an “encumbrance” under the policy and found that they did not. *See id.* at 258. The *Strass* court did not address whether the prospective assessments constituted “defects” under the policy, nor was the exception to the exclusion for the exercise of police power at issue in that case. Therefore, *Strass* is inapposite to the issues raised by Vestin in this appeal.

Similarly, in *Edwards v. St. Paul Title Ins. Co.*, 563 P.2d 979 (Colo. Ct. App. 1977), the court held that an improvement assessment that had not been levied at the time of issuance of the title insurance policy did not constitute a lien under the policy. *See id.* at 980 (emphasis added). Again, the court did not address whether the prospective assessment constituted a “defect” under the policy and the exception to the exclusion for the exercise of police power was not at issue in that case. The holding in *Edwards* is similarly irrelevant to any issue before this Court.

The court in *Butcher v. Burton Abstract & Title Co.*, 216 N.W.2d 434 (Mich. Ct. App. 1974), addressed whether assessments against plaintiff’s property that were not due and did not constitute liens at the time the title insurance policy was issued, constituted “encumbrances” that were covered under the policy. *See id.* at 435-36. The court, in construing the word “encumbrance,” held that “a special assessment does not become an

encumbrance until it has achieved lien status.” *Id.* at 436. That case similarly has no relevance to this case because the issue of whether the assessment constituted a “defect” was not addressed, nor was the issue of the exception to the exclusion for the exercise of police powers at issue in that case. *See also Cummins v. U.S. Life Title Ins. Co.*, 357 N.E.2d 975 (N.Y. Ct. App. 1976) (same); *Cole v. Home Title Guaranty Co.*, 244 N.E.2d 470 (N.Y. Ct. App. 1968) (same); *Medeiros v. Guardian Title & Guaranty Agency, Inc.*, 387 N.E.2d 644 (Ohio Ct. App. 1978) (same).

The creation of the Eagle Mountain SID and the recordation of the Notice of Intention in the Utah County Recorder’s Office constitute the exercise of governmental police power that falls within the exception to the exclusion for the exercise of police power in the Policies. At the very least, the exception to the police power exclusion demonstrates that an ambiguity exists with respect to the parties’ intentions as to coverage under the Policies. Because the district court improperly relied on an irrelevant line of cases in determining as a matter of law that the Policies are unambiguous and do not provide coverage to Vestin, the Order should be reversed and this case remanded for further proceedings.

**C. First American’s Actions Confirm that the Policies are Ambiguous**

In addition to the provisions of the Policies creating an ambiguity regarding coverage, First American’s own actions show that in order to avoid liability, it was obligated to disclose and except the Eagle Mountain SID from coverage in the Policies. In a policy that First American issued to Integrated Financial Associates (“IFA”) prior to the Assessment Ordinance, the policy disclosed the existence of, and excepted from

coverage, the Eagle Mountain SID. (R. 234, 253). Although First American disclosed and excepted the Eagle Mountain SID from coverage in the IFA policy, it failed to do so in the Vestin Policies. The disclosure and exception from coverage in the IFA policy is consistent with industry practice. (R. 232, 359).<sup>8</sup>

In addition, Policy No. 3192 discloses a different special improvement district created by Eagle Mountain City, and further discloses that the Property is within the Eagle Mountain City and is subject to all charges and assessments levied by the City. (R. 241-242, 253). That improvement district, however, did not affect the Property. (R. 233, 359). First American's disclosures of a special improvement district in the Policies and that the Property is located within Eagle Mountain City demonstrates that it was First American's practice to disclose potential assessments against real property covered under a title insurance policy. First American's argument in the district court that only perfected liens must be disclosed is not in keeping with its own practice.

Furthermore, had First American wanted to except the Notice of the Eagle Mountain SID from coverage, it could 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 assessment 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.

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<sup>8</sup> Courts have held that "pertinent custom and usage are, by implication, incorporated into a policy and are admissible to aid in policy interpretation . . . ." See *Somerset Savings Bank v. Chicago Title Ins. Co.*, 649 N.E.2d 1123, 1127 (Mass. 1995) (citing *Affiliated FM Ins. Co. v. Constitution Reinsurance Corp.*, 626 N.E.2d 878 (1994)).

James L. Gosdin, *Title Insurance, A Comprehensive Overview* 336, Section of Real Property, Probate and Trust Law/American Bar Association (1996). First American did not include such an exclusion in the Policies and did not disclose or exclude the Eagle Mountain SID in accordance with its own and industry practice. The district court's ruling that First American was not required to disclose or except the Eagle Mountain SID in order to avoid coverage was error and should be reversed.

#### **D. Conclusion**

The Policies do exclude from coverage the exercise of governmental police powers, such as the creation of a special improvement district, but except from the exclusion the exercise of police power that is recorded in the public records. Because the Policies did not except or exclude from coverage the Eagle Mountain SID, and because the SID was recorded in the public records, the existence of the Eagle Mountain SID renders First American liable on the Policies under the various insuring clauses. Furthermore, First American's own actions, which are consistent with industry practice, of excluding the Eagle Mountain SID in a policy issued to another insured, and excluding a special improvement district in one of the Policies issued to Vestin, demonstrate that in order for First American to avoid liability, First American was required to disclose and except the Eagle Mountain SID from coverage. At the very least, the exception to the "police power" exclusion and First American's actions show that an ambiguity exists regarding the intended coverage under the Policies. This ambiguity creates an issue of

fact regarding the intent of the parties. Accordingly, the district court's order was incorrect and should be reversed.<sup>9</sup>

## **II. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE THE EAGLE MOUNTAIN SID IS A “DEFECT” WHICH IS COVERED BY THE POLICIES**

The insuring clause contained in the body of the Policies provides that First American insures against loss or damage sustained or incurred by Vestin or its successors and assigns by reason of any of the following:

- 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). Basic rules governing the interpretation of insurance policies show that the term “defect” in the Policies should be construed to include the Eagle Mountain SID.<sup>10</sup>

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<sup>9</sup> In construing a contract, a court first determines as a matter of law if a contract is ambiguous. If the Court determines ambiguity, then there is an issue of fact as to the intention of the parties. *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 22, 54 P.3d 1139, 1145 (Utah, 2002) (“Whether an ambiguity exists in a contract is a question of law....” “When ambiguity exists, the intent of the parties becomes a question of fact.” “[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.”).

<sup>10</sup> Individual provisions of an insurance policy are construed in light of the whole policy. *See Holmes Development, LLC v. Cook*, 2002 UT 38 ¶ 24, 48 P.3d 895, 902 (Utah 2002). Policy terms are harmonized and given effect if possible. *Utah Farm Bureau Ins. Co. v. Cook*, 1999 UT 47, ¶ 5, 980 P.2d 685, 686 (Utah 1999). Unless ambiguous or unclear, or defined in the policy, the words of a policy are generally given their plain and ordinary meaning. *Holmes*, 48 P.3d at 902 (Utah 2002). 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 & Guaranty Co. v. Sandt*, 854 P.2d 519,

After the creation of the Eagle Mountain SID, the Notice of Intention to create the Eagle Mountain SID was recorded, as required by Utah law, with the Utah County Recorder's office on August 4, 2000. *See* Utah Code Ann. § 17A-3-307(6)(a)(i).<sup>11</sup> The Notice of Intention gives notice of the creation of the Eagle Mountain SID, and the intention to levy assessments on the property located within the special service district.

There is no dispute that an assessment made regarding the Eagle Mountain SID has priority over the interest of Vestin in the Property and the Trust Deeds. Section 10 of the Assessment Ordinance states that 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). *Accord* Utah Code Ann. § 17A-3-323. 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 even more apparent.

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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 Bureau*, 1999 UT 47, ¶ 5, 980 P.2d at 686. 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 685.

<sup>11</sup> Utah Code Annotated § 17A-3-307 (1991) provides:

If the governing body creates the special improvement district, it shall, within five days from the date of creating the district, file a copy of the final approved notice of intention, a copy of the final approved resolution creating the district, and a list of properties proposed to be assessed described by tax identification number and legal description in the county recorder's office in the county in which the property is located.

(emphasis added).



The Policies insure against loss or damage sustained by Vestin by reason of any title “defect.” The term “defect” is not defined in the Policies. Case law defines a title “defect” as something different and less than a “lien” or “encumbrance.” This conclusion is based in part on the fact that title insurance policies use both terms, which would be unnecessary if they had the same meaning. In interpreting the meaning of the word “defect” in a title insurance policy, the court in *Stewart Title Guaranty Co. v. Greenlands Realty L.L.C.*, 58 F. Supp. 2d 370 (D.N.J. 1999), held:

This case requires the Court to define “defect” as used in the title insurance policy issued by Stewart Title to Greenlands. 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 (N.J. Super. Ct. Ch. Div. 1969) (quoting Black’s Law Dictionary 509 (4th ed. 1968)).... 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.

*Id.* at 382. The court also noted that “a title can be burdened with some defects so minimal or trivial that title is ‘relatively,’ although not perfectly, free from doubt.” *Id.* In addition, the court held that while the title of the insured was “marketable,” a title “defect” nonetheless existed:

The circumstances of this case involve a situation in which there was an alleged “defect” that was sufficiently insignificant to leave the title “relatively free from doubt,” and, thus, marketable. Therefore, I find, based on the undisputed evidence in the summary judgment record, that Greenlands had marketable title, but that this title also had a “defect.”

*Id.* at 382.

Similarly, in *United Fire & Casualty Co. v. Fidelity Title Ins. Co.*, 258 F.3d 714

(8<sup>th</sup> Cir. 2001), the court defined “defect” broadly:

The plain and ordinary meaning of “defect” is broad, referring to any “fault or shortcoming or failing; imperfection.... Defect is the general word for any kind of shortcoming, imperfection, or deficiency, whether hidden or visible.” Random House Webster’s College Dictionary 347 (2d 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.

*Id.* at 719 (citation omitted); *see also* Barlow Burke, *Law of Title Insurance* (3<sup>rd</sup> ed. 2000)

§ 3.05 at 3-76.1 (“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....”).

Regardless of whether the Notice of Intention is a lien or encumbrance under the Policies, the district court erred by failing to find that the Notice of Intention and Eagle Mountain SID falls within the purview of the definition of “defect” in the Policies. The Order of the district court should accordingly be reversed and this case remanded for further proceedings.

### **III. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE FAILURE TO DISCLOSE THE EAGLE MOUNTAIN SID IS AN “INCORRECTNESS” IN THE REPRESENTATIONS OF FIRST AMERICAN IN THE POLICIES**

In Endorsement F.A. Form 31, the Policies insure against loss as a result of the “incorrectness” of the assurances given in the Policies:

[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.

(emphasis added). In this case, an “incorrectness” in the policies exists because there is a “restriction” caused by the existence of the Eagle Mountain SID that impairs the priority of the Trust Deeds securing the Loans.

The term “impair” is not defined in the Policies. However, the term has been defined to mean “as 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, 119 St. Ct. 710, 717 (1999). The rule of contract interpretation requires that a policy should be construed liberally in favor of the insured and against the insurer so as to promote and not defeat the purpose of insurance. *United States Fidelity & Guaranty Co. v. Sandt*, 854 P.2d 519, 521 (Utah 1993). Unless ambiguous or unclear, or defined in the policy, the words of a policy are generally given their plain and ordinary meaning. *Holmes*, 48 P.3d at 902 (Utah 2002). Without question, the Eagle Mountain SID will diminish and injure Vestin’s trust deeds.

The term “restrictions” is likewise not defined in the Policies. In the Endorsement, however, it does state that a restriction shall not be deemed to refer to a lease, and does not relate to environmental protection. Except for those limitations, the term “restrictions” has its ordinary meaning which is: “something that restricts,” “a regulation that restricts or restrains,” and “a limitation on the use or enjoyment of

property.” Merriam-Webster Dictionary (2003). Because the Eagle Mountain SID falls within this definition, the district court’s Order was in error and should be reversed.

#### **IV. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE THE RECORDED NOTICE OF THE EAGLE MOUNTAIN SID WAS AN “OTHER MATTER” AFFECTING THE PRIORITY OF THE TRUST DEEDS**

Endorsement CLTA Form 104 provides extended coverage to Vestin’s assignees, and 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: ... 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....**

(emphasis added).

The recorded notice of the existence of a special improvement district is an “other matter” affecting the priority of the insured Trust Deeds.<sup>12</sup>

As noted above, First American disclosed in the Policies the existence of an inapplicable improvement district and the fact that the Property is located within Eagle Mountain City. In another policy, First American disclosed the Eagle Mountain SID.

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<sup>12</sup> The Policies also insure against loss as a result of the title to the Property being “unmarketable.” The Notice of Intention and the intended assessment, even if not yet made, still renders the title unmarketable. In *Bel-Air*, the court stated: “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.” *Bel-Air*, 444 A.2d at 1122. Furthermore, the question of whether a defect in title renders title unmarketable is not proper for summary disposition and is a question of fact for the jury. *See Mellinger v. Ticor Title Ins. Co. of Ca.*, 113 Cal. Rptr.2d 357, 360 (Ca. Ct. App. 2001) (a question of marketability is a question of fact to be decided by a jury and not by a trial court as matter of law).

First American argued in the district court, however, that only existing liens are covered under the Policies. This position is inconsistent with the language of the Endorsement. The Endorsement insures against an existing lien **“or the existence of other matters affecting the validity or priority of the lien of the insured mortgage.”** If coverage was limited to an existing lien, the additional language would not be necessary. Clearly, the rules of contract construction dictate that the Endorsement covers more than existing liens. Thus, even if a lien does not exist, the existence of the Eagle Mountain SID constitutes an “other matter” affecting title. The district court therefore erred in finding that the Notice of Intention and the Eagle Mountain SID were not “other matters” affecting the validity or priority of Vestin’s lien. The district court’s order should accordingly be reversed and this case remanded for further proceedings.

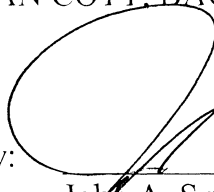
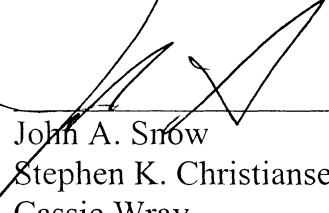

### **CONCLUSION**

Vestin’s claims are covered under three separate insuring clauses in the Policies. In addition, the insuring clauses of the policies, when read in conjunction with the exception to the “police power” exclusion, and in light of First American’s own actions and industry practice, demonstrate that, at a minimum, the Policies contain an ambiguity precluding summary disposition of Vestin’s claims. The district court therefore erred in ruling as a matter of law that the Policies are unambiguous and that Vestin’s claims are

not covered under the Policies. The district court's Order was error and should accordingly be reversed and this case remanded for further proceedings.

DATED this 2<sup>nd</sup> day of March, 2004.

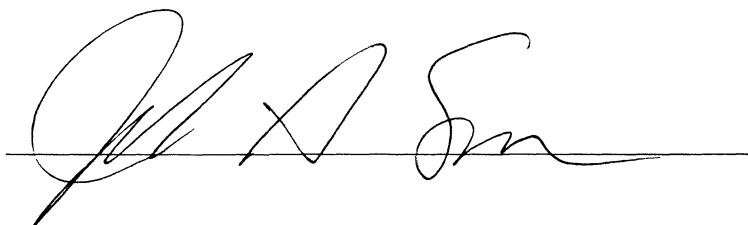
VAN COTT, BAGLEY, CORNWALL & McCARTHY

By:     
John A. Snow  
Stephen K. Christiansen  
Cassie Wray  
*Attorneys for Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **BRIEF OF APPELLANT** to be mailed, postage prepaid, this 2<sup>nd</sup> day of March, 2004, to the following counsel of record:

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

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

## Addenda



### **ADDENDUM**

<u>Exhibit No.</u>	<u>Document</u>
1	Order of Dismissal with Prejudice
2	Policy of Title Insurance, Policy No. 3192-A-49
3	Policy of Title Insurance, Policy No. 2701-A-49
4	Complaint
5	Affidavit of Daniel B. Stubbs
6	Affidavit of Thomas E. Lea

## **EXHIBIT 1**

**FILED DISTRICT COURT**  
Third Judicial District

NOV - 5 2003

By df SALT LAKE COUNTY  
Deputy Clerk

ORDER PREPARED AND SUBMITTED BY

Alan L. Sullivan (3152)

Brett P. Johnson (7900)

SNELL & WILMER

15 West South Temple, Suite 1200

Gateway Tower West

Salt Lake City, Utah 84101-1004

Telephone: (801) 257-1900

Facsimile: (801) 257-1800

*Attorneys for Defendant First American Title  
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:

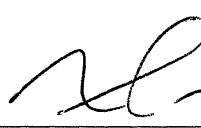
1. Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, Vestin has failed to state a claim upon which relief can be granted.

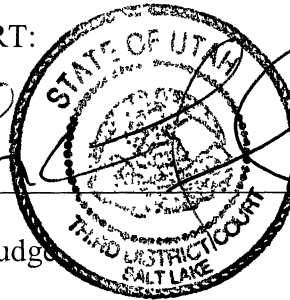
2. All claims for relief alleged in Vestin's complaint are hereby dismissed with prejudice.

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



**CERTIFICATE OF SERVICE BY THE CLERK OF THE COURT**

I hereby certify that I caused to be mailed to the following a true and accurate copy of the foregoing, postage prepaid, on the \_\_\_\_\_ day of \_\_\_\_\_, 2003:

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

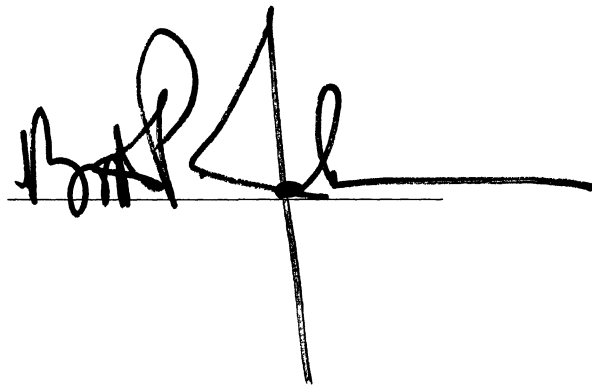
John A. Snow  
Cassie Wray  
50 South Main Street, Suite 1600  
Post Office Box 45340  
Salt Lake City, Utah 84145-0340

---

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of October, 2003, a true and correct copy of the foregoing was placed in the United States Mail, postage prepaid, addressed to the following:

John A. Snow  
Cassie Wray  
50 South Main Street, Suite 1600  
Post Office Box 45340  
Salt Lake City, Utah 84145-0340

A handwritten signature in black ink, appearing to be "John A. Snow", written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke extending to the right.

## **EXHIBIT 2**



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 3481202

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 extended 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 a 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 "I" also includes:
  - (i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a person who is an obligor under the provisions of Section 12(c) of Conditions and Stipulations (reserving, however, all rights and interests as to any successor that the Company would have had against a decedent insured, unless the successor acquired the indebtedness from a purchaser for value without knowledge of the asserted defect, lien, or claim, adverse claim or other matter insured against by this policy relating title to the estate or interest in the land);
  - (ii) any governmental agency or governmental instrumentality as an insurer or guarantor under an insurance contract or guaranty 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 constitute 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 word "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 access to and from the land is insured by this policy.
- e) "mortgage" mortgage, deed of trust, trust deed, or other 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 public records 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 affecting 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.

### 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 the 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 the 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 thereafter be increased by accruing interest and advances made to protect the lien 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 paid shall be deemed a payment under this policy.

### 11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for 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, the loss or damage shall be payable within 30 days thereafter.

any part of the estate or interest in the land by foreclosure trustee's conveyance in lieu of foreclosure or other legal manner which argues the lien of the insured mortgage, (ii) a transferee of the estate interest so acquired from an insured corporation provided the transferee parent or wholly-owned subsidiary of the insured corporation and corporate successors by operation of law and not by purchase; (iii) to any rights or defenses the Company may have against any insurer or insured, and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest in the land to a contract of insurance or guaranty insuring or guaranteeing indebtedness secured by the insured mortgage

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

(c) **Amount of Insurance.** The amount of insurance after the loss or after the conveyance shall in neither event exceed the least

(i) The amount of insurance 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 insurance, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the acquisition of the estate or interest in the land and secured and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made or (iii) the amount paid by any governmental agency or government-instrumentality, if the agency or instrumentality is the insured or, in the acquisition of the estate or interest in satisfaction of its contract or guaranty

#### **NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.**

The insured shall notify the Company promptly in writing (i) in case of loss or damage as set forth in Section 4(a) below, (ii) in case knowledge of loss or damage to an insured hereunder of any claim of title or interest which affects 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 insured 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 or refused. If prompt notice shall not be given to the Company then the insured shall terminate with regard to matters for which prompt notice is required provided that failure to notify the Company shall in no case prejudice the insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice

#### **DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.**

Upon written request by the insured and subject to the options in Section 6 of these Conditions and Stipulations the Company shall at its cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim against the insured or 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 under this policy. The Company shall have the right to select counsel (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and the insured shall be liable for and will not pay the fees of any other counsel. The insured shall not pay any fees, costs or expenses incurred by the insured in the prosecution of those causes of action which allege matters not insured under this policy.

The Company shall have the right at its own cost to institute or defend any action or proceeding or to do any other act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or the lien of the insured mortgage, as insured or to prevent loss or damage to the insured. The Company may take any action under the terms of this policy, whether or not it shall be necessary or desirable to do so. The insured shall not be liable for and will not pay the fees of any other counsel. The insured shall not pay any fees, costs or expenses incurred by the insured in the prosecution of those causes of action which allege matters not insured under this policy.

Whenever the Company shall have brought an action or a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by competent jurisdiction and expressly reserves the right in its opinion to appeal from any adverse judgment or order.

In all cases where this policy permits or requires the Company to defend or provide for the defense of any action or proceeding the Company 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 insured to use, at its option, the name of the insured for this purpose requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding in securing evidence obtaining witnesses prosecuting or defending any action or proceeding or effecting settlement and (ii) in any action or proceeding in the opinion of the Company may be necessary

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 obligated to advance at and after Date of Policy

person or property in respect to the claim had this policy not been issued 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, guaranties, 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.**

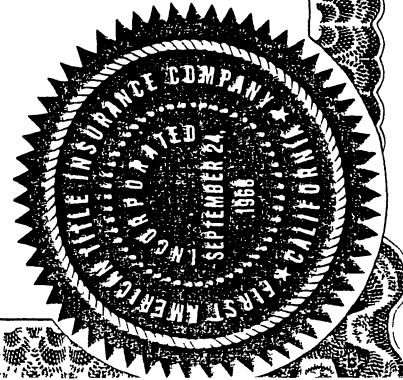
All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at 114 East Fifth Street, Santa Ana, California 92701 or to the office which issued this policy

FIRST AMERICAN



*First American Title Insurance Company*

**POLICY  
OF  
TITLE  
INSURANCE**



## ***Schedule A***

POLICY NO.: 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 20,000/1,800,00th 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 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.

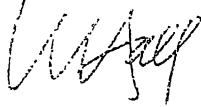
Wherever in this endorsement any or all the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or restrictions contained in any lease.

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**

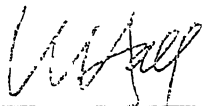
The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land to abut upon a physically open street known as

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

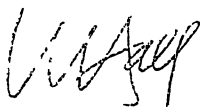
Arthur K Brown and Loretta Brown, Trustees of the Arthur K Brown and Loretta Brown Revocable Living Trust dated 9/3/91 as to an undivided 15,000/1,800,000th interest and Daniel M Tabas, a married man as his sole and separate property as to an undivided 100,000/1,800,000th interest and Joel T Jacobs and 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 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:

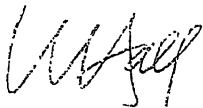
Kenneth H. Wyatt and Phyllis P. Wyatt, Trustees of the Kenneth H. Wyatt and Phyllis P. Wyatt Revocable Trust dated 6/4/86 as to an undivided 125,000/1,800,000th interest and Terrence B. Gleeson and Penny S. Gleeson, husband and wife as joint tenants as to an undivided 25,000/1,800,000th interest Daniel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

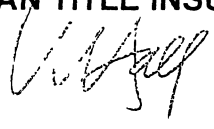
DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 732,500/1,800,000th interest

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:

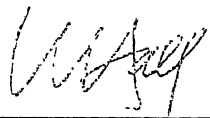
DM Mortgage Investors, LLC, a Nevada Limited Liability Company as to an undivided 992,500/1,800,000th interest

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:

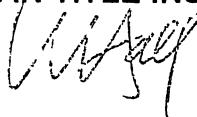
DM Mortgage Investors, LLC, a Nevada Liability Company as to an undivided 25,000/1,800,000th interest

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

## 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

[illegible]

NOTES: "A" (12) THOMAS B TORNE 29377-86 23  
"B" (33) THE RANCHES, L.C. 32339-00  
"C" (40) THE RANCHES, L.C. 32339-00  
"D" (42) THE RANCHES, L.C. 11983-99



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 HAVE QUESTIONS REGARDING ITS EFFECT OR CONTENT,

## **EXHIBIT 3**



WE HEREBY CERTIFY THIS TO BE  
A TRUE AND CORRECT COPY OF  
THE ORIGINAL DOCUMENT.

# 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

*Parker S. Kennedy*

PRESIDENT

ATTEST

*Mark A. Arnesen*

SECRETARY

UT  
CW 3470452

owing 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:

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.

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.

Acts 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:

created, suffered, assumed or agreed to by the insured claimant; 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; resulting in no loss or damage to the insured claimant; 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 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.

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 a judgment or lien creditor.

## CONDITIONS AND STIPULATIONS

### DEFINITIONS OF TERMS.

Following terms when used in this policy mean:

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

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

(b) any governmental agency or governmental instrumentality in insurer or guarantor under an insurance contract or guaranty or guaranteeing the indebtedness secured by the insured or any part thereof, whether named as an insured herein or not; (c) the parties designated in Section 2(a) of these Conditions and Stipulations.

"insured claimant": an insured claiming loss or damage.

"knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of records as defined in this policy or any other records which constitute constructive notice of matters affecting the land.

"land": the land described or referred to in Schedule A, and interests affixed thereto which by law constitute real property. The term does not include any property beyond the lines of the area 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 an interest in the land is insured by this policy.

"mortgage": mortgage, deed of trust, trust deed, or other instrument.

"public records": records established under state statutes at the time of 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.

"unmarketability of the title": an alleged or apparent matter affecting 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.

### 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 the 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 the 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 thereafter be increased by accruing interest and advances made to protect the lien 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 paid shall be deemed a payment under this policy.

### 11. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for 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, the loss or damage shall be payable within 30 days thereafter.

force as of Date of Policy in favor of (i) an insured who acquires an interest in the estate or interest in the land by force of the lien of the insured mortgage; (ii) a transferee of the estate or interest acquired from an insured corporation, provided the transferee is a wholly-owned subsidiary of the insured corporation, and the insured corporation is not a successor by operation of law and not by purchase, and the insured corporation is not a transferee of the estate or interest in the land by force of the lien of the insured mortgage; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest in the land by force of the lien of the insured mortgage.

**After Conveyance of Title.** The coverage of this policy shall be the same as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an interest in the land, or is secured by a purchase money mortgage given by a person other than the insured, or only so long as the insured shall have reason of covenants of warranty made by the insured in any conveyance of the estate or interest. This policy shall not be a contract of insurance or guaranty insuring or guaranteeing the insured against loss or damage to the estate or interest in the land, or to the interest in the land, or to the indebtedness secured by a purchase money mortgage given to the insured.

**Amount of Insurance.** The amount of insurance after the loss or damage 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 the insured mortgage as of Date of Policy, interest thereon, expenses of the insured, amounts advanced pursuant to the insured mortgage to assure the insured with laws or to protect the lien of the insured mortgage prior to acquisition of the estate or interest in the land and secured by reasonable amounts expended to prevent deterioration of the estate or interest, but reduced by the amount of all payments made; or (ii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured in the acquisition of the estate or interest in satisfaction of its contract or guaranty.

#### 7. DETERMINATION AND EXTENT OF LIABILITY.

**NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.** The insured shall notify the Company promptly in writing (i) in case of 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.

#### 8. LIMITATION OF LIABILITY.

insured shall notify the Company promptly in writing (i) in case of 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.

(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.

(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 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.

#### 9. 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.

#### 10. 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 obligated to advance at and after Date of Policy.

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, guaranties, 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, a validating officer or authorized signatory of the Company.

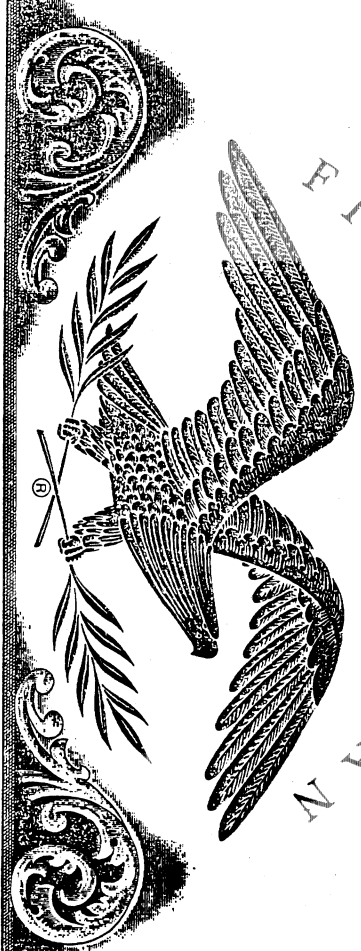
#### 15. SEVERABILITY.

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.

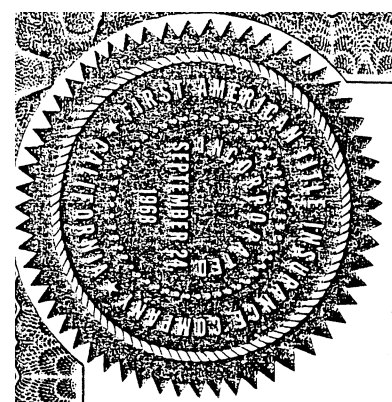
All notices required to be given the Company and any state or federal agency in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at 114 East Fifth Street, Santa Ana, California 92701, or to the office which issued the policy.

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.

58:048:0026 & 58:048:0027

## **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 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.

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

*Anne S.*

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: *W. Hall*  
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:

Lauraine Z. Painter, Trustee of the Painter 1983 Trust dated 10/17/83 as to an undivided 12,600/1,965,000th interest, and Elizabeth A. Cole, Trustee of the Elizabeth A. Cole Family Trust dated 10/7/93, as to an undivided 22,328.008/1,965,000th interest and John E. Dawson, Trustee of the John E. Dawson Separate Property Trust dated 12/5/96 as to an undivided 14,259.11/1,965,000th interest and Fred W. Stone and Marian Stone, Trustees of The Fred W. Stone and Marian Stone Family Trust as to an undivided 25,000/1,965,000th interest and Dawson Investment, Inc., a Utah Corporation as to an undivided 30,000/1,965,000th interest and Diane Jean Wertz, Trustee of the Leona Carnini Residuary Trust dated 5/16/00 as to an undivided 25,000/1,965,000th interest and Sherin E. Hollander and Sara A. Hollander, Trustees of the Sherwin E. Hollander and Sara A. Hollander Family Trust dated 3/22/00 as to an undivided 25,000/1,965,000th interest and Orville Ray Brown and Betty Lou Brown, husband and wife as joint tenants as to an undivided 25,000/1,965,000th interest and Richard O. Godmere and Evelyn K. Godmere, husband and wife as joint tenants as to an undivided 25,000/1,965,000th 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

*Ann S.*

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:

Capsource, Inc., dba Del Mar Mortgage as to an undivided 45,000/1,965,000th Interest

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

- (E) 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;
- (F) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (G) 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**
- (H) 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: \_\_\_\_\_

*[Signature]*  
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

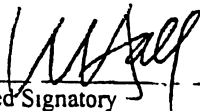
- (A) The failure of the beneficial interest under the mortgage referred to in paragraph 4 of Schedule A to have been transferred to such insured by a valid assignment or assignments;
- (B) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (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



ENDORSEMENT

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

*Anna S*

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: \_\_\_\_\_

*W. A. J. J.*  
Authorized Signatory

## ENDORSEMENT

*Amos*

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

ISSUED BY

### FIRST AMERICAN TITLE INSURANCE COMPANY

**CHARGE: \$00.00**

All beneficial interest of John Kevin Baldwin Revocable Trust UAD 7/14/94 is hereby transferred to and the Company hereby insures:

Ernest Paul Coker and Helen Louise Coker, Trustees of the Ernest Paul Coker and Helen Louise Coker Inter-vivos Trust dated 6/7/74 as to an undivided 25,000/1,965,000th interest and Joan Ryba, an unmarried woman as to an undivided 50,000/1,965,000th interest and Erika G. Visbeek, Trustee of the Visbeek Inter-vivos Revocable Trust as to an undivided 15,000/1,965,000th interest and William D. Bauer and Annemarie J. Bauer, Co-Trustees of the Bauer Revocable Trust U/A dated 11/8/82 as to an undivided 20,000/1,965,000th interest and Rose Billich Stargrant, Trustee of The Rose Billich Stargrant Trust as to an undivided 15,000/1,965,000th interest and Giovanni Loschiavo and Elizabeth Loschiavo, Trustees of The Loschiavo Family Trust dated 3/14/96 as to an undivided 25,000/1,965,000th interest and Earl W. Porter and Joyce H. Porter, husband and wife as joint tenants as to an undivided 25,000/1,965,000th interest and John E. O'Riordan and Sonhild O'Riordan, husband and wife as joint tenants as to an undivided 37,500/1,965,000th interest and Herbert R. Marks and Jean Ciers Marks, husband and wife as joint tenants as to an undivided 14,828.08/1,965,000th interest and Robert Drey, an unmarried man as to an undivided 20,000/1,965,000th interest and Elizabeth A. Cole, Trustee of The Elizabeth A. Cole Family Trust dated 10/7/93 as to an undivided 27,671.92/1,965,000th interest and Joseph A. Lombardo and Carol Ann Lombardo, Trustees of The Lombardo Living Trust dated 2/9/00 as to an undivided 25,000/1,965,000th 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

*[Signature]*

*8-10-2001*

**ENDORSEMENT**

*Anne S.*

POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

ISSUED BY

**FIRST AMERICAN TITLE INSURANCE COMPANY**

**CHARGE: \$00.00**

All beneficial interest of Louella K. Hitchcock is hereby transferred to and the Company hereby insures:

Louella K. Hitchcock, Trustee of The Fred Hitchcock and Louella K. Hitchcock Revocable Living Trust as to an undivided 30,000/1,965,000th interest

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

- (E) 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;
- (F) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (G) 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**
- (H) 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.

*8-10-2004*

**FIRST AMERICAN TITLE INSURANCE COMPANY**

By: *[Signature]*  
Authorized Signatory

**ENDORSEMENT**

*Annas*

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:

**Jack M. Kint, a married man as his sole and separate property as to an undivided 50,000/1,965,000th interest and Robert George Bruno and Kay Ann Bruno, Trustees of The Robert George Bruno and Kay Ann Bruno Trust of 1999 as to an undivided 25,000/1,965,000th 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**

*10-4-2000*

By: \_\_\_\_\_

*[Signature]*  
Authorized Signatory

## ENDORSEMENT

*Annex*

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:

**The interests of John E. O'Riordan and Sonhild O'Riordan are hereby assigned to:**

**C. E. Langford, Trustee under a Declaration of Trust Dated 10/25/97 as to an undivided 15,000/1,965,000th interest**

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

- (E) 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;
- (F) The existence of any subsisting tax or assessment lien which is prior to the insured mortgage except: **NONE**
- (G) 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**
- (H) 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.

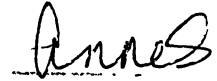
**FIRST AMERICAN TITLE INSURANCE COMPANY**

*10-1-2000*

By: \_\_\_\_\_

*[Signature]*  
Authorized Signatory

## ENDORSEMENT



POLICY NO.: 2701-A-49

JACKET NO.: CW3470452

FILE NO.: 7603

ISSUED BY

**FIRST AMERICAN TITLE INSURANCE COMPANY**

**CHARGE: \$50.00**

The Company hereby insures VESTIN MORTGAGE, INC., A NEVADA CORPORATION, AS TO AN UNDIVIDED 25,844.37/1,965,000TH INTEREST against loss or damage which such insured shall sustain by reason of any of the following:

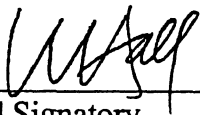
- (a) The failure of the beneficial interest under the mortgage referred to in Paragraph 4 of Schedule A, to have been transferred to such insured by a valid assignment or assignments;
- (b) The existence of any reconveyance, either full or partial, of the insured mortgage, or any modification or subordination thereof, appear in the public records.

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.

June 13, 2001

**FIRST AMERICAN TITLE INSURANCE COMPANY**

By: \_\_\_\_\_

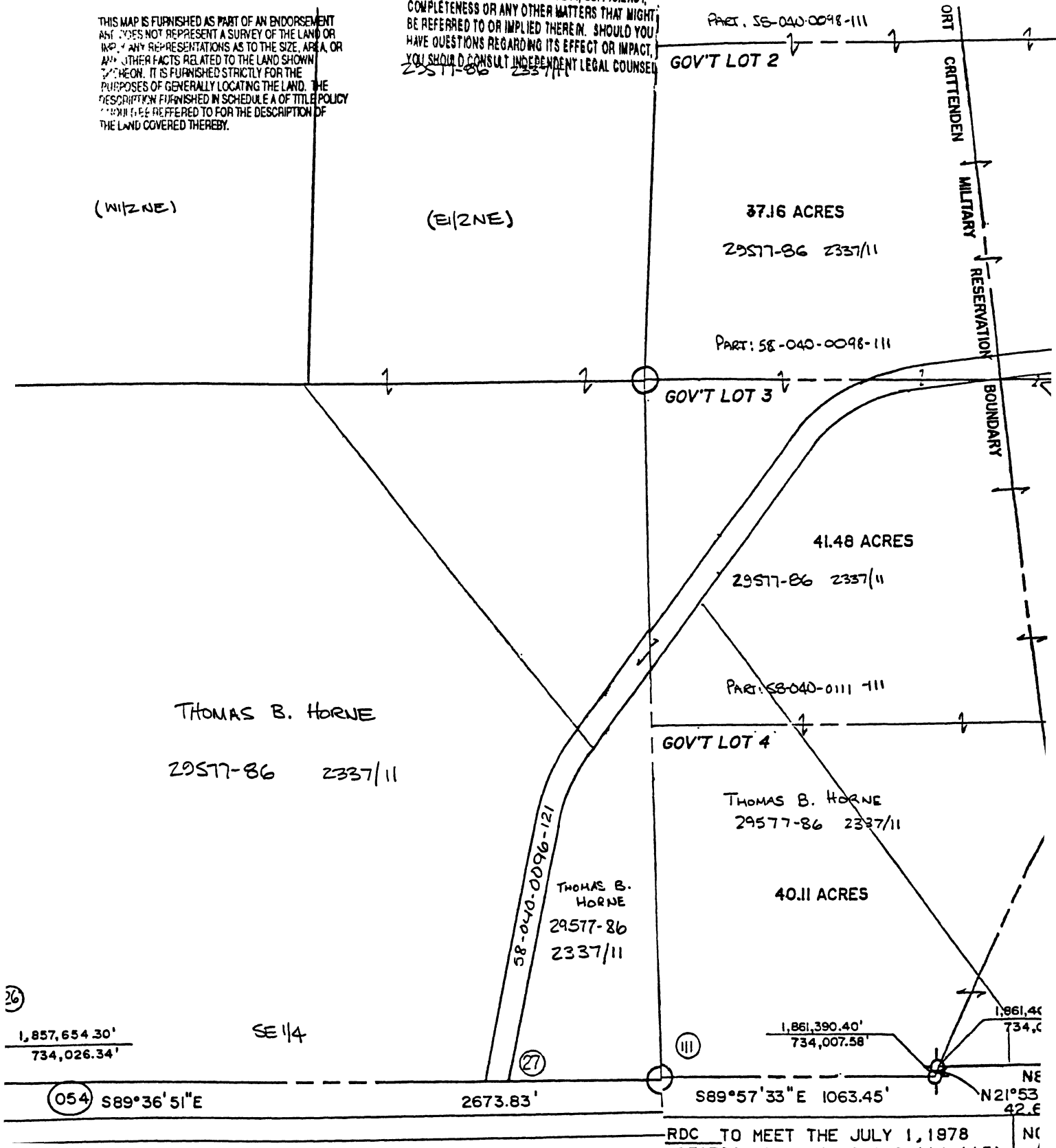


Authorized Signatory



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## **EXHIBIT 4**

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.	<b>COMPLAINT</b>  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**

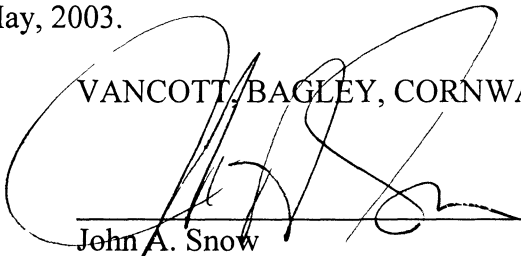
Vestin hereby makes a demand for a trial by jury on all issues triable as a matter of right by a jury, as provided in Utah R. Civ. P. 38.

#### **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 30<sup>th</sup> day of May, 2003.

VANCOTT, BAGLEY, CORNWALL & McCARTHY



John A. Snow  
Cassie Wray  
Attorneys for Plaintiff

## **EXHIBIT 5**

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**

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

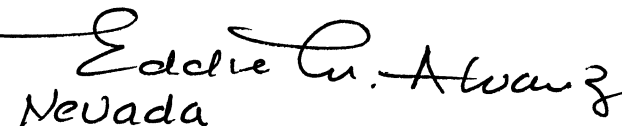
of a foreclosure, then when Vestin attempted to liquidate its interest in the property by selling the same, the assessment applicable to the property would become due and payable.

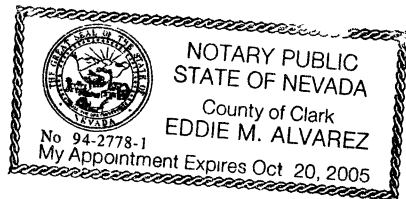
14. If Vestin had been aware of the Eagle Mountain SID and that the assessments by the Eagle Mountain SID became immediately due and payable upon a voluntary transfer of title (as opposed to an “involuntary” transfer by foreclosure), Vestin would have had the opportunity to structure the Loans to avoid 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 9<sup>th</sup> day of August, 2003.

  
Daniel B. Stubbs

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



## **EXHIBIT 6**

## **AFFIDAVIT OF THOMAS E. LEA**

STATE OF NEVADA )

ss

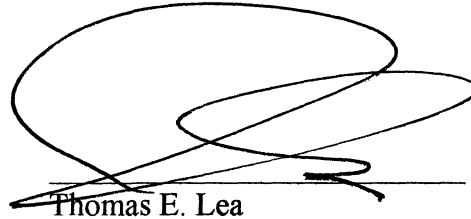
COUNTY OF CLARK )

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 6<sup>th</sup> day of August, 2003.

  
Thomas E. Lea

**ACKNOWLEDGEMENT**

STATE OF Nevada     )  
                                          ) ss.  
COUNTY OF Clark    )

On the 6<sup>th</sup> 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



