

(3) *Forfeiture Clause*

Horizon included a forfeiture clause in its contract that permitted it to terminate the purchaser's interest on default and retain all previously paid installments. A substantial number of contracts and sums of money have been forfeited under the Horizon contract (Findings 129-131). It will never be known how many customers continued making payments because of the Hobson's choice presented by the forfeiture clause. Although forfeiture clauses in installment contracts are legal in a majority of jurisdictions, they are unfair to the purchaser. Dobbs, *Remedies* Section 12.14 (1973). Upon forfeiture, the seller receives the benefit of the land and all previous payments; he is unjustly enriched at the expense of the purchaser.

In an effort to reach equitable results, an increasing number of states have departed either legislatively or judicially from the ancient common law rule of forfeiture. By preventing forfeitures, installment land sales contracts are brought into line with mortgages and installment sales of goods under the Uniform Commercial Code. Neither mortgage law nor the U.C.C. permits forfeiture, but limit the seller to his actual damages. Dobbs, *Remedies* Section 12.14(1973), U.C.C. Section 2-718.

Limiting recovery to actual damages is more compelling where the contract containing the forfeiture clause is an adhesion contract. In this case the stronger party, Horizon, has secured for itself a remedy for contract breach that far exceeds its anticipated actual damages. Had this been a liquidated damages clause, it would have been struck down as a penalty because it bears no relationship to anticipated damages. [290]

The penal nature of the forfeiture clause, particularly in combination with the duress of an adhesion contract, is indicative of the oppressiveness of forfeiture and the unfairness of Horizon's forfeiture clause. Concluding that the forfeiture provisions of Horizon's contracts are unfair represents a departure from an old and oppressive rule; yet, it does not break new ground, for equity has long abhorred a forfeiture.

J. Horizon Is Liable For The Unfair Or Deceptive Acts Of Its Sales Representatives

In reports filed with the Securities and Exchange Commission, ("SEC"), Horizon has reported that its sales representatives are full-time employees (CX 64D, 65E). For the fiscal year ended May 31, 1974, Horizon reported to the SEC that "the Company's own sales organization" accounted for 98 percent of its sales (CX 66C). Thus,

the relationship between Horizon's sales representatives and Horizon Corporation is that of principal and agent. Horizon, having clothed its sales representatives with apparent authority in the form of contracts, TBA maps, unit maps, property reports, films, presentation manuals, and Horizon-sponsored dinner parties, is responsible for their sales representations even if unauthorized. *Goodman v. F.T.C.*, 244 F.2d 584, (9th Cir. 1957). (The technical form of the relationship is not determinative; in a similar sales situation a corporation was liable for the acts of its jobbers considered independent contractors. *Star Office Supply Co.*, 77 F.T.C. 383, 446-46 (1970)).

Horizon points to the integration-disclaimer clause of its contract claiming exculpation from liability and lack of apparent authority in the sales representatives. It is clear from customer testimony that they perceived the representations of sales representatives as those of Horizon. Mere disclaimer clauses cannot absolve Horizon of the continuous and significant, both in substance and number, of misrepresentations made by its sales personnel. It is clear from the internal surveys of its sales offices that Horizon knew of these unfair and deceptive acts and practices and tacitly condoned them. In fact, testimony about sales training and the training manuals themselves show Horizon as the initiator of many of the unfair acts and practices.

Even if it were to be found that Horizon honestly and systematically dismissed sales representatives who violated their pledge, this would not exonerate Horizon of liability. As the Second Circuit Court of Appeals noted in *Standard Distributors, Inc. v. F.T.C.*, 211 F.2d 7, 13 (2d Cir. 1954): "unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act."

K. Neither Laches Nor Equitable Estoppel Bar Relief

The issuance of an order in this case is not barred by the equitable defenses of laches and equitable estoppel. As the Commission recently noted in *In the Matter of SKF Industries, Inc.*, Docket No. 9046, Opinion of the Commission, p. 8 n. 8 [94 F.T.C. 6 at 83] (July 25, 1979), neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917); *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 623-24 (1953); *United States v. Firestone Tire & Rubber Co.*, [291]374 F. Supp. 431, 433 (N.D. Ohio 1974). The Commission's investigation of Horizon, which commenced in October 1971 (CX 65D), is of signifi-

cance to this proceeding in that Horizon, knowing it was under investigation, failed to take significant steps to correct its misleading and deceptive sales programs. Horizon's internal surveys alone constitute sufficient evidence to demonstrate that there has been no discontinuance of the unfair and deceptive practices prior to issuance of the Commission's complaint.

L. Remedy

It is well established that the Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices," and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946). The courts have repeatedly affirmed the power of the Commission to go beyond the specific violations found and to prohibit similar practices, *FTC v. Mandel Bros. Inc.*, 359 U.S. 385, 392-93 (1959), "so that its order may not be by-passed with impunity." *FTC v. Ruberoid, Co.*, 343 U.S. 470, 473 (1952). The Order entered herein is necessary to achieve the objective of preventing unfair, misleading and deceptive sales practices in the future.

Horizon suggests that any order exempt (i) property which is exempt from the scrutiny of OILSR pursuant to 15 U.S.C. 1702, (ii) single transactions in which the purchase price is greater than \$25,000, (iii) parcels of 50 acres or more in size, and (iv) lots for which utilities are or will be available within a date certain and upon specified conditions (Respondent's Reply To Complaint Counsel's Proposed Order, pp. 12-13). Such exemptions are not justifiable. It is clear that the purchaser of large quantities of land is not immune from deception; indeed, large purchasers may be more in need of the protection provided by this Order since the ILSDA does not require disclosures on large parcels. The public interest is not served, nor Horizon's unfair or deceptive acts or practices stopped, by placing such limitations on the scope of this Order.

In consideration of Horizon's contention that the order should be limited to undeveloped land which is subject to no obligation to develop (Respondent's Reply To Complaint Counsel's Proposed Order, p. 11), the scope of the Order has been limited to vacant land, undeveloped land, predeveloped land, or any other land which is not immediately available as a building site with utilities in place or under construction. This limitation is intended to exclude from the coverage of the Order, building lots with houses constructed thereon,

or with utilities in place and available for immediate building purposes.

Section I

Section I of the Order consists of three subsections which order Horizon to cease and desist from (A) making 15 specific representations, (B) referring to 8 listed topics, and (C) engaging in 9 listed acts or practices. Although a number of these prohibitions are far reaching, the findings would indicate that such unfair and deceptive conduct by Horizon [292] was instrumental in persuading customers to purchase Horizon property. The breadth of these prohibitions is a reasonable preventative measure against new but similar unfair or deceptive sales schemes which would enable Horizon to by-pass with impunity this Order.

Section II

The provisions of Section II affirmatively require Horizon to notify prospective purchasers of the potential risks and the material facts regarding the purchase of land from Horizon, and to offer a refund or exchange where there has been a material failure to provide a contracted-for improvement.

Paragraph II A, "Notice To Buyers," provides consumers with basic factual information about the offered property two days prior to any in-person sales contact. The two-day period permits the consumer to assess the merits of the property without being subject to Horizon's sophisticated sales techniques and sales pressures. The Notice informs consumers in an objective way that (1) the topic is land sales; (2) the location and average cost of the land being sold; (3) the uncertainty of investment value or ability to resell; and (4) the availability and cost information for the following improvements: roads, water, sewers, electricity, telephone service and recreational facilities. At its conclusion, the "Notice To Buyers" states the advisability of seeking professional assistance and of reading the property report.

Paragraphs II B and C verbally and physically incorporate the "Notice To Buyers" into the sales contract.

Paragraph II D states the method and terms of a refund procedure in the event that Horizon has failed to provide contracted for improvements within six months of the time specified in the contract. This provision, to be included in all contracts, requires affirmative notification on the part of Horizon, which is justifiable under the circumstances of a failure to meet contract terms.

Section III

Section III requires Horizon to disclose the risky nature of land investment and the purchaser's right to reconsider and cancel the contract during a period of insulation from Horizon's sales representatives. The terms of the adhesion contract are cleansed of some unfairness by prohibiting the integration and forfeiture provisions.

Paragraph III A requires Horizon to "clearly and conspicuously" include in all sales and promotional materials a specified warning about the uncertainty of land values and of resale potential. Such an unequivocal disclosure about the risks in purchasing land should mitigate any conflicting implications of land as an excellent, risk-free investment.

Paragraph III B requires Horizon to incorporate into its contract a clause granting a right of cancellation within ten days after signing the contract. To insure that the purchaser can truly reflect on the sagacity of his purchase, all communications from Horizon must cease during the ten-day period. Other provisions insure that purchasers have knowledge of and do not waive or forfeit their cancellation right. [293] Horizon is required to include a separate paragraph calling the purchaser's attention to the ten-day period; to include two copies of a separate form entitled "Notice Of Right Of Cancellation"; to orally notify purchasers of the right to cancel; and to notify purchasers so that they can cure any deficiency in the "Notice Of Right Of Cancellation."

Where an exchange privilege exists, Paragraph III F requires Horizon to specifically disclose the fact that building exchange lots may increase purchaser indebtedness and may not be in desirable locations.

Paragraph III G institutes a mandatory refund privilege conditioned on the purchaser making a personal visit to the property within one year. Although this provision turns Horizon's refund privilege from an optional to a mandatory one, requiring that Horizon provide a personal visit-refund provision is not unreasonable in light of the time limitation imposed, Horizon's unfair and deceptive acts and practices in the past, and Horizon's chosen method of selling its land sight unseen to buyers located at great distances from the property.

Despite the fact that Horizon routinely included a personal visit-refund provision coupled with a property visit credit in its contracts, the record shows that few people exercised this refund option and in fact often were reloaded when they did make a property visit, even though they were not satisfied with their original purchase. To

protect against a reoccurrence of the above situation, Horizon is required to: (1) clearly disclose the terms of the refund privilege, (2) provide the purchaser with a specific "Notice Of Cancellation After Inspection," and (3) refrain from communicating with the purchaser during the five-day refund period subsequent to the property visit.

Paragraph III H requires Horizon to make public the names and addresses of purchasers of its lots. This will enable the public, including builders, to contact lot purchasers about the purchase or sale of the property. It takes away the monopoly which Horizon has on the names and addresses of lot purchasers prior to recording a deed to the property.

Subsections I through L of Section III go to remedying the evil of forfeiture in Horizon's adhesion contract. Horizon will be permitted to collect or retain only its actual damages both in future contracts and in contracts which are in existence as of the time this Order becomes final. This Order does not grant complaint counsel's requested retroactive relief for contracts in which forfeitures have occurred prior to the effective date of this Order. In light of *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) and 15 U.S.C. 57(b), such restitution is not ordered. However, failure to grant administrative relief in the form of restitution should not be considered indicative of a failure of Horizon's customers to qualify for relief; rather, the Commission should seek judicial redress for penal forfeitures in accordance with 15 U.S.C. 57(b).

In addition, Horizon is prohibited from enforcing the integration clause of its contract. The record shows a substantial number of material representations made apart from the written contract. These representations were unfair and deceptive and were relied on by [294] purchasers. Purchasers should not be prevented from using these representations as proof in any contract dispute with Horizon or in any subsequent litigation.

Paragraph III N authorizes a letter (Appendix A) be sent to all purchasers of Horizon's land. The letter serves to inform purchasers of this lawsuit and of the rights and options open to them.

Section IV

Section IV requires a change in the management structure of the HCIA's. Horizon is prohibited from controlling the management of the associations and is thereby prevented from utilizing the resources of the HCIA's for its own benefit. Further, HCIA members are given the opportunity to postpone payment of HCIA assessments until the lot being assessed is ready for development. Payments over

a forty-year period on a lot which may never be developed is particularly onerous. Further, HCIA payments to an association by those who have forfeited on their lots, and have no interest whatsoever in the development should be refunded. These payments are in an escrow account, are readily available for refunds, and refunds seem just and proper.

Section V

Section V requires Horizon to inform its present and future agents and affiliates of the contents of this Order. It further commands Horizon to police the activities of its agents and affiliates to insure compliance with this Order. In light of Horizon's past history of failure to prevent misrepresentations by its sales force, this section is both reasonable and necessary.

While the notice and disclosure requirements of this Order duplicate in some respects information in the property reports, such additional disclosures are obviously necessary since the property reports have not apprised purchasers of all information material to a decision to purchase respondent's land.

Redress

The Commission has stated in its complaint that it may seek redress for injury to consumers in the form of restitution and refunds for past, present and future consumers, and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act, as amended (15 U.S.C. 57(b)), if the record of this proceeding, and other factors, make such course of action necessary and appropriate. For this reason, full redress for consumers has not been ordered by the undersigned. However, it is recommended that the Commission now proceed under Section 19(b).

The record in this proceeding reveals a course of conduct filled with deliberate misrepresentations and the withholding of material information from consumers. The end result of this planned course of conduct was to appropriate from consumers millions of dollars for virtually worthless desert land that was represented to be an excellent [295] investment. This entire sales scheme was made with deliberateness and with the knowledge of its falsity, and it unjustly enriched a few at the expense of thousands of unsuspecting consumers. Commission redress for these helpless victims of a vicious consumer fraud is not only warranted, but may be the sole remaining hope for any consumer relief.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

2. The challenged acts, practices and methods of competition of respondent are in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

3. Respondent Horizon Corporation has engaged in the sale of land, located in the States of Texas, Arizona and New Mexico, and has utilized in connection therewith false, misleading, deceptive and unfair representations and acts and practices, and has failed to disclose to purchasers material information in respect to such land.

4. Through the use of the aforesaid unfair or deceptive acts or practices, respondent has caused purchasers of its land to pay substantial sums of money to it for land that has little value as investments and little use as homesites, and has received and retained such sums of money and has failed to offer to refund or refused to refund such money to such purchasers.

5. The use by respondent of the aforementioned unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are true, and into the purchase of substantial amounts of respondent's land because of said mistaken and erroneous belief.

6. The aforementioned acts or practices were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. [296]

ORDER

I

It is ordered, That respondent Horizon Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, contracting or other promotion of vacant land, undeveloped land, predeveloped land, or any vacant land which is not immediately usable as a building site with utilities in place or under construction, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing, directly or by implication, through the use of any means, that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment;
2. There is little or no financial risk involved in the purchase of respondent's land;
3. The resale of land purchased from respondent is not, or [297] will not be difficult;
4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, *unless* such is a fact, and *unless* the terms, conditions and arrangements for repurchase, resale, or assistance are clearly and conspicuously disclosed at the time such representation is made;
5. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise;
6. Lots designated by respondent as "single-family residential", "multi-family residential", "commercial", or terms of similar import have a significant difference in present or expected value;
7. The price set by respondent for the land is equivalent to the market value of the land, *unless* adequate market data on resales of similar land (land in a similar location with the same degree of development) by previous purchasers in the possession of respondent substantiates this representation;
8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money;
9. The purchase of land in general is a good, profitable, safe or sound investment; [298]
10. The demand for land offered for sale by respondent has increased, is increasing, or will increase;
11. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing;
12. Purchasers must purchase immediately in order to ensure that a particularly desirable location will be available, or that lots similar to those being offered for sale may not or will not be available at the same price in the foreseeable future;
13. Purchasers have been specially selected;
14. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is

not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided*, that respondent may accurately recite the terms and conditions of the contract and of a refund privilege, if any, or of a cancellation right, if applicable; [299]

15. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in prices, including reference by actual dollar amount, percentage increase, or by any other means as indicative of market value, or of a change in market value;

2. The past, present or future population, employment or industrial statistics or trends or other statistics or trends in a geographic area, unless respondent has a reasonable basis at the time of the statement or representation to conclude that such statistic or trend either now has or, within the near future, will have a significant effect on respondent's property or a part thereof, other than those parts of each property which respondent has reserved for development, to which such statement or representation refers or relates;

3. The present, planned, proposed or potential development, improvement or facilities of the particular land being offered or of the subdivision or project in which the offered land is located that [300]differs in any material respect from the relevant language of the most current property report or from the "Notice to Buyers" (set forth in Part II of this Order);

4. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment;

5. The purchase, reservation, contracting or consideration by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to, any reference to any other person having a "hold" on a lot;

6. Respondent's reputation, size, assets or listing on any stock exchange; *provided*, that respondent may make such references as are required by statute or regulation in the place and manner required by such statute or regulation;

7. The present, planned, proposed or potential development of any land by anyone other than respondent;

8. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means: [301]

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with the purchase decision or the purchase of respondent's land;

2. Failing to provide any required federal or state property report sufficiently in advance of the signing of a contract so as to enable the purchaser to read it completely without interruption or distraction by respondent's representatives or employees;

3. Filling out a contract with the purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he desires to purchase the land being offered;

4. Subjecting a purchaser who has evidenced a desire not to purchase respondent's land to continued sales effort from any sales representative or other employee other than the original sales person, *i.e.*, any continuation of the "T.O." or "takeover" system;

5. Including in any contract or in any other documents shown or provided to purchasers, language stating that no express or implied representations have been made in connection with the sale of respondent's land, or that any particular representation has not been made in connection therewith;

6. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any [302]material respect from the rights or obligations of the parties as stated in the contract of sale, the Notice to Buyers provided for in Section II of this Order, and the property report;

7. Including any contract language permitting respondent to retain all sums previously paid by the purchaser upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract;

8. Failing to disclose, clearly and conspicuously, in all sales presentations, promotional materials, contracts and advertising relating to specific lots the existence, nature, location, size and significance of any and all easements, and any other physical features which could affect the full use and enjoyment of a lot;

9. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours.

Order 97-F.T.C.

II

It is further ordered, That respondent Horizon Corporation shall:

A. Distribute to all purchasers a copy of the following "Notice to Buyers" at least two days prior to any in-person sales contact. (1) In [303]cases where the purchaser is invited by mail to attend a meeting sponsored by respondent, the Notice shall be included with the invitation. (2) In cases where respondent arranges to meet with the purchaser in the purchaser's home, or other location, respondent shall mail the Notice to the purchaser allowing sufficient time for the Notice to arrive two days prior to the meeting. (3) In cases where the initial contact with the purchaser is in-person (as, for example, at a booth located in a public place) respondent shall, after identifying briefly the purpose of the contact, give the Notice to the purchaser, request that the purchaser read it, and provide ample uninterrupted time for the purchaser to read it completely before continuing with any sales presentation. (4) In cases where the sale is to be completed entirely through the mail, the Notice shall accompany the initial mailing to the purchaser. The Notice shall be on a separate sheet of paper not attached to any other paper and shall contain only the required information and no other writing, unless approved in advance by the Commission. The Notice shall be in the following format and content:

NOTICE TO BUYERS

NAME OF SUBDIVISION
 NAME OF SELLER
 EFFECTIVE DATE OF NOTICE

THE PURPOSE OF [DESCRIBE THE TYPE OF MEETING OR CONTACT] IS TO PERSUADE YOU TO SIGN A CONTRACT FOR THE PURCHASE OF LAND IN [NAME OF STATE] AT AN [304]APPROXIMATE COST OF [AVERAGE LIST PRICE FOR THE LOTS BEING OFFERED], OF AN AVERAGE SIZE OF _____ ACRE(S), WHICH IS A COST PER ACRE OF \$ _____.

IMPORTANT

THE SELLER ADVISES YOU THAT IT IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS A FINANCIAL INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. THE FUTURE VALUE OF LAND IS VERY UNCERTAIN. EVEN IF THE DEVELOPMENT PROCEEDS ON SCHEDULE, YOU WILL FACE THE COMPETITION OF THE SELLER'S OWN SALES PROGRAM IF YOU OFFER YOUR LOT FOR SALE. THIS USUALLY INVOLVES AN EXTENSIVE SALES CAMPAIGN BY THE SELLER AND MARKETING COMMISSIONS WHICH YOU MAY NOT BE ABLE TO MATCH. YOU MAY ALSO FACE THE POSSIBILITY THAT REAL ESTATE

BROKERS MAY NOT BE INTERESTED IN SELLING YOUR LOT OR LISTING YOUR LOT FOR SALE.

[State the number of lots sold in the subdivision by the seller from the initial sale to the date of this Notice. State the number of unsold lots currently available for sale. State the number of lots which the seller intends to offer in the future to complete sales in the subdivision.]

[PROVIDE the following development information for the unit(s) being offered:]

ROADS

(INFORMATION TO BE APPLICABLE TO THE ROADS FRONTING PURCHASER'S LOTS) [305]

State who is currently responsible for construction and maintenance and whether the roads will be maintained by a public authority, a property owners' association or some other entity at some time in the future. State the cost to buyer for construction/maintenance, if any, during interim and after turnover.

State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the roads as represented. If not, include the following warning: **WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE ROADS; THEREFORE, THERE IS NO ASSURANCE THAT THEY WILL BE COMPLETED.**

Provide the following roads information:

| Unit | Starting date | Percent now complete | Estimated completion date* | Present surface | Final surface** |
|------|---------------|----------------------|----------------------------|-----------------|-----------------|
|------|---------------|----------------------|----------------------------|-----------------|-----------------|

* If not known, insert the following warning: **WARNING: THE PLANS FOR THE ROADS ARE SO INDEFINITE THEY MAY NOT BE COMPLETED.**

** If unpaved then state "UNPAVED" and describe the surface. [306]

WATER

If water is to be supplied by an individual private system, state the estimated cost to the buyer of installation, treatment facilities, necessary equipment and any other required costs. If individual wells are to be used, state whether or not a refund or exchange will be issued in the event a productive well cannot be installed. If yes, state the terms and conditions thereof. If no, insert the following warning: **WARNING: A SUCCESSFUL PRODUCING WELL IS NOT GUARANTEED. NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO DIG A SUCCESSFUL WELL.**

If water is to be provided by a central system, state whether the buyer is to pay any construction costs, one-time connection fees, availability fees, special assessments or

Order 97 F.T.C.

deposits for the central system. If so, state the estimated cost. If the buyer will be responsible for construction costs of the water mains, state the costs to install the mains to the most remote lot covered by the Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: **WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL WATER SYSTEM; THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED. [307]**

Provide the following water information:

| Unit | Starting date | Percent now complete | Service Available date* |
|------|------------------|-------------------------|----------------------------|
|------|------------------|-------------------------|----------------------------|

* If not known, insert the following warning: **WARNING: THE PLANS FOR THE CENTRAL WATER SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.**

SEWER

State the method of sewage disposal to be used. If by septic tank or other individual system, state the estimated cost of the system and any necessary tests. State whether a permit is required. If so, and if each and every lot has not been already approved, insert the following warning: **WARNING: THERE IS NO ASSURANCE PERMITS CAN BE OBTAINED FOR THE INSTALLATION AND USE OF SEPTIC TANKS OR OTHER INDIVIDUAL ON-SITE SEWAGE SYSTEMS.** State whether or not a refund or exchange will be issued in the event a permit is denied for the particular lot purchased, and the terms and conditions thereof. If neither will be issued, insert the following warning: **WARNING: NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO INSTALL A SEPTIC TANK OR OTHER ON-SITE SEWAGE SYSTEM.**

If a central sewage treatment and collection system is being installed, state who is responsible for construction of the system. State whether [308]buyer will pay any construction costs, special assessments, one-time connection fees, availability fees, use fees or deposits. State the amounts of these charges. If the buyer is to pay the cost of the sewer mains, state the cost of installation of the mains to the most remote lot in this Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: **WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL SEWER SYSTEM; THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED.** Provide the following sewer information:

| Unit | Starting date | Percentage of completion | Service Availability date* |
|------|---------------|-----------------------------|-------------------------------|
|------|---------------|-----------------------------|-------------------------------|

464

Order

* If not known, insert the following warning: WARNING: THE PLANS FOR THE CENTRAL SEWAGE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

ELECTRIC SERVICE

If the primary service lines have not been extended in front of, or adjacent to each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges [309] for extension of primary lines. Based on that policy, state the cost to the buyer for extending primary service to the most remote lot in this Notice. Provide the following electric service information:

| Unit | Starting date | Percentage complete | Service Availability date* |
|------|---------------|---------------------|----------------------------|
|------|---------------|---------------------|----------------------------|

* If not known, insert the following warning: WARNING: THE PLANS FOR THE ELECTRIC SERVICE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

TELEPHONE SERVICE

If the service lines have not been extended in front of, or adjacent to, each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges for extension of service lines. Based on that policy, state the cost to the buyer of extending service lines to the most remote lot in this Notice. [310]

Provide the following telephone service information:

| Unit | Starting Date | Percentage complete | Service Availability date* |
|------|---------------|---------------------|----------------------------|
|------|---------------|---------------------|----------------------------|

* If not known, insert the following warning: WARNING: THE PLANS FOR THE TELEPHONE SYSTEM ARE SO INDEFINITE IT MAY NOT BE COMPLETED.

RECREATIONAL FACILITIES

Identify each recreational facility. For each facility, provide the following information:

Order

97 F.T.C.

| Facility | Percent complete | Date of start of construction | Date Available for use* | Financial Assurance of completion** | Buyer's cost and assessments*** |
|----------|------------------|-------------------------------|-------------------------|-------------------------------------|---------------------------------|
|----------|------------------|-------------------------------|-------------------------|-------------------------------------|---------------------------------|

* If not known, insert the following warning: **WARNING: THE PLANS FOR THE (identify the facility) ARE SO INDEFINITE IT MAY NOT BE COMPLETED.**

** If none, state "none". If such exists, state the type and amount.

*** State any construction or use costs to the buyer including any [311] applicable property owner's association assessment, maintenance assessment or use fee.

At the conclusion of the Notice, place the following warning set off by a box outline: **IMPORTANT, OBTAIN AND READ THOROUGHLY THE FULL PROPERTY REPORT BEFORE SIGNING ANYTHING. THE PROPERTY REPORT CONTAINS ADDITIONAL INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE CONTRACTING TO PURCHASE THIS LAND. IT IS DESIRABLE TO SEEK THE ASSISTANCE OF COUNSEL OR A QUALIFIED REAL ESTATE PROFESSIONAL FOR ASSISTANCE IN EVALUATING THE TERMS OR MERITS OF THIS PURCHASE BEFORE SIGNING ANYTHING. RETAIN THIS NOTICE—REPRESENTATIONS CONTAINED IN IT BECOME A PART OF ANY CONTRACT YOU MAY SIGN WITH THE SELLER.**

If you wish to obtain more information or if you wish to cancel any appointment we may have arranged with you, you may call this toll-free number: 800 _____.

-(End of Notice)-

B. Include in all contracts of sale the following provision:

The representations and statements made by seller in the Notice to Buyers and in the Property Report regarding roads, utilities, improvements and recreational facilities are hereby incorporated into, and made a part of this contract as if set forth fully herein. [312]

C. Attach to the contract a copy of the Notice to Buyers that was given to the purchaser when the purchaser was first contacted by respondent.

D. Include in all contracts the following provision:

In the event the subdivision or the lot which is the subject of this contract has not been provided with or does not have available any contracted-for improvement or utility, or there has been a material failure to provide or make available any contracted-for recreational facility, amenity or structure, within six months of the time specified in the contract, the seller will, within 30 days after the expiration of the six-month time period, provide the buyer by certified mail, return receipt requested, with notice of such failure to provide or such unavailability, and of the buyer's right to a refund of all moneys paid (including, but not limited to principal, interest, taxes, and assessments) under the contract, plus interest at the rate of 7 percent per annum computed from the date of seller's default.

Provided, however, That at the time the purchaser is notified of such

refund, the purchaser may also be offered the option of selecting, instead of such refund, an exchange of the purchaser's lot, at no additional cost to the purchaser for another lot to which all contractual obligations of [313]seller have been met, which was or would have been of at least equal price on the date the purchaser's contract was signed, which is located in the same subdivision, has the same zoning classification, has the same utilities and improvements as seller was obligated to provide under the original contract, and is located no further from the same or substantially similar recreational and commercial facilities and amenities as the original lot. Where the buyer has received a deed or other evidence of interest in the property other than this contract, purchaser may be required, as a condition of obtaining a refund, to return such deed or other evidence of interest.

E. Carry out the notification and refund provisions as set forth in Paragraph D above and, in connection therewith not solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon the right of a purchaser to a refund as set out in Paragraph D of this Order, except that respondent may require a purchaser to exercise his option for a refund within a stated time period of not less than forty-five days after receipt by the purchaser of the Notice required by Paragraph D of this Order.

III

It is further ordered, That respondent Horizon Corporation shall:

A. Include clearly and conspicuously in all sales presentations, promotional materials, printed advertisements and radio and television commercials, the following statement: [314]

THE FUTURE VALUE OF LAND IS VERY UNCERTAIN. THE SELLER ADVISES YOU THAT IT IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS A FINANCIAL INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. IT IS SUGGESTED THAT YOU DISCUSS ANY POSSIBLE PURCHASE WITH A LAWYER, REALTOR OR OTHER QUALIFIED PROFESSIONAL.

B. Include clearly and conspicuously in each contract for the sale of respondent's land the following statement, in 12-point boldface type:

YOU, THE BUYER, HAVE THE RIGHT TO CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

SHOULD YOU CHOOSE TO CANCEL WITHIN THIS TIME, ANY PAYMENTS

Order

97-F.T.C.

MADE BY YOU UNDER THIS CONTRACT WILL BE RETURNED AND ANY LEGAL DOCUMENT SIGNED BY YOU WILL BE CANCELLED AND RETURNED, WITHIN TEN BUSINESS DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE.

TO CANCEL THIS CONTRACT, YOU MUST MAIL OR DELIVER A SIGNED COPY OF THE 'NOTICE OF RIGHT OF CANCELLATION' (THAT WILL BE FURNISHED BY THE SELLER), OR SEND A TELEGRAM, OR SEND ANY OTHER WRITTEN NOTICE OF CANCELLATION TO SELLER AT SELLER'S [315]PLACE OF BUSINESS. A MAILING MUST BE POSTMARKED, OR A TELEGRAM MUST BE FILED FOR TRANSMISSION, NOT LATER THAN MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT.

During this ten-day period after the signing of a land purchase contract all communications, personal, telephonic or otherwise, between respondent and purchaser are forbidden and the initiation of any such communication by respondent shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable anytime before the purchased land is fully paid for and deeded to purchaser.

C. Print the following in 12-point boldface type as a separate paragraph of the contract immediately preceding the space provided for the purchaser's signature:

ATTENTION: WHILE YOU HAVE 10 BUSINESS DAYS IN WHICH TO RECONSIDER YOUR DECISION AND CANCEL THIS CONTRACT WITH FULL REFUND, WE RECOMMEND THAT, *BEFORE SIGNING*, YOU CONSIDER YOUR NEEDS CAREFULLY AND HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, REAL ESTATE AGENT OR OTHER QUALIFIED PROFESSIONAL.

D. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in 12-point [316]boldface type "NOTICE OF RIGHT OF CANCELLATION," which shall contain in 10-point boldface type the following information and statements:

Date of Transaction

Lot Identification(s)

Contract Number

NOTICE OF RIGHT OF CANCELLATION

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT. USE THIS TIME TO EXAMINE WITH CARE THIS CONTRACT AND THE PROPERTY REPORT. YOU SHOULD ALSO USE THIS TIME TO HAVE BOTH THIS CONTRACT AND THE PROPERTY REPORT REVIEWED BY A LAWYER, REAL ESTATE AGENT OR OTHER QUALIFIED PROFESSIONAL.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY [317]DOCUMENT YOU SIGNED WILL BE RETURNED WITHIN TEN BUSINESS DAYS AFTER THE SELLER RECEIVES THIS CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [name of respondent], AT [address of respondent's place of business] POSTMARKED (if mailed) OR FILED FOR TRANSMISSION (if telegraphed) NOT LATER THAN MIDNIGHT OF _____ . [Date]

I (WE) HEREBY CANCEL THIS TRANSACTION. (EACH BUYER MUST SIGN THIS NOTICE.)

[Date]

[Signature of buyer(s)]

-(End of Notice)-

Respondent shall, before furnishing copies of this "Notice of Right of Cancellation" to the purchaser, complete both copies by entering the name of respondent, the address of the respondent's place of business, the date of the transaction, the contract number and lot identification(s), and the date, not earlier than the tenth business day following the date of the signing by the purchaser, by which the purchaser may give notice of cancellation.

Respondent shall, where the signature of a purchaser is solicited during [318]the course of a sales presentation, inform each purchaser

Order

97-F.T.C.

er orally, at the time the purchaser signs the contract, of the right to cancel as stated in this Paragraph of this Order.

E. Honor any signed and timely notice of cancellation by the purchaser, and within 10 business days after the receipt of such notice, (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

Whenever a timely notice of cancellation is received and said notice is not sufficient or proper in any manner, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the third business day following the purchaser's receipt of the mailing, if the purchaser is to obtain a refund.

F. Whenever respondent extends a privilege or other right whereby the purchaser may exchange the undeveloped land for a building lot, respondent shall:

1. Include in all materials, including the contract, which discuss the privilege or right, or if such privilege or right is described orally, include in such oral discussion, and in a concurrently delivered written notice, the following statement: BUILDING EXCHANGE LOTS EQUAL IN SIZE [319]AND COST TO THE LOT YOU ARE PURCHASING MAY BE LOCATED SUBSTANTIAL DISTANCES FROM THE ESTABLISHED DEVELOPED AREAS, AND THEY MAY HAVE LESS DESIRABLE ROADS, UTILITIES AND APPEARANCE SO THAT YOU MAY WISH TO EXCHANGE FOR OTHER MORE ATTRACTIVE BUILDING LOTS THAT THE SELLER MAY OFFER. THESE OTHER LOTS MAY BE SMALLER IN SIZE AND MAY REQUIRE YOU TO PAY MORE MONEY THAN YOU ARE NOW CONTRACTING TO PAY; and

2. State the specific financial terms or formula for exchange of the purchaser's equity in the original lot into the building lot, in the same place and manner as the statement in subparagraph 1 above.

G. Whenever respondent sells property site unseen it shall extend a refund privilege conditioned upon the purchaser making a personal visit to the property within one year after purchase and notifying respondent within five days after inspection that a refund desired. Respondent shall:

1. Provide the purchaser with a copy of the following "INSPEC-

TION AND REFUND PRIVILEGE NOTICE" at the time the contract is signed. The Notice shall be on a separate sheet of paper containing no other writing. The Notice shall be worded as follows: [320]

INSPECTION AND REFUND PRIVILEGE NOTICE

Personal inspection of any land purchase is highly desirable. If you should decide to inspect your purchase in accordance with the requirements of the refund privilege, you should be aware that it will be in seller's interest during the visit to encourage you to retain your property and to perhaps purchase additional land or trade for a more expensive parcel. Therefore, you may encounter additional sales presentations.

You should take the time during your inspection to visit the local area and examine the real estate market where the property is located. You should, on your own, contact local independent real estate agents for information.

In the event you decide to cancel this purchase, you will not be reimbursed by seller for your travel expenses.

THIS INSPECTION AND REFUND PRIVILEGE IS IN ADDITION TO AND DOES NOT TAKE AWAY YOUR 10-DAY CANCELLATION RIGHT. SEE YOUR CONTRACT.

-(End of Notice)- [321]

2. Provide the purchaser five business days *after* making the personal inspection within which to request a refund.

3. Include in any contract, in immediate proximity to the provision setting forth the availability of this refund, the following statement: YOU, THE BUYER, HAVE UNTIL MIDNIGHT OF THE FIFTH BUSINESS DAY AFTER THE CONCLUSION OF YOUR IN-PERSON INSPECTION IN WHICH TO NOTIFY THE SELLER OF A DECISION TO CANCEL. YOU MAY CANCEL THE ORIGINAL PURCHASE AS WELL AS ANY PURCHASE MADE DURING THE INSPECTION VISIT. NO REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS FIVE DAY PERIOD.

4. Ensure that every purchaser who seeks to make this inspection visit sees the precise lot identified in the purchaser's contract.

5. Orally inform the purchaser of this post-visit 5-day cancellation right at the time the contract is signed and again at the

Order

97 F.T.C.

conclusion of the inspection visit; the visit shall be deemed to conclude:

a) after the purchaser has inspected the precise lot contracted for; and,

b) at the end point in the visit or tour when all contact with the purchaser by any employee or representative of respondent terminates. [322]

6. Furnish each purchaser, at the conclusion of the inspection visit (as determined in Paragraph G 5 above), with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION" which shall contain in boldface type of a minimum size of 10 points the following statements:

NOTICE OF CANCELLATION

AFTER INSPECTION

Date of conclusion of inspection tour of property

Lot Identification(s)

Contract number(s)

YOU MAY CANCEL YOUR CONTRACT(S) WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE FIFTH BUSINESS DAY AFTER THE ABOVE DATE. NO REPRESENTATIVE OF SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS FIVE DAY PERIOD. IF ANY REPRESENTATIVE OF SELLER DOES CONTACT YOU, PLEASE NOTIFY SELLER AT THIS TOLL-FREE NUMBER: 800 _____.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY LEGAL DOCUMENTS YOU SIGNED WILL BE RETURNED TO YOU WITHIN 10 BUSINESS DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE. [323]

TO CANCEL YOUR CONTRACT(S), MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: (Name of Respondent), AT (address of respondent's place of business), POSTMARKED (IF MAILED) OR FILED FOR TRANSMISSION (IF TELEGRAPHED) NOT LATER THAN MIDNIGHT OF _____.

(WE) HEREBY CANCEL THE ABOVE-DESCRIBED CONTRACT(S). (EACH BUYER MUST SIGN THIS NOTICE.)

(Date)

(Buyer's signature)

(Buyer's signature)

7. Before furnishing the purchaser copies of the "Notice of Cancellation After Inspection" set forth in Paragraph G6. above, complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property, the identifying contract numbers and the date, not earlier than the fifth business day following the conclusion of the inspection (as determined in Paragraph G5. above), by which the purchaser may cancel the purchase(s). [324]

8. During the post-inspection cancellation period all communications, personal, telephonic or otherwise, between respondent and the purchaser are forbidden and the initiation of any such communication by respondent shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable anytime before the purchased land is fully paid for and deeded to purchaser.

9. Investigate any notification received from purchasers of contact violating the provisions of Paragraphs G3. and G8. above, and comply with the requirements of Section V, Paragraphs F and G herein.

10. Honor any signed and timely Notice of Cancellation After Inspection by a purchaser, and within 10 business days after the receipt of such Notice (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

11. Where a timely Notice of Cancellation After Inspection is received purportedly in accordance with the requirements of this section, but where said notice is not sufficient or proper in some manner and respondent does not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the [325]purchaser must be mailed by midnight of the fifth day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

H. Unless otherwise requested by the purchaser, promptly record, with the appropriate authority of the county in which the land is located, all contracts for the purchase of respondent's land, and take such steps as may be necessary to advise such county authority from time to time of the last known mailing addresses of the purchasers under such contracts, but in no case later than the end of the calendar month following that in which respondent

becomes aware of any change in such mailing addresses. Once a lot is deeded, Horizon's obligation hereunder shall expire.

I. Include in all contracts for the sale of land a provision limiting the amount of moneys to be forfeited by a purchaser in the event of the purchaser's default under the contract to an amount not greater than respondent's actual damages from such forfeiture.

J. Refund to purchasers who are deemed in default after the effective date of this Order all moneys paid under the contract, including but not limited to principal, interest, taxes, and assessments which in the aggregate exceed respondent's actual damages within 60 days after the purchaser is deemed to have defaulted; *provided*, that this paragraph shall not preclude respondent from offering a defaulting purchaser additional alternatives which may be selected at the purchaser's option, in lieu of a refund. For purposes of this section of the Order, a purchaser shall be deemed to have defaulted when either of the following occurs: [326]

1. purchaser notifies respondent of intent to default; or
2. purchaser has failed to make a payment for a period of six months from due date of such payment.

K. Forbear from relying upon or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any purchaser the following contract clauses:

1. Respondent's contract clause which provides that the seller may retain all sums previously paid by purchaser in the event that the purchaser fails to pay any installment due or otherwise to perform any obligation under the contract; and
2. Respondent's contract clause to the effect that no express or implied representations have been made in connection with the sale other than those appearing in the contract.

L. Not misrepresent, nor solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon, the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation. [327]

M. Include in all contracts of sale of land a provision insuring free alienability of the purchaser's interest therein and extending the contractual rights and privileges of the purchaser to subsequent purchasers or assignees from the purchaser.

N. Mail to all purchasers of respondent's land, both those who are deeded and those who are under contract for the purchase of

such land, regardless of whether or not they are in default, the Notice attached to this Order as Appendix A.

IV

It is further ordered, That respondent shall:

A. With respect to any improvement association, however designated, which has jurisdiction over any land within any of respondent's subdivisions:

1. Take such actions, including the casting of all of respondent's votes and the soliciting of votes from purchasers of land known to be members of a given association if necessary, as are needed to call a special meeting of the members of said association no later than 60 days after this Order becomes final. [328]

2. Take such actions as are needed to notify all members of said association of the purposes and proposals to be made at such meeting as specified in subparagraph (3), and recommending that they vote for such proposals; *provided further*, that such notice shall be clear and conspicuous, shall be sent to all members by first class mail not later than 30 days before the scheduled date of such meeting and shall include no information other than the information contained in subparagraph (3).

3. Propose at any such meeting called pursuant to subparagraph (1), the following amendments in the articles of incorporation and by-laws of each such association as may be needed to accomplish the following:

(a) A limitation on the holding of positions on the Board of Directors, any Committee or as an officer of said association by anyone who, while serving in that position, is or has been a director, officer, employee, agent or representative of respondent or any of its subsidiaries or divisions to less than a majority of Board members. [329]

(b) Elimination from such by-laws and articles any powers, such as to extend utility lines, which the association has not and is not likely to use because of adverse effects on its non-taxable status.

(c) Postponement of the annual charges and assessments by each undeveloped lot owner until such time as water, sewer and electric utilities are in place in the street in front of each lot, or until such time as the utilities have been contracted for and the date of installation is certain.

(d) Refund of all HCIA charges paid by any purchaser whose

Order

97 F.T.C.

contract has been forfeited or cancelled, together with a refund of a pro rata share of any interest earned on such payments to the date of refund.

(e) If (c) above is adopted, postponement of a purchaser's right to vote on association business until such time as the purchaser is liable for payment of charges and assessments. [330]

4. Cast all of respondent's votes in favor of all of the amendments in the articles of incorporation and by-laws which are described in subparagraph (3).

V

It is further ordered, That respondent Horizon Corporation shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future sales representatives and other employees, independent brokers, advertising agencies and others who sell or promote the sale of respondent's land or who otherwise have contact with the public on behalf of respondent;

B. Provide each person so described in Paragraph (A) above with a form to be returned to respondent, clearly stating that person's intention to conform his or her business practices to the requirements of this Order;

C. Inform each person described in Paragraph (A) above that respondent shall not use any such person or the services of any such person, unless such person agrees to and does file notice with respondent that he or she will conform his or her business practices to the requirements of this Order;

D. In the event such person will not agree to so file notice with respondent and to conform his or her business practices to the requirements of this Order, respondent shall not use such person or the services of such person;

E. Inform the persons described in Paragraph (A) above that respondent is obligated by this Order to discontinue dealing with those persons who engage on their own in the acts or practices prohibited by this Order, or who fail to adhere to the affirmative requirements of this Order;

F. Institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in Paragraph (A) above conforms to the requirements of this Order, and promptly investigate and resolve any complaints about such persons received by respondent, and maintain records of such complaints, investigation and disposition for five years from the date of the disposition of the complaint;

HORIZON CORP.

464

Order

G. Discontinue dealing with any person described in Paragraph (A) above, revealed by the aforesaid program of surveillance, who more than once engages on his own in the acts or practices prohibited by this Order; *provided, however*, that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondent in any proceeding brought to recover penalties for alleged violation of any other paragraph of this Order;

H. Create, maintain and staff a toll-free telephone number service that consumers may employ during regular business hours to request information, to cancel an appointment or to notify respondent of a [332]complaint. Provide this number in the space provided in the Notice to Buyers (Section II herein) and in the Notice of Cancellation After Inspection (Section III, Paragraph G6. herein).

VI

It is further ordered, That in the event respondent transfers all or a substantial part of its business or its assets to any other corporation or to any other person, including a transfer of all or part of the ownership interest of any or all respondent's wholly-owned subsidiaries, respondent shall require said transferee to file promptly with the Commission a written agreement to be bound by the terms of this Order; *provided*, that if respondent wishes to present to the Commission any reasons why said Order should not apply in its present form to said transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

VII

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its subsidiaries.

VIII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a [333]successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

FEDERAL TRADE COMMISSION DECISIONS

Order

97 F.T.C.

IX

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

APPENDIX A

IMPORTANT NOTICE TO LOT BUYERS IN
(Name of Subdivision)

The Federal Trade Commission is sending this letter to all (insert subdivision) lot buyers. It contains facts you should know about your purchase and about the seller.

In 1975, the Federal Trade Commission brought a lawsuit against Horizon Corporation, the parent company of (insert subdivision). This letter is part of the order issued when the lawsuit was decided.

Please read this letter carefully and consider the alternatives suggested in Part II. The Commission cannot advise you as to which decision is best for you.

I. LOT VALUE AND RESALE

There is virtually no resale market for (insert subdivision) lots which have not been developed with utilities. If your lot is presently undeveloped, it is unlikely that you would be able to resell it now except at a substantial loss. The extent of community development and population growth in the particular area of (insert subdivision) where your lot is located will determine whether or not you could resell your lot once it is developed. The population growth and community development necessary to enable you to sell your lot at or near the price you paid or are paying for it may not occur for many years, if at all. If the lot may be exchanged for a developed lot, there may be some small demand by builders for a limited number of such lots at the present time.

You should be aware that Horizon is not obligated in any way to buy back your lot or help you resell it.

II. OPTIONS AVAILABLE TO PURCHASERS

There are a number of options available to you at this time which you should review based on the information provided in this notice.

1. You can continue making your payments.
2. You can refuse to make any further payments and perhaps take a tax loss. According to the FTC Order you *cannot* be required to pay any more money, but if you elect this option, you will lose your land and all the money you have paid. However, if

you purchased your lot as an investment and not for your own use as a homesite, you might be able to declare the money you lost as a tax loss, deductible from your income on federal and state tax returns. It is suggested strongly that you contact your local District Director of the Internal Revenue Service *before* deciding whether to stop payments, if your decision is based on the possibility of taking a tax loss. Whether your loss is deductible will be based on your specific situation and you should *not* rely on this letter as authority for a deduction.

3. You can stop making payments and seek satisfaction against Horizon in a private lawsuit. You should consult an attorney before electing this option. The Commission's Order may be relevant in such a suit and your attorney should obtain a copy.

4. You can relocate to (insert subdivision) and, if possible, build on your lot or exchange for a building lot if so permitted by your contract or by company policy. You may, however, be required to pay more money for this exchange lot. Check with the company for details.

If you have any questions about the contents of this letter, write to me. Please do not telephone.

If you have questions about your account, or the development of your specific lot, call Horizon toll-free at (). A representative will return your call. Instead of calling, you may wish to write to:

()
 (Insert respondent's address)
 ()

In any letter, you should include your name as set forth in your contract, your account number, your lot identification number, your current address and telephone number, and the name of the subdivision in which your lot is located.

Sincerely,
 Attorney

OPINION OF THE COMMISSION

By BAILEY, *Commissioner*:

The Horizon Corporation is a land sales company incorporated under the laws of Delaware, with its principal office in Tucson, Arizona. At the time of this proceeding, it was engaged in the business of buying large parcels of unimproved land, developing core residential areas within those parcels, and selling the remaining unimproved lots to the public to be held primarily as investments. The large parcels of Horizon properties that were the subject of this case are Horizon City, near El Paso, Texas; Waterwood, near Houston, Texas; Rio Communities and Paradise Hills, near Albuquerque, New Mexico; Arizona Sunsites, near Tucson, Arizona; and Whispering Ranch, near Phoenix, Arizona. With the exception of Waterwood, which partially fronts Lake Livingston, Texas, Horizon's

properties are located in desert regions. As of May 31, 1976, the combined land area of these properties was 440,000 acres, or 687.5 square miles, and 280,200 acres had been sold. (See I.D. 8-22)¹ [2]

In marketing its properties, Horizon relied on national advertising, dinner parties held for potential purchasers, and in-home sales solicitations. The complaint alleges that during its marketing presentations, the respondent committed unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (FTC Act or Section 5), by making false and misleading representations to potential buyers of its land, by failing to disclose material facts and by using "high pressure" sales tactics. The heart of the complaint lies in counts I and II, which charge that Horizon marketed its undeveloped properties as excellent investments with little or no financial risk when in fact those properties were financially risky investments both because their future value was uncertain and because purchasers would probably be unable to sell their lots at or above the purchase price at the time of represented liquidity. (See I.D.p. 1) Other complaint counts, which will be discussed below, allege specific misrepresentations through which Horizon conveyed the net impression of its "excellent, financially risk-free" marketing theme.

The proceedings in this case were lengthy, lasting over 80 days; the record includes nearly 17,000 pages of transcript and 2,500 exhibits; and the proposed findings and briefs exceed 1,000 pages. Administrative Law Judge (ALJ) Ernest G. Barnes issued an Initial Decision, containing 295 pages and 137 findings of fact. He found that representations alleged in the complaint occurred in a significant number of Horizon's sales presentations, and that the net impression created by those representations was that Horizon property was an excellent, short-term investment with little or no financial risk. Based upon extensive expert testimony concerning the actual value

¹ The following abbreviations will be used in this opinion:

| | |
|--------|---|
| I.D. | - Initial Decision finding number |
| I.D.p. | - Initial Decision page number |
| Tr. | - Transcript page number |
| CX | - Complaint Counsel's exhibit number |
| RX | - Respondent's exhibit number |
| RAB | - Respondent's appeal brief |
| CAB | - Complaint Counsel's appeal brief |
| R. Ans | - Respondent's answering brief |
| C. Ans | - Complaint Counsel's answering brief |
| R. Rep | - Respondent's reply brief |
| C. Rep | - Complaint Counsel's reply brief |
| RPF | - Respondent's proposed findings |
| CPF | - Complaint Counsel's proposed findings |

of Horizon land vis-a-vis its represented value, Judge Barnes concluded that this net impression was both false and misleading. (I.D.p. 256)

Respondent appealed the Initial Decision, arguing that the weight of the evidence is insufficient to establish liability. Complaint counsel cross appealed, seeking several substantial changes in the order entered by the ALJ. Oral argument was heard on May 8, 1980. During the argument, Commissioner Bailey asked respondent's counsel whether the parties had considered settling the case. Counsel responded that they had, but that he had agreed with complaint counsel not to mention that fact during the oral argument. (Oral Argument, Tr. 28)

On May 15, 1980, Commissioner Bailey received a letter from respondent's counsel (with copies to all participating Commissioners and complaint counsel) stating that settlement discussions had been revived. However, the Commission continued to consider the case and prepare its opinion on the merits because it did not have before it any motion to withdraw the case from adjudication so that the terms of an appropriate settlement could be considered. [3]

On November 26, 1980, the Commission received a "Joint Motion for Stay of Proceedings" from the parties requesting a stay in the Commission's consideration of this matter for seventy-five (75) days so that counsel for both sides could "finalize the remaining provisions of a proposed consent order for submission to the Commission." The Commission granted this motion in part, stating that no opinion would issue during the 75-day period but that it declined to stay consideration of the case. On February 17, 1981, the parties requested a twenty-one (21) day extension of the stay; the Commission also granted this request. On March 9, 1981, complaint counsel filed a "Motion for Leave to Modify Appeal." The motion stated that complaint counsel sought leave to modify their appeal from the Initial Decision. The proposed modification would "substitute proposed amendments to the findings, conclusions (of law) and order in the initial decision." Complaint counsel stated that they "seek leave to proceed in this manner so that this matter may remain in litigation for determination of legal and factual issues by the Commission." Simultaneously, respondent filed a "Response to Motion for Leave to Modify Appeal" which stated that respondent "consents" to complaint counsel's motion and that respondent intends to "withdraw its appeal from the initial decision and waive all appeal rights if the Commission accepts no later than May 15, 1981, the findings, conclusions and order to be proposed in complaint

counsel's modified appeal." The Commission granted complaint counsel's request for leave to submit a modified appeal.

On March 24, 1981, complaint counsel submitted its "Modification of Appeal" (hereinafter "proposed modifications"). Simultaneously, respondent submitted a "Response to Modification of Appeal" stating that, while it continues to assert that "evidence in the record does not support any findings or conclusions that respondent violated Section 5 of the Federal Trade Commission Act. . . , should the Commission accept the findings and conclusions substantially as offered by complaint counsel, or otherwise finds that the Act was violated, respondent joins complaint counsel in recommending the cease and desist order proposed by complaint counsel." However, respondent stated that it conditioned its recommendation on issuance of a final order (or an order subject only to public comment) by the Commission not later than May 15, 1981. On April 10 and April 14, 1981, at the request of the Commission, the parties filed briefs addressing some of the issues raised by the proposed modifications.

On April 24, 1981, the newly appointed Director of the Bureau of Consumer Protection,² filed a motion requesting additional changes in the order recommended by complaint counsel and respondent and asked that the Commission give respondent 10 days to respond to those suggestions. After reviewing the cease [4]and desist order recommended by the parties, and the Bureau Director's proposed changes, the Commission decided to make several modifications in the order's provisions before considering its final issuance. On April 30, 1981, the Commission directed the parties to submit briefs addressing the changes it had made in the cease and desist order they had recommended. These briefs were submitted on May 8, 1981.

After considering all briefs and the parties' proposed modifications, as well as the entire record developed in this case and the Initial Decision, the Commission has decided to issue this opinion and the attached order. The Commission agrees with the ALJ's holding that respondent has violated Section 5 in several respects. We largely concur in his Initial Decision, and with certain modifications discussed below and enumerated in Appendix A to this opinion, the Commission adopts findings of fact numbers 1 through 137.

The opinion set forth here is the product of the Commission's independent consideration of the record in this case. While the Commission has given due consideration to the proposed modifications of the findings of fact and conclusions of law submitted by

² James H. Sneed, the actual appointee to the position of Bureau Director, recused himself from this matter and the Deputy Director of the Bureau, Linda Colvard Dorian, acted in his behalf.

complaint counsel, and adopted those which it believes to be appropriate, the final conclusions of law entered here reflect changes in the Initial Decision which the Commission believes are supported by its review of the record as a whole.

As regards the order recommended by complaint counsel and respondent, the Commission has made modifications in some provisions but has substantially adopted the overall remedial scheme suggested by the parties. This scheme, taken as a whole, adequately addresses the violations of Section 5 committed by Horizon. However, the Commission notes that since the remedial scheme was developed in the context of respondent's offer to withdraw its appeal if the Commission adopted complaint counsel's proposed modifications of the ALJ's order, the Commission will not necessarily view this remedial scheme as a model for relief in future land sales cases.

The Commission's discussion of the violations committed by Horizon will focus first on the nature of Horizon's representations concerning the investment potential of its land, and second on whether those representations were true.³ In brief, we conclude [5] that Horizon marketed its land as an excellent, risk-free, short-term investment when in fact the investment potential of this land has not been and will not be realized in the time frames represented.

In addition, this opinion will discuss the role of so-called "high pressure" tactics in the sale of Horizon land, finding that some of these tactics constitute deceptive trade practices because they occurred in the context of deceptive misrepresentations concerning the land's value as an investment.

This opinion will also address the complaint allegations concerning the unfairness of five standard provisions included in Horizon's land sales contracts. The Commission upholds the ALJ's finding of liability with respect to one of these provisions—the forfeiture clause, but reverses his findings of liability regarding the other four

³ Although six separate Horizon properties were under investigation in this proceeding, the evidence presented at trial was structured more toward proof of company-wide violations than toward individual analyses of the six different properties. As a result, the ALJ found liability for all of the properties without separating out the evidence for each property individually.

In analyzing the record evidence concerning what representations were made, the Commission will also adopt a company-wide approach because we have been able to determine that Horizon's marketing approach was substantially similar for all six properties which are the subject of this proceeding. The record evidence on representations includes testimony of consumers as well as former sales representatives, training manuals, newspaper advertisements and celebrity promotional films. Consumer and sales representative testimony touched on virtually every property and reveals a substantially similar marketing approach to each. Training manuals, advertisements and celebrity promotional films further document Horizon's official policy and also reveal a unified marketing approach. However, when the Commission analyzes the truth of the representations made, we will consider each property separately. The six properties differ in several key respects (e.g. location, size, terrain, degree of development etc.). To sustain a conclusion that any given property is not in fact an "excellent, risk-free investment", we must analyze the evidence pertaining to the investment value of each individually.

provisions—the integration clause, property visit credit, guarantee and exchange privilege.

The Commission then considers the various general defenses raised by respondent, concluding that none individually, nor all collectively, should bar its findings of liability and entry of an order in this case.

Finally, the Commission rejects respondent's assertion that it does not have jurisdiction over the instant case and concludes that its jurisdiction over Horizon's land sales practices is complementary but not coterminous with that of other federal and state agencies. [6]

I. REPRESENTATIONS

The first step in determining whether Horizon violated Section 5 is to review the substantial record evidence concerning what representations Horizon made to consumers interested in purchasing its land. These representations define the nature of the investment consumers thought they were obtaining, and provide the framework for analyzing whether this investment is in fact what Horizon said it would be. A review of this evidence indicates that, through false and misleading representations and material omissions of fact, Horizon left prospective purchasers with the net impression that the land they were buying was an excellent, financially risk-free investment which would mature over a short-term.⁴

Horizon's typical sales presentation relies on a technique that it calls "funneling": an approach that is designed initially to interest a prospect in investments and in land generally, then to focus the presentation on Horizon's various properties, next to narrow the focus to a single property, and, finally, to center on the specific lot that the sales representative is authorized to sell. (I.D. 39; I.D.p. 256) The representations alleged in the complaint are most easily understood if put into the context of a typical "funnelled" presentation.

The starting point in Horizon's marketing approach was an attempt to convince prospective investors that the safest and most financially rewarding investment possible is land. (I.D. 39 and 49) Horizon's sales representatives bolstered their sales pitch by comparing the investment value of land to the value of all other major types of investments. Consumers and former sales representatives testified at trial that prospects were repeatedly assured that their lots would

⁴ The Commission does not intend to rigidly define "short-term" or "long-term" investment. Respondent defines long-term as greater than twenty years. (See, e.g., RX 67) For purposes of this opinion we will accept that definition of long-term, and define as short-term any representations that an investment would mature in less than twenty years.

appreciate in value at a higher rate than other types of investments such as stocks, bonds, savings accounts and insurance, and that the rate of appreciation would outpace inflation. (I.D. 49; *see, e.g.*, CX 527c, w; Schuman, Tr. 5245; Kelly, Tr. 16431; and RPF 138; complaint counts I, II, and XXXI) To graphically convey this "fact" regarding land generally, Horizon's sales representatives frequently invoked a concept referred to as the "four pillars of investment." (*See, e.g.*, Schuman, 16431) Tr. 5244-45; Kelly, Tr. The four pillars represent stocks and bonds, savings accounts, insurance, and land. Sales representatives told prospects that regardless of which of these four investments they placed their money in initially, their money would always end up in land. Horizon claimed that this result was assured because the sophisticated investors who float stocks and [7] bonds, and who control banks and insurance companies, know that land yields the highest profits. Prudence therefore demands they commit their money to the purchase and development of real estate. (I.D. 49)

Horizon sales representatives, as well as Horizon's promotional materials, repeatedly stressed Federal Housing Administration (FHA) statistics, showing a 20 per cent/per annum increase in the value of land nationally between 1946 and 1968. (I.D. 51)⁵ One Horizon training manual refers to these statistics as "the most powerful selling tool ever devised." (CX 962a) The FHA statistics reflect the average appreciation of land throughout the country, from unimproved city lots to suburban and rural acreage. In applying these statistics to its own unimproved lots located in sparsely populated areas, Horizon made no effort to qualify their value as an accurate projection of the appreciation Horizon investors could expect. Although accurate in and of themselves, the FHA statistics were used to create the thoroughly misleading impression that government figures projected a return of 20 per cent/per annum on Horizon land.⁶

Horizon also trained many of its sales representatives to cite specific examples of extraordinary profits that had been made in the past on land in the United States, especially examples of tremendous profits that had been made on land in the locality where the sales presentation was being made. (I.D. 50, 53-55) Some of these examples

⁵ The use of these statistics was deemphasized in 1972 and eliminated from respondent's sales presentations in 1974. (I.D. 51)

⁶ It is a long-established principle of Section 5 law that "words and sentences may be literally and technically true and yet framed in such a setting as to mislead and deceive." *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943). Thus, in *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950), the Court stated:

To tell less than the whole is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.

included extraordinary profits that had allegedly been made on land purchased from Horizon. However, these claimed "profits" were calculated by comparing the escalating prices Horizon charged for its land over the years rather than any profits realized by consumers in the resale of their [8]Horizon lots. The use of atypical claims of profit made on land, even if true, can be misleading (and therefore deceptive) in the absence of a disclosure that such profits may be atypical.⁷

Once sold on a "smart" investment in "choice" land, the prospect was then directed to Horizon land.⁸

When the sales presentation "funnelled" to Horizon land, four general assertions served as the cornerstones of respondent's investment theme: (1) the rate of population growth in the southwestern United States would increase dramatically; (2) the increased population would settle in and around Horizon properties; (3) population growth would spur community development, which in turn would act as a catalyst for the establishment of an active resale market; (4) as a consequence of development and resale, the purchaser's investment would mature within a short-term. (Complaint counts III, IV, VI, VII, and VIII)

All four cornerstones are found in Horizon promotional films narrated by celebrities Merv Griffin or Leif Erickson. The films were regularly shown at Horizon's promotional dinner parties. (I.D. 36) They were also frequently shown during in-home sales presentations, or else representations similar to those in the films were conveyed to prospects by sales representatives. (I.D. 39)⁹ The thrust of the representations, as stated in the Merv Griffin film, is that "investors in Horizon land can be assured that they are investing in the very best type of profit potential land." (CX 527z-17) Both the films and the sales representatives stated that Horizon properties were located in growth areas of the Southwest, that by the year 2000 the population of the United States would increase from 200,000,000 to 300,000,000, and that most of that increased population could be expected to settle in and around growth cities such as El Paso, Houston, Albuquerque, [9]Tucson and Phoenix. (See, e.g., CX 527)

⁷ See, e.g., *National Dynamics Corp.*, 82 F.T.C. 488, 564-65 (1973), *aff'd in part and remanded in part*, 492 F.2d 1333, 1335 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974), *modified on remand*, 85 F.T.C. 391, 393-94 (1974), *reconsideration*, 85 F.T.C. 1052, 1053-54 (1975).

⁸ Although the Initial Decision primarily addresses issues relevant to Horizon's properties, the law judge did find, and we affirm, that Horizon had no basis to represent that land is generally superior to all other forms of investment, or that land will always appreciate in value at a rate higher than the rate of inflation. (See I.D. pp. 265-66).

⁹ These films were one of Horizon's most effective sales tools. The Commission's screening of representative copies of the films expedited our consideration of this case. Transcripts of the films' dialogue appear at CX 526 and 527. For a description of the films, see I.D. 46 and 87.

Horizon's promotional literature characterized these cities as lying in the "path of people and progress." (See, e.g., CX 274)

Horizon's dinner parties and in-home sales solicitations also featured representations concerning the growth capacity of its communities. For example, CX 858 is a script used by Horizon's dinner party speakers at various times in the Denver, Colorado, area. During those parties, prospects were told that according to a Presidential Commission the population explosion would require the building of "a new community of 250,000 every forty days," and that such new communities would "develop on the outskirts of existing [growth cities.]" (CX 858f) Speakers added that investors who own land on the outskirts of these existing cities would profit as their property becomes absorbed for development. (CX 858f-g)

Horizon further represented through written, oral, and visual media that dramatic population increases, coupled with "locked-in" growth corridors in the El Paso and Albuquerque metropolitan areas, would lead to development, resale, and profitability of lots in Horizon City and Rio Communities within a relatively few years. (See, e.g., CX 527z-3) These representations were intended to convey the impression that El Paso and Albuquerque could grow only in the direction of Horizon's properties, or that "almost all" or "most" of the growth of these cities would be toward Horizon's properties. Thus, these properties would develop quickly and profitably for lot owners. Respondent's promotional campaign stressed that in all of North America, only three existing cities have "locked-in" geographic corridors that allow population growth to occur "in one direction and one direction only," and two of these cities are El Paso and Albuquerque. (CX 858g)¹⁰

Horizon's sales representatives claimed repeatedly that El Paso is one of the fastest growing cities in the United States and that natural and artificial barriers surrounding El Paso will cause growth to be locked-in toward the direction of Horizon City. These barriers include the Rio Grande River, which separates the United States from Mexico at a point southwest of the city to a point south of the city, the Franklin Mountains, which dominate portions of land north and northwest of the city, and Fort Bliss Military Reservation, which stretches to the northeast. Respondent concludes that as the population of El Paso grows toward Horizon City, an increasing demand for living space will confront a necessarily limited supply of land, resulting in appreciation of the land's value. (I.D. 75) [10]

Like El Paso, Albuquerque was represented to be a bustling city

¹⁰ The other North American city represented to have a "locked-in" growth corridor is Vancouver, Canada. Findings relevant to Horizon's "locked-in" growth claims are summarized at I.D. 73 and 75.

with a "locked-in" growth corridor that leads directly to Horizon property. (I.D. 73) Sales representatives and promotional films informed consumers that natural barriers surrounded Albuquerque, creating a "fence" that constrained growth. The barriers included the Sandia and Manzano Mountains, three Indian reservations, three land grants, and a United States military installation, none of which, according to Horizon, was available for development.

When selling land in Rio Communities, sales representatives stated that growth could no longer occur within the "fenced" area, but that a freeway leading south from Albuquerque to Rio was a "gate" in that fence, and that because of the freeway growth would "leapfrog" the intervening barriers. (See, e.g., I.D.p. 113) To graphically emphasize this point, sales representatives folded over promotional maps to demonstrate that Albuquerque was only three and one half "building miles" from Rio Communities. The ALJ summarized the situation as follows:

Albuquerque is described as a dynamic, pulsating city with a wall surrounding it on all four sides, bursting at the seams, with more and more people arriving each and every day. A freeway was built to the south to relieve the pressure and it leads to Rio del Oro, a completely preplanned community. [As Horizon said]—"Doesn't this look like a money making situation" (CX 160X, Y, Z1). (I.D.p. 112)

The remaining part of the sales presentation concentrated on the final two cornerstones of respondent's investment theme: community development and resale markets, and the length of time until investment maturity. Former sales representatives testified at trial that when funnelling the presentation to a specific property they played up Horizon's corporate image as a "community developer." They represented alternatively that Horizon was one of the leading community developers in the Southwest, that it was one of the leading community developers in the nation, or that it was one of the leading community developers in the world. (I.D. 80) One advertisement, emphasizing that land is only as good as the company you buy it from, stated that Horizon had \$150 million in assets, a net worth of \$60 million and an inventory of land valued at \$240 million. (CX 352) [11]

Sales representatives claimed that as a development company Horizon would establish residential areas, build country clubs and shopping centers, develop industrial and recreational parks, attract hospitals and universities, and set up improvement associations for continuing development. (I.D. 79-80; see also I.D. 81-83) Horizon representatives boasted that the company had retained a prominent planning firm, Gruen Associates, to "master plan" its properties, and that it had designated each lot within a property to be used for

specific residential or commercial purposes. (I.D. 79) During solicitations, consumers were presented with unit maps for each property that purported to show each lot and the specific, designated end use that each lot was assigned. (I.D. 78; I.D.p. 266) Prospects were also shown "TBA" maps, which are promotional maps printed by Horizon that depict the overall property "To Be Allocated," and its proximity to a neighboring city. Many of the "TBA" maps contain glossy photographs of residents enjoying themselves at recreational facilities in the property's core area. (See, e.g., CX 206-10, 230-32) Presentation manuals used during in-home sales solicitations and celebrity films also include many attractive scenes of the Southwest and Horizon communities. (CX 195-197, 526-27) During property visits and fly-in tours, customers were shown through the developed core areas where there were homes, golf courses and other amenities. Many consumers were led to believe that the property they were purchasing would soon be part of such a community. (I.D. 67)

Horizon represented that it was obligated to build roads within eight years of purchase. (I.D. 80; see, e.g., CX 932e, 949d) Images were conjured of properties criss-crossed with highways and secondary roads, and of communities humming with traffic and commerce. (See, e.g., I.D. 78-80) However, as the ALJ found, "[as] to most of its properties, Horizon's only contractual commitment is to stake the lot and to cause a road fronting on the property to be completed within thirty days after the purchaser has completed his payments or approximately eight years from the date of signing the contract, whichever is later." (I.D.p. 10) The "roads" need be no more than bulldozed strips in the desert sand because Horizon is not contractually obligated to provide road surfacing or maintenance. (I.D. 80)

The record indicates that the net impression of consumers following sales presentations was that their lot would be provided with utilities by either Horizon, the community improvement associations, or some other "developer." (I.D. 83; I.D.p. 266; see, e.g., CX 927f-g, 929i, 930g, 943a-b, 944e, 947f, [12]j, l, m, 948e)¹¹ These utilities are the key to any successful community development, for without them the "city" has no light and the desert land remains arid. Respondent failed to inform consumers that if neither Horizon, the improvement associations, nor any other developer were to install utilities, the cost to consumers of individually extending utilities to their lots would be prohibitive.¹² (See, e.g., *infra*, p. 32, note³³, p. 37, note³⁹)

¹¹ A number of transcript pages cited in I.D. 83 have been renumbered. Pages 5925-26, 6180, 6202, 6213, 6296, 6477-78, 6486, and 6577 are currently pages 5204-05, 5459, 5481, 5492, 5577, 5760-61, 5769, and 5830, respectively. Transcript pages 5918-6567 (Volume 9017-2-7) have been renumbered 5197-5850.

¹² The record reveals that community improvement associations exist for Rio Communities, Paradise Hills,

(Continued)

The Commission agrees with the ALJ's finding that the net impression¹³ created by Horizon's sales representatives was that roads and utility hookups to the consumer's property either [13] existed or would exist by the expiration of the land sales contract. (I.D.p. 266) The effect of these representations on consumers cannot be underestimated: roads and utilities mean the possibility of communities, communities mean resale, and resale means profit. Moreover, the incessant use of the terms "community" and "community developer" in Horizon's promotional literature and sales presentations had an undeniable capacity to mislead consumers into believing that Horizon was obligated to develop their property.¹⁴ Horizon was characterized as a Herculean enterprise, registered on the New York Stock Exchange, that had the financial capability to carry out a development program, and the managerial responsibility and expertise to put such a development program into action.¹⁵ Barbara Kelly, a former sales trainer and sales representative, succinctly made this point by describing the instructions from her own training:

Don't sell dirt. It doesn't matter where people own land, as long as Horizon is involved. They are the people that are going to make it happen. They are not a land sales company but a development company. That is the way we felt. (Kelly, Tr. 16,432)

These representations of a developed community, one well thought out and planned in advance, complete with schools, hospitals, residences, parks, industry, country clubs, and a permanent improvement association, had the capacity to lead consumers to believe

Horizon City and Waterwood. Under the land sales contract, membership is mandatory and annual membership fees in the range of \$10-120 are assessed. (I.D. 81-83) Testimony at trial indicated that the tax-free status of the community improvement associations (other than the association established for Waterwood) may limit their activities. For example, the associations may not be able to install utilities without losing their tax exempt status. (Roach, Tr. 13194) Further, expert testimony confirms the conclusion that the associations' accumulation of funds to date cannot meet the financial requirements of an infrastructure sufficient to provide utilities for the Horizon properties where they exist. (I.D. 81-83) Nevertheless, sales representatives used the associations' general contribution to development as a sales tool. (I.D. 82) Thus, Horizon not only misrepresented the role the associations could realistically play in developing the properties, but deceptively failed to disclose material information about the limitations on their activities. (See, e.g., *The Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 649 (1978), citing *Portwood v. FTC*, 418 F.2d 419, 424 (10th Cir. 1969); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 891 (6th Cir. 1967); and *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963), cert. denied 375 U.S. 944 (1963))

¹³ In making these determinations, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. (See, e.g., *Beneficial Corp. v. FTC*, 542 F.2d 611, 617-18 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977); *Continental Wax Corp. v. FTC*, 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc. v. F.T.C.*, 329 F.2d 365, 367 (7th Cir. 1964); *Charles of the Ritz Distrib. Corp. v. F.T.C.*, 143 F.2d 676, 679 (2nd Cir. 1944))

¹⁴ The ALJ found that Horizon's characterization of itself as a "community developer," and of its properties as "communities," were misleading but not false because "the evidence is undisputed that Horizon has spent millions of dollars in its several properties." (I.D. 79) We affirm this finding.

¹⁵ See, e.g., "Waterwood Training film," CX 169c. The film stated that, at the time of Waterwood's development, total investment by everyone concerned will be 2.5 billion dollars, and that "Horizon Corporation is one of the few community developers in the industry with the resources to undertake a development of this dimension."

that they were purchasing an excellent, financially risk-free investment, which would prove to be rewarding within a short-term.

Horizon defends against this charge by saying that it made no representations regarding its development obligations and that no contract document commits it to accomplish development. (See, e.g., RAB 27-31) The assertion that no representations regarding development were made is belied by the record; the assertion that Horizon had no contractual obligations, even if true, misses the point. [14]

False verbal representations by a seller constitute deception within the meaning of Section 5. The fact that such representations are omitted from a written contract does not alter their status under Section 5.

The final level of Horizon's funnelling sales presentation was to concentrate on specific lots which were available for sale at the time of the presentation in question. Within each property,¹⁶ Horizon zoned lots for three types of use: single family units, multiple family units, and commercial property. (I.D. 69-70; complaint counts VI, VII) Horizon represented that properties zoned for different uses had different values and could be expected to appreciate at different rates. For example, Ms. Kelly testified that she was trained to sell single family property as a modest investment with a good return, multi-family property as a more expensive but more rewarding investment, and commercial property as the "cream of the crop." (Kelly, Tr. 16,432) Lots were also platted as being along a streetfront, on a corner, or in a cul-de-sac. (I.D. 70) The latter two locations were represented to have a greater investment value. Locations near proposed highways and highway loops, schools or university sites, shopping centers and recreational areas were stressed when there was no assurance of when, if ever, such development would materialize. (I.D. 69) Horizon discovered that existing customers were a fertile source of new sales, and those customers were vigorously induced to trade existing property for property zoned for a different use in a different location, always property which was more expensive and which would require a longer time to pay off. (For a description of this "reloading" technique, see I.D. 68; Schuman Tr. 5253-54; see also, I.D. 39 and CX 927e, h, 929c, d, e, 932f, 936c, 937b, 938d, 939a, 943a-b, 947j, n, 950i, 951f, g) However, without development, the only way to tell the difference between the different types of lots was to use a surveyor's map—all were composed of arid land, far from buildings or utility lines, with few access roads or even fences to distinguish between them. (See, e.g., I.D. 67)

¹⁶ With the exception of Whispering Ranch.

The ALJ found that some Horizon lots, although zoned for residential or commercial uses, were rendered useless by natural phenomena such as arroyos, washes and flood plains. (I.D. 85-86) He further found that these unexpected risks were not disclosed to consumers. (Id.) The failure to disclose a significant risk [15] that the purchaser of a product cannot reasonably be expected to anticipate constitutes a material omission of fact and a violation of Section 5's prohibition on deceptive business practices.¹⁷

Because the resale of individual lots would constitute the final disposition of the investment, customers frequently inquired about the existence of a resale market. Training manuals prior to 1971 were silent as to resale, while training manuals after 1971 instructed sales representatives to explain to prospects that lots could be resold by listing them with local brokers. (I.D. 61; *see, e.g.*, CX 157v, 160) Despite the "official" policy after 1971 of prohibiting representations that Horizon would assist in resale, former sales representatives testified that they were trained to, and did, make representations to prospects that Horizon would aid purchasers in their resale effort. (I.D. 61; I.D. p. 261-62; CX 950e) Frequent representations were made that due to a large consumer demand Horizon property was selling at a brisk pace, assuring that investors would encounter no difficulty in resale on their own and raising the possibility of resale prior to the time of development. (I.D. 61-62) Some sales representatives went so far as to suggest to prospects that because Horizon was a development company it might seek to repurchase the lots directly in order to facilitate community planning. (I.D. 62; complaint count VIII) We believe the clear message communicated to consumers from these representations was that an active resale market was already in existence or that one would come into existence during the represented term of the investment. (*See, e.g.*, CX 927n, 932e, 936c, 944e, 946h, 947f, i, l, m, n, 955d)

In fact, as our analysis of the investment value of the six properties will illustrate, there was no resale market for Horizon land. (I.D. 123-128)

Pace of development and availability of a resale market were important to potential investors because those factors determined how long consumers would be required to hold their investment before it could be disposed of for profit. The record indicates that sales representatives were trained to, and did, make specific time frame representations regarding the short-term nature of the

¹⁷ The Supreme Court has determined that in the context of an investment decision, facts are "material" if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway*, 426 U.S. 438, 449 (1976).

investment. (I.D. 53-60; I.D. pp. 259-60). The ALJ found that, "the time in which an appreciation in the price of Horizon's land could be realized was generally stated by sales representatives to be three to five years during the period 1968 to 1970. The [16]time period later was changed to seven to ten years, and there is some indication that more than ten years was used by sales representatives." (I.D.p. 259) The findings of the ALJ are amply supported by the record. The testimony at trial establishes that prior to 1971 sales representatives randomly predicted that customers' investments would mature within one to two years, or three to five, or five to seven. (I.D. 58-59)

Prior to 1971, Horizon's management was either ignorant of its sales force's representations, or else, in the face of brisk sales, it chose to ignore them. However, in approximately 1971, coincidentally the same time that the Federal Trade Commission began its investigation, Horizon management issued verbal new policy directives that its land was to be sold as an investment of at least twenty years. (I.D. 58; RAB 58-59; R. Rep 28-29) Former sales representatives testified at trial that it was virtually impossible to sell Horizon land as a twenty year investment, (I.D.pp. 59, 63) and that consequently representatives ignored the directive. (I.D. 58-59)

In 1973 respondent printed a brochure entitled "Principles of Land Ownership—A Policy Statement by Sidney Nelson, President, Horizon Corporation" ("Principles").¹⁸ The "Principles" state that Horizon land is a long-term investment, defined as greater than twenty years. Horizon maintains that since 1973 it has trained sales representatives to make *no* representations regarding length of holding time, save that appreciation would be long-term. Training manuals printed after 1973 instruct sales representatives to respond to questions, concerning the amount of time before the investment would mature, with the answer that Horizon has no "crystal ball" and that it cannot predict the future. (I.D. 58) Horizon argues that since the introduction of its "Principles" in 1973, it has reformed its sales policies to omit time frame representations, so that even if misrepresentations had been made in the past, that problem has been corrected, making a Commission order in this case unnecessary. (See, I.D. 57-58; I.D.pp. 259, 268; RAB 58-59) However, the record shows that the vast majority of sales representatives failed to conform to this new policy. As late as 1975, representations were still being made that purchasers could realize specific profits within two to ten years, over the "short-term", or over the term of the contract (typically eight to ten years). (See, CX 927h, l, m. 928b, 929k, 930c, d,

¹⁸ A text of the "Principles," RX 67 and 1551, is included in I.D.p. 54-56.

g, 932e, f, 936b, 938d, 942c, 943a-b, 944e, t, 946h, 947f, i, l, m, n, 949d, 950d, i, k, 951e, g, h, 955d.) Further, even if we [17]assume that Horizon management was successful in omitting references from sales presentations, and that this policy is currently in force, this policy does not cure the consumer injury caused by Horizon's failure to apprise investors that undeveloped Horizon land is not a short-term investment. To the extent purchasers are not adequately impressed with the fact of the extremely long-term nature of the investment—well into the twenty first century or beyond, as we find below—there is a deceptive omission of a material fact. Accordingly, even if Horizon successfully implemented this new sales policy, Horizon violated Section 5 of the FTC Act.

In addition to complaint counts I and II, which were affirmed by the ALJ, complaint counts III and IV charge that Horizon represented to consumers that their lots would be located within fully developed communities by the end of their eight to ten year land sales contract with Horizon, and that therefore, their investment would mature by that date. Our review of the record has disclosed that in most instances where time frame representations were made, purchasers entered into contracts with Horizon after being told that their investment would mature in ten years or less. (I.D. 58-59) In instances where sales representatives avoided time frame representations, consumers routinely inferred from the net impression of the presentation that maturity would be reached at the end of the eight to ten year period. (See I.D. 58-59; I.D.p. 259) Accordingly, we find that the record amply confirms the charges contained in complaint counts III and IV as to most of Horizon's sales. In the remainder of its sales, Horizon's representatives uniformly stated that the time until maturity would be ten to eighteen years. On the record before us, the Commission is hard pressed to find a significant number of Horizon sales where lots were represented as long-term assets.¹⁹

In sum, respondent's assertion before the Commission that short-term representations were never made is contradicted by the record. The alternative assertion, that respondent did not know of the overzealous claims of its errant sales representatives, lacks credibility and, even if true, cannot serve as a defense to Section 5 liability. Uncontradicted testimony establishes that sales representatives encountered difficulty in selling property when prospects were clearly apprised that resale would not be [18]possible for at least

¹⁹ Although Horizon officials testified that consumers were always apprised of the long-term nature of the asset, the ALJ did not find Horizon's witnesses credible on this point. (I.D.p. 273) We uphold his findings with respect to this issue and also affirm his general conclusions concerning the credibility of Horizon's witnesses, except where specifically noted in our modifications of the ALJ's findings of fact (see this opinion and Appendix A). (I.D.pp. 272-75)

eighteen to twenty years. (I.D. pp. 59, 63, 259; *see also*, CX 951i; Miller, Tr. 2356) It is difficult to believe that Horizon management did not searchingly inquire as to the marketability of its product and the manner in which its agents represented that product. As the ALJ points out, the law of agency demands no less. (I.D.p. 290) However, even if Horizon management chose to remain ignorant of the time frame representations made by its sales force, its ignorance constitutes a failure to exercise reasonable diligence in controlling sales practices in the field, and does not serve as a defense to Section 5 liability. We find that Horizon knew, or with the exercise of reasonable diligence should have known, that representations regarding the short-term nature of its product were regularly made by its agents. The Commission also finds that respondent knew, or with the exercise of reasonable diligence should have known, that a resale market for its properties would not develop prior to the year 2000, and that consequently Horizon land should not be marketed as a short-term investment.²⁰ Therefore, we conclude that Horizon allowed its agents to make false and misleading statements in marketing its properties.²¹

Horizon rejects the ALJ's characterization that the above evidence constitutes representations of an "excellent" investment. Instead, Horizon maintains that it represented its properties as "a desirable expenditure of discretionary funds." (RPF 137, p. 80; *see, also*, RPF 135-136) Alan Nevin, a realty investment expert, testified on behalf of Horizon that an "excellent" investment must have "a high guaranteed tax shelter, cash flow, substantial equity built up, tremendous tax shelter, guaranteed high level of appreciation probably 15 to 20 percent or more and be risk-free." (Nevin, Tr. 15,955; *see* I.D.p. 263) Horizon argues that because it made adequate disclosures of uncertainty as to time of resale and appreciation, its property was not represented as an excellent investment as that term is understood by an investment analyst. (RPF 134-137; R. Rep 12-17) This argument must be rejected because it relies upon a fundamental misunderstanding of Section 5 principles. In this regard, the Commission is in complete agreement with Judge Barnes' statement of the law: [19]

It is the impression conveyed or the implication created *in the mind of the ordinary purchaser* that is the concern in this proceeding, not whether the representations fit

²⁰ See individual property analyses, *infra* at pages 26-48.

²¹ Horizon relies on testimony of "satisfied" customers to prove that it did not misrepresent its properties. However, as the law judge points out, respondent cannot escape liability for a significant number of misrepresentations merely because in other instances misrepresentations may not have been made. (I.D. pp. 272-73) Nor is it a defense to a charge of deception under Section 5 that some customers were satisfied with the product, despite false and misleading representations having been made. (I.D.p. 272, n. 21)

precisely into the mold of an excellent investment created by a sophisticated realty investment expert. The word "excellent" has a dictionary meaning of "superior, very good of its kind; [e]minently good; first-class." *Webster's Seventh New Collegiate Dictionary*, 1969. Horizon, in almost every conceivable way short of an absolute guarantee, represented its land to be an excellent investment, better than savings accounts, stocks and bonds, and insurance, and risk free [I]t is concluded that Horizon represented its land to be a superior investment, [e]minently good, first-class Beyond any doubt, Horizon created the impression that its properties were excellent investments. (I.D.p. 263) (emphasis added)

The Commission has examined the evidence of record from the posture of a typical consumer who bought Horizon land. We have viewed both Horizon's representations and disclosures in the context of how and when they were made. We find that Horizon made unqualified representations concerning the appreciation of land as an investment, misrepresented its development obligations and failed to inform consumers of hidden risks when they existed; and we conclude that these claims and omissions of material facts violated Section 5. We further find that the net impression created by the representations detailed in I.D. 1-137 is that Horizon land is an excellent, financially risk-free, short-term investment. To determine if these general investment claims also violate Section 5, we turn now to an analysis of whether the evidence concerning Horizon's various properties contradicts those claims.

II. INVESTMENT VALUE OF HORIZON'S PROPERTIES

The Commission bases its findings regarding the truth of Horizon's representations concerning the investment value of its properties on the testimony of expert witnesses at trial who identified several factors that must be considered in evaluating the quality of land investments. The most important factors cited were: (1) the likelihood that the properties will absorb future population growth and development; (2) the future costs of any development expenses to be incurred by the purchaser; (3) whether the purchase price of the land was equal to the market value of the land; (4) special risk factors associated with the property; and (5) the carrying costs of the property until liquidation. (I.D.pp. 276-77; *see, generally*, I.D. 101-117) [20]

Of these five criteria, expert witnesses testified that an economic analysis of the investment characteristic called "absorption" (factor (1) above) was the most crucial test of a property's investment value, and consequently the Commission's determination of the truth of Horizon's representations centers on that criterion.

The record reveals significant variations among the six Horizon

properties with respect to absorption and also development costs (factor (2) above). Therefore, those factors will be separately considered in the discussions of each property which follow.

However, the record indicates with respect to factor (3) above, that lots in each of Horizon's six properties are susceptible to the same analysis with respect to market value. Rather than review that evidence six times, the Commission's finding concerning market value for all properties will precede the property-by-property analyses.

Similarly, the evidence concerning factor (4)—special risk factors, such as fractionalization of ownership and adequacy of development plans—applies equally to all six properties and will be considered as a whole before proceeding to the property-by-property analyses.

With respect to factor (5), carrying costs,²² complaint counsel offered some limited evidence to show that such costs existed, however this evidence is insufficient to establish that they posed material costs to investors in this case. Therefore, the Commission will not consider them in determining the truth of Horizon's investment claims.

A. Market Value and Special Risk Factors

An important criterion used by expert witnesses to evaluate the investment quality of Horizon land was whether the purchase price established by Horizon was equal to the land's market value. According to expert witnesses, the market value of land is the price arrived at through arm's length bargaining; it is essential in determining market value that both parties be well informed, that they are each motivated by their best self-interest, that they have a reasonable time to complete the transaction, and that the purchase price be unaffected by external factors. Respondent defines market value as "the highest price in terms of money which a property will bring in a competitive and open [21]market, under all conditions *requisite to a fair sale*, the buyer and seller each acting prudently [and] *knowledgeably*, and assuming the price is not affected by any undue stimulus." (Lomax, Tr. 15271, emphasis added; RAB 19).

Based on testimony of consumers and local real estate agents, the ALJ found that a resale market for undeveloped Horizon land was virtually nonexistent, now and in the foreseeable future,²³ and

²² Carrying costs include such expenditures as property taxes, improvement association charges and interest paid on the purchase price.

²³ Extensive record evidence reveals that, outside of the development core, at the time of trial little development existed on any property (I.D. 8-22; I.D.pp. 277-81), and virtually no resale market existed for lots within any property. The evidence concerning the availability of resale markets shows that (1) real estate brokers were unable to resell the land and therefore refused even to accept listings on Horizon's lots; (2) several individuals

(Continued)

concluded that that is strong evidence that undeveloped Horizon land has no market value. (I.D. pp. 281-82) He also found that even if the price Horizon originally paid to purchase its land represented market value, the tremendous disparity between Horizon's purchase cost and selling price is evidence that Horizon's selling price is far in excess of market value. (I.D. pp. 281-84)

Horizon urges reversal of this finding on a number of grounds. (See RAB 17-22; R. Rep 17-24) Horizon argues first that lack of a resale market evidences only present illiquidity, and does not prove that the land has no investment value. (RAB 21) The Commission must reject this argument for several reasons. By 1978, when the record closed in this proceeding, consumers who purchased lots in 1969 on the basis of representations that their investment would mature in seven to ten years had already been disappointed. Further, Horizon's argument fails to distinguish between short and long-term investment value. Lack of present liquidity is probative of whether a resale market may be expected to develop over the short-term. Also, other available evidence, particularly the absorption studies which will be discussed below, establishes that the present illiquidity of Horizon land will extend over the short-term. [22]

Horizon next argues that its expert witnesses have concluded that the purchase price consumers paid Horizon for the land represents its market value. (RAB 19) Horizon concedes that its experts based their testimony about market value "primarily upon a showing that the purchasers of the land were knowledgeable." (*Id.*) However, since the Commission finds in the property-by-property analyses below that Horizon's representatives significantly misrepresented the nature of the investment consumers were buying, the Commission cannot accept Horizon's conclusion that those consumers were "knowledgeable" in their investment decisions. (See C. Ans 23)

Horizon further contends that no conclusion regarding low market value may be properly drawn from the disparity between Horizon's acquisition cost and its selling price, and that such consideration by the ALJ was arbitrary. (RAB 21) Horizon reasons that it is illogical to compare the price it paid in 1959 with the price it asked in 1972; that the price Horizon paid per acre was much lower because it

made unsuccessful attempts to sell their lots; (3) a substantial number of purchasers eventually gave up efforts to sell their lots in frustration and defaulted on their contracts; (4) a substantial number of Horizon lots were auctioned off at tax sales but even those auctions sometimes failed to attract bids for Horizon lots; (5) expert witnesses could not discover a resale market for Horizon lots; and (6) some lots were ultimately assigned a minimum appraisal value for tax purposes. We further agree with the ALJ that Horizon officials were on notice of the lack of a resale market because they knew about the events described immediately above. (I.D. 123-128; I.D.p. 281)

bought the land in bulk; and that Horizon's master plan for development increases the land's value.

The Commission agrees with respondent that the bulk acreage it acquired in 1959 was a vastly different asset from the fractionalized property Horizon sold to consumers in 1972. However, this fact leads us to a different conclusion than the one Horizon posits. Horizon's division of its properties into small lots, which it sold principally to individual consumers rather than to large developers, frustrated a coordinated development effort. Thus, short-term development of Horizon land was unlikely even if Horizon properties were able to attract the population levels widely predicted by respondent. Because development of Horizon properties over the short-term was unlikely, no resale market for that land developed. Accordingly, consumers were left holding land that today lacks any short-term market value. Therefore, although the ALJ should have recognized the difference in the nature of the asset Horizon bought and the one it sold, the Commission affirms the ALJ's finding that undeveloped Horizon lots have no short-term investment value because no market exists to buy and sell those lots.

In sum, we conclude that respondent's definition of market value is fatally flawed for the purposes of this case by its own requirements regarding the knowledgeability of the buyer and the fairness of the sales transaction. Considering all of the evidence, we conclude that the purchase price established by Horizon bore little relation to the land's market value principally because of our agreement with the ALJ that there is virtually no resale market for Horizon land. [23]

Another element of investment value identified by expert witnesses at trial is the existence of special risk factors, such as physical characteristics of the land that determine whether it can be developed, the availability of an adequate water supply, the expertise and capability of the people involved in managing the investment, the adequacy of development plans and whether the ownership of the property is too fractionalized to enable a realistic achievement of development plans. The two most pertinent special risk factors which affect equally the majority of Horizon lots are fractionalization of ownership and lack of achievable development plans. As discussed above, the fractionalization of the ownership of Horizon lots has frustrated any meaningful development to date because individual lot owners, who in many instances live long distances from their property, cannot organize collective development efforts effectively. Further, the development plans promised by Horizon have not materialized and therefore cannot supplement or replace owner efforts. These problems have substantially contrib-

uted to the failure of the land as an excellent, risk-free investment that will mature over the short-term, which is how the land was marketed.

B. Absorption and Costs of Development

"Absorption" was defined at trial as the analysis of when a property will be placed into a specific "end use." (*See, e.g.*, Stevenson, Tr. 6589) "End use" is the purpose for which a purchaser ultimately buys property from an investor; it is generally a productive retail use,²⁴ but can also embrace non-productive financial transactions, such as holding valueless land for purposes of taking a tax loss deduction. (I.D. 105) End use is crucial to an informed investment decision because if the represented end use of a specific property is not in fact a reasonable end use for that property, that investment cannot correctly be characterized as "excellent." By selling its properties for ultimate residential and commercial end uses within a short-term, Horizon impliedly represented that those were reasonable end uses of its properties. Consequently, the Commission must determine whether it was reasonable for Horizon [24] to represent that its lots *would* be used for residential and commercial purposes over a short-term time frame of less than twenty years, and in many cases less than ten years.

One method of determining whether the represented end use is reasonable is to compare the represented end use with expert testimony concerning a property's "highest" or "best" end use. "Highest" end use is determined by analyzing the use of the property that at the time of final disposition will yield the greatest return on the investment dollar.²⁵ For example, one expert witness testified that the best end use of Whispering Ranch lots would be for cattle grazing. (Mangin, Tr. 3424)

The rate at which a property will be placed into its end use is the subject of an absorption study, which predicts the resolution of a supply and demand clash for property in a given study area.²⁶ At

²⁴ "End Use" was discussed by complaint counsel's expert witness, Professor Stevenson. Professor Stevenson testified:

[S]ound investment value must ultimately be related to use, which is basically a retail end user use. I think this is true in the stock market where you see many of the promotions that had no fundamental end market for their product got burned. This has been true in real estate. You can ride bubbles, you can ride dreams, but fundamentally it is end use that creates value (Stevenson, Tr. 6587).

²⁵ "Highest end use" was discussed by complaint counsel's expert witness, Jack Mann. Mr. Mann testified: Highest and best use is one of the basic principles. It is defined as that legal reasonable approximate utilization that results in the greatest net return to the land, legal in the sense that it must not be illegal, reasonable in the sense it must be susceptible of achievement and approximate is another word for "near," which simply means it is a use which must occur within the reasonably near future. (Mann, Tr. 7583).

²⁶ Respondent did not offer into evidence any type of absorption study for any of its properties prepared prior to the time it began to market land as an "excellent, risk-free investment." (I.D. 33) We can only infer, therefore, that no such studies existed. To the extent it made representations relevant to the absorption of its properties

least four distinct types of absorption studies were [25] proffered at trial.²⁷ The first type of absorption study is called a "trend curve" or "growth curve." (See, e.g., Stevens, Tr. 14731-34) It involves plotting a curve on a graph that represents the historical growth rate in a given study area, and extending the curve to predict future growth. The second type of absorption study is a statistical model that focuses on economic and demographic factors. (See, e.g., Stevens, Tr. 14749-54, 14892) Among the factors indexed in the studies before us are population density changes derived from census data, income data, tax rates, labor costs, land costs, percentages of ethnic populations, and desirability of climate.

The trend curve and statistical absorption studies described above were used by expert witnesses and city planners to predict future absorption in large geographic areas, such as regions and major cities. From this data, a third type of absorption study was prepared to predict specifically the absorption of population and industry by Horizon's properties. Thus, the third type of absorption study is another statistical model. By computing, in a mathematical function, economic and demographic factors that appear to influence the population distribution and growth among different sections of specific cities, analysts are able to project future growth trends in suburban areas close to those cities. Using this approach, witnesses testified to the percent of a study area's future population that a Horizon property may be expected to garner. (See, e.g., Stevens, Tr. 14695-96)

A fourth type of absorption study was used for Waterwood. Because Waterwood was designed primarily as a recreational community and not as a residential community, an economic study was prepared to aid in predicting the rate of "consumption" of units

without establishing "prior substantiation" for those representations, it may have violated Section 5. (See *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *aff'd in part and remanded in part*, 492 F.2 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974), *modified on remand* 85 F.T.C. 391 (1974), *reconsideration*, 85 F.T.C. 1052 (1975); *Pfizer Inc.*, 81 F.T.C. 23 (1972)) However, because the complaint did not allege a lack of substantiation, and because our review of the record indicates that this question was not tried by the express or implied consent of the parties (see *Commission Rules of Practice*, 16 C.F.R. 3.15(a)(2)), we decline to find an independent violation of Section 5 on this ground.

Expert testimony at trial clearly demonstrates that such studies are a prerequisite to the development of a truthful marketing program. (I.D. 133) In future cases, the Commission will consider carefully the adequacy of the substantiation possessed by a land sales company at the time representations are made in evaluating whether Section 5 violations have occurred.

²⁷ Horizon has argued that complaint counsel produced absorption studies for only one property, Horizon City. (RAB at 17-18) While Horizon is correct that Horizon City is the only property for which complaint counsel contracted with a private analyst to prepare an absorption study, complaint counsel nevertheless did produce existing studies prepared by state and local planning offices that yield absorption data. If a specific absorption study—the analysis of when a property is expected to be placed into a specific end use—is deemed credible, it makes little difference whether the study was prepared by a city's planning department or by a private economist. Indeed, Horizon's own expert witnesses treat city planning projections as absorption studies. (See, e.g., Stevens, Tr. 14731-2)

in Waterwood, rather than the rate of growth of Waterwood's permanent population. (See Stevens, Tr. 14696) [26]

The Commission below analyzes the various absorption studies in the record on a property-by-property basis. In balancing the investment value of each property against Horizon's investment claims, particular attention is directed to two central questions: (1) based on absorption analysis, will respondent's properties be placed into residential and commercial end uses in a short-term period of less than twenty years; and (2) based on the time until absorption, can residential and commercial end uses be considered reasonable end uses of respondent's properties.

The second factor identified by expert witnesses as important to evaluating land investment decisions concerned the future costs of any development expenses to be incurred by the investor. Consideration of this factor is particularly appropriate in this case, because the parties have debated whether consumers understood both that Horizon was not obligated to develop its properties and that development costs of a consumer's lot could be many times the purchase price of that lot. The Commission therefore also reviews the evidence concerning this issue in the property-by-property analyses below.

Horizon City

As of May 31, 1976, Horizon City contained 135.94 square miles or 87,000 acres, (some 60,000 of which had been sold) and was located 5-19 miles southeast of the city limits of the City of El Paso, Texas. El Paso contained 160.71 square miles and had a population of approximately 400,000 when the record closed. (I.D. 17; CX 874 p. 48)

Horizon City lots were platted and sold for residential and commercial end uses. Whether these were reasonable "end uses" over the short-term time frame represented is a function of the interaction between the supply of land in the El Paso metropolitan area and the demand for that land. In this regard, both sides at trial produced absorption studies that describe the outcome of El Paso's supply and demand duel, and which inform us whether, where, and when people are expected to move into the El Paso area. Despite the attempt at trial to prove whose projected population figures were more accurate, the Commission affirms the ALJ's finding that the parties differed only insignificantly with regard to El Paso's expected future population. (I.D.p. 279)

In preparation for trial the parties prepared thirty year absorption studies of both the El Paso Standard Metropolitan Study Area (El

Paso SMSA) and Horizon City, for the years 1975–2005. At trial, the two sides each called witnesses who were experts in the fields of economics, demographics, and real estate planning. Expert witnesses called by complaint counsel projected a population of the El Paso SMSA for the year [27]2005 of approximately 742,450.²⁸ (I.D.p. 279) Expert witnesses called by Horizon projected a medium population for the same year of approximately 809,000 and a low projection of 745,000.²⁹ (*Id.*) [28]The difference between complaint counsel's figure and respondent's low figure is less than 5,000, a difference that we find is meaningless in the context of a projection thirty years into the future.³⁰

Because the parties substantially agree on the likely population of the El Paso SMSA in 2005, the real controversy centers around whether Horizon City can be expected to absorb enough of that population in order to establish an active resale market. Horizon contends that, due to high growth and a locked-in corridor of development, sufficient resale markets will develop. Respondent's expert witnesses Dr. Stevens and Mr. Lomax both project populations of approximately 75,000 for Horizon City in 2005. (I.D. 111, 113) Based on these projections, respondent expects absorption of land in Horizon City to be 19,000 acres, or 21.8 per cent of the land, by the year 2005. (I.D. p. 279) By contrast, complaint counsel's experts

²⁸ Among the evidence most heavily relied upon by complaint counsel witnesses was a 1970–74 demographic study prepared by the Department of Planning, Research and Development, City of El Paso (Planning Department), which assessed current and future transportation needs of the El Paso SMSA through the year 2000. Complaint counsel's expert, Joseph Lusteck, used the Planning Department's study to project the 2005 population of 742,450.

Mr. Lusteck is a real estate planning consultant and President of the Real Estate Division of Wortman and Mann, Inc., a real estate and financial services company located in Jackson, Mississippi. Prior to his employment by this firm, he was with the Pima County [Tucson, Arizona] Planning Department and then with the Jackson [Mississippi] Planning Board. (I.D. 103)

The record also indicates that the Planning Department's 1970–74 study predicted a year 2000 population for the El Paso SMSA of 680,750. A Planning Department study conducted in 1976 revised the projected figure to 685,000, a difference of 4,250. (I.D.p. 279; compare CX 876 with CX 797)

²⁹ Horizon's expert witnesses were Dr. Benjamin Stevens and D.A. Lomax. Dr. Stevens prepared an absorption study projecting populations of 863,700, 809,000, and 745,000 as high, medium, and low populations, respectively, for the El Paso SMSA in 2005. D.A. Lomax accepted the Planning Department's figures as accurate and produced a population projection that was in accord with Dr. Stevens. (I.D.p. 279)

Dr. Stevens is the President, Director and senior research associate of the Regional Science Institute, a non-profit research corporation doing work in regional analysis, regional economics, industrial location, land development and urban planning. The field of regional science encompasses the fields of economics, demographics and planning. Dr. Stevens received a Master's Degree in city planning and a Ph.D. in regional planning and economics from the Massachusetts Institute of Technology. He has authored or co-authored 60 articles, reports and discussion papers on various aspects of regional science. For the last twenty years, he has been co-editor of the *Journal of Regional Science*, the most highly regarded professional publication in its field. (I.D. 110)

Mr. Lomax is a professional real estate appraiser and consultant, who specializes in land in Texas, New Mexico and Arizona. He had been an appraiser for 25 years at the time of his testimony and is a member of the American Institute of Real Estate Appraisers, a senior Real Estate Appraiser and an Accredited Rural Appraiser. At the time of trial, he was national vice president of the Society of Real Estate Appraisers and had served for six years on the Society's Board of Governors. He is the author of the *Rural Appraisal Handbook* for the New Mexico State Tax Commission and has written several articles for professional Magazines on appraising. (I.D. 112)

³⁰ The expert witnesses agreed that the more distant the projection the greater the chance of statistical error. (*See, e.g., Mann, Tr. 7700, 7738*)

predict a population in 2005 sufficient only to absorb 2,859 acres, or 3.3 per cent of the land in Horizon City. (I.D.p. 279) Horizon has argued that "[a] city is never fully absorbed; few cities even exceed 70-75% absorption." (RAB 18) While it may be true that few cities ever exceed 75 per cent absorption, in the instant case, respondent's best estimate is that by the year 2005 Horizon City will remain 78.2 percent *unabsorbed*. Complaint counsel estimate that Horizon City will be 96.7 per cent *unabsorbed*.

Although respondent has disputed that significant numbers of short-term representations were made, respondent has never seriously contended in this proceeding that Horizon City could be developed within a short-term of less than twenty years. As stated, we find that a significant number of short-term representations were made. Accordingly, we hold that representations of [29]excellent, financially risk-free investments regarding unimproved lots in Horizon City, which were due to mature within a short-term, were false and misleading and were deceptive within the meaning of Section 5.³¹ [30]

Although we have found that respondent's best estimates of potential Horizon City absorption are insufficient to stimulate a resale market over the time frame represented by Horizon, we further find that even those projection are overly optimistic and predicated on unlikely assumptions. Mr. Lomax's population projection of 75,000 for Horizon City was based on the assumption that,

all of the lands . . . immediately contiguous to the basic development area of Horizon City would be absorbed into the community, [the city of El Paso,] and would be a part of the community. *This is assuming that the community were to grow in a very straight pattern, taking in every section of land as it moves from where it is now out to that point in time.* (Lomax, Tr. 15217) (Emphasis added)

The assumption of a "very straight" growth pattern has its genesis in respondent's belief that growth in the El Paso SMSA is locked-in to a geographic corridor leading from El Paso's city boundaries to Horizon City's front door. To rely on such an assumption, respondent

³¹ Further confirmation of our conclusion exists in the fact that resale of Horizon City lots has been insignificant through the time of trial. (See, generally, I.D. 125) Illustrative of the situation is the experience of the El Paso Board of Realtors, which operates a Realtors Listing Service (RLS), and which increased its membership from 166 in 1970 to 354 in 1977. The ALJ found that of "about 1400 inquiries to the RLS there were approximately 266 listings and 14 sales of Horizon City property during the period from 1970 to 1976 (Tr. 2376, 2388-89)." (I.D.p. 238) Consumer testimony also indicates that little or no resale market existed. (I.D.p. 240)

Respondent additionally contends that Horizon City is in fact a desirable long-term investment, which could mature within twenty to thirty years. We do not have to reach the merits of this contention since we find that short-term representations were made. However, we note in passing that even if we assume that Horizon made long-term representations and that respondent's absorption estimates are more accurate than complaint counsel's, we doubt that an absorption of only 21.8 per cent of Horizon City's lots will result in the stimulation of a sufficient resale market to enable the owners of Horizon land to engage in competitive dispositions of their investment over a twenty to thirty year period.

must ignore both the past directions of growth surrounding El Paso, and the official future development plans of El Paso's Planning Department. Jonathan Cunningham, the Director of the Planning Department, testified at trial regarding issues concerning the direction of El Paso's growth. The Planning Department has prepared annual demographic studies of the El Paso SMSA since 1960 and has prepared several studies encompassing a number of years. Major studies were undertaken in 1963, 1969, and 1976 in conjunction with El Paso County, the Texas Highway Department, and the Bureau of Public Roads (now the Federal Highway Administration). (Cunningham, Tr. 2514) These studies were developed to assess the current and future transportation needs of the El Paso SMSA. [31]

Mr. Cunningham's testimony is summarized by the ALJ at I.D. 76. He testified that since his incumbency began in 1958, El Paso has grown, and is expected to continue to grow, in more than one direction. Although natural and artificial barriers constrain growth on three sides of El Paso, these barriers are not a solid curtain. The Planning Department expects significant growth to continue on either side of the Franklin Mountains, to the north and to the west, as well as in the "Lower Valley" area to the southeast. The Lower Valley contains vast acreage of fertile to arid land between the Rio Grande River and Interstate Highway 10, south of Horizon City. Limited growth is also expected in the vast acreage between Ft. Bliss and Horizon City, north of Horizon City.

Mr. Cunningham testified that El Paso has vigorously pursued a policy of annexing developing communities that border the City. He stated that the City was currently engaged in constructing a major "North-South Freeway," which will lie between the Franklin Mountains and Ft. Bliss. Community development has already begun along this highway as the City annexes land and extends utilities and City services. One of complaint counsel's experts, Joseph Lusteck, testified that in addition to the vast tracts of land surrounding El Paso, as of the date of trial, sufficient vacant land existed within the city boundaries to accommodate *all* of El Paso's projected growth through the year 2005. (I.D. 104)³² Moreover, the land within the City would have the advantage of ready access to city services and city utilities. Considering the vast amount of unimproved land both within and without the corporate city, Mr. Lusteck concluded that the principal flaw in the Horizon City property was

³² For a description of Mr. Lusteck's qualifications, see, *supra*, p. 27 at note ²⁸.

the oversupply of land in relation to the relatively small projected demand for that land. (*Id.*)

The oversupply problem is magnified by the difficulty of extending utilities to Horizon City. Respondent divided Horizon City into small lots, which it sold principally to individual consumers rather than to large developers. Without the sincere effort of a developer who has the financial capacity to extend utilities to Horizon City, the fractionalization of land ownership in Horizon City results in an inadequate infrastructure which is incapable of [32]establishing utilities. (I.D.p. 284) The cost of development is extremely high, and few, if any, individual consumers could be expected to have the financial capacity to extend utilities to their own lots.³³ [33]

³³ Complaint counsel has compiled the following data from Horizon's federal property reports. (CPF 4.219, 4.220)

As of May, 1975, the costs of providing utility services to the various areas of Horizon City could be as high as the following amounts:

| <u>Service (and Comments)</u> | <u>Amount</u> |
|--|--|
| Water (drilling individual wells not permitted) | \$200,000 (CX 35p-q, 36o-p) \$2.00 per foot |
| Gas line beyond 150 feet alternative is LP bottled gas with storage tank | \$180,000 (CX 35q-r, 36p-q) \$200 |
| Telephone | \$135,000 (CX 35r, 36q) |
| Sewage - central system | \$1,000,000 |
| septic tank | \$450 (CX 36q-r, 35r-s) |

The estimated cost of installing an electric line to the Horizon City lots listed below, which are nine of the "typical" lots used in Mr. Mann's appraisals, (CX 892g-x), are as follows:

| <u>Lot and Location</u> | <u>Electric Line Cost</u> |
|---|---------------------------|
| (1) Lot 1 - Mountain Shadow Estates Unit 54, Block 389 | \$23,729 |
| (2) Lot 2 - Horizon City Estates, Unit 19, Block 19 | 38,797 |
| (3) Lot 3 - Horizon City Unit 44, Block 318 | 3,472 |
| (4) Lot 4 - Mountain Shadow Estates Unit 30, Block 232 | 55,937 |
| (5) Lot 5 - Sunland Estates Unit 19, Block 69 | 7,452 |
| (6) Lot 6 - Horizon City Unit 82, Block 687 | 13,591 |
| (7) Lot 7 - Horizon City Estates | 47,305 |
| (8) Lot 8 - El Paso East | 1,546 |
| (9) Lot 9 - Horizon City Estates Unit 15, Block 2 | 23,594 |

(CPF 4.219, 4.220)

When Horizon began to market its land in the 1960's, it represented to consumers that it or some other developer would develop the property over the short-term. However, according to complaint counsel's proposed findings of fact, when the record in this proceeding closed in 1978, Horizon City had been developed to the following extent:

The Horizon City property consists of about 87,000 acres. (Lusteck, Tr. 7039). That acreage includes [an] existing development "core" with a total size of 6,400 acres (CX 1563b). As of June, 1978, 18 years after Horizon began selling lots in this property (RX 1538a-h), buildings had been constructed on only about 600 acres in that existing core (Steele, Tr. 14019-20). There were about 700 to 800 dwellings in Horizon City as of June, 1978 (Steele, Tr. 14022). Only two other homes were located outside that core in the rest of the property (Steele, Tr. 14022). No homes had been built as of that time in the 4,000 acre core area surrounding the lake (Steele, Tr. 14022; RX 1536b). Various other holdings by Horizon total another 1,500 acres. (RX 1536b) Thus, the total area within the property on which building has occurred after more than 18 years is about 600 acres out of 87,000 acres. That amounts to less than 7/10ths of 1% of the land in that property. (CPF 4.215, p. 140)

We find that the preponderance of the record evidence establishes that growth in the El Paso SMSA is not significantly "locked-in" toward Horizon City. The record also indicates that due to a massive oversupply of land surrounding El Paso, coupled with the availability of city services and utilities to communities which develop within the City, little if any land in Horizon City can be expected to develop in the foreseeable future beyond the small core area where respondent has committed the necessary funds for development. Accordingly, we conclude that Horizon violated Section 5 when, through false and misleading representations and material omissions of fact, it marketed Horizon City lots as an excellent, financially risk-free, short-term investment. [34]

Rio Communities

As of May 31, 1976, Rio Communities contained 249,000 acres, or 389.06 square miles, and was located 3-18 miles east of the town of Belen, New Mexico. Some 159,000 acres had been sold. (I.D. 11) Rio's northern edge is 35 miles south of Albuquerque, New Mexico. (*Id.*) Horizon literature points out that its Rio property "blankets a land area larger than the combined cities of San Diego, Las Vegas and Philadelphia." (CX 155c) Horizon began purchasing land for Rio Communities in the 1960's; in mid-1978 there were approximately 700 homes on the property with an estimated population of between 2,500 and 3,000. (I.D. 13) The population of Belen, in 1976, was approximately 5,000. (I.D. 11)

Whether Horizon's representations concerning Rio Communities were true depends upon the reasonableness of the represented end use of Rio lots in the context of the represented time until absorption. At trial, complaint counsel called economic and demographic experts to testify, as well as the Director of the City of Albuquerque Planning Department (Planning Department) and the Director of the Middle Rio Grande Council of Governments (COG). COG is an association of local governments that was established to coordinate planning for the entire Albuquerque area. (I.D. 74)³⁴ Complaint counsel also produced absorption studies prepared by the Planning Department and by COG. For example, Exhibit CX 828, entitled "Land Use Plan-1985-Albuquerque, New Mexico" (Land Use Plan), is a 1964 Planning Department economic and growth analysis, with projections through 1985. This study has been on the public record during the entire time in which Horizon has made representations relevant to the absorption or marketability of its Rio lots. The "Land Use Plan" concludes:

Albuquerque has an abundance of vacant land available for urban development. Even the most optimistic growth projections would not utilize this land within the current century. (CX 827z-11; see also, Carruthers, Tr. 3036)

Absorption studies conducted by COG after 1964 downwardly revise the Planning Department's population projections. (I.D. pp. 118, 278 n.24) COG further concludes that the most efficient planning strategy in the Albuquerque area is for development to occur in vacant land in and around existing cities, so that [35] utilities and city services can be made readily available. (See, e.g., CX 837 pp. 23-27) Given this conclusion, we can infer that COG's planning efforts are and will be geared toward developing land both within Albuquerque's city limits and in its immediate suburbs. Thus, local government entities will be working at cross purposes with any effort to develop Rio Communities (some 35 miles south of Albuquerque) over the short-term.

Complaint counsel's expert witness, Professor Howard Stevenson, supports this conclusion.³⁵ Professor Stevenson did not prepare an absorption analysis of his own; his conclusions rested on an analysis

³⁴ It is worth noting that neither Rio Communities nor Paradise Hills are represented in the COG and therefore are not active participants in that group's development planning. (Id.)

³⁵ Dr. Howard Stevenson is an associate professor at the Harvard University School of Business Administration. He holds doctorate and master's degrees from the Harvard Business School. His doctorate focused on business policy and long-range planning, and his master's, which he received with high distinction, involved specialization in investment finance. Dr. Stevenson is a trustee of a successful real estate investment trust, a director of a company which invests long-term pension accounts in the United States realty market, a director of a company whose activities include building and development, and a trustee of a non-profit charitable organization whose primary purpose is acquisition and development of raw land which is deemed to be of a critical conservation interest. (I.D. 101)

of studies already published. The Initial Decision incorporates Professor Stevenson's conclusions at page 200:

The total of lots available in [Rio] sites exceeds the full needs of the community of Albuquerque under the most optimistic projections through—and I have to think back, given what I just included—well beyond the end of the century and depending on which projections you read, perhaps well into the 22nd century (Stevenson, Tr. 6676).

Since at least 1972, COG reports have consistently predicted that the greatest share of Albuquerque's future growth, through 1995, would occur in the northeast sector. (CX 836 p. 11, 828g; Pierce, Tr. 3117) Population projections of respondent's expert witnesses were basically in accord with those of COG, however respondent differed with respect to the direction of growth.³⁶ [36]

Horizon's expert witness, Dr. Benjamin Stevens, testified that Albuquerque's population growth will allow Rio Communities to develop as a satellite city.³⁷ Dr. Stevens analyzed industrial location and employment in Rio Communities, predicted the number of commuters between Rio and Albuquerque, predicted the migration of retired couples to Rio, predicted the secondary employment generated by the projected population of Rio (Stevens, Tr. 14850), and concluded that the likely population of Rio Communities in the year 2005 would be 60,000 but could be as low as 30,000 or as high as 90,000. (Stevens, Tr. 14867) Even if respondent's projections are accurate, the Commission finds that the absorption of only 60,000 people (an event not predicted to occur until beyond the close of this century) in a property that contains 690 square miles (six times the size of the District of Columbia (I.D.p. 277)) will not result in the stimulation of a resale market of sufficient size to enable the owners of Horizon land to engage in competitive dispositions of their investment within the short-term.³⁸

Evidence supporting respondent's "locked-in" claim is similarly unconvincing. At best, the evidence produced by Horizon supports only the conclusion that growth would be locked-in over the long-term. Relying on testimony of its own expert witness, Horizon has stated: ". . . by the end of the century the major portion of Albuquerque's growth would be channeled in a southern direction toward Rio Communities (Nevin, Tr. 15874-75)." (emphasis added,

³⁶ COG projected a population in the Albuquerque area by the mid-1980's of 800,000 people (Pierce, Tr. 3112-15); the city itself projected a population of 825,000 people by the year 1985 (Carruthers, Tr. 3035). Horizon's expert witness gave a somewhat more conservative projection of 700,000 to 750,000 (Lomax, Tr. 15159).

³⁷ For a description of Dr. Stevens' qualifications, see *supra*, p. 27, note 29.

³⁸ Detailed findings concerning the lack of a resale market for undeveloped Rio lots, at the time of trial, are found at I.D. 124. These findings, which we uphold, conclude that there was no resale market for undeveloped lots in Rio Communities as of 1978.

RPF 103) At no time on appeal has Horizon pointed to evidence that would indicate a rapid locked-in growth pattern over the short-term in which its sales force represented development would occur. It is certain that growth is not significantly locked-in for the seven to ten year time period generally represented, and unlikely that growth will be significantly locked-in at any time during this century. Accordingly, we affirm the ALJ's conclusion that representations of locked-in growth were false.

Respondent further contends that absorption of Albuquerque will not necessarily precede absorption of Rio simply because vacant land is available within Albuquerque. The argument is bottomed on the fact that the price of a building lot in Rio may be vastly cheaper than a comparable lot in Albuquerque. (RPF p. 135 n.94) Respondent's analysis, however, fails to consider all [37]relevant information. While the cost of *purchasing* a lot for a homesite in Rio may indeed be relatively inexpensive, the cost of *developing* a Rio lot outside of the development core is prohibitive to the ordinary consumer.³⁹ Horizon has not contracted with any other development company to begin improvement in a significant number of Horizon lots, and the fractionalization of ownership in Rio has prevented the development of an infrastructure capable of coordinating development. The result is that after close to two decades of Rio land sales, only 800 dwelling units had been constructed, concentrated on 500 to 1,000 acres within the Enchanted Mesa development core, out of Rio's 249,000 acres. (Steele, Tr. 14013-16; RX 1541a-i)

In conclusion, we find that the massive oversupply of land in Rio Communities, the distance of Rio Communities from Albuquerque, the multi-directional growth of Albuquerque at present, the availability of land and utilities within Albuquerque, and the prohibitive cost of obtaining utilities in Rio Communities effectively preclude

³⁹ Complaint counsel compiled the following data from Horizon's federal property reports. Cost of installing utilities to lots so that those lots could be used for building are considerable. As of May, 1975, costs for utilities within the various subdivisions of Rio then being offered for sale could be as great as the following amounts:

| | | | |
|-------------|---|-----------|---------------------------------|
| Electricity | | \$142,500 | (CX 11n) |
| Water | - extension of line | \$340,000 | (CX 10m) |
| | - drilling well | \$ 12,500 | (CX 10m, 11m) |
| Gas | - lines not available, use bottled gas instead; | \$ 500 | for storage facilities (CX 12n) |
| Telephone | - line | \$165,000 | (CX 12n-o) |
| | - radio telephone | \$ 2,500 | (CX 12n-0) |
| Sewage | - septic tank | \$350,600 | (CX 10-0) |

In addition, it was not possible to drill for water on lots within Rio del Oro (CX 10/1-m). Septic tank use was subject to the granting of a variance because some lots were below the minimum size required, following an increase in that minimum by local authorities, apparently after the lots were planned by Gruen Associates and subdivided by respondent (See, e.g., CX 10n-o, 11n-o). (CPF 4.128)

the establishment of an active resale market for Rio lots over the short-term. Therefore, representations of excellent, risk-free, short-term investments regarding Rio lots were false and misleading and deceptive under the FTC Act. [38]

Paradise Hills

As of May 31, 1976, Paradise Hills consisted of 13,000 acres, or 20.3 square miles, and at its closest border was located 3 miles northwest of Albuquerque, New Mexico. Some 9,000 acres had been sold. Paradise Hills was Horizon's first property to be purchased and marketed. The ALJ found that, "[s]ales of acreage parcels have been insignificant since 1970. . .". (I.D. 8)

The analysis of whether Paradise Hills lots were properly sold with the expectation of their evolution into a fully developed community within a short-term follows closely the preceding analysis of Rio Communities. Complaint counsel argue that Paradise Hills will not be developed over the short-term because of the ample availability of vacant land within Albuquerque, where utilities and municipal services already exist, and because of the fractionalization of ownership of vacant Paradise Hills land, which casts doubt on any rapid expansion of Albuquerque's utility system. This argument is supported by expert testimony, and embraced by the ALJ, who found that if Paradise Hills' past growth rate is duplicated each year in the future, it will take over a century to fully utilize all lots. (I.D. 102; I.D.pp. 277-78; *see, supra*, Rio Communities analysis.) Although Horizon represents that Paradise Hills is its model community, local realtors confirmed at trial that virtually no resale market exists for Paradise Hills lots outside of the core area.⁴⁰ [39]

Respondent's defense relies primarily on the testimony of two expert witnesses to prove that Paradise Hills lots are an "excellent investment".⁴¹ These witnesses, D.A. Lomax and Alan Nevin, produced detailed investment analyses which traced the historic rise in land values in the Albuquerque area, and which conclude that Paradise Hills lots can be expected to continue to appreciate throughout this century. (I.D. 113, 117)⁴² [40]

⁴⁰ The resale market for undeveloped Paradise Hills land has always been insignificant. (*See, generally*, I.D. 123) For example, the Albuquerque Board of Realtors' Multiple Listing Service reports only one sale of undeveloped Paradise Hills land between 1970 and 1974. (CX 817A-N) Also, William A. Kelly, a Paradise Hills realtor and former Horizon sales representative, testified that the lack of a local resale market resulted in his having to refuse the 50-100 persons who sought bulk acreage listings of undeveloped Paradise Hills land with his firm between 1975 and 1978. (I.D. 123)

⁴¹ Actually, Horizon's expert witnesses characterized the investment as "very good". (Lomax, Tr. 15207; Nevin, Tr. 16071)

⁴² For a description of Mr. Lomax's qualifications, *see, supra*, p. 27, note ²⁰.

D.A. Lomax's credibility was hotly disputed by the parties at trial because he was interviewed by complaint

(Continued)

The Commission finds that Horizon's defense fails to respond to the gravamen of the complaint, which charges that Horizon sold land as a rapidly appreciating asset which would be liquid within a short-term. The investment analysis of respondent's witnesses overlooks the fact that virtually no resale market exists for those lots or is likely to exist within the short-term. If a consumer purchased land in Paradise Hills in 1965, with the expectation of using investment profit to help finance retirement in 1985, the knowledge that the value of the land has theoretically risen offers little consolation to the consumer, when in 1985 no one wants to buy that land. Accordingly, while it is unclear whether Paradise Hills will attract a sufficient population to establish a resale market over the long run, the record is sufficiently clear to enable the Commission to confirm the complaint's allegations with respect to Paradise Hills. We hold that Horizon violated Section 5 when, through false and misleading representations, it marketed Paradise Hills lots as excellent, risk-free, short-term investments.

Arizona Sunsites

As of May 31, 1976, Arizona Sunsites contained approximately 47,500 acres, or 73.4 square miles, and was located in Cochise County, Arizona, between 12 and 31 miles from Wilcox, Arizona, approximately 55 miles north of Douglas, Arizona, and 100 miles southeast of Tucson, Arizona. Some 35,000 acres had been sold. Wilcox and Douglas had approximate populations of 3,000 and 12,000, respectively. (I.D. 14) Horizon describes Sunsites as "thinly populated . . . consist[ing] primarily of undeveloped land, grazing land and farm land." (CX 67z-4, 10-k report for fiscal 1976) At the time of trial, Arizona Sunsites had a population of 1,150, with thirty-five homes located outside of the core area. (I.D. 14, 15) Sales of Arizona Sunsites land began in 1962. (RX 1542b)

counsel prior to his engagement by Horizon as an expert witness and took positions directly contrary to his subsequent testimony for Horizon at trial. For example, on cross examination, complaint counsel elicited the following testimony from Mr. Lomax:

Q. Do you recall also stating [at an earlier interview with complaint counsel] that if Horizon subdivisions grew as fast as Albuquerque, it would be the 22nd century before lots would be developed, all lots would be developed?

A. Yes, I probably made that statement. (I.D. 114)

The ALJ therefore gave little weight to Mr. Lomax's testimony. (I.D.p. 283) We uphold the ALJ's findings concerning Mr. Lomax's credibility.

Mr. Alan Nevin is a consulting economist and senior vice president with the Sanford Goodkin Research Corporation of Del Mar, California. Sanford Goodkin provides investment advice to the real estate and lending community. Mr. Nevin's areas of expertise include land, new construction and the technicalities of feasibility. His previous employment included jobs with Ernst & Ernst, Gladstone Associates and the American Housing Guild. He holds a Master of Arts degree in statistical research from Stanford University and a Masters Degree in Business Administration from American University. (I.D. 117)

Horizon represented that investors could realize short-term profit from Sunsites lots based on end uses of commercial and residential development. The record strongly supports complaint counsel's allegation that commercial and residential lots will not develop within a short-term, and that Sunsites will not likely be developed anytime within this century. In support of this finding, the ALJ and the Commission rely heavily on expert testimony of economic development planners employed by the State of Arizona and Cochise County. [41]

At the time of trial, Frank Mangin had been Program Director for Economic Development for the Arizona Governor's Office, Planning Department since December 1975.⁴³ He was responsible for attracting employment-based industries to Arizona. (Mangin, Tr. 3372) Mr. Mangin testified that he has received no inquiries from industry regarding potential development in Arizona Sunsites, and further that the property "lacks the first ingredient" necessary to attract industry, "a demonstrable labor supply." (Mangin, Tr. 3401) Mr. Mangin also stated that neighboring towns could not provide jobs for residents of Arizona Sunsites. (Mangin, Tr. 3401-04) He concluded that the population was too thin in Sunsites and neighboring towns even to support a retail trade center. (Mangin, Tr. 3406)⁴⁴

Mr. Mangin further testified that seventy-five per cent of the residents of Sunsites are retired. (Mangin, Tr. 3404) There are no schools in Sunsites, and the nearest high school is 28 miles away. (*Id.*) Moreover, Mr. Mangin testified that the economy of Arizona Sunsites won't support an adequate medical infrastructure, and that Arizona Sunsites had not a single doctor. (Mangin, Tr. [42]3398-99, 3415, 3471-2)⁴⁵ Relying on Mr. Mangin's testimony, the ALJ correctly identified a contradiction in Sunsites development: the community is dependent upon retirees for growth, but medical facilities and personnel are inadequate either to support a geriatric

⁴³ Mr. Mangin's experience has also extended to similar employment on behalf of Cochise County and Douglas, Arizona. (See I.D. 106; Mangin, Tr. 3374-5, 3396, 3433-37) He was therefore familiar with Arizona Sunsites.

Prior to his employment in the Governor's office, Mr. Mangin was Executive Director of the Douglas (Cochise County) Arizona Chamber of Commerce and consultant to the City of Douglas Industrial Development Authority. Mr. Mangin was also employed by Arizona's Valley National Bank as vice president of Industrial Development. He was a real estate broker from 1959 until 1965. (I.D. 106)

⁴⁴ Mr. Mangin explained that major retail outlets generally require a population far in excess of Sunsites' current population or future population expectations.

There aren't enough folks to have a 30,000 square foot Sears or 75,000 square foot K-Mart. In the case of, for instance, a major retail discount house, they usually like trade area populations of 50,000, so that's why the only major retail outlets in Cochise County are in Sierra Vista and Douglas, because Douglas and Agua Prieta combined are about 60,000 and the Sierra Vista trade area is about 50,000.

⁴⁵ Mr. Mangin testified to the difficulty of attracting doctors to rural communities. In 1972 there were 46 physicians (41 medical doctors and five doctors of osteopathy) servicing a population of one physician per 1,500 people. Because of the insufficient medical market in Sunsites, the Planning Department has made little effort to attract medical personnel to the Sunsites area. Mr. Mangin stated that while some rural communities in Arizona have incentive programs to attract doctors, Sunsites does not. (Mangin, Tr. 3398-98, 3472)

community or to spark growth or development as a retiree center. (I.D. 106; I.D.p. 280)

David Altenstadter, Cochise County Planning Director since 1970, prepared an absorption study in 1975, entitled Cochise County Projective Allocation Model. (CX 860) This report, which was widely disseminated in Cochise County, projected year 2000 populations of 152,778 in Cochise County and 5,000-6,000 in Arizona Sunsites. (I.D. 109) While the relationship between a population of 5,000 and land spanning 73.4 square miles was never translated into an absorption percentage, we conclude that absorption will be insufficient to enable competitive disposition of investment property over the short-term.⁴⁶

In addition to the vast oversupply of land at Sunsites, the cost of utility extension is prohibitive.⁴⁷ [43]

Respondent's sole expert witness regarding Sunsites was Sanders Solot, a Tuscon real estate appraiser.⁴⁸ Mr. Solot analyzed the investment value of Arizona Sunsites and concluded that the value of Sunsites lots would increase at a rate at least equal to the cost of living, approximately 7 per cent to 10 per cent per year between 1978 and 2005. (Solot, Tr. 15738, 15750) Mr. Solot testified that all of the land in Sunsites was developable; he did not testify as to when, where, and how development would occur. (Solot, Tr. 15645, 15706) He concluded ultimately that Arizona Sunsites lots are a sound 20-30 year *long-term* investment of discretionary funds. (Solot, Tr. 15646, 15677)

In light of the Commission's finding that Horizon marketed Sunsites as a short-term investment, respondent's best evidence—that Arizona Sunsites is a sound long-term investment of discretionary funds—amounts to a virtual concession of complaint charges that respondent deceptively represented to purchasers that their lots would be located within fully self-contained communities within a short-term. We hold that Horizon's use of false and misleading statements to market Arizona Sunsites property constitutes a violation of law under Section 5 of the FTC Act.

⁴⁶ Detailed findings concerning the lack of a resale market for undeveloped Sunsites lots, at the time of trial, appear at I.D. 128.

⁴⁷ See, e.g., Fusco, Tr. 4030 (cost of extending electric lines to property is \$1.50 per foot plus \$50 standby charge); Bethel, Tr. 4171 (some properties would require four mile extensions from existing electric lines); Fusco, Tr. 4031 (cost of drilling a well is \$10 per foot, with an average well being 350 to 500 feet).

⁴⁸ Mr. Solot had been an appraiser for 25 years at the time of his testimony, working primarily in Arizona. He is a member of the American Institute of Real Appraisers and is a Senior Real Estate Appraiser with that organization. He is a graduate of the University of Arizona and has taught real estate appraisal courses at the University. (I.D. 115)

Whispering Ranch

As of May 31, 1976, Whispering Ranch contained approximately 19,000 acres, or 29.6 square miles, and was located in Maricopa County, Arizona, approximately 36 miles northwest of Phoenix, Arizona. (I.D. 16) With the exception of unpaved roads constructed by Horizon, Whispering Ranch has no current development, including no development core. (*Id.*) In a 1969 prospectus, Horizon describes the property's terrain as hilly range land, its soil as generally coarse granular to sandy loam in character, and its vegetation as primarily southwestern desert type, namely [44]cactus, yuccas, and mesquite.⁴⁹ Whispering Ranch was Horizon's only property that was not zoned for any specific end use.⁵⁰ However, Horizon represented that the land would become absorbed for residential and commercial purposes as Phoenix expands. (I.D. 88; *see, also*, Horizon's SEC 10-k report for fiscal 1976, CX 67c)

Frank Mangin testified as an expert witness on behalf of complaint counsel.⁵¹ The ALJ summarized his testimony as follows:

In Mr. Mangin's opinion Whispering Ranch is suitable only for cattle grazing (Tr. 3424). He testified that Whispering Ranch is so far removed from economic activity and utilities that no one to his knowledge has thought about Whispering Ranch as a potential residential area (Tr. 3389). It does not have any value for any commercial or industrial purpose (Tr. 3390). The location has no labor force, transportation access or utilities (Tr. 3390-93). Mr. Mangin cannot conceive of Whispering Ranch having any value within the next 30 years for residential, commercial or industrial purposes (Tr. 3396). He testified that Whispering Ranch was "removed from people, roads, utilities and, consequently, demand for the use of it" (Tr. 3424). (I.D. 106; *see, also*, I.D. p. 280) [45]

Although respondent represented that its communities would grow rapidly because they are located near growth cities such as Phoenix, Mr. Mangin does not believe there will be rapid growth on the Whispering Ranch property. He testified that Phoenix has grown in a multidirectional pattern, and that as growth moves out 360 degrees from the center of Phoenix there is an exponential increase in the available supply of inexpensive vacant desert land. Accordingly, Mr. Mangin foresees no development whatsoever at Whispering Ranch within at least the next thirty years. (Mangin, Tr. 3394-96, 3427-28, 3468) David Hamernick, a planner in Arizona's Office of Economic Planning and Development, was in accord with Mr. Mangin's assessment of the availability of land for private commercial or home use. (I.D. 108; *see, also*, Hamernick, Tr. 3677-78, 3672-

⁴⁹ Prospectus, Horizon Corp., February 26, 1969, CX 632-15.

⁵⁰ A consumer's description of her Whispering Ranch purchase is contained in I.D. pp. 94-95. (Testimony of Nancy Tweedy)

⁵¹ For a description of Mr. Mangin's qualifications, *see, supra*, p. 41, note 43.

74, 3668; *see also*, CX 843, pp. 31-32—Report of Planning Department) Due in part to this vast undeveloped acreage, and the fractionalization of land ownership in Whispering Ranch, the cost of extending utilities was prohibitive.⁵²

Sanders Solot was respondent's sole expert witness concerning the investment value of Whispering Ranch.⁵³ He testified that the best end use of Whispering Ranch property is long-term land investment, defined as 20-30 years. (I.D. 115; Solot, Tr. 15607) The record is unclear as to whether Mr. Solot meant a 20-30 year period beginning as of the date that he testified, or as of the date the consumer's contract was signed. (I.D. 115) Mr. Solot did not have an opinion as to when Whispering Ranch would be developed for use as home sites. (I.D. 115; Solot, Tr. 15706) He predicted that Whispering Ranch property would appreciate in value at a rate at least equal to the rate of inflation. (I.D. 115) He acknowledged, however, that a possible reason no current resale market existed for Whispering Ranch lots was due to an inordinate supply of land in the area.

Since we find that Whispering Ranch property, like Horizon's other properties, was marketed as a short-term investment, Mr. Solot's testimony amounts to a virtual concession of the complaint's charges with respect to Whispering Ranch. We would also note that Mr. Solot's projection of 20-30 year investment liquidity was at loggerheads with the testimony of complaint counsel's expert witnesses. The preponderance of evidence supports complaint counsel's argument that Mr. Solot's 20-30 year projection is overly optimistic. [46]

In conclusion, we find that Whispering Ranch lots will not be placed into commercial or residential end uses during the short-term represented to consumers by Horizon and chances are remote that lots will be placed into commercial or residential end use until sometime in the next century. We conclude that Horizon's marketing representations were deceptive and in violation of Section 5 of the FTC Act.

Waterwood

Respondent has sold lots in Waterwood, its latest property, since 1973. (RX 1543b) As of May 31, 1976, Waterwood contained 25,000 acres, or 39 square miles, and was located 19 miles from Huntsville, Texas, which had a population of 15,000. Some 1200 acres had been

⁵² *See, e.g.*, Campbell, Tr. 3296 (400 foot well would cost \$4,000, exclusive of the \$500 pump); Mattison, Tr. 3567 (basic cost of overhead single-phase electric line would cost \$10,000 per mile, plus approximately 25-30 per cent more to account for the difficulties to construction posed by the hilly terrain).

⁵³ For a description of Mr. Solot's qualifications, *see supra*, p. 43, note 48.

sold. Waterwood is approximately 100 highway miles north of Houston. (*Id.*) At the time of trial, 7,000 acres of Waterwood had been platted and were for sale; Horizon held the remaining 18,000 in acres in reserve. Waterwood borders the 90,000 acre Lake Livingston, fronting 44 miles of the lake's 450 mile shoreline. (RPF 30) Lake Livingston is the second largest artificially-made lake in Texas, and the largest lake completely within Texas' borders. (*Id.*)

Unlike Horizon's other properties, Waterwood was designed primarily for resort and second home end use, although Horizon also envisioned a demand for primary homesites to house a permanent population of retirees and a workforce employed in the Waterwood area.

The homesites projected were for single family and multi-family dwellings. Sales included lots fronting Lake Livingston and Waterwood golf course. Complaint counsel allege deception in Horizon's represented end use, arguing, that due to an oversupply of similar recreational communities in the same market, Horizon's claims regarding time to development and resale of Waterwood lots were overly optimistic.

At trial, complaint counsel's sole witness was Professor Howard Stevenson.⁵⁴ The Commission can find no evidence indicating that Professor Stevenson relied on, or produced, absorption studies in preparation of his testimony. It appears, rather, that Professor Stevenson's opinion was based solely on his having visited the Houston area just prior to appearing in this proceeding. He testified to the existence of a number of similar [47]recreational communities in the Houston market area, pointing out that several of these communities were already complete with marinas and utilities. He testified that several communities were being developed by firms with assets greater than or equal to Horizon's, including one community which was being developed by a subsidiary of the Exxon Corporation. Professor Stevenson concluded that due to the number of recreational communities in the Houston market, relative to the demand for such communities, Waterwood would have an insufficient absorption within the foreseeable future to be considered an excellent, financially risk-free, short-term investment. (Stevenson, Tr. 6770-72)

Professor Stevenson further pointed out that when Horizon disposes of its original 7,000 acres of platted lots, it can then market its remaining 18,000 acres. In that event, consumers seeking a resale market for their land would come into competition with Horizon's

⁵⁴ For a description of Dr. Stevenson's qualifications, see, *supra*, p. 35, note 35.

selling efforts. (Stevenson, Tr. 6762) Complaint counsel argue that this constitutes deception, because prospects believed that they would be able to resell after absorption of the original 7,000 acres.⁵⁵

Respondent argues that Professor Stevenson's testimony was unreliable because of his failure to provide a data base for his conclusions. Respondent produced three expert witnesses whose testimony relied on absorption analyses of Waterwood. We agree with respondent that its witnesses' testimony concerning Waterwood absorption were more reliable than complaint counsel's. But our analysis of the evidence offered by respondent's witnesses leads to a finding that respondent violated Section 5.

Charles Osenbaugh testified as an expert for Horizon.⁵⁶ In its proposed findings, respondent characterizes Mr. Osenbaugh's testimony as suggesting that "an extensive resale market would [48] develop by 1984." (RPF 186) We believe that this statement mischaracterizes his testimony, the thrust of which was not that a resale market would exist by 1984, but that none would exist prior to 1984 because lots would have no resale value without utilities, which Waterwood Improvement Association was obligated to install by 1984.⁵⁷ Assuming that utility installation begins by 1984, approximately eleven years after sales began, a resale market might begin to develop at that time. (Osenbaugh, Tr. 15,671) If Mr. Osenbaugh is correct that no significant resale market will develop until utilities are substantially in place, we conclude that an adequate resale market cannot exist within the short-term time frame represented by Horizon.

Horizon called two other expert witnesses, Dr. Stevens and Alan Nevin, both of whom agreed that absorption of Waterwood will occur by the year 2005.⁵⁸ Both relied on Dr. Stevens' absorption studies extending to that date. The unmistakable inference from their testimony is that absorption is not likely to be sufficient at any time before the end of this century. Additionally, these studies did not

⁵⁵ Detailed findings concerning the lack of a resale market for undeveloped Waterwood lots, at the time of trial, are found at I.D. 126.

⁵⁶ Charles Osenbaugh is a real estate appraiser and consultant with Osenbaugh & Associates. He is a member of the American Institute of Real Estate Appraisers and a Senior Real Estate Appraiser. He has taught for the Society of Real Estate Appraisers, and at the University of Oklahoma, University of Santa Clara, Louisiana State University and University of Houston. Osenbaugh & Associates have performed numerous appraisals for the federal government, State of Texas, several school districts and many private corporations. Mr. Osenbaugh has testified as an expert appraiser in the United States Tax Court, federal district courts and state and county courts in Texas. (I.D. 116)

⁵⁷ Waterwood Improvement Association was obligated to construct fronting roads and extend utility service to the community within ten years from the date of a sale. Under the terms of this land sales contracts, consumers were assessed both an annual charge (\$120 for single family homes) and a capital improvement charge (\$2000 for single family lots) to pay for these services. (I.D. 81)

⁵⁸ For a description of Dr. Stevens' qualifications, see *supra*, p. 27, note ²⁹; for a description of Mr. Nevin's qualifications, see *supra*, p. 39, note ³².

contemplate resale competition from Horizon's remaining 18,000 acres of unplatted land.

We hold that the preponderance of record evidence establishes that Waterwood is not an excellent, financially risk-free, short-term investment, and that in marketing them as such Horizon violated Section 5 of the FTC Act. [49]

Conclusion

In sum, we have considered in detail the truth of respondent's claims concerning the investment value of its properties. We have concluded in the property-by-property analyses that the various absorption studies establish the falsity of a number of Horizon's representations: the population surrounding these properties has not increased at a rate sufficient to absorb Horizon properties over the short-term; El Paso and Albuquerque do not have locked-in growth patterns toward Horizon properties; and, neither the Horizon Corporation, the improvement associations, nor any other developer could have been expected to carry out respondent's master plan for development. Thus, based on the absorption analysis, we have found that respondent's properties will not be placed into residential or commercial end uses in a short-term period of less than twenty years.

The preponderance of credible evidence adduced at trial indicates that substantial development in any of the properties will not begin to occur prior to the year 2000, and most probably will take place many years after that, rendering the properties an inappropriate *short-term* investment, which is how they were marketed. The record indicates that either insufficient populations will exist to occupy and spur development of certain properties, or that an oversupply of undeveloped land coupled with multidirectional growth patterns in neighboring cities will result in much of Horizon's land remaining unoccupied and undeveloped at least into the next century.⁵⁹ It is also clear from reading Horizon's contractual documents, where development obligations are carefully omitted, that Horizon never intended to develop any of its properties outside of the core areas.⁶⁰ Horizon argues that its initial expenditures were meant to attract industry, homeowners and other developers who would in turn

⁵⁹ The ALJ found that "The overriding defect in all of Horizon's properties is their size in relation to the markets in which they are situated. The absorption of these properties is projected so far into the future that it is impossible to foresee the ultimate risks that may exist." (I.D. p. 277) We concur in his statement of the overall problem with Horizon's marketing plan.

⁶⁰ Horizon disclosed in its annual financial report to the Securities and Exchange Commission what it failed to disclose to its customers: "The 'laying out and planning' of a project or community is not analogous to the 'development' of a project or community." (Horizon's SEC 10-K report for fiscal 1976, CX 67c)

assure development. (See, e.g., RAB 29-32) However, by fractionalizing the ownership of the land in all of its properties among individual consumers scattered throughout the country, Horizon ensured the frustration of any coherent development plan that some other developer might have otherwise wished to undertake. Horizon's argument further [50] lacks credibility because Horizon knew, or with the exercise of reasonable diligence should have known, that its land would remain unused as residential or commercial property throughout this century. Because no resale market will develop for Horizon's residential and commercial lots within the foreseeable future, residential and commercial uses cannot be considered to be reasonable end uses for those lots. It also follows that because no resale market existed for *any* of Horizon's undeveloped lots, no difference in value could have existed between Horizon's differently zoned lots. (See I.D. pp. 265-66)

On the basis of the foregoing analysis of the evidence applied to the factors⁶¹ expert witnesses identified as most important in evaluating the quality of land investments, we hold Horizon's claims that its land was an excellent, financially risk-free, short-term investment were false, misleading and deceptive and a violation of Section 5 of the FTC Act.

III. HIGH PRESSURE SALES TACTICS

Complaint count XVIII alleges deception or unfairness in Horizon's sales practice of representing, "directly or by implication, that a prospective purchaser must purchase a lot immediately to insure that the price will not increase or that the desired location will be available."

Based on testimony of former sales representatives and consumers, the ALJ found that Horizon used representations of periodic price increases to accomplish three purposes: to create a sense of "urgency" in the sales presentation; to mislead consumers into believing that a rise in Horizon's selling price indicated an increase in the investment value of the land; and to aid in reloading sales to existing customers. (His findings are summarized at I.D. 71-72; see also I.D. 68. In general, we uphold his findings of fact, with the modifications enumerated in Appendix A.) [51]

Horizon employed a number of techniques to stimulate immediate purchases. For example, sales representatives interrupted in-home

⁶¹ The Commission's consideration of evidence regarding the first factor alone enables us to conclude that Horizon land was not an excellent, risk-free, short-term investment. Our consideration of evidence regarding the second, third and fourth factors confirms this conclusion. Therefore, complaint counsel's failure to meet their burden of proof on the last factor is not fatal to their case.

sales presentations to make phone calls to Horizon's home office in Tucson, on the pretense of urgently trying to reserve a lot for the consumer while he or she decided on whether to purchase the lot. Sales representatives sometimes called the Tucson office on the pretense of ascertaining whether a specific lot remained available. The call was unnecessary, as one former sales representative testified, because lots in a given unit or subdivision were generally allocated to specific sales representatives for specific days or evenings. One former sales representative testified about a "reloading" technique whereby a representative arrived at a consumer's home to update the consumer on previously bought property. While there, the representative received a pre-arranged phone call informing him or her that a piece of property, with a specific use designation, was available for about an hour or so. Similar techniques were used at dinner parties, where sales representatives announced that they were reserving choice lots for the consumers sitting at their table. (I.D. 71)

Horizon trained sales representatives to represent to consumers that if they did not immediately purchase a specific lot, the lot's purchase price could significantly rise overnight, the specific lot would probably be sold to someone else in the immediate future, or that an entire Horizon property would be imminently sold out. Horizon's goal was to create an atmosphere where consumers believed that if they did not act immediately to purchase Horizon land, they would be forever foreclosed from participating in Horizon's excellent investment opportunity. (I.D. 71-72)

Consumers testified that they were told of "hot property", i.e. property that would be sold shortly, or property that would imminently rise in value and price. (*Id.*)

The ALJ concluded that these practices were deceptive because Horizon's undeveloped lots were sufficiently fungible so that there would be an abundant supply of them at all times. (I.D.p. 267) He concluded that the practices were unfair because they placed "unwarranted sales pressure" on prospects, depriving them of a full opportunity to consider or obtain advice about their purchase. (*Id.*)

The Commission does not accept "unwarranted pressure" as a test of unfairness under Section 5. We hold, however, that Horizon's high pressure sales tactics violated Section 5 because they occurred in the context of pervasive deception as to material facts. Specifically, representations that price and value of land would imminently increase and that land would become imminently unavailable were artificial devices contrived by Horizon's [52]management to mislead consumers. Respondent used price increases to represent past and

future increases in the value of its land, even though its prices bore no relation to the land's market value. (I.D. 71-72; I.D. pp. 258, 265; see discussion *supra*, pages 20-23) Respondent implied that consumers would lose the opportunity to invest in Horizon land if they did not act immediately, even though as of August 1975, Horizon's vast properties contained approximately 356,000 lots, nearly 80,000 of which were unsold even after many years of intense marketing. (I.D. 23)⁶²

In this context of deception, consumers were pressured into making immediate decisions, without the benefit of sober reflection or the aid of a qualified real estate professional. The Commission concludes that Horizon's practice of misleading consumers into believing that they had to purchase immediately in order to avoid imminent price increases and to assure availability of lots, constitutes a deceptive trade practice under Section 5 of the FTC Act. [53]

IV. HORIZON'S CONTRACT PROVISIONS

Five provisions of Horizon's standard form contracts were challenged in this proceeding: (1) the integration clause; (2) the forfeiture clause; (3) the property visit credit; (4) the guarantee; and (5) the exchange privilege.⁶³

The ALJ found that all five contract provisions were deceptive

⁶² Horizon's appeal brief states that the "crucial issue is the truth or falsity of the alleged representations." (RAB 37) The brief later defines these representations as those "concerning the need for promptness." (RAB 38) Respondent argues that so long as price increases were actual, and that so long as a possibility existed that a prospect could lose a specific lot, Horizon's representations were not false. Horizon cites the following as authority to support the proposition that it cannot be a violation of Section 5 to inform consumers of unavailability of supply or of price increases when such representations are not false: *Guides Against Deceptive Pricing*, 16 C.F.R. 233 at 233.5 (1968); *Readers Digest Association, Inc.*, 64 F.T.C. 1276 (1964); *Prentice-Hall, Inc.*, 64 F.T.C. 30 (1964); *Velox Service, Inc.*, 56 F.T.C. 1311 (1960); *Artistic Modern, Inc.*, 54 F.T.C. 225 (1957).

Horizon's reliance on these authorities is misplaced. In the instant case, Horizon's representations that price increases reflected increases in investment value and demand, and that Horizon properties would be imminently sold out, were false, and Horizon's representations that there was a "need for promptness" were also untrue. The cited cases, in fact, resulted in orders prohibiting direct or indirect representations that supplies were limited, when such was not the case. Thus, Horizon's representations were unlawful under the authorities it cites.

⁶³ Horizon has used two different formats for its land sales contracts. During most of the period in which Horizon sold land, its contracts consisted of two separate documents—a Receipt of Deposit (hereinafter "Receipt") (see, e.g., CX 141) and an Agreement for Deed (hereinafter "Agreement") (see, e.g., CX 151). The Receipt was a single page document, containing the price of the property, the terms of financing and one version of the Horizon Corporation guarantee. The Receipt incorporated by reference the provisions contained in the Agreement. The Agreement was also a single page document containing additional conditions of sale which formed the principal terms of the contract between Horizon and the purchaser. These conditions included a second version of the guarantee, the property visit credit, the exchange privilege and the forfeiture and integration clauses discussed below.

Beginning in 1976, Horizon combined these documents into a single contract entitled "Contract for Purchase of Land" (hereinafter "Contract") which it continued to use at least until the record in this proceeding closed in 1978. (See, e.g., RX 984) The conditions of sale are set forth at the start of the Contract and are individually captioned. In addition, a section headed "Highlights of this Contract" directs the consumer's attention to specific provisions, including those relating to default and forfeiture, taxes and prepayment. The integration clause is set forth in a paragraph entitled "General Provisions". Only some contracts retain the exchange privilege. (Compare RX 180 (contract for Horizon City with exchange privilege) with RX 979 (contract for Paradise Hills without exchange privilege)) The property visit credit and the Horizon guarantee are omitted from all post-1976 Contracts.

and/or unfair. (His conclusions regarding the integration and forfeiture clauses appear at I.D.pp. 288-290; his conclusions concerning the property visit credit, guarantee and exchange privilege are set forth at I.D.p. 267.)

For the reasons set forth below, we reverse his findings of liability concerning the integration clause, property visit credit, guarantee and exchange privilege used in Horizon's land sales contracts. We uphold his finding of liability concerning the forfeiture clause. [54]

The ALJ found that Horizon's land sales agreements were contracts of adhesion because one party (i.e. the consumer) must "adhere to the whole contract or forego entering into any contract." He concluded that the adhesive nature of Horizon's contracts was important because "the standards of fairness to be applied and the legal consequences which ensue depend in a large part on the method of contracting." (I.D.p. 288)⁶⁴

We agree that Horizon's land sales contracts, in both their pre- and post- 1976 forms, were adhesive in nature. We also agree that that conclusion establishes the level of scrutiny to be applied to the five provisions at issue. Standard form contracts, negotiated on a take-it-or-leave-it basis, are unexceptional in consumer transactions. However, if a contract is adhesive in nature and its terms appear unreasonably harsh, the Commission will, as the courts have, scrutinize those terms carefully to determine if they are unconscionable, unfair, or deceptive. As the discussion below will indicate, the determination whether a term is unfair or deceptive depends on its operation in a specific factual context.

The courts have developed standards for defining and scrutinizing adhesion contracts. If a contract is memorialized in a pre-printed form, they will construe its terms most strongly against the party who prepared it. They will also consider the ability of the weaker party in the transaction either to bargain or shop for better terms. (See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 84-97 (1960); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965; *Fleischmann Distilling Corp. v. Distillers Co., Ltd.*, 395 F. Supp. 221 (S.D.N.Y. 1975); and *Farmer's Union Grain Terminal Ass'n v. Nelson*, 223 N.W. 2d 494 (N.D. 1974))

Commentators have also defined contracts of adhesion as those arising from a situation where one of the parties is in a disadventa-

⁶⁴ In urging reversal of the ALJ's conclusions, respondent argues as a threshold matter that the adhesive nature of Horizon's land sales contracts was neither alleged in the complaint nor litigated and briefed by the parties in the proceeding below. (RAB 44) We cannot accept this argument because complaint counts XXIII and XXVI both allege the existence of elements critical to a determination of whether the Horizon contract has features of an adhesion contract. Further, the record taken as a whole contains evidence that is more than adequate to define the nature of the transaction between Horizon and its customers, especially their relative bargaining positions when contracts were signed.

geous position because the contract's provisions are standardized and stereotyped. They agree that such contracts are usually narrowly construed against the author. (See 4 *Williston [55]on Contracts* Section 626 at 855-57 (3d ed. 1961); see, also, *Corbin on Contracts* Sections 1-559 A-I (Supp. 1980); J. Calamari and J. Perillo, *Contracts*, Sections 1-3 at 6 (2d ed. 1977); Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract", 43 *Colum. L. Rev.* 629 (1943); and Duncan, "Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code", 34 *L.A. L. Rev.* 1081 (1974))

The Comments to Article Two of the Uniform Commercial Code (UCC) have adopted these principles in defining contracts which the court may refuse to enforce on grounds of unconscionability. (See Comments to UCC 2-302:10-19 at 400-405 (2d ed. 1970)) The UCC Comments suggest that inequality of bargaining power, the relative experience of the parties and the circumstances surrounding execution of the contract should all be considered in determining whether its terms are unconscionable.

In addition, the Commission, in 1975, promulgated a trade regulation rule concerning the Preservation of Consumers' Claims and Defenses, 15 C.F.R. 433 (hereinafter "Holder Rule"), relying in part on the law of adhesion contracts to find unfair and deceptive standard form clauses that cut off consumers' claims and defenses against assignees of certain types of credit contracts. The Statement of Basis and Purpose for the Holder Rule states:

[P]romissory notes and waivers of defenses are inserted as boilerplate in installment agreements. . . . [C]onsumers rarely comprehend the significance of these devices at the time when the transaction is consummated. . . . *The Commission believes that relief under Section 5 of the FTC Act is appropriate where sellers or creditors impose adhesive contracts upon consumers, where such contracts contain terms which injure consumers, and where consumer injury is not off-set by a reasonable measure of value received in return.* (emphasis added) 40 Fed. Reg. 53523-53524 (1975).

The Commission then went on to consider the nature and scope of the consumer injury caused by holder-in-due-course clauses, their offsetting benefits and the full range of public policy issues affecting any determination whether they are deceptive or unfair.

The Commission's use of the law of adhesion contracts in the Holder Rule Statement of Basis and Purpose suggests the appropriate relationship between the definition of a contract as adhesive and a declaration that any of its provisions are unfair or deceptive under Section 5. A simple finding that a contract is adhesive does not end the inquiry. Rather, that finding, as a matter of policy, defines the

level of scrutiny the Commission applies to an inquiry into whether any of that contract's terms is unfair or deceptive. [56]

Applying the criteria outlined by the authorities as discussed above, we must agree with the ALJ that Horizon's land sales agreements (both pre- and post- 1976 versions) had features of an adhesion contract. They were all pre-printed and contained standard boilerplate provisions. There is no evidence on the record that consumers ever did or could have bargained for modifications in the conditions of sale that are at issue in this proceeding. Thus, at least with respect to those provisions, the contracts were presented to consumers on a take-it-or-leave-it basis. Consumers were in an unequal bargaining position vis-a-vis Horizon both because, as lay investors, they were generally unsophisticated concerning the key factors which must be weighed in making an informed decision to invest in undeveloped land and because Horizon misrepresented the nature and value of the land it was selling.

Respondent has argued that its contracts cannot correctly be characterized as adhesion contracts because: (1) the fact that a contract consists of standard terms does not make it adhesive; (2) purchasers were able to negotiate the terms of payment on their contracts; and (3) contracts of adhesion by definition must concern necessities of life which are "unobtainable elsewhere" and Horizon lots were neither necessities of life nor unique. (RAB 44)

As we have indicated above, we do not rely on the simple fact that Horizon's agreements were pre-printed in finding them adhesive. Rather, we have used other criteria in conjunction with the pre-printed nature of Horizon's forms to define their adhesive nature.

Consumers' ability to "negotiate" one aspect of their contracts with Horizon—i.e. to choose one of several payment plans—similarly cannot vitiate our conclusion that the contracts had adhesive features. Consumers did not have the opportunity to negotiate the other major conditions of sale imposed by Horizon and it is those non-negotiable provisions that are challenged in this proceeding.

In asserting that adhesion contracts must by definition apply only to the purchase of necessities of life, Horizon relies solely upon a New York state court case, *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S. 2d 681 (1975), *aff'd* 84 Misc. 2d 782, 386 N.Y.S. 2d 276 (App. Term 1975). [57]

In fact, courts are divided on the question of whether the law of adhesion contracts is limited to agreements for the purchase of necessities.⁶⁵ And, recent commentary on this issue does not

⁶⁵ For examples of cases where the doctrine has been applied to sales of goods or services which cannot be considered necessities of life, see *Bank of Indiana, Nat. Ass'n v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979)

acknowledge any "necessities" limitation. (See *Corbin on Contracts* Sections 1-559 A-I (Supp. 1980)) Further, the unconscionability provisions of the Uniform Commercial Code contain no limitation on the type of contract to which special scrutiny should apply. (See Comments to UCC 2-302:1 *et seq.* at 391 (2d ed. 1970))

For purposes of applying Section 5, the Commission believes that the authorities omitting this limitation are better reasoned. It therefore concludes that an adhesion contract analysis is applicable in Section 5 proceedings to agreements concerning the purchase of goods and services besides those viewed strictly as necessities.

As for respondent's contention that an adhesion contract can only exist where the goods or services in question are "unobtainable elsewhere", we can find no support for this suggested limitation in any generally recognized authorities which discuss the subject. Further, as complaint counsel points out, the only case cited by respondent as support for this proposition involved a situation where a farmer entered into a standard form contract to sell grain but, following the buyer's breach of the contract, the farmer managed to sell his grain to another party. (C. Ans 43, *citing Farmer's Union Grain Terminal Ass'n v. Nelson*, 223 N.W. 2d 494, 496 (N.D. 1974))

Having concluded that Horizon's contracts were adhesive in nature, we turn to an examination of the five challenged provisions. [58]

A. Integration Clause

Count XXV of the complaint alleges that respondent utilizes a standard form contract which contains a "condition of sale" to the effect that there exists no understanding or agreement between the parties except as "expressly set forth" in their written land sales contract. The complaint charges that the use of such an integration clause is unfair or deceptive because "respondent makes representations . . . which differ in material respects from the obligations of respondent or purchasers under said contract."⁶⁶

In sustaining this allegation, the ALJ concluded that respondent's inclusion of an integration clause is "oppressive, unscrupulous and unfair" and causes substantial injury to consumers. However, he did not define the precise nature of this injury other than to state that

(voiding deficiency clause in dairy farmer lease agreement); *Steven v. Fidelity and Casualty Co. of New York*, 377 P.2d 284 (Cal. 1962) (voiding a clause limiting coverage of airline passenger accident insurance); *Gray v. Zurich Insurance Company*, 419 P.2d 168 (Cal. 1966) (voiding an exception clause to an insurer's general duty to defend in a comprehensive personal liability policy); and *La Sala v. American Savings & Loan Association*, 489 P.2d 1113 (Cal. 1971) (invalidating certain clauses found in loan contracts where the purposes to which the loan proceeds were applied were not part of the factual record of the case).

⁶⁶ The integration clause included in Horizon's contracts reads:

There is no understanding or agreement between the parties except as expressly set forth herein. . . . RX 984-C

the integration clause makes "the finality of the contract's terms explicit" and that Horizon's contracts contained "Draconian terms". (I.D.p. 289)

The Commission considers a finding of substantial, unjustified consumer injury essential to a conclusion that a business act or practice is unfair.⁶⁷ Therefore, the issue presented is whether the record in this proceeding demonstrates any substantial consumer injury flowing from Horizon's use of an integration clause. For the reasons discussed below, we find that it does not.

An integration clause reenforces the standard legal interpretation of land sales contracts which prevails in American jurisprudence. Under the statute of frauds, contracts for the sale of land must be in writing to be enforceable. *Restatement of Contracts* Section 178 (1932) If the written contract appears complete on its face, courts will generally assume the contract is intended by the parties to be a complete expression of their agreement. The addition of an integration clause is generally viewed by the courts as a further indication of the parties' intent that the contract serve as a complete expression of their agreement. [59]3 *Corbin on Contracts* Section 578 (1960 and Supp. 1980) If the Court determines that the contract is a complete expression of the parties' agreement, then under the parol evidence rule neither side may introduce into a court proceeding any evidence of oral (or written) representations or agreements made prior to or contemporaneous with the execution of the final written contract. *Restatement of Contracts* Section 237 (1932)

However, the statute of frauds, the parol evidence rule and the inclusion of an integration clause do not prohibit a purchaser of land from introducing oral or written evidence into a court proceeding to establish that the parties do not have a binding contract because of illegality, fraud, duress, mistake or insufficiency of consideration. *Restatement of Contracts* Section 238 (1932)

Thus, the inclusion of an integration clause in Horizon's standard form contracts will not, as a legal matter, bar Horizon purchasers from suing the company and asserting claims of fraud at the inception. At most, the presence of the integration clause will introduce an additional legal issue into the proceeding. Given the operation of the contractual principles described above, we cannot find that the potential evidentiary implications of the clause cause injury to consumers.

Complaint counsel suggest that the real reason for the insertion of the clause is to discourage consumers from pressing otherwise valid

⁶⁷ See, e.g., Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). See, *infra*, p. 62, note¹¹.

claims. The consumer injury caused by the clause is that "consumers induced by oral or other claims to sign contracts will believe that the clause is fully enforceable when respondent invokes it to defeat their claims." (C. Ans 44-45)

Complaint counsel do not cite any record evidence that consumers have in fact been chilled from asserting their legal rights by Horizon's integration clause or that respondent ever misrepresented the nature or effect of the clause. And, in fact, the one piece of evidence cited by the ALJ in support of his finding of unfairness is testimony by consumers that they believed statements by sales representatives to be part of their contractual agreements with Horizon. (I.D.p. 289)

In the absence of concrete evidence that consumers were chilled from asserting their legal rights when they read the integration clause contained in Horizon contracts, or that respondent misrepresented the operation of the clause, we decline to find that respondent's use of such clauses constitutes an unfair practice. Accordingly, we reverse the ALJ's decision regarding this contract clause. [60]

B. Forfeiture Clause

Complaint counts XXIX and XXXIII contain allegations concerning the forfeiture clauses included in Horizon's land sales contracts. Count XXIX alleges that the forfeiture clause set forth in the pre-1976 Horizon Agreement—which allows Horizon to retain *all* sums paid by the purchaser in the event of a default on *any* installment—is unfair because "the sums retained by respondent are not calculated to bear any relation to actual damages . . . sustained . . . by reason of the purchaser's default." Count XXXIII alleges that respondent's "continued retention" of any payments which are in excess of "reasonable damages" is also an unfair act or practice.

At trial, the evidence revealed that Horizon has used three different versions of a forfeiture clause in its standard form contracts. The first version was in use in the early (pre-1976) sales contracts which are the subject of the complaint. In the event of purchaser default on an installment due under the contract, this early forfeiture clause provides, in the alternative, that Horizon may terminate the contract and retain as liquidated damages all sums previously paid by the purchaser, or that Horizon can pursue any other remedy available to it at law or in equity.⁶⁸

⁶⁸ Horizon's pre-1976 forfeiture clause is one of several conditions of sale continued on the back of the Agreement for Deed. The clause provides as follows:

This Agreement is not divisible and prompt payment of all sums due from Buyer under this Agreement is a condition of this Agreement and failure to make such payments according to the plan selected by Buyer shall entitle Seller to terminate this Agreement and re-enter and take possession of the property and to retain all

(Continued)

In 1976, Horizon modified this version of the provision to make forfeiture Horizon's sole remedy for a purchaser's [61]default, expressly disclaiming any personal liability on the part of the purchaser.⁶⁹

The most recent contract contained in the record, RX 981, reveals yet a third variety of forfeiture clause. This contract, dated June 1977, provides that upon a purchaser's default or cancellation, Horizon must refund any sums paid toward the principal by that purchaser in excess of 45 percent of the purchase price. This refund must be made within 30 days.⁷⁰

The ALJ found that at least the first two versions of Horizon's forfeiture clauses were unfair because they were "penal" in nature, were contained in an adhesion contract and operated to "unjustly enrich" the seller. (I.D.p.290) [62]The ALJ entered an order prohibiting Horizon from collecting or retaining upon default more than its actual damages both under future contracts and under contracts which are in existence at the time that the order becomes final. But he declined to grant complaint counsel's request for retroactive relief for consumers who forfeited payments before the order's effective date, citing the limitations imposed by *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). (I.D.p. 293)

For the reasons explained below, we affirm the ALJ's finding of unfairness with respect to those versions of Horizon's forfeiture clause which allowed the company to retain upon default all sums previously paid by the buyer. To reach this conclusion, we apply the legal standards embodied in our unfairness authority.

In finding the existence of legal unfairness, the Commission focuses primarily on two criteria: the existence of unjustified, substantial consumer injury and the violation of established public policy.⁷¹ To be legally "unfair", consumer injury must satisfy three

sums paid under this Agreement as liquidated damages, or, at the option of Seller, to pursue any other appropriate remedy available at law or in equity.

CX 142-B

⁶⁹ Most of the contracts now used by Horizon contain a separately numbered and titled paragraph captioned "Buyer's Default." That paragraph states:

Buyer shall have no personal liability under the terms and conditions of this contract and Horizon's sole remedy in the event of Buyer's default hereunder shall be to terminate this contract and re-enter and take possession of the property and retain all sums paid under this contract as liquidated damages.

RX 984-C

⁷⁰ The only contract in the record that contains this language is for Rio Communities. Paragraph 8 of the contract provides:

Buyer's Cancellation or Default

Buyers shall have no personal liability under the terms and conditions of this contract and Horizon's sole remedy in the event of Buyer's cancellation or default hereunder shall be to terminate this contract and re-enter and take possession of the property and to retain all sums paid under this contract as liquidated damages except for any principal payments made in excess of 45% of the purchase price which shall be refunded to the Buyer by Horizon within thirty (30) days from declaration of default or notice of cancellation.

⁷¹ See Letter from Federal Trade Commissioners to Senators Wendell H. Ford and John C. Danforth (December 17, 1980). The letter delineates the Commission's views of the boundaries of its consumer unfairness

(Continued)

tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice at issue produces; and it must be an injury that consumers themselves could not reasonably have avoided. [63]

The record below clearly establishes that substantial consumer injury occurred as a result of Horizon's retention of all sums paid in the event of buyer default. (I.D.131) The record shows that for the most part, the 100 per cent forfeiture provisions enabled Horizon to retain sums greatly in excess of any actual damages occasioned by purchaser default. We are unable to detect any countervailing benefits to consumers or competition that the practice produces. Further, we conclude that the injury produced by the 100 percent forfeiture clauses could not reasonably have been avoided by consumers who were unable to bargain over these clauses which were contained in a contract that is adhesive in nature and signed in an atmosphere of deceptive misrepresentations by the seller about the value of the investment and the nature of the deal being offered under the contract.

Respondent argues that no consumer injury was caused by the presence and operation of the forfeiture clauses. It contends that the ALJ's decision was based solely on an injury which might "hypothetically" flow from the use of a forfeiture clause. (RAB 47) Respondent apparently overlooks the specific and substantial consumer injury demonstrated in the record. (CX 852).

Respondent also contends that the ALJ improperly included interest payments in the calculation of consumer injury. (R. Ans 41). We do not reach the question of whether in an ordinary land sales transaction a forfeiture clause which allows a seller to retain interest payments could violate Section 5. We do find that where, as in this case, the transaction occurred in an atmosphere of pervasive deception about the value of the purchase and the nature of the terms and conditions of sale coupled with the adhesive nature of the contract in question, the ALJ properly included interest payments retained under a 100 percent forfeiture clause in his calculation of consumer injury.

The second criterion considered by the Commission in determining a practice to be legally unfair is whether that practice violates public policy. We conclude that that criterion is satisfied in this case. [64]

jurisdiction. The criteria relied on here were first summarized in 1964, when the Commission issued its Statement of Basis and Purpose for the trade regulation rule entitled Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964). Those criteria were later quoted with apparent approval by the Supreme Court in *FTC v. Sperry & Hutchinson*, 405 U.S. 223, 244-45 n. 5 (1972).

Horizon argues that forfeiture clauses do not violate any recognized public policy because most states do not prohibit such clauses. But that argument, directed at forfeiture clauses in general, is wide of the mark. Horizon's forfeiture clause offends the clear public policy that the law should not countenance harsh contract terms which are unreasonably favorable to one party when the other party lacked meaningful choice because of deception in the inducement of the contract. The public policy abhorring unconscionable terms when the contract has been negotiated in an atmosphere of deception has been clearly articulated by the courts⁷² and is the basis for the Uniform Commercial Code's unconscionable contract provisions. (UCC Section 2-302 (1970 version)) Also, we note in passing a developing trend in state and federal law toward the imposition of limitations on the provisions of forfeiture clauses in installment contracts for the sale of land.⁷³ Thus, there is no developing trend in the law that is inconsistent with the position we take here. Rather, the trend is to the contrary. [65]

In sum, we find that the two versions of Horizon's forfeiture clause which allow the company to retain upon default all sums previously paid by the buyer were contained in a contract which is adhesive in nature and was negotiated and signed in an atmosphere of unequal bargaining power, high pressure sales tactics and deceptive misrepresentations; and we hold that they are unfair in violation of Section 5 of the FTC Act. Because the forfeiture provisions at issue in this case arise in the context of land sales accomplished through a deceptive marketing scheme, we need not reach the question of

⁷² See, e.g. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir.1965); *Fleischmann Distilling Corp. v. Distillers Co., Ltd.*, 395 F. Supp.221, 232 (S.D.N.Y. 1975); *New York Jewelry Co.*, 74 F.T.C. 1361, 1406-07, 1412 (1968).

⁷³ The Interstate Land Sales and Full Disclosure Act (ILSFDA) Amendments of 1979 expressly provides that any contract for the sale of land in interstate commerce which does not contain a clause limiting forfeiture rights of the seller in the event of a buyer's default to 15 per cent of the purchase price or the seller's "actual damages" (whichever is greater), can be revoked by the purchaser any time within a two-year period from the date the contract was signed. 15 U.S.C. 1703 (1979). Also, Maryland and Oklahoma have enacted statutes specifically forbidding forfeiture clauses. (Md. Real Property Code Ann. 10-101 to 108 (1974 & Supp. 1980); Okla. Stat. Ann. Tit. 16, 11A (West Supp. 1980)) Ohio effectively prevents forfeiture clauses from resulting in the payment of penalties by requiring judicial sale of the property when, prior to default, the customer has paid 20 per cent or more of the purchase price. (Ohio Rev. Code Ann. 5313.01-10 (Page 1970)) Many other states provide grace periods during which the buyer can remedy his or her default. The time periods vary from ten days in South Dakota to as much as one year in North Dakota. (S.D. (Compiled) Laws Ann. 21-50-1 to -3 (1979); N.D.Cent.Code 32-18-01 to 04 (1976)) An alternative statutory approach is to impose mortgage foreclosure requirements on the termination of land contracts. (See, e.g., Fla. Stat. 697.01 (1969) and Mich.Stat. Ann. 27A.3101 (1962))

The courts have developed many other tools to blunt the force of strict forfeiture. Waiver of default by the vendor is one concept which is frequently employed. (See, e.g., *In re Northern Ill. Dev. Corp.*, 309 F.2d 882 (7th Cir.1962), cert. denied, 372 U. S. 965 (1963)) Courts have also recognized an equitable right of redemption. (See, e.g., *Ward v. Union Bond and Trust Co.*, 243 F. 2d 476 (9th Cir. 1957); *Nigh v. Hickman*, 538 S.W.2d 936 (Mo.App.1976)) For an overview of the trend of state court decisions in this area, see G. Nelson and D. Whitman, "The Installment Land Contract: A National Viewpoint", B.Y.U.L. Rev. 541 (1977) and J. King, "Forfeiture: The Anomaly of the Land Sale Contract", 41 A.L.L.Rev. 71 (1977).

whether the forfeiture clauses at issue in this proceeding are, without more, unfair in a land sales transaction. [66]

C. Property Visit Credit, Guarantee and Exchange Privilege

1. Property Visit Credit and Guarantee

The property visit credit provision of Horizon's land sales contracts says that if consumers visit their land within one year of purchase, Horizon will give them a "credit" in the form of a five percent deduction (up to a maximum amount of \$600.00) from the cash price of the lot. The amount of the credit will be deducted from their account balances at the tail end of their payments. The credit is offered "for the purpose of encouraging personal inspection of the subdivision in which the property purchased is located." (See, e.g., CX 152-B)⁷⁴

Receipt of the credit was conditioned on the consumer acknowledging that the land was not misrepresented at the time of sale. While the contract provision described the reimbursement aspects of the credit, it did not mention this requirement. Instead, the requirement was set forth for the first time in a "Property Visit Credit Certificate" that Horizon mailed to consumers in an "important document package" several days after the sale. The pertinent portion of that certificate states:

TO BE COMPLETED AT THE TIME OF PROPERTY VISITATION TOUR

I have seen my land. It is as represented and I am satisfied with my property investment. Please credit my account in accordance with this certificate.

Landowner (s) signature (s) _____
(I.D. 64) [67]

The property visit credit provision of Horizon's contract was related to the provision extending a "Horizon guarantee". Indeed, the guarantee presents the converse of the property visit credit waiver requirement: the guarantee states that Horizon will refund all money paid on the property if the property was misrepresented at the time of sale. However, requests for such refunds may only be made at the property in question upon completion of a company-

⁷⁴ The full text of this provision reads:

Upon confirmation and acceptance by Horizon Corporation or applicable subsidiary, Buyer will be issued a Property Credit Allowance Certificate in the amount of 5% of the cash price (net additional sales price in superseding sales) up to a maximum amount of \$600.00. The Property Visit Credit Allowance is issued for the purpose of encouraging personal inspection of the subdivision in which the property purchased is located. The Allowance granted herein is deductible from the remaining account balance at the time the principal balance is equal to the amount of the Certificate, providing that the personal inspection and company guided tour is made within one (1) year of the date of the acceptance of this Agreement and providing that the payments due hereunder have been current throughout the term of this Agreement.

(CX 152-B)

guided inspection tour which occurs within one year of the date of purchase.⁷⁵ Obviously, consumers confronted with both the property visit credit certificate and the guarantee were put to a choice: in order to obtain reimbursement of their travel expenses, they must certify that no misrepresentations occurred. However, by certifying that no misrepresentations occurred, they sacrifice their right to a refund.

The record below indicates that both the property visit credit and the guarantee were used as sales tools by Horizon sales representatives. (I.D. 66) Both provisions were discontinued when Horizon revised its contracts in 1976.

Count XV of the complaint alleges that Horizon's property visit credit is deceptive because respondent has represented, directly or by implication, that it entitles consumers to immediate reimbursement for their travel expenses, when such is not the case. In fact, the complaint continues, the property visit credit merely entitles consumers to a deduction from remaining account balances when those balances equal their travel expenses (i.e. at the tail end of their payments).

The ALJ refused to uphold the allegations contained in Count XV because, although he found that the reimbursement aspect of the property visit credit operates exactly as described in the complaint, he also found that this aspect of the credit was "typically explained accurately to the customers" and that, therefore, no deception occurred. (I.D. 63) Complaint counsel do not appeal this finding. We affirm the ALJ's conclusion. [68]

Count XXX of the complaint alleges that the "Property Visit Credit Certificate" used by Horizon further specifies that purchasers may only qualify for reimbursement if (1) they tour their land within one year of the date of purchase and (2) they declare that the land is as it was represented to be and that they are satisfied with their property investments. Count XXX alleges that the imposition of these conditions is an unfair practice because the consumer often cannot ascertain whether misrepresentations have occurred at the time of the property visit.

The ALJ upheld these allegations of unfairness contained in the complaint. He based his conclusions on two facts: (1) the requirement that purchasers declare no misrepresentations had occurred was not

⁷⁵ The guarantee provision read:

Horizon Corporation or applicable subsidiary guarantees to refund all money paid on your property if it was MISREPRESENTED to you at the time of sale. Requests for such refunds may be made only at the property upon completion of buyer's initial company-guided personal inspection tour within one year of the date of purchase by stating the details on the company's refund request form.

adequately explained to Horizon customers and (2) in any case, consumers were unable to execute a knowing waiver because they could not evaluate the investment quality of the property at the time of the property visit. (I.D.p. 267)

Complaint Count XXX also alleges that the guarantee is deceptive because the purchaser may not be able to ascertain whether the property has been misrepresented on a company-guided inspection tour.

The ALJ upheld this allegation, concluding that the guarantee "was presented in a vague manner creating the false implication that it was a money-back guarantee if the purchaser was dissatisfied with the property." (I.D.p. 267)

The Commission is unable to uphold the ALJ's findings that the property visit credit and the guarantee, operating together, were deceptive and unfair. The ALJ's conclusion that consumers understood they would only receive the credit in the form of a deduction at the tail end of their installment payments fatally undermines his findings of liability. Under these circumstances, consumers knew (or should have known) before they visited the land that if they wished a refund, they would never get the opportunity to receive a credit on the account balance because the refund would wipe out the account. Consumers therefore must have understood that the two provisions were mutually exclusive. This understanding removes any deception from Horizon's explanation of the operation of the two provisions.

The Commission recognizes that deceptive misrepresentations continued during company-guided inspection tours. (I.D. 67) These misrepresentations have been considered in our findings concerning Horizon's deceptive sales practices in general. However, we are unwilling to find that these misrepresentations rendered the property visit credit and guarantee *independently* deceptive or unfair in view of our conclusion that consumers understood the operation of the two provisions before they visited the land. [69]

2. Exchange Privilege

Horizon offered an exchange privilege to purchasers of its undeveloped lots, which permitted them to exchange their land for land located in other areas, including those where development had occurred, under certain circumstances.⁷⁶ No complaint count alleges

⁷⁶ A typical clause reads:

At any time prior to delivery of the Warranty Deed, the SELLER agrees to accept the above land in trade, applying the full principal paid, for any other available land, except land located within any designated building area, which is, at the time of exchange, equal to or greater than the original price of the traded property. In addition, upon commitment to buy or commence construction of his home within NINETY (90) DAYS and complete construction within ONE HUNDRED TWENTY (120) DAYS thereafter, PURCHASER

(Continued)

that the exchange privilege clause contained in some of Horizon's contract documents is either deceptive or unfair. Nevertheless, the ALJ found that the exchange privilege was used in "a deceptive and misleading manner", although he did not give any reasons for this conclusion. (I.D. p. 267) [70]

Respondent has argued that its use of the exchange privilege was not only nondeceptive and fair, but actually enhanced the value of Horizon's lots as homesites. Respondent essentially contends that the opportunity to exchange undeveloped lots for lots in developed areas assured that consumers could use their land as homesites when they wanted to. (RPF pp. 183-184; RAB 34-35) Respondent specifically disputes the ALJ's finding elsewhere in his opinion that the privilege has had no impact on the pace of building in Horizon's properties. The ALJ entered this finding because "it is evident that the exchange privilege cannot accommodate all the lot purchasers with a building site" and "Horizon's undeveloped lots were not sold as homesites, but as investments . . ." (I.D.p. 286)

Complaint counsel defend the ALJ's conclusion, contending that exchange areas in currently developed core areas cannot accommodate everyone and that so-called "satellite core areas" have never materialized. (C. Ans 24) Further, complaint counsel argue that because the exchange privilege is limited to owners of single-family lots, it cannot offer relief to many of the consumers affected by this proceeding. (C. Ans 33)

We must conclude that the parties have fought to a draw on this issue. We decline to uphold the ALJ's finding that the exchange privilege was used in a misleading manner. However, we also reject respondent's contention that the exchange privilege enhanced the investment value of its lots, both for the reasons stated by complaint counsel and because the privilege was limited to those who would commit themselves to starting construction of a home within 90 days of an exchange, and completing such construction within 120 days thereafter. Because of these limitations on consumers' exercise of the exchange privilege, we agree with the ALJ that the privilege did not materially enhance the investment value of Horizon land. [71]

V. HORIZON'S DEFENSES

Horizon asserts a number of defenses to bar findings of liability

may exchange one single-family residential lot for a similar size lot in any building exchange area within the same development, so long as one is available, without any increase in the purchase price of the land. The then current utility costs to the lot line and proportionate street improvement costs are to be paid for by the PURCHASER at the time construction is to commence, or shall be included in the cost of the house if purchased from the Company.

under Section 5. Respondent maintains that complaint counsel have failed in their burden of proof of establishing a violation of law. Respondent contends that it disclosed all material facts concerning its land through the dissemination of various documents to consumers, and that those disclosures eliminated any possible deception which might otherwise have occurred. Respondent next argues that it should not be held liable for the unauthorized statements of its sales representatives. Lastly, respondent asserts that this proceeding is barred by the doctrines of laches and equitable estoppel.

A. Burden of Proof

Commission Rule 3.51(b), 16 C.F.R. 3.51(b) requires that an initial decision be based upon a consideration of the record as a whole, and supported by reliable, probative, and substantial evidence. (See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)) Respondent contends that the ALJ ignored substantial record evidence in concluding that complaint counsel met its burden of establishing by a preponderance of the evidence that Horizon violated Section 5. (RAB 7-13)

On page 256 of his Initial Decision, the ALJ concluded that Horizon marketed its property as an excellent, risk-free investment. He goes on to state that "[i]n making this determination, consideration has been given to the total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed. See *Beneficial Corp. v. FTC*, 542 F.2d 611, 617-18 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977); *Continental Wax Corp. v. FTC*, 330 F.2d 475, 477 (2nd Cir. 1964); *National Bakers Services, Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 679 (2nd Cir. 1944)."

Respondent maintains that in evaluating the record, the ALJ failed to heed the requirement of *Universal Camera*, 340 U.S. at 448, that the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Horizon argues that certain findings of fact could not have been entered if the ALJ had actually considered the record as a whole. (See RAB 7-10) In its brief, Horizon asks that the Initial Decision be reversed on this ground. At oral argument, counsel for respondent commented that "[p]erhaps the Commission will have to look at the record as a whole. . . . I respectfully request the Commission do that. . . ." (Oral Argument, Tr. 16) [72]

The Commission has studied the whole record in this case. We find

that the record as a whole adequately supports most of the findings and conclusions entered by the ALJ.⁷⁷ In this opinion, the Commission has noted where it has modified the specific findings of fact entered by the ALJ. (See, e.g., Appendix A)⁷⁸ The Commission affirms the ALJ's conclusion that complaint counsel have met their burden of proof in this matter and we accordingly reject Horizon's defense.

B. Written Disclosure Documents

Horizon defends against this action by asserting that it disseminated to customers various documents, chiefly a federally required property report, which disclosed material information concerning the customer's purchase. Horizon argues that in reaching his conclusion of liability, the ALJ only considered evidence of verbal representations made to consumers. Respondent's appeal brief states that it "is patently unfair to reach conclusions on the net impression of a sales presentation unless a customer's recollection is placed in the context of the entire presentation—both written and oral." (RAB 14) [73]

Horizon's position assumes that Horizon itself gave equal weight to verbal and written representations in its sales program. However, if the Commission finds that Horizon's verbal presentation so overpowered its written disclosures to the extent of rendering the latter ineffective, then the Commission must reject Horizon's defense. (See *Raymond Lee Organization*, 92 F.T.C. 489 (1978)) Complaint Count XXII alleges that Horizon distributed its disclosure documents "under such circumstances that it is likely that many purchasers will not read such documents. . . ." Count XXII charges that Horizon's obtaining substantial financial commitments from consumers under these circumstances independently constitutes an unfair or deceptive act or practice. For the reasons below, the Commission rejects Horizon's defense and concurs in the ALJ's affirmance of complaint Count XXII. (I.D.pp. 270-272; see I.D. 77)

The Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C.

⁷⁷ Respondent objects to the weight the ALJ assigned to testimony of its witnesses, whom the ALJ deemed were less credible than complaint counsel's witnesses. (I.D.pp. 272-75) However, it is the ALJ, as trier of the facts, who has lived with the case, and who has had the opportunity to closely scrutinize witnesses' overall demeanor and to judge their credibility. Accordingly, absent a clear abuse of discretion, the Commission will not disturb on appeal the ALJ's conclusions as to credibility. (See *Lenox, Inc.*, 73 F.T.C. 578, 604 (1968), *aff'd*, 417 F.2d 126 (2d Cir. 1969)) The Commission finds no evidence of abuse of discretion in this case which would lead it to disturb the ALJ's conclusions concerning the credibility of Horizon's witnesses, except where specifically noted in our modifications of the ALJ's findings of fact. (See this opinion and Appendix A)

⁷⁸ The preponderance of the record evidence supports the Commission's finding that respondent marketed its properties as excellent, risk-free, short-term investments. This finding describes the net impression of respondent's marketing theme. When finding a specific net impression "the entire mosaic should be viewed rather than each tile separately." *FTC v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (2nd Cir. 1963).

1701-1720 (1979), requires land sales companies to deliver to each of its customers a federal property report, intended to disclose material information. Although ILSFDA contains no instruction detailing methods of delivering the property report, the Office of Interstate Land Sales Registration (OILSR), which is charged with administering ILSFDA, has promulgated the following regulation:

. . . [T]he following practices shall be deemed to be a violation of the Act.

(b) Giving the property report to a purchaser along with other materials when this is done in such a manner as to conceal the property report from the purchaser. 24 C.F.R. 1715.25(b) (1980).

The record evidence reveals that sales representatives treated the property reports in three different ways during sales presentations: either the reports were given a cursory examination, or following the signing of a contract they were left with the customer with their importance unemphasized, or else they were used during the sales presentation to indicate federal government approval of Horizon properties. (See generally, I.D. 77) CX 157 is representative of a number of training manuals introduced into evidence. The manual instructs the representative to remove the property report from the representative's briefcase, at an appropriate moment in the presentation, and to briefly inform the prospect of the type of information the report contains. The representative is next instructed to "replace sample in briefcase." [74](CX 157f) Although the property report would then be left with the customer if he or she made a purchase, the customer rarely appreciated the importance of the report's information due to Horizon's overwhelming verbal assurances. Sales representatives testified that consumers were not encouraged to read property reports during a sales presentation, because if customers were reading reports they were not listening to the sales pitch. (See, e.g., Doyle, Tr. 4627-28; Dmitry, Tr. 16108) Consumers testified that due to the nature of the presentations they did not realize the importance of the property reports, and they did not read them. (I.D. 77) The ALJ concluded that the "significance of the federal property reports was not communicated to customers, that actual delivery of the reports was designed to gloss over its importance as a disclosure instrument, and that customers did not read the reports." (I.D.p. 271)⁷⁹

In addition, one former sales representative testified that he was

⁷⁹ The ALJ, at I.D.pp. 270-71, reviewed Horizon's other supposed disclosure documents, including Sydney Nelson's "Principals of Land Ownership" (see, *supra*, discussion at 16-17) and statements contained in certain contract documents and on Horizon's TBA maps. Like the property reports, the record supports the conclusion that

(Continued)

trained to represent that the property report "actually was an endorsement by the federal government. An endorsement . . . that what we say in there has been checked and looked at and approved by the federal government as being true as stated." (Hillman, Tr. 4740-41)

In upholding the ALJ's conclusion that the federal property report was delivered to purchasers in a manner calculated to conceal the importance of the disclosures it contained, the Commission does not address the question of whether Horizon complied with OILSR regulations. As we note, in our discussion of jurisdiction, *infra*, OILSR and the Commission share complementary jurisdiction over marketing practices in the land sales industry. It is the Commission's function to appraise the net impression of respondent's marketing scheme, and to determine the effectiveness, in a specific factual setting, of required or voluntary disclosures. [75]

In the context of Horizon's numerous verbal misrepresentations, highlighted throughout this opinion, written disclosures could not easily have overcome consumers' net impression of excellent, risk-free, short-term investments. We find that the manner in which Horizon delivered its disclosure documents was designed to obscure their importance, and thus rendered the documents ineffective as disclosure instruments. Therefore, we reject Horizon's defense that such documents cured any deception which might have occurred. In addition, we affirm complaint Count XXII to the extent that Horizon used the property reports to indicate federal government approval of its properties, and we hold that such a practice is deceptive under Section 5.

C. Representations of Sales Representatives

Horizon argues that it is not liable for any unfair or deceptive acts or practices of its sales force because: (1) Horizon was generally unaware of such acts or practices; (2) when Horizon became aware of such acts or practices the sales representative was either deprived of his or her commission or was fired; and (3) Horizon's sales representatives were not clothed with apparent authority. (RAB 54)

As our discussion indicates, *supra*, pages 17-18, the Commission is unconvinced that Horizon management was unaware of the manner in which its sales force marketed its property. In addition, the Commission agrees with the ALJ's reasoning that dismissal of a representative who violated company policy does not relieve Horizon

these documents were delivered in such a manner as to distract the consumer's attention from the disclosures they contained.

of liability. (See I.D.p. 290; see, also, *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13 (2d. Cir. 1954)). Lastly, we agree with the ALJ that Horizon "clothed its sales representatives with apparent authority in the form of contracts, TBA maps, unit maps, property reports, films, [and] presentation manuals . . . , [and as such Horizon] is responsible for their sales representations even if unauthorized. *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957)." (I.D.p. 290)

D. Laches and Equitable Estoppel.

The Commission affirms the ALJ's conclusion that neither laches nor equitable estoppel is a defense to an action brought by the government in the public interest. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-9 (1917); *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 623-24 (1953); *United States v. Firestone Tire & Rubber Co.*, 374 F. Supp. 431, 433 (N.D. Ohio 1974). [76]

VI. JURISDICTION

Respondent contends that the Commission lacks jurisdiction over this matter because Congress gave the Department of Housing and Urban Development (HUD) exclusive jurisdiction over every facet of the land sales industry when it enacted the Interstate Land Sales and Full Disclosure Act (ILSFDA), 15 U.S.C. 1701 *et seq.* (1979). Respondent argues that the pervasiveness of the Act and its implementing regulations, 24 C.F.R. 1700 *et seq.* (1979), and the fact that those laws grant HUD power over fraudulent sales practices, indicate that Congress intended HUD's Office of Interstate Land Sales Regulation (OILSR) to be the exclusive regulator of interstate land sales. Respondent further argues that regulation and review of land sales practices by both OILSR and the FTC would produce conflicting standards of conduct for the sales industry. Finally, it contends that the Initial Decision usurps OILSR jurisdiction by finding that compliance with OILSR regulations constitutes an unfair business practice. (RAB 51)

We reject respondent's arguments for the following reasons. First, ILSFDA does not expressly grant OILSR exclusive jurisdiction over fraudulent land transactions. Second, neither the language of the statute nor the legislative history supports implied repeal of Section 5 of the FTC Act with respect to interstate land sales practices. Third, regulation under ILSFDA and the FTC Act do not pose the threat of conflicting regulatory standards. Finally, we conclude that

the FTC and OILSR serve complementary but not coterminous regulatory roles.

To support its contention that Congress' enactment of ILSFDA granted exclusive jurisdiction over unfair and deceptive practices in the sale of land to OILSR, respondent must demonstrate that Commission jurisdiction under Section 5 has been either expressly or impliedly repealed. *See generally, United States v. National Association of Securities Dealers, Inc. (NASD)*, 422 U.S. 694 (1975).

Respondent has failed to identify any express grant of exclusive jurisdiction in ILSFDA. Our own review of the statute indicates that no such express repeal exists. Accordingly, respondent must rely on the doctrine of implied repeal.

The Supreme Court has long held that it is "a cardinal principal of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *see also, Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Gordon v. New York Stock Exchange*, [77]422 U.S. 659, 682 (1975). Therefore, the proponent carries a heavy burden to show that it was Congress' "clear and manifest" intention that the statute in question was to be repealed. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). In determining whether a statute has been impliedly repealed a court will first scrutinize the plain language of the allegedly preemptive statute, and then, if necessary, look to the legislative history. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184-185 (1978). If a Congressional intention to repeal is not evident from either of these sources, the two statutes in question must be in irreconcilable conflict, or the later act must have been "clearly intended as a substitute" before a court will apply the doctrine of implied repeal. *Posadas*, 296 U.S. at 503; *see also, NASD*, 422 U.S. at 719-20; thus, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see, also, Gordon*, 422 U.S. at 685 (1975).

On its face, ILSFDA contains no language or provisions that could be interpreted as an expression of Congressional intent to grant OILSR exclusive jurisdiction over interstate land sales practices or to limit other agencies' authority in that area. On the contrary, Section 1713 of ILSFDA explicitly provides that alternative avenues of legal recourse are retained despite the passage of the special legislation directed at land sales transactions. That section states that "[t]he rights and remedies provided by this chapter shall be *in addition to any and all* rights and remedies that may exist at law or in equity." (emphasis added) 15 U.S.C. 1713 (1979). An example of a

legal remedy not available under ILSFDA is the Commission's broad redress authority under Section 19 of the FTC Act, 15 U.S.C. 57b (1976).

The fact that some of ILSFDA's provisions give OILSR review authority which is similar to the authority exercised by the FTC under Section 5 cannot be read as an expression of Congressional intent to grant exclusive jurisdiction. The FTC shares authority over various advertising and sales practices with several other agencies including the Consumer Product Safety Commission, the Food and Drug Administration and the Justice Department. Yet, despite these instances of overlapping agency authority, the FTC can be and is considered the agency with the foremost enforcement authority and expertise in the area of unfair and deceptive trade practices.⁸⁰ [78]

The legislative history of ILSFDA indicates that Congress was aware of the involvement of other agencies, including the FTC, in reviewing interstate land sales practices at the time the Act was adopted and during the course of its many amendments but did not choose to include an express or implied exclusivity provision in the Act.⁸¹ The legislative history further indicates that Congress anticipated a system of dual jurisdiction over the land sales industry. The most explicit statements of this intention are contained in the 1978 House and Senate hearings on proposed amendments to ILSFDA.

During the 1978 hearings of the House Subcommittee on Housing and Community Development, the dual jurisdiction over deceptive and unfair advertising between the FTC and OILSR was directly discussed. Various passages of testimony reveal that in 1978 the Committee members assumed the existence of concurrent jurisdiction. Typical of these remarks is a question by the Subcommittee Chairman to an FTC representative:

Chairman Ashley. Mr. Steinman, since most consumer complaints regarding land

⁸⁰ See, e.g., *FTC v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972).

⁸¹ See, e.g., *Interstate Land Sales Full Disclosure Act: Hearings on S. 2672 Before A Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2nd Sess. 307-308 (1966) (Letter of FTC Chairman Paul Rand Dixon); *Oversight of the Interstate Land Sales Full Disclosure Act: Hearings on H.R. 10999 Before the Subcomm. on General Oversight and Renegotiation of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess. 350 (1978) (testimony of Bureau of Consumer Protection, FTC); *The Interstate Land Sales Full Disclosure Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development, of the House Comm. on Banking Finance and Urban Affairs*, 95th Cong., 2nd Sess. 566-567 (1978) (testimony of Bureau of Consumer Protection, FTC); *Interstate Land Sales Program: Hearings on S. 2716 Before the Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 2nd Sess. 38-39 (1978).

Congress has included exclusivity provisions when it intended to limit jurisdiction over a particular subject matter to one or a few agencies. See, e.g., *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 n. 27 (1962).

Such provisions have been included by Congress when it was aware of and wanted to avoid the potential for conflict between agencies having dual jurisdiction. See, e.g., *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 130, (1974); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178-188 (1978).

sales appear to involve deceptive marketing practices, would it make sense to consolidate enforcement for fraud in the FTC *instead of maintaining the dual jurisdiction involving both the FTC and HUD?* (emphasis added) *The Interstate Land Sales Full Disclosure [79] Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 2nd Sess. 669 (1978).*⁸²

The fact that Congress envisioned a system of concurrent jurisdiction is most clearly stated in the House Report that accompanied the 1979 amendments.⁸³ When discussing the new provision for a biennial report from OILSR to Congress, the House Committee stated:

Often improved industry practices, unanticipated trends in consumer problems and new remedies devised by other agencies who also review the land sales industry will suggest needed amendments to existing law. (emphasis added) H.R. Rep. No. 96-154, 96th Cong., 1st Sess. 40-41 reprinted in [1979] U.S. Code Cong. & Ad. News 2346, 2356.

Therefore, we conclude that Congress not only was aware of FTC activity in the land sales area, including the instant suit against respondent,⁸⁴ but also that it intended a system of overlapping jurisdiction.

Respondent argues that concurrent jurisdiction will subject land developers to conflicting regulatory standards, citing as an example the ALJ's finding that Horizon complied with OILSR regulations and yet violated Section 5. (RAB 51) However, [80] as our discussion above indicates, the Commission finds that although Horizon disclosed in its property reports the information required by OILSR, these disclosures did not ameliorate the deceptive misrepresentations through which it marketed its land. Compliance with OILSR's requirements cannot be construed as immunizing a company's overall sales techniques from scrutiny under Section 5. The OILSR regulations are meant to be preventive safeguards against improper sales tactics. Situations will exist, as in the instant case, where the overall sales plan is such that consumer injury results despite technical compliance with OILSR requirements. Thus, the issue is not whether compliance with an OILSR regulation constitutes an unfair business practice but rather whether respondent's sales

⁸² See, also, *The Interstate Land Sales Full Disclosure Act Amendments: Hearings on H.R. 11265 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 2nd Sess., 112-113 (1978)* (remarks of Chairman Ashley); *Id.* at 73 (remarks of Rep. Brown); *Id.* at 55-56, 73 (remarks of Rep. Minish); *Id.* at 550 (testimony of Patricia Worthy, Administrator of OILSR); *Id.* at 73 (remarks of Rep. Brown); *Id.* at 112 (testimony of Patricia Hynes, Assistant U.S. Attorney, Southern District of New York).

⁸³ The House Report was adopted by the Conference Committee. [1979] U.S. Code Cong. & AD. News 2346, 2346.

⁸⁴ *Interstate Land Sales Program: Hearings on S. 2716 Before the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 2nd Sess. 35 (1978)* (testimony of the Bureau of Consumer Protection, FTC).

practices, taken as a whole, have negated the preventive utility of technical compliance with OILSR requirements.⁸⁵

We conclude that regulation of fraudulent land sales practices under both ILSFDA and Section 5 is a complementary but not coterminous process. Review of land transactions is complementary because the ultimate regulatory goal—protection of consumers from fraudulent business practices—is the same under both statutes. Yet, the scope of each agency's review authority and its ability to rectify abusive practices are vastly different. Therefore, repeal of Section 5 as to the land sales industry is not necessary for ILSFDA to work as intended. *Gordon*, 422 U.S. at 685; *Silver*, 373 U.S. at 357.

For the foregoing reasons we reject respondent's contention that the Commission does not have jurisdiction over the instant case. [81]

VII. ORDER TO CEASE AND DESIST

The order to cease and desist entered by the Commission in this case is substantially similar to the order recommended by the parties. The Commission believes that this order, taken as a whole, adequately addresses the violations of Section 5 committed by Horizon and provides a basis for resolving this matter without the delay and uncertainty of entry of a cease and desist order, followed by appellate review and a separate Section 19 redress action in federal district court.⁸⁶ However, the Commission will not necessarily view this remedial scheme as a model for relief in future land sales cases.

The order requires payment of \$14.5 million in redress over a six year period to past purchasers of Horizon land. It also requires Horizon to ensure that it, or some other entity, spends \$45 million over a 20-year period for improvements at any of the six Horizon properties which were the subject of this proceeding. The order enjoins Horizon from committing unfair or deceptive acts or practices and contains affirmative requirements designed to eliminate further violations of Section 5. The prospective relief contained in the order differs depending on whether the land sold is "developed" or "undeveloped", as those terms are defined in the order's preamble; sales of "developed" land (Sections I-III) are treated less

⁸⁵ As we mentioned above, OILSR recognizes the possibility of this kind of situation:
... (The following practices shall be deemed to be a violation of the Act.

(b) Giving the property report to a purchaser along with other materials when this is done in such a manner as to conceal the property report from the purchaser. 24 C.F.R. 1715.25(b) (1980).

⁸⁶ Additional litigation in pursuit of further monetary relief for purchasers of Horizon land would apparently be fruitless in light of the limited assets available to respondent. (See supplemental briefs filed by the parties on May 8, 1981.)

stringently than sales of "undeveloped" land (Sections IV-VI). The Commission believes that this different treatment is justified by the record, which primarily concerned sales of undeveloped land.

APPENDIX A*

MODIFICATIONS OF THE ADMINISTRATIVE LAW JUDGE'S INITIAL
DECISION, IN THE MATTER OF HORIZON CORPORATION,
DOCKET NO. 9017

Note: These modifications are in addition to those noted in the Commission's opinion.

| <u>Page</u> | <u>Line</u> | <u>Addition or Deletion</u> |
|-------------|-------------|--|
| 493 | 1 | Add footnote "None of the findings of fact 1 to 23 applies to the time period after October 10, 1978, unless otherwise indicated herein." |
| 493 | 22 | Change to read: "Horizon as of the date the record in this proceeding closed and for some time past had been engaged . . ." |
| 495 | 18 | Delete: "the balance has been or will become available for sale" and insert: "it is uncertain whether all or any part of the balance will become available for sale to consumers." |
| 502 | 34 | Insert footnote to read: "TBA maps* . . ." Footnote placed at bottom of page 502 should read: "** A TBA map depicted an entire property and the surrounding area and included certain information relating thereto." |
| 504 | 9 | Change period to comma at the end of the sentence and add the following phrase: "but were challenged primarily on the grounds that they contained deceptive and misleading statements and representations." |
| 504 | 37 | Delete the word "requirements" and place in lieu thereof the word guidelines. |
| 504 | 40 | Delete the sentence beginning, "The evidence of record" and add the following sentence in lieu thereof: "OILSR never brought any proceeding seeking to enforce those guidelines against Horizon." |
| 505 | 23 | Delete the words "recent years" and insert in lieu thereof, "1973 and 1974" |
| 506 | 39 | Delete the phrase "and early 70's" |

A number of typographical errors contained herein were corrected during the editing of the document and thus, may not be found within the text as indicated.

- 507 2 Before the sentence beginning "Invitations . . ." insert this sentence: "This sales method was deemphasized and ultimately terminated in the early 70's."
- 507 & 508 39-41 & 1 Delete this sentence and citations thereto: "While . . . 16543-44)."
- 508 18-20 Delete this sentence beginning: "Jing Jo Yu . . . closing rooms (Tr. 6353-60)."
- 508 18 After "16480" insert from lines 20-22: "; see testimony of Elsie Colon . . ." plus citations thereto
- 512 5 & 6 Delete "that permeated"
- 512 5 Insert "in" after "theme"
- 512 7 Delete "promise" and insert "representation" in lieu thereof
- 512 8 Delete "constant"
- 512 28 After "Tr. 1918" insert "; see also Tr. 1922-23"
- 512 30-38 Delete these lines
- 513 1 & 2 Delete these lines
- 515 21 Change "tract" to "track"
- 517 11 Insert "in late 1969" between the words "used" and "in"
- 518 9 Change "would" to "could"
- 521 23 Insert "in the late 1960's and early 1970's" between "presentations" and "used"
- 523 29 Delete "numerous" and insert "some" in lieu thereof
- 524 13 & 14 Delete both of these lines and insert in lieu thereof: "One sales representative testified that he was given the following party close for use at the conclusion of the dinner talk:"
- 524 38-40 Delete "These . . . investment." and insert "(CX 505-15)" after "properties" on line 38.
- 525 9 Insert "some of" between the words "by" and "Horizon"
- 525 10 Delete the words "Land is" and insert in lieu thereof "These salesmen"
- 525 11 Insert "land" between "represented" and "to"
- 525 12 Insert "by them" between "represented" and "as".
- 526 21 Insert "During the late 1960's and early 1970's many" before "sales"
- 527 19 Insert "some" between "which" and "sales"

- 527 20 Delete the "s" on "representatives"
- 527 27 Delete the last "s" in "representatives"
- 527 34 Delete "Horizon's internal surveys of its sales offices revealed" and add "There were" in lieu thereof
- 528 9-14 Delete the sentences beginning "One sales representative told prospects. . . . There were no figures. (Tr. 5970)."
- 528 23 Add "s" to make "value" plural
- 528 23-24 Delete "was to raise the inference" and insert in lieu thereof "inferred"
- 528 37 Add new sentence: "The FHA charts were deemphasized in 1972 and eliminated in 1974."
- 528 38 Delete "Horizon's internal survey of its sales offices revealed" and add "There were" in lieu thereof
- 529 25 Delete the word "entire"
- 530 33 Delete the word "greatly"
- 530 34 Delete the word "grossly"
- 531 2 Delete the word "percentage" and insert in lieu thereof "range"
- 531 2 Delete the word "would" and insert in lieu thereof "might"
- 531 12 Delete "would assure" and insert in lieu thereof "should lead to"
- 531 20 Insert "some" before the word "sales"
- 531 20 & 21 Insert the word "approximate" between "the" and "time"
- 531 22-26 Delete five lines beginning "Bruce . . . representatives:"
- 531 22 Insert after sentence ending on line 22: "These representatives did not present."
- 531 27 Change "The" to the lower case "the"
- 531 27 Delete "is not presented to the customer"
- 531 29 Delete "But"
- 531 29 Begin sentence: "Rather, . . ."
- 531 29 Delete "it is" and insert "they" in lieu thereof
- 531 29 Insert "development" after "with"
- 531 29 Delete "assured"

- 531 30 Change "the" to "them", add period after "them" and delete "representative (CX 929E)."
- 531 33 Add an "s" to "reveal" and delete "beyond any doubt"
- 531 38 Insert "Some" before "Training"
- 532 5 Begin paragraph with: "During 1970-1971 such instructions or directions were included in the training manuals. In addition to the written instructions, there were oral restrictions and limitations given to sales representatives. Such instructions did not eliminate the investment misrepresentations."
- 532 28 Change "would" to "could"
- 532 34 Delete the word "thereafter" and insert "1971" in lieu thereof
- 534 37 Correct the misspelling of "antedates"
- 538 23-28 Delete the whole paragraph and insert in its place: "Some sales representatives used the 'Principles' in their presentations. Other representatives did not use them. They often were not read or understood by customers."
- 540 13 Delete the word "clearly"
- 540 13 Insert the word "some" between the words "that" and "sales"
- 543 3-9 Delete whole paragraph
- 543 & 544 39-6 Delete lines 39-41 and 1-6.
- 544 17 Delete the words "very very"
- 544 18 Delete the words "very much".
- 545 33-35 Delete the line: "Horizon's 'self-evaluative' documents, which report on surveys of sales offices which Horizon undertook beginning in 1973, revealed that"
- 545 35 Begin paragraph with "Representations . . ."
- 545 35 Delete the word "routinely"
- 545 37 & 38 Delete the sentence: "These representations are set out in detail in findings 91-100, see especially CX 927L-M,O,"
- 545 40 & 41 Delete: "These internal survey reports reveal that"
- 545 37 & 38 Insert and place in parentheses citations after "mentioned", line 37
- 545 41 Insert the word "some" before the word "older"
- 546 1 Delete: "Findings 91-100; see especially"
- 546 2 Insert hyphen in "CX 927G-I"

Opinion

- 546 2 Add the sentence: "Some sales representatives used time periods as short as three to five years before the land could be resold at a profit. The shortest time periods were for lots close to the development areas (CX 927L-M)."
- 546 3 Delete: "The survey documents reveal that it was routine"
- 546 3 Insert: "Another" before "practice" and "was" after "practice"
- 546 6 Delete the word "much"
- 546 7 Delete "(Findings 91-100; especially)"
- 546 9-14 Delete the whole paragraph
- 546 30 & 31 Delete: "Horizon's internal surveys of its sales offices revealed that"
- 546 31 Capitalize "The"
- 546 32 Delete "serious"
- 546 33 Delete "(Finding 93; see especially)"
- 546 34-36 Delete the whole paragraph
- 546 38 Insert the sentence: "Some, but not all, of these customers did receive refunds" after "misrepresentations"
- 546 38-42 Delete lines 38-42 beginning with "On April 12, 1972"
- 547 1-12 Delete these lines
- 547 14 Insert "some" after "that"
- 548 23 Change "would" to "could"
- 548 24 Insert the sentence: "Other Waterwood customers purchased on the basis of profit and development potential in periods up to ten years (CX 930 C, G, 932F)."
- 549 4 Change "would" to "could"
- 549 25 Delete "and utilities would be provided"
- 552 30-35 Delete last full paragraph at bottom of page
- 554 4-10 Delete these lines
- 555 3 Add the sentence: "A limited resale program was instituted in Horizon City in 1975 for deeded lots and in Waterwood in 1976 for deeded and undeeded lots."

- 556 5-8 Delete "J.D. Oliver and A.R. Oliver were informed by the Horizon sales representative that the Waterwood lots that they purchased would be resold by the sales representative or by Horizon. (Tr. 976-78, 1037-38, 1090-91)."
- 557 2 Add, within the parenthetical citation: "; see also, CX 951G, H)"
- 557 18 Insert after "Tr. 4902": "; see also CX 927N)."
- 557 31-41 Delete these lines
- 558 42 Delete text beginning "Mr. Gothard."
- 559 1-5 Delete text beginning "by Bruce Lehmann" to "(Tr. 6100)."
- 560 4 Delete "-82)" and insert "-86, 16288)."
- 560 5-15 Delete this paragraph
- 560 16-20 Delete these lines, but keep sentence beginning "Evelyn Tracy . . ."
- 560 24 Delete: "Horizon's internal surveys of its sales offices found" and insert "In" in lieu thereof, before "several"
- 560 25 Delete the word "where"
- 560 27 Delete the word "outright"
- 560 30 Insert "; see also Tr. 16673, 16691-696, 16676, 16679" after "950E, G"
- 560 30 Add sentence: "Customers believed that Horizon's price for its land reflected a fair local real estate market price for which they might resell their land (CX 946H)."
- 562 16 Add after the last sentence: "Statements approved by the company were not considered a basis for refunds"
- 564 21 & 22 Delete "apparently as late as 1977" and add citations in line 22 to citations in line 21
- 564 23 After "Commission's" insert "investigation began"
- 564 23 Delete "complaint herein issued"
- 567 17 Insert "some" in lieu of "Horizon's internal surveys of its sales offices found evidence that"
- 567 26 Add ", CX 951G, H" after "Tr. 16478-80"
- 567 29 Insert "some" before "customers"
- 567 33 Insert "some" before "customers"
- 568 23 Add the word "not" between the words "that" and "all" and delete the word "not" between "were" and "staked."

- 568 29 After the word "he", insert the word "scheduled" and delete the word "controlled"
- 568 30 Add "s" to "tour" and delete the word "schedules"
- 573 29-32 Delete these lines
- 573 33-35 Delete these lines
- 575 13-17 Delete these lines
- 575 25 Insert the sentence: "It was the customer's choice to visit by jeep or by airplane" before the sentence beginning "This sale . . ."
- 577 36 End paragraph by inserting sentence: "She did not receive a refund because the sales representative did not believe that a misrepresentation had been made."
- 579 7 & 8 Delete sentence beginning "Horizon headquarters"
- 579 8 Delete "In April, 1973"
- 579 8 Add "During 1973 and 1974" before "Horizon mailed"
- 579 25-27 Delete: "The general practice, however, was not to give customers the appreciated value on their trade-ins (Tr. 3941, 4612-13)."
- 580 20 Insert "some" before the word "sales" and change the upper case "S" to lower case.
- 580 24 Delete this line
- 580 25 Capitalize the "R" in "reloading"; delete "the" after "in" and insert "some" in lieu thereof. Change the semi-colon after "offices" to a comma; delete "reloading" and insert "where it" in lieu thereof
- 580 27 Delete "These surveys showed that" and insert "some" in lieu thereof
- 580 31 Insert "C," between "929" and "D"
- 580 31 & 32 Delete: "The surveys also revealed" and insert "In some"; also delete "where"
- 580 36 Start sentence with "There were" and delete "The surveys"; delete "noted"
- 580 40 Insert "Some" before "sales"
- 581 38 At the end of line 38, add: "The University later conducted a few classes in the Rio Community shopping center offices."
- 582 16 & 17 Delete the phrase: ", employed by Horizon from 1968 until 1974 (Tr. 1904)" and after "trained" insert "in 1968"
- 582 29 Insert "Some" before the word "sales"

- 582 36 Insert "Some" before the word "customers"
- 583 1 Change "would" to "could"
- 583 30-41 Delete these lines
- 584 1 Delete this line
- 584 29 Change "would" to "could"
- 584 40 Insert "possible" in front of "three-way"
- 585 33-35 Delete these lines
- 585 36-43 Delete these lines
- 586 12 & 13 Delete: "Horizon's internal surveys of its sales offices reveal extensive" and insert "There was"
- 587 3-10 Delete first full paragraph
- 587 38 & 39 Delete the last sentence: "There is other evidence of pressure on customers to purchase immediately."
- 589 9 Delete "each" and insert "one" in lieu thereof
- 589 24 & 25 Delete "(Tr. 4946)"
- 589 26 & 27 Delete these lines and insert ellipsis before "being sold"
- 589 28 Insert "4946," before "4966"
- 590 18 Add new paragraph between paragraph ending on line 18 and paragraph beginning on line 19: "Numerous lots were typically available for sale in a particular unit or subdivision. One or more lots in a given unit or subdivision would generally be allocated to a particular salesman or to several salesmen. Allocations of unsold lots were occasionally shifted among salesmen or from one sales office to another. The sales representative called Horizon before finalizing a sale to find out whether a given lot had already been sold and to remove the lot from inventory if it were sold."
- 590 19 After "period" insert "in either 1970 or 1971"
- 590 32 Add this sentence: "No other witness testified to the use of this preplanned call approach."
- 591-592 38-2 Delete paragraph beginning "Joan Wild . . ."
- 592 31-36 Delete the first two sentences from this paragraph
- 593 16 Insert "There were" in place of "Horizon's internal surveys of its sales offices revealed"
- 595 19-28 Delete these lines
- 595 & 596 29-43 & 1-2 Delete these lines except for citations; insert "; see also Tr. 16430, 16506, 2111-14, 2126, 2169, 4687, 4733-35)." after "5053-54" at end of line 18

Opinion

- 596 5 Insert "2011-12, 2113-14" after "Tr."
- 596 29-42 Delete these lines
- 597 1-2 Delete these lines
- 603 22 Insert "many" in place of "almost all"
- 604 4 Insert "some salesmen" in place of "it is"
- 604 4 Insert "or mainly" after "only"
- 604 5 Insert "Other sales representatives indicated that the Southeast was one of El Paso's major growth directions."
- 611 23 Delete "sales representatives and"
- 613 10-16 Delete this paragraph
- 617 31 Insert "offered rebuttal evidence" in place of "employees testified"
- 618 4 Insert after "Tr.": "915, 1503,"
- 618 7-37 Last sentence of first full paragraph and rest of page should be deleted
- 619 1-2 Delete these lines
- 619 3 First full paragraph should start "Many customers testified"
- 619 3 Delete "all"
- 635 16 Change "Wesley Roark" to "Wayne Roach"
- 637 12 Delete "grossly"
- 637 13-14 Delete "to continue" and add comma after "fund"
- 637 14 Add the phrase after "fund": "unless such fact is disclosed clearly and conspicuously"
- 640 31 Last paragraph, insert "some" after "that"
- 641 11-14 Delete first sentence
- 641 22-24 Delete sentence starting with "Joan Wild", including citations
- 641 33-43 Delete these lines
- 642 19-25 Delete this paragraph
- 644 7-9 Delete this paragraph
- 644 33 Insert "all" before "purchasers"
- 644 34 Insert "all" before "customers"
- 644 35 Delete "they" and insert "some" before "were"

- 644 41 Delete words "which can be used" and insert in lieu thereof: "which has no significant impediments, such as easements, to the use of the entire lot"
- 645 2-5 Delete these lines, starting with "There is"
- 645 6 Delete: "There is no record evidence that"; and insert the words "failed to inform some" after "Horizon"; delete "informed any"
- 645 7 "Customer" should be plural
- 650 19 Add this citation at the end of the first full paragraph: "(See also Tr. 3519-21, 3729-30, 1291-93.)"
- 650 28-39 Delete these lines, beginning with "Mr. Rosenthal"
- 651 8 Delete heading
- 651 9-40 Delete these lines
- 652-665 Delete these pages
- 666 1-18 Delete these lines
- 671 19 & 20 Delete sentence starting "He noted" and ending with "(Tr. 6690-93)"
- 673 23-30 Delete these last eight lines starting with "This understanding"
- 673 23 Add the sentences: "The contractual exchange privilege for many lots expired when the lots were deeded to the customer. Horizon voluntarily honored some exchange requests after deeding them."
- 700 27 Add prefix "dis" to "similar"
- 703 5-7 Delete the words: "described the Horizon communities as 'bastard' cases because Horizon has shifted the financial burden of its developments to the lot purchasers (Tr. 16032-34). He"
- 706 19 Add: "The evidence on this contention was inconclusive."
- 719 7-11 Delete sentence beginning "However Horizon"
- 721 35 At the end of the paragraph add: "Some customers who forfeited made unsuccessful efforts to obtain refunds (e.g., John Gothard, Tr. 6097-6100)."
- 723 13 Delete "Available evidence indicates that Horizon had"; capitalize "No" and after "public" (line-15) insert "were offered into evidence"
- 723 28 Delete "there were" and insert "he had seen"
- 723 37 Delete heading
- 723 38-41 Delete these lines

| | | |
|---------|-------|---|
| 724-725 | | Delete these pages |
| 726 | 1-27 | Delete these lines |
| 726 | 29 | Before "Horizon's" insert "Many of" |
| 726 | 29 | Delete the word "all" in the first line of finding 136 |
| 726 | 31 | Delete "they" and insert "These lots" in lieu thereof |
| 727 | 8 | Delete "Leonard Steele testified that" |
| 727 | 9 | Begin the sentence with "Water" |
| 727 | 10 | Insert "ground" before "water" |
| 727 | 11-14 | Delete the sentence starting with "This will require" including citations |
| 727 | 14 | Add at end of the paragraph the sentences: "Therefore, it was never part of the development plan to use individual wells. Rather, the plan called for the use of company wells for which adequate fresh water existed as of the date of the hearing." |
| 727 | 18-20 | Delete the sentence after "CX, 10M" beginning with "This" and ending with "(Finding 85-86)." |
| 728 | 14 | Before "Horizon City" insert the words, "the most remote" |
| 728 | 35-37 | Delete the phrase, "but no money has been escrowed to assure completion of the roads and"; capitalize "There" to begin a new sentence and add this phrase after "roads": "but they have been maintained to date" |
| 728 | 41 | Add this paragraph after "(CX-10K)" "The cost of development and of assessment were not adequately disclosed to some customers (CX 932F; 950J)." |
| 729 | 9 | Delete "Average price per acre \$53.78" |
| 730 | 4 | Delete the zero in the third column |
| 730 | 9 | Delete "\$133.45" in the third column |
| 730 | 29 | Delete the phrase "Average price per acre \$148.00" |

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel for respondents and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. The Commission, for the reasons stated in the accompanying Opinion, has granted each appeal in part and denied each in part. Therefore, *It is ordered*, That the initial decision of the administrative law

judge be adopted as the Findings of Fact and Conclusions of Law of the Commission except as otherwise inconsistent with the attached opinion (including Appendix A).

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist be entered:

ORDER

PREAMBLE

1. For purposes of this Order the following definitions shall apply:

Horizon Corporation or *respondent* shall mean the corporate respondent, its successors and assigns, its officers, directors, agents, representatives and employees, directly or through any corporate subsidiary, division, or other device.

Purchase price and *cash price* shall be defined as cash price is defined in the Truth-in-Lending Act's implementing Regulation Z (12 C.F.R. 226.2(n)).

Lots or *land* shall include all subdivided parcels of land sold or offered for sale by respondent.

Subdivision shall mean any land (located in any state) which is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale as part of a common promotional plan, such as the plan used by respondent in marketing the properties involved in this proceeding. One indicator of a common promotional plan is the use of standard form contracts in the context of large scale merchandising of small lots to persons who typically do not see the land at the time of purchase. *Provided, however*, That, *lots* or *land* shall not include: [2]

a. The offer or sale of lots in a subdivision containing fewer than twenty-five lots.

b. The offer or sale of any lot upon which a residential or commercial structure is located.

c. The offer or sale of any lot together with or under a contract with respondent or a builder to construct a house or other building thereon within twenty-four (24) months.

d. The offer or sale of lots for which the total purchase price in any single transaction is more than \$50,000.00, or the cumulative size of the lot or lots sold in a single transaction is 100 acres or more.

e. The offer or sale of any lot or parcel to any person, partnership or corporation not affiliated with respondent where the land is not acquired for any personal, family or household purpose. *Personal, family or household purpose* shall include investments by individual consumers.

2. As used in this Order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting directly or by implication, and by any manner or means. [3]

3. Sections IV, V and VI of this Order shall not apply to the sale and offer of sale by respondent of the following types of lots:

a. All lots which at the time of sale are accessible by paved road and to which electric, water and sewer lines have been installed to the lot line.

b. All lots which at the time of sale are accessible by paved road and to which electric and water lines have been installed to the lot line, and where a septic tank can be installed at a cost not to exceed the normal installation cost ordinary to the locale in which the lot is located and where such a septic tank is permitted by laws or ordinances in effect as of the date of sale.

c. All lots for which Horizon or any other bona fide entity is obligated by contract, covenant, indenture, charter, statute or ordinance to provide, or has provided, paved access, and electric, water and sewer lines to the lot line.

d. All lots to which access over maintained roads and electric lines to the lot line are already in place or are the obligation of Horizon or any other entity, and water and sewage disposal are available from a central water system or a well and septic tank at costs not to exceed the normal installation costs ordinary to the locale in which the lot is located, [4]and where such well and septic tank are permitted by law or ordinances in effect as of the date of sale.

e. All lots which would otherwise qualify under paragraphs a, b, c, or d, above, except that an electric line is not installed to the lot line and no bona fide entity is obligated to provide an electric line extension if the lot is one acre or larger in size and an electric line extension is available from a utility company at a cost disclosed in the Cost Sheet provided pursuant to Section II. A herein.

4. Sections I, II, and III of this Order shall apply only to the sale and offer of sale by respondent of any lot or land qualifying under subparagraphs a, b, c, d or e above.

Final Order

I.

It is ordered. That respondent Horizon Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, acting directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale or sale of lots or land as defined herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment, unless respondent can demonstrate that such is a fact and is not misleading. [5]
2. There is little or no financial risk involved in the purchase of respondent's land, unless respondent can demonstrate that such is a fact and is not misleading.
3. The resale of land purchased from respondent is not, or will not be difficult, unless respondent can demonstrate that such is a fact and is not misleading.
4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, unless such is a fact, and is not misleading, and unless respondent discloses clearly and conspicuously the current costs of such service and any material limitation on such service.
5. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise, unless such is a fact and not misleading.
6. Lots to which respondent has given one designation, such as "multi-family residential," "commercial," "acreage" or terms of similar import, have a significantly different present or expected value than lots with any other designation unless (i) such representation is true and is not misleading, (ii) respondent has a reasonable basis at the time of making such representation to believe that it is true, and (iii) respondent discloses clearly and conspicuously in immediate conjunction with the written use of any such designation other than [6]single family residential: A lot's designation as [specify designation, e.g. multi-family] may have no bearing on whether such use will occur.
7. The price set by respondent for the land is equivalent to the market value of such land, unless at the time of such representation

it is substantiated by adequate market data on sales and resales (including attempts to resell and listings for resale that are known or should be known by respondent) of similar land (land in a similar location with the same degree of development); *provided, however*, that if the data upon which the market value is determined does not include resales by individual purchasers, respondent shall clearly and conspicuously disclose both orally and in writing, that the seller's estimate of market value is not based on actual resales by individual purchasers.

8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money.

9. The demand for land offered for sale by respondent has increased, is increasing, or will increase, unless such is a fact and is not misleading.

10. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing, unless such is a fact and is not misleading. [7]

11. Purchasers must purchase immediately in order to insure that a particularly desirable location will be available at the same price in the foreseeable future, unless such representation is true and is not misleading.

12. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided*, that respondent may accurately recite the terms and conditions of the contract and of all refund privileges and cancellation rights, if applicable.

13. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

14. Any lot is located within a geographic area designated or described as "community," "town," "city," or by words or terms of similar import, unless respondent discloses in reasonable proximity therewith the approximate population of the community, town or city, its distance from the lot subject to the representation, and an accurate listing of some or all of the facilities located therein; *provided, however*, that such disclosures [8] need not be made where such representation is made on-site to a purchaser within the subdivision in which the lot is located; and *provided, further*, that

respondent shall not be obligated to rename any currently platted property or to make any such disclosures solely because of the use of the name of any such currently named property.

15. The purchase of land in general is a good, profitable, safe or sound investment.

B. Making any false or misleading reference to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in price, including reference by actual dollar amount, percentage increase, or by any other means, as indicative of market value, or of a change of market value.

2. The past or present population, employment or industrial statistics or trends or other statistics or trends in a geographic area.

3. The predicted future population, employment or industrial statistics or trends or other statistics or trends in a geographic area. For such future statistics or trends, such reference shall not be considered false if at the time such reference is made respondent has a reasonable basis for believing it to be an accurate prediction. [9]

4. The present, planned, proposed or potential development, improvement or facilities of the lot being offered or of the unit, subdivision or project in which the lot is located. An accurate statement shall not be considered misleading if it is clearly disclosed to the customer (a) whether the development or improvement will be undertaken by respondent or a third party, (b) when the development or improvement is likely to be undertaken, (c) whether the purchaser has any contractual or other interest in the development or improvement, and (d) any costs which may accrue to the customer other than those normally assessed for the use of a public facility.

5. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment.

6. The signing of a contract or any reservation by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to, any reference to any other person having a "hold" on a lot; *provided, however*, that respondent may refer to any bona fide sale or option on a lot for which it receives consideration.

7. Respondent's reputation, size, assets or listing on any stock exchange. It shall not be considered false or misleading for respondent to make such references [10]as are required by statute or regulation in the place and manner required by such statute or regulation, or for respondent to provide any purchaser or prospective

purchaser upon request with any document prepared in accordance with the rules of the Securities and Exchange Commission, the Department of Housing and Urban Development, or the Office of Interstate Land Sales Registration.

8. The present, planned, proposed or potential development of any land by anyone other than respondent.

9. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means:

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with a purchase decision or the purchase of respondent's land.

2. Failing to provide any required federal or state property report before the customer signs the contract; failing to recommend that the customer read the federal property report; interrupting or distracting any customer from reading a property report. [11]

3. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any material respect from the rights or obligations of the parties as stated in the contract of sale, or the property report.

4. Including language in any contract permitting the respondent to retain any sums paid by the purchaser in excess of the amount permitted to be retained by respondent under Part III F of this Order, upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract.

5. Failing to disclose, clearly and conspicuously, to each customer the existence, size, location, and nature of any and all easements and other physical features which could significantly affect the full use and enjoyment of the lot being offered for sale.

6. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours. [12]

II

It is further ordered, That respondent:

A. Provide each prospective purchaser of lots a copy of the "cost sheet" pursuant to regulations of the Office of Interstate Land Sales

Registration in effect as of January 1, 1981. Such cost sheet shall be properly filled out to disclose the estimated costs for the lot or parcel offered. If such regulations are revised to provide for increased disclosure of development cost information to the prospective purchaser, respondent shall comply with such revised regulations. If such regulations are revised to require less disclosure, respondent shall, notwithstanding such regulations, disclose all development cost information now required, unless such disclosure would violate the revised regulations. If necessary to comply with revised regulations, the format of the disclosure may be revised, *provided*, that any revised format must disclose the required information in a clear and conspicuous manner.

B. Include in all contracts of sale the following provision:

The contents of the federal property report are part of this contract. *Provided, however*, That where the property report provides an accurate and not misleading estimate of costs or description of current facilities it shall not be a breach of the contract should such estimate or description become inaccurate after the contract is effective. [13]

C. Include in all contracts executed from the date this Order becomes final until the final disbursement of the trust fund established in part VII of this Order the following provision:

In the event Horizon is unable to furnish the improvements to the Buyer's lot as described herein within six months of the promised date, unless such failure is caused by acts of God or other causes not under control of Horizon, Horizon shall, upon reconveyance of the lot in the same form and condition of title as conveyed to Buyer, offer the Buyer a choice of an exchange for an alternative lot or a refund of all principal and interest paid under this Contract or the Promissory Note and Deed of Trust, where applicable. If Horizon provides such exchange or refund, Horizon shall be released from any and all obligations under this contract at law or in equity.

Provided, however, Horizon may use any time period shorter than six months in such contractual clause.

D. Notify each purchaser within 30 days of any failure to provide, within six months of the promised date, any improvements to the purchaser's lot as required by the contract. [14]

III

It is further ordered, That:

A. Respondent shall include clearly and conspicuously in all contracts, promotional materials and printed advertisements the following statement:

The seller is not selling the lots in this subdivision as an investment. The future value of this land and your ability to resell it are uncertain. It is suggested that you discuss any possible purchase with a qualified professional.

B. Respondent shall include clearly and conspicuously in each contract for the sale of land the following statement in 12 point bold face type immediately preceding the space provided for the purchaser's signature; *provided, however*, that in the event that any state or federal law or regulation requires that another statement immediately precede the space provided for the purchaser's signature, the statement required herein may precede any such statement(s):

YOU HAVE THE RIGHT TO CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE YOU SIGN THIS CONTRACT.

IF YOU CANCEL WITHIN THIS TIME, WE WILL PROMPTLY REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT. [15]

TO CANCEL THIS CONTRACT, YOU MUST NOTIFY US WITHIN TEN BUSINESS DAYS AFTER YOU SIGN THE CONTRACT. NO SALES REPRESENTATIVE WILL CONTACT YOU DURING THESE TEN BUSINESS DAYS. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN 30 DAYS OF ITS OCCURRENCE, YOU WILL HAVE UP TO 180 DAYS FROM THE DATE OF PURCHASE TO CANCEL THIS CONTRACT.

WE RECOMMEND THAT BEFORE SIGNING YOU CAREFULLY EXAMINE THIS CONTRACT AND THE PROPERTY REPORT AND HAVE THEM REVIEWED BY A QUALIFIED PROFESSIONAL.

During this ten-business-day period after the signing of a land purchase contract, Horizon is forbidden to initiate any sales-related contact with the purchaser. Any such contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of 180 days from the date of purchase, but only if the customer notifies Horizon of the contact within thirty days after its occurrence. *Provided, however*, That it shall not be forbidden for a non-sales employee or representative of Horizon to contact a customer by telephone to ascertain if the property report was delivered, and to check the accuracy of the information on the contract. [16]

C. Respondent shall furnish each purchaser, at the time the purchaser signs a contract for the purchase of land, with the Purchaser Cancellation Notice required by regulation of the Office of Interstate Land Sales Registration as of January 1, 1981. In the event that such regulation is revised to disclose more information to the customer, to extend the length of the cancellation period, or

otherwise to increase the purchaser's rights, respondent shall comply with such amended regulation. Notwithstanding any revision to such regulation, respondent shall grant to the customer at the minimum the rights required by the regulation in effect on January 1, 1981.

D. Respondent shall honor any signed and timely notice of cancellation or its functional equivalent by the purchaser, and promptly after the receipt of such notice, (a) refund all payments made under the contract (b) cancel any contract or other legal document executed by the purchaser, and (c) provide the purchaser with written notice of such cancellation.

Whenever a timely notice of cancellation or its functional equivalent is received and said notice is not sufficient or proper in any manner, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser [17]of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth business day following the purchaser's receipt of the mailing, if the purchaser is to obtain a refund.

E. Whenever respondent sells property to a purchaser who has never seen the property before executing a contract for the purchase thereof, respondent shall extend a refund privilege conditioned upon the purchaser making a personal visit to the property within 180 days after the purchase and notifying respondent within ten business days after inspection that a refund is desired.

1. Respondent shall provide the purchaser with a copy of the following "Inspection and Refund Privilege Notice" at the time the contract is signed. The notice shall be a separate sheet of paper containing no other writing. The notice shall contain such of the bracketed language as is applicable. The notice shall be worded as follows:

INSPECTION AND REFUND PRIVILEGE NOTICE

Personal inspection of any land purchased is desirable. We recommend that you visit your property. If you visit your property within 180 days, you can cancel your contract for any reason within 10 days after your visit and get a full refund.

If you decide to inspect your land under the terms of the refund privilege, during the visit [18]the seller may encourage you to keep your land. The seller may also try to sell you more land, or have you trade for more expensive land. The seller [will or will not] reimburse you for your travel expenses [if you cancel your contract].

You should take time during your inspection to visit the local area and examine the real estate market where the property is located.

This inspection and refund provision is in addition to and does not take away your

rights to cancel within ten business days after you sign your contract. See your contract.

2. Respondent shall provide the purchaser ten business days after making the personal inspection within which to request a refund.

3. Respondent shall include in every contract, in immediate proximity to the provision setting forth the availability of this refund, the following statement:

IF YOU HAVE NOT PREVIOUSLY SEEN THE PROPERTY YOU HAVE UNTIL MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE CONCLUSION OF YOUR INSPECTION IN WHICH TO NOTIFY THE SELLER OF YOUR DECISION WHETHER TO CANCEL YOUR CONTRACT. NO SALES REPRESENTATIVE SHOULD CONTACT YOU ON BEHALF [19]OF THE SELLER DURING THIS TEN BUSINESS DAY PERIOD. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN TEN DAYS OF ITS OCCURRENCE, YOU WILL HAVE 30 DAYS FROM THE DATE OF YOUR VISIT TO CANCEL THIS CONTRACT.

4. Respondent will insure that every purchaser who seeks to view his or her lot can see and identify the lot specified in the contract; *provided, however,* that so long as the lot can be located by a stake at one corner or other definite land mark, it is not necessary that all four corners be marked.

5. Respondent shall furnish each purchaser at the conclusion of the inspection visit with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION" which shall contain in bold face type of a minimum size of 10 point, the following statement:

NOTICE OF CANCELLATION AFTER INSPECTION

DATE OF CONCLUSION OF INSPECTION TOUR OF PROPERTY: _____

LOT IDENTIFICATION: _____

NAME OF CUSTOMER: _____

You may cancel your contract without any penalty or obligation at any time prior to midnight [20]of the tenth business day after the above date. No sales representative should contact you on behalf of the seller during this ten business day period. If a sales representative contacts you, and you notify us of the contact within 10 days of its occurrence, you will have 30 days from the date of your visit to cancel this contract.

If you cancel, we will promptly send you a full refund.

To cancel your contract, mail or deliver a signed copy of this cancellation notice or any other written notice, or send a telegram to (name of respondent), at (address of respondent's place of business), postmarked not later than midnight of _____

Final Order

97 F.T.C.

I (we) hereby cancel the above described contract. (Each buyer must sign this notice).

DATE

BUYER'S SIGNATURE [21]

6. Before furnishing a purchaser copies of the "Notice of Cancellation After Inspection" set forth above, respondent shall complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property, the name of the customer, and the date, not earlier than the tenth business day following the conclusion of the inspection, by which the purchaser may cancel the purchase.

7. During the post inspection cancellation period, Horizon is forbidden to initiate any sales related contact with the purchaser. Any such initiation of contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of thirty days from the date of the visit, but only if the customer notifies Horizon of the contact within ten days of its occurrence.

8. Respondent shall investigate any notification received from purchasers of contact violating the provisions of III.E.7. above. [22]

9. Respondent shall honor any signed and timely Notice of Cancellation After Inspection or its functional equivalent submitted by a purchaser, and promptly after receipt of such notice will (a) refund all payments made under the contract, (b) cancel the contract executed by the purchaser, and (c) send written confirmation of such cancellation to the purchaser.

Provided, however, That if the property has been deeded to the purchaser, Horizon may require that the property be reconveyed to Horizon with the same condition of title as was conveyed to the customer.

10. Where a timely Notice of Cancellation After Inspection or its functional equivalent is received purportedly in accordance with the requirements of this section, but where said notice is not sufficient or proper in some manner and respondent does not intend to honor the notice, Horizon shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund. [23]

F. Include in all contracts for the sale of land a provision limiting the amount of principal and interest to be forfeited by the purchaser in the event of the purchaser's default to an amount not greater than (1) 44 percent of the cash price of the property plus (2) any amount paid which exceeds the cash price of the property.

G. Refund to each person who purchases land after the date this Order becomes final and defaults on his or her contract, all principal and interest paid which exceeds 44 percent of the cash price of the land up to a maximum refund of 56 percent of the cash price of the lot. Such refund shall be made within sixty (60) days after the purchaser is deemed to have defaulted; *provided, however*, that this paragraph shall not preclude respondent from offering a defaulting purchaser additional alternatives which may be selected at the purchaser's option, in lieu of a refund. For purposes of this section of the Order, a purchaser shall be deemed to have defaulted when either of the following occurs: [24]

1. the purchaser notifies respondent of intent to default; or
2. the purchaser fails to make a payment for a period of six months from the due date of a payment; *provided, however*, that this provision shall not prohibit respondent from granting any purchaser an extension of time within which to make payments.

H. Respondent shall not misrepresent the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation in order to solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon such right. [25]

IV

It is ordered, That respondent in connection with the advertising, offering for sale and sale of lots or land other than those lots or land covered by parts I, II and III of this Order, do forthwith cease and desist from:

A. Representing that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment, unless respondent can demonstrate that such is a fact and is not misleading.

2. There is little or no financial risk involved in the purchase of respondent's land, unless respondent can demonstrate that such is a fact and is not misleading.

3. The resale of land purchased from respondent is not, or will not be difficult, unless respondent can demonstrate that such is a fact and is not misleading.

4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, unless such is a fact, and unless the terms, conditions and arrangements for repurchase, resale or assistance are clearly and conspicuously disclosed at the time such representation is made. [26]

5. The value of any land, wherever situated, whether or not marketed by respondent has risen, is rising, or will rise, unless respondent can demonstrate that such is a fact and is not misleading.

6. Lots to which respondent has given one designation, such as "single-family residential," "multi-family residential," "commercial," "acreage" or terms of similar import, have a significantly different present or expected value than lots with any other designation unless (i) such representation is true and is not misleading, (ii) respondent has a reasonable basis at the time of making such representation to believe that it is true, and (iii) respondent discloses clearly and conspicuously in immediate conjunction with the use of any such designation: A lot's designation as [specify designation, e.g., multi-family] will have no bearing on whether such use will occur.

7. The price set by respondent for the land is equivalent to the market value of the land, unless adequate market data on resales (including attempts to resell and listings for resale that are known or should be known by respondent) of similar land (land in a similar location with the same degree of development) by previous purchasers in the possession of respondent at the time of such representation substantiates the representation. [27]

8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money.

9. The purchase of land in general is a good, profitable, safe or sound investment.

10. The demand for land offered for sale by respondent has increased, is increasing, or will increase, unless respondent can demonstrate that such is a fact and is not misleading.

11. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing, unless such is a fact and is not misleading.

12. Purchasers must purchase immediately in order to insure that a particularly desirable location will be available, or that lots similar to those being offered for sale may not or will not be

available at the same price in the foreseeable future, unless such representation is true and is not misleading. [28]

13. Purchasers have been specially selected, unless respondent can demonstrate that such is a fact and is not misleading.

14. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser, including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided*, that respondent may accurately recite the terms and conditions of the contract and of all refund privileges and cancellation rights, if applicable.

15. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

16. Any of the lots is located within a geographic area designated or described as a "community," "town," "city," or by words or terms of similar import; *provided, however*, that respondent shall not be obligated to rename any currently platted property. [29]

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in price, including reference by actual dollar amount, percentage increase, or by any other means, as indicative of market value, or of a change of market value.

2. The past, present or future population, employment or industrial statistics or trends or other statistics or trends in a geographic area, unless respondent has a reasonable basis at the time of the statement or representation to conclude that such statistical trend either now has or, within the near future, will have a significant effect on respondent's property or the part thereof, other than those parts of each property which respondent or any other entity has reserved for development, or has developed with roads, and electric, water, telephone, and sewer lines, to which such statement or representation refers or relates.

3. The present, planned, proposed or potential development, improvement or facilities of the unit, [30] subdivision or project in which the offered land is located that differs in any material respect from the relevant language of the most current property report or from the "Notice to Buyers" (set forth in Part V of this Order).

4. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment.

5. The reservation or consideration by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to any reference to any other person having a "hold" on a lot; *provided, however*, that respondent may refer to any bona fide sale or option on a lot for which it receives consideration.

6. Respondent's reputation, size, assets or listing on any stock exchange; *provided*, that respondent may make such references as are required by statute or regulation in the place and manner required by such statutes or regulations; and *provided, further*, that [31]respondent may provide any purchaser or prospective purchaser upon request with any document prepared in accordance with the rules of the Securities and Exchange Commission, the Department of Housing and Urban Development, or the Office of Interstate Land Sales Registration.

7. The present, planned, proposed or potential development of any land by anyone other than respondent.

8. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means:

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with a purchase decision or the purchase of respondent's land.

2. Failing to provide any required federal or state property report before the customer signs the contract; failing to recommend that the customer read the federal property report; interrupting or distracting any customer from reading a property report. [32]

3. Filling out a contract with a purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he or she desires to purchase the land being offered.

4. Subjecting a purchaser who has evidenced a desire not to purchase respondent's land to continued sales efforts from any sales representative or other employee other than the original sales person, i.e., any institution of a "T.O." or "takeover" system.

5. Including in any contract or in any other document shown or provided to purchasers, language stating that no express or implied representations have been made in connection with the sale of

respondent's land, or that any particular representation has not been made in connection therewith.

6. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any material respect from the rights or obligations of the parties as stated in the contract of sale, the Notice to Buyers provided for in Section V of this Order, or the property report. [33]

7. Including in any contract language permitting the respondent to retain any sums paid by the purchaser in excess of the amount permitted to be retained in Sections VI. H. and I. of this Order upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract.

8. Failing to disclose, clearly and conspicuously, both orally and in writing, to each customer the existence, size, location, significance and nature of any and all easements and other physical features which could significantly affect the full use and enjoyment of the lot being offered for sale.

9. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations and sightseeing tours. [34]

V

It is further ordered, That respondent:

Distribute to all prospective purchasers of land covered by this section, a copy of the following "Notice to Buyers" at the commencement of any sales presentation, request that the purchaser read it, and not interrupt the reading thereof by any purchaser. Where the sale is conducted entirely through the mail, the notice shall accompany the property report mailed to the purchaser. The Notice shall be on a separate piece of paper and shall contain only the required information and no other writing, unless approved in advance by the Commission.

NOTICE TO BUYERS

NAME OF SUBDIVISION:

NAME OF SELLER:

EFFECTIVE DATE OF NOTICE:

THE LAND BEING OFFERED FOR SALE IS IN THE STATE OF _____
MILES FROM THE CITY OF _____. THE LOT IS _____ [ACRE(S) OR

SQUARE FEET] IN SIZE AND THE COST IS \$ _____ . YOU MAY PURCHASE LOTS OTHER THAN THIS ONE.

THE SELLER IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS AN INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. [35]

THE FUTURE VALUE OF LAND IS UNCERTAIN AND MAY HAVE NO RELATION TO THE PRICE, WHICH IS SET BY THE SELLER. THE FUTURE POPULATION OF THIS SUBDIVISION AND THE SURROUNDING AREAS CANNOT BE PREDICTED.

[PROVIDE the following development information for the unit(s) being offered:]

ROADS

(INFORMATION TO BE APPLICABLE TO THE ROADS FRONTING PURCHASER'S LOT)

State who is currently responsible for construction and maintenance and whether the roads will be maintained by public authority, a property owners' association or some other entity at some time in the future. State the cost to buyer for construction/maintenance, if any, during interim and after turnover.

State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the roads as represented. If not, include the following warning: WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE ROADS. THEREFORE, THERE IS NO ASSURANCE THAT THEY WILL BE COMPLETED. [36]

Provide the following road information:*

| Unit | Starting date | Percentage now completed | Estimated completion date | Present surface | Final surface** |
|------|---------------|--------------------------|---------------------------|-----------------|-----------------|
| | | | | | |

* If not known, insert the following warning: WARNING THERE ARE NO PLANS FOR ROADS.

** If unpaved then state "UNPAVED" and describe the surface.

WATER

If water is to be supplied by an individual private system, state the estimated cost to the buyer of installation, treatment facilities, necessary equipment and any other required costs. If individual wells are to be used, state whether or not a refund or exchange will be issued in the event a productive well cannot be installed. If yes, state the terms and conditions thereof. If no, insert the following warning: **WARNING: A SUCCESSFUL PRODUCING WELL IS NOT GUARANTEED. NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO DIG A SUCCESSFUL WELL. [37]**

If the water is to be provided by a central system, state whether the buyer is to pay any construction costs, one-time connection fees, availability fees, special assessments or deposits for the central system. If so, state the estimated cost. If the buyer will be responsible for construction costs of the water mains, state the cost to install the mains to the most remote lot covered by the Notice. State whether there is adequate financial assurance in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: **WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL WATER SYSTEM. THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED.**

Provide the following water information:

| Unit | Starting date | Percentage now complete | Service Available date* |
|------|---------------|-------------------------|-------------------------|
|------|---------------|-------------------------|-------------------------|

* If not known, insert the following warning: **WARNING: THERE ARE NO PLANS FOR A CENTRAL WATER SYSTEM. [38]**

SEWER

State the method of sewage disposal to be used. If by septic tank or other individual system, state the estimated cost of the system and any necessary tests. State whether a permit is required. If so, and if each and every lot has not been already approved, insert the following warning: **WARNING: THERE IS NO ASSURANCE PERMITS CAN BE OBTAINED FOR THE INSTALLATION AND USE OF SEPTIC TANKS OR OTHER INDIVIDUAL ON-SITE SEWAGE SYSTEMS. State whether or not a refund**

or exchange will be issued in the event a permit is denied for the particular lot purchased, and the terms and conditions thereof. If neither will be issued, insert the following warning: **WARNING: NO REFUND OR EXCHANGE WILL BE GRANTED IF YOU ARE UNABLE TO INSTALL A SEPTIC TANK OR OTHER ON-SITE SEWAGE SYSTEM.**

If a central sewage treatment and collection system is being installed, state who is responsible for construction of the system. State whether buyer will pay any construction costs, special assessments, one-time connection fees, availability fees, use fees or deposits. State the amounts of these charges. If the buyer is to pay the cost of the sewer mains, state the cost of installation of the mains to the most remote lot in this Notice. State whether there is adequate financial assurance [39] in the form of an escrow or trust account, or surety bond, to assure completion of the central system and any future expansion. If not, include the following warning: **WARNING: TOO LITTLE MONEY HAS BEEN SET ASIDE TO ASSURE THE COMPLETION OF THE CENTRAL SEWER SYSTEM. THEREFORE, THERE IS NO ASSURANCE THAT IT WILL BE COMPLETED.** Provide the following sewer information:

| Unit | Starting date | Percentage of completion | Service Availability date* |
|------|---------------|--------------------------|----------------------------|
|------|---------------|--------------------------|----------------------------|

* If not known, insert the following warning: **WARNING: THERE ARE NO PLANS FOR A CENTRAL SEWAGE SYSTEM.**

ELECTRIC SERVICE

If the primary service lines have not been extended in front of, or adjacent to each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges for extension of primary lines. Based on that policy, state the cost to the buyer for extending primary service to the most remote lot in this Notice. Provide the following electric service information:

| Unit | Starting date | Percentage of completion | Service Availability date* |
|------|---------------|--------------------------|----------------------------|
|------|---------------|--------------------------|----------------------------|

* If not known, insert the following warning: **WARNING: THERE ARE NO PLANS FOR AN ELECTRIC SERVICE SYSTEM. [40]**

TELEPHONE SERVICE

If the service lines have not been extended in front of, or adjacent to each lot, state whether the buyer will be responsible for any construction costs. If so, state the utility company's policy and charges for extension of service lines. Based on that policy, state the cost to the buyer of extending service lines to the most remote lot in this Notice.

Provide the following telephone service information:

| Unit | Starting date | Percentage of completion | Service Availability date* |
|------|---------------|--------------------------|----------------------------|
|------|---------------|--------------------------|----------------------------|

* If not known, insert the following warning: WARNING: THERE ARE NO PLANS FOR A TELEPHONE SYSTEM.

RECREATIONAL FACILITIES

Identify each recreational facility. For each facility, provide the following information:

| Facility | Percent complete | Date of start of construction | Date Available for use | Financial Assurance of completion* | Buyer's cost and assessments** |
|----------|------------------|-------------------------------|------------------------|------------------------------------|--------------------------------|
|----------|------------------|-------------------------------|------------------------|------------------------------------|--------------------------------|

* If none, state "none." If such exists, state the type and amount. [41]

** State any construction or use costs to the buyer including any applicable property owner's association assessment, maintenance assessment or use fee.

At the conclusion of the Notice, place the following warning set off by a box outline: **IMPORTANT: OBTAIN AND READ THOROUGHLY EACH PROPERTY REPORT AND CONTRACT BEFORE SIGNING ANYTHING. THE PROPERTY REPORT CONTAINS INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE YOU SIGN A CONTRACT TO BUY THIS LAND. IT IS DESIRABLE TO HAVE A LAWYER OR OTHER QUALIFIED PROFESSIONAL EVALUATE THIS PURCHASE BEFORE YOU SIGN ANYTHING. KEEP THIS NOTICE—STATEMENTS MADE IN IT BECOME A PART OF ANY CONTRACT YOU MAY SIGN WITH THE SELLER. [42]**

VI

It is further ordered, That in all sales and offers to sell after the date this Order becomes final, respondent shall:

A. Include clearly and conspicuously:

1. In all contracts for the sale of land the following statement:

The seller is not selling the lots in this subdivision as an investment. Therefore, do not count on your lot rising in value or your being able to resell it. The future value of this land is uncertain and may have no relation to the price, which is set by the seller. It is suggested that you discuss any possible purchase with a lawyer or other qualified professional.

2. In all sales presentations, promotional materials and printed advertisements covered by this section the following statement:

The future value of land is very uncertain. The value, if any, of this land may have no relation to the price, which is set by the seller. The [43]seller is not selling the lots in this subdivision as an investment.

Therefore, do not count on your lot rising in value or your being able to resell it. It is suggested that you discuss any possible purchase with a lawyer or other qualified professional.

B. Include clearly and conspicuously in each contract for the sale of land the following statement, in 12 point bold face type:

YOU, THE BUYER, HAVE THE RIGHT TO CANCEL THIS CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE YOU SIGN THIS CONTRACT.

IF YOU CANCEL WITHIN THIS TIME, WE WILL PROMPTLY REFUND ANY PAYMENTS MADE BY YOU UNDER THIS CONTRACT.

TO CANCEL THIS CONTRACT, YOU MUST NOTIFY US WITHIN TEN BUSINESS DAYS AFTER YOU SIGN THE CONTRACT. NO SALESMAN WILL CONTACT YOU DURING THESE TEN DAYS. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN 30 DAYS OF ITS OCCURRENCE, YOU WILL HAVE UP TO 180 DAYS FROM THE DATE OF PURCHASE TO CANCEL THIS CONTRACT. [44]

During this ten-business-day period after the signing of a land purchase contract, Horizon is forbidden to initiate any sales-related contact with the purchaser. Any such contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of 180 days from the date of purchase, but only if the customer notifies Horizon of the contact within thirty days after its occurrence. *Provided, however,* That it shall not be forbidden for a non-sales employee or representative of Horizon to contact a customer by telephone to ascertain if the property report was

delivered, and to check the accuracy of the information on the contract.

Provided, That where Horizon as a matter of corporate practice or pursuant to any legal requirement provides a cancellation period exceeding ten business days, the highest applicable specific number of days greater than ten shall be substituted for "ten" or "tenth" wherever those words appear in the Notice of Cancellation set forth above. This requirement shall apply to Sections VI. C. and VI. D. of this Order as well as to this Section VI. B. [45]

C. Print the following in 12 point bold face type as a separate paragraph of the contract immediately preceding the space provided for the purchaser's signature:

YOU HAVE TEN BUSINESS DAYS IN WHICH TO RECONSIDER YOUR DECISION AND TO CANCEL THIS CONTRACT WITH FULL REFUND. HOWEVER, WE RECOMMEND THAT BEFORE SIGNING YOU EXAMINE CAREFULLY THIS CONTRACT AND THE PROPERTY REPORT AND HAVE THEM REVIEWED BY A LAWYER OR OTHER QUALIFIED PROFESSIONAL.

Provided, however, That in the event that any federal or state law or regulation requires that another statement immediately precede the space provided for the purchaser's signature, the above statement may precede such statements(s).

D. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in 12 point bold face type " NOTICE OF RIGHT OF CANCELLATION, " which shall contain in 10 point bold face type the following information and statements: [46]

Date of Transaction

Lot Identification

NOTICE OF RIGHT OF CANCELLATION

You may cancel this transaction without any penalty or obligation at any time prior to midnight of the tenth business day after the date shown on the contract. Use this time to examine with care this contract and property report. We suggest that you also use this time to have this contract and the property report reviewed by a lawyer or other qualified professional.

No sales representative should contact you on behalf of the seller during this ten business day period. If a sales representative contacts you, and you notify us of the

Final Order

97 F.T.C.

contact within 30 days of its occurrence, you will have up to 180 days from the date of purchase to cancel this contract.

If you cancel, any payments made by you under the contract will be returned promptly to you.

To cancel this contract, notify us not later than midnight of ____ that you want to cancel. Although you may notify us in any manner you choose, we recommend that you notify us by mailing a signed copy of this notice to (name of respondent) at (address). [47]

I (we) hereby cancel this contract. (Each buyer must sign this notice).

Date

Signature of Buyer

Respondent shall, before furnishing copies of this "Notice of Right of Cancellation" to the purchaser, complete both copies by entering the name of respondent, the address of the respondent's place of business, the date of the transaction, and lot identification(s), and the date, not earlier than the tenth business day following the date of the signing by the purchaser, by which the purchaser may give notice of cancellation.

Respondent shall, where the signature of a purchaser is solicited during the course of a sales presentation, inform each purchaser orally, at the time the purchaser signs the contract, of the right to cancel as stated in this Paragraph of this Order.

E. Honor any signed and timely notice of cancellation by the purchaser, or its functional equivalent, and promptly after the receipt of such notice, (a) refund all payments made under the contract and (b) cancel and return any contract or other legal document executed by the purchaser. [48]

Whenever a timely notice of cancellation or its functional equivalent is received and said notice is not sufficient or proper in any manner, and respondent does not intend to honor the notice, respondent shall immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth business day following the purchaser's receipt of the mailing, if the purchaser is to obtain a refund.

F. Whenever respondent extends a privilege or other right

whereby the purchaser may exchange undeveloped land for a building lot:

1. Include in all materials, including the contract, which discuss the privilege or right, or if such privilege or right is described orally, include in such oral discussion, and in a concurrently delivered written notice, the following statement: BUILDING EXCHANGE LOTS EQUAL IN SIZE AND COST TO THE LOT YOU ARE PURCHASING MAY BE LOCATED SUBSTANTIAL DISTANCES FROM THE ESTABLISHED DEVELOPED AREAS. THEY MAY HAVE LESS DESIRABLE ROADS, UTILITIES AND APPEARANCE. THEREFORE, YOU MAY WISH TO EXCHANGE FOR OTHER BUILDING LOTS THAN THE SELLER MAY OFFER. THESE OTHER LOTS MAY BE SMALLER IN SIZE AND MAY REQUIRE YOU TO PAY MORE MONEY THAN YOU ARE NOW CONTRACTING TO PAY.

2. State the specific financial terms or formula for exchange of the purchaser's equity in the original [49]lot into the building lot, in the same place and manner as the statement in subparagraph 1 above.

3. Include in all contracts for the sale of land a provision extending the contractual rights and privileges of the purchaser to all subsequent buyers and assignees of that land.

G. Whenever respondent sells property sight unseen it shall extend a refund privilege conditioned upon the purchaser making a personal visit to the property within 180 days after purchase and notifying respondent within ten business days after inspection that a refund is desired. Respondent shall:

1. Provide the purchaser with a copy of the following "INSPECTION AND REFUND PRIVILEGE NOTICE " at the time the contract is signed. The notice shall be on a separate sheet of paper containing no other writing. The notice shall be worded as follows:

INSPECTION AND REFUND PRIVILEGE NOTICE

Personal inspection of any land purchased is desirable. We recommend that you visit your property. If you visit your property within the next 180 days, you can cancel your contract for any reason within 10 days after your visit and get a full refund. [50]

If you decide to inspect your land under the terms of the refund privilege, during the visit the seller may encourage you to keep your land. The seller may also try to sell you more land, or have you trade for a more expensive lot.

You should take time during your inspection to visit the local area and examine the real estate market where the lot is located.

If you cancel this purchase, the seller will not reimburse you for your travel expenses.

This inspection and refund privilege is in addition to and does not take away your

right to cancel within ten business days after you sign your contract. See your contract.

2. Provide the purchaser ten business days after making the personal inspection within which to request a refund.

3. Include in every contract, in immediate proximity to the provision setting forth the availability of this refund, the following statement: YOU HAVE UNTIL [51]MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE CONCLUSION OF YOUR IN PERSON INSPECTION IN WHICH TO NOTIFY THE SELLER OF A DECISION TO CANCEL. NO REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS TEN BUSINESS DAY PERIOD. IF A SALES REPRESENTATIVE CONTACTS YOU AND YOU NOTIFY US OF THE CONTACT WITHIN TEN DAYS OF ITS OCCURRENCE, YOU WILL HAVE 30 DAYS FROM THE DATE OF YOUR VISIT TO CANCEL THIS CONTRACT.

4. Insure that every purchaser who seeks to view his or her lot can see and identify the particular lot specified in the contract; *provided, however*, that so long as the lot can be located by a stake at one corner or other definite landmark, it is not necessary that all four corners be marked.

5. Orally inform the purchaser of the post-visit ten-business-day cancellation right (i) at the time the contract is signed, unless the sale is entirely completed through the mail, and (ii) at the conclusion of the inspection visit.

6. Furnish each purchaser at the conclusion of the inspection visit with a dated and completed form, in duplicate, captioned "NOTICE OF CANCELLATION AFTER INSPECTION" which shall contain in bold face type of a minimum size of 10 point, the following statement: [52]

NOTICE OF CANCELLATION AFTER INSPECTION

DATE OF CONCLUSION OF INSPECTION TOUR

OF PROPERTY: _____

LOT IDENTIFICATION: _____

NAME OF CUSTOMER: _____

You may cancel your contract without any penalty or obligation at any time prior to midnight of the tenth business day after the above date. No sales representative of the seller should contact you in any way during this ten business day period. If a sales representative contacts you and you notify us of the contact within 10 days of its occurrence, you will have 30 days from the date of your visit to cancel the contract.

If you cancel, we will promptly send you a full refund.

To cancel your contract, mail or deliver a signed copy of this cancellation notice or any other written notice, or send a telegram to (name of respondent), at (address of

464

Final Order

respondent's place of business), postmarked not later than midnight of _____ [53]

I (we) hereby cancel the above described contract. (each buyer must sign this notice).

DATE

Buyer's signature

7. Before furnishing a purchaser copies of the "Notice of Cancellation After Inspection" set forth in paragraph VI. G. 6. above, complete both copies by entering the name of the respondent and the address of its place of business, the conclusion date of the inspection of the property, the name of the customer, and the date, not earlier than the tenth business day following the conclusion of the inspection, by which the purchaser may cancel the purchase.

8. During the post-inspection cancellation period, Horizon is forbidden to initiate any sales related contact with the purchaser. Any such initiation of contact shall be grounds for rescission of the purchase contract and recovery of all payments thereunder at purchaser's option, exercisable any time before the expiration of thirty days from the date of the conclusion of the visit, but only if the customer notifies Horizon of the contact within ten days of its occurrence. [54]

9. Investigate any notification received from purchasers of contact violating the provision of Paragraphs VI. G. 8. above, and comply with the requirements of Section X, Paragraphs F and G herein.

10. Honor any signed and timely Notice of Cancellation After Inspection or its functional equipment submitted by a purchaser, and promptly after the receipt of such Notice (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

11. Where a timely Notice of Cancellation After Inspection or its functional equivalent is received purportedly in accordance with the requirements of this section, but where said notice is not sufficient or proper in some manner and respondent does not intend to honor the notice immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of the error and stating clearly and conspicuously that a proper notice signed by the purchaser must be mailed by midnight of the fifth day

following the purchaser's receipt of the mailing if the purchaser is to obtain a refund. [55]

H. Include in all contracts for the sale of land a provision limiting the amount of moneys to be forfeited by a purchaser in the event of the purchaser's default under the contract to an amount not greater than respondent's actual damages from such forfeiture, such provision to include the definition of "actual damages" set forth in Section VI. I. below.

I. Refund to customers who purchase after the effective date of this order and who are deemed in default, all moneys paid under the contract, including but not limited to principal, interest, taxes, and assessments which in the aggregate exceed respondent's "actual damages", as that term is defined below, within 60 days after the purchaser is deemed to have defaulted; *provided*, that this paragraph shall not preclude respondent from offering a defaulting purchaser additional alternatives which may be selected at the purchaser's option, in lieu of a refund. For purposes of this section of the Order, a purchaser shall be deemed to have defaulted when either of the following occurs:

1. purchaser notifies respondent of intent to default; or
2. purchaser has failed to make a payment for a period of six months from the due date of such payment. [56]

"Actual damages" upon a buyer's default shall be limited to respondent's actual out-of-pocket costs for commissions and overrides paid out to sales personnel and not recovered from them in connection with the cancellation of an account or contract to buy property from respondent as a result of the buyer's default, *provided*, that the amount of the actual damages may not exceed 15 percent of the cash price of the property, as "cash price" is defined in the Truth-In-Lending Act's implementing Regulation Z (12 CFR 226.2(n)).

J. Forbear from using or enforcing in any manner, or representing that respondent will rely upon or enforce in any manner, against any purchaser, a contract clause which provides that the respondent may retain all sums previously paid by the purchaser in the event that the purchaser fails to pay any installment due or otherwise to perform any obligation under the contract.

K. Not misrepresent, nor solicit or obtain the purchaser's assent to or otherwise impose any condition, waiver or limitation upon, the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or any applicable statute or regulation. [57]

VII

It is further ordered, That respondent shall establish the Horizon Corporation Trust Fund for the benefit of past purchasers of lots from respondent on the following basis:

1. The trust fund will be established not later than fifteen (15) days following the date this Order is issued by the Commission in final form.

2. The trustee shall be a national bank mutually agreeable to respondent and the Commission, pursuant to a trust agreement also mutually agreeable to respondent and the Commission.

3. Not later than thirty (30) days following the date this Order is issued in final form respondent shall issue a debenture payable to the "Horizon Corporation Trust Fund," and deliver it to the trustee.

4. The debenture will be a six (6) year noninterest bearing debenture in the principal amount of \$14.5 million, payable in six equal installments with the first such installment being due on June 1, 1982, and subsequent installments being due on each June 1 thereafter to and including June 1, 1987. [58]

Payments into the trust fund shall be due and payable on the dates specified in this paragraph. The trustee shall receive each of the payments specified in this Order no later than seven days after it is due and payable. Respondent shall be in violation of the terms of this Order if it fails to make any of the payments specified in this agreement within the period ending seven days after such payment is due and payable. Interest payments required by Paragraph VII (8) of this Order shall continue to apply to any delay in payment beyond the date when it is due and payable. Such interest payments shall be required regardless of any allegation of a violation of this Order as described in this paragraph. [59]

5. The trustee shall maintain the corpus of the trust fund in general obligations of or obligations guaranteed by the United States Government or an agency of the United States Government. All interest earned during the pendency of the trust fund shall be added to the corpus of the trust fund.

6. The trustee shall make the books and records of the trust fund available to the Federal Trade Commission or a representative thereof for inspection and copying during normal business hours at any time(s) until sixty (60) days following the final disposal of the trust fund residue. The trustee and respondent shall be given twenty-four (24) hours advance notice of any inspection of the trust fund books and records by the Commission. The trustee shall provide

an annual report in the nature of an accounting of the trust fund to the Commission.

7. No costs associated with the establishment, administration or distribution of the trust fund shall be paid out of the principal or interest of the fund, except as provided in paragraph 18 if there is a third distribution of funds. [60]

8. If any of the six annual payments into the trust fund shall not be made on the date any such payment is due, Horizon shall pay interest on the principal amount then due and owing at a rate which is two percent (2%) above the prime interest rate at Citibank, New York, at the close of business on the date the payment is due or the first business day thereafter.

9. Within thirty (30) days following the third payment into the trust fund, the trustee shall distribute substantially all of the money then in the trust fund to the persons eligible for payments from the fund as determined herein.

10. Within thirty (30) days following the final payment into the trust fund, the trustee shall distribute all of the money in the trust fund to the persons eligible for payments from the fund as determined herein.

11. The persons eligible for payment from the trust fund shall be those who meet the criteria listed on Exhibit A attached hereto.

12. Purchasers eligible for payment from the trust fund shall be mailed a copy of the letter attached hereto as Exhibit B within 180 days from the date this Order is issued in final form by the Commission. [61]

13. Any person eligible for payment from the trust fund who cannot be located by respondent shall forfeit his or her right to receive the notification in Exhibit B and the two payments from the trust fund. Respondent shall exercise good faith efforts reasonably calculated to locate all persons eligible for payments from the trust fund. Such efforts shall include:

(a) Mailing the notification to the most current address as disclosed in respondent's records or on the county tax rolls, if such tax rolls are reasonably available from the county in which the person's land is located.

(b) Confirming addresses with the appropriate improvement association, if any.

(c) If necessary, mailing a second notification letter with an address correction requested from the Post Office.

(d) Telephoning any person whose mailing address cannot be discovered through the above methods. Respondent shall, to the

extent necessary, telephone the last known home and business telephone number of the person, and seek information from directory assistance at the person's last known address. [62]

If the above efforts are unavailing, the person shall be removed from the list of eligible persons; *provided, however*, that the person shall be reinstated if respondent or the trustee should be informed of his or her current mailing address not less than thirty (30) days prior to either of the disbursements from the trust fund. If such person is reinstated as eligible for a payment from the trust fund after the initial disbursement from the fund, his or her right to a payment shall be limited to his or her proportionate share of the second distribution.

14. Persons eligible for a payment from the trust fund will be informed in the notification letter that they must inform respondent of all address changes until the final distribution of the fund. A form for such notification, attached hereto as Exhibit D, will be provided to each eligible person for this purpose. Respondent will inform the trustee of all such address changes not less than thirty (30) days prior to each distribution from the trust fund. If any person's payment check is returned by the Post Office as being undeliverable because of incorrect address, and if the person failed to inform respondent of a change of address which has occurred, such person will forfeit any right to a share of the distribution. [63]

15. Respondent may, at its sole discretion, require each eligible person to sign a waiver of claims in the form attached hereto as Exhibit C as a condition precedent to receiving payment from the trust fund.

16. Persons eligible for refunds will not be required to reconvey property to respondent to qualify for payment from the trust fund.

17. Each eligible person will receive a pro rata share of the trust fund distribution to which he or she is entitled, to be determined on the basis of the ratio of his or her payments of principal to respondent to the total of all such payments from June 1, 1969 to the date of each distribution by all persons eligible for payments from the trust fund. Payment will be made by check drawn on the trust fund and mailed to eligible persons by first class mail.

18. The trustee will be instructed to make all reasonable efforts to distribute the entire trust fund. Any residue in the fund resulting from interest earned after checks are mailed to eligible persons or from checks not cashed for a period of six (6) months after distribution or other causes will be donated in equal shares to the Horizon Communities Improvement Association, [64]Inc., the Horizon Communities Improvement Association of New Mexico, Inc., the

Tierra Grande Improvement Association, Inc., and the Waterwood Improvement Association, Inc. *Provided, however,* That if the residue exceeds \$250,000 the trustee may redistribute the residue to those purchasers who cashed the second distribution check. All expenses of such redistribution shall be paid from the residue of the trust fund, and no such distribution shall be made unless the expenses of the distribution are not more than 25 percent of the trust fund residue. Any residue remaining after the third distribution shall be distributed to the improvement associations as provided above. [65]

VIII

It is further ordered, That respondent shall assure that it and other entities will spend not less than \$45 million for improvements in the properties within the twenty years following the date this Order becomes final. Such expenditures may be made for improvements in Rio Communities, Horizon City, Arizona Sunsites, Waterwood, and/or Paradise Hills. The improvements may include roads, utilities, hotels, residential apartments, commercial facilities, recreational facilities, churches, civic buildings, or any other improvements or facilities, except that expenditures for construction of single family residences shall not be included in the computation of the \$45 million. To qualify under this provision, the improvements must be located within the confines of the properties listed above. The only exception to this locational requirement is that expenditures to construct utility plants and transmission or pipe lines predominantly to serve a Horizon property shall be included, notwithstanding that the plant and the transmission or pipe lines may not be located within one of the five properties enumerated above. [66] The expenditure of funds required by this paragraph shall be made according to the following schedule:

\$11.25 million shall be spent within 7 years of the effective date of this Order; \$22.5 million shall be spent within 10 years of the effective date of this Order; \$33.75 million shall be spent within 15 years of the effective date of this Order; \$45 million shall be spent within 20 years of the effective date of this Order.

IX

It is further ordered, That not more than one officer or employee of respondent shall at any one time serve on the boards of directors of each of the following: Horizon Communities Improvement Association, Inc., the Horizon Communities Improvement Association of

New Mexico, Inc., the Tierra Grande Improvement Association, Inc. and the Waterwood Improvement Association, Inc. [67]

X

It is further ordered, That respondent, Horizon Corporation shall:

A. Deliver, by certified mail or in person, a copy of this Order to all of its present and future sales representatives and other employees, independent brokers, advertising agencies, and others who sell or promote the sale of respondent's land;

B. Provide each person so described in Paragraph A above with a form to be returned to respondent, clearly stating each person's intention to conform his or her business practices to the requirements of this Order.

C. Inform each person described in Paragraph A above that respondent shall not use the services of any such person, unless such person agrees to and does file a notice with respondent that he or she will conform his or her business practices to the requirements of this Order;

D. In the event such person will not agree to so file notice with the respondent and to conform his or her business practices to the requirements of this Order, respondent shall not use the services of such person; [68]

E. Inform the persons described in Paragraph A above that respondent is obligated by this Order to discontinue dealing with those persons who engage on their own in the acts or practices prohibited by this Order or who fail to adhere to the affirmative requirements of the Order;

F. Institute a reasonable program of continuing surveillance to reveal whether the sales practices of each of said persons described in Paragraph A above conform to the requirements of this Order, and promptly investigate and make good faith efforts to resolve any complaints about such persons received by respondent, and maintain records of any such complaint, investigation and disposition for five years from the date of the disposition of the complaint;

G. Discontinue dealing with any person described in Paragraph A above revealed by the aforesaid program of surveillance, who more than once engages on his or her own in the acts or practices prohibited by this Order; *provided, however,* that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondent in any proceeding brought to recover penalties for alleged violations of any paragraph of this Order. [69]

XI

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment, reorganization or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or other change in the corporation which may affect compliance obligations arising out of this Order. [70]

XII

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its subsidiaries. [71]

XIII

It is further ordered, That respondent shall within sixty (60) days after the service upon it of this Order, and annually thereafter until sixty (60) days after the final disbursement of funds in the trust funds established in part VII. herein, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order. [72]

XIV

The relief set forth in this Order fully satisfies any claim for consumer redress which the Commission may have under Sections 5 and 19 of the Federal Trade Commission Act arising out of the acts and practices alleged in the complaint in this matter.

EXHIBIT A

To be eligible for a partial refund from Horizon Corporation, a person must meet all of the following criteria:

1. The person must have contracted to purchase a lot from Horizon Corporation at any time from June 1, 1969 to August 31, 1974.
2. The purchaser must either:
 - (a) have completed paying for the lot; or
 - (b) be current in making payments to Horizon when the trustee distributes the partial refunds; or
 - (c) have defaulted on his or her contract after paying 75% or more of the purchase price.

3. The lot purchaser must not have received prior relief of any of the following types from Horizon:

(a) Relief amounting to at least 25% of the cash price of the lot from (i) a refund, (ii) a judgment in a lawsuit, or (iii) a reduction in the price of the lot; or

(b) an exchange of the lot initially purchased for a lot developed with a road and utilities; or

(c) an exchange of the original lot for a lot in Paradise Hills pursuant to the filing of a claim in the settlement of the class action entitled *O'Neil v. Horizon Corp.*, No. Civ. 75-133 (D. Ariz. 1975).

4. No refunds will be given for any purchase prior to June 1, 1969. If as a result of an exchange or a subsequent purchase after June 1, 1969 the purchaser's contract is increased, a refund will be given based only on the increase in the contract price.

EXHIBIT B

IMPORTANT: We owe you a partial refund.

Dear Customer:

We are sending this letter to you under an order issued by the Federal Trade Commission.

In 1975, the Federal Trade Commission filed a complaint against Horizon Corporation concerning its past sales practices. As part of the resolution of this complaint, Horizon will refund to you a portion of the purchase price of the land you purchased from us. Horizon also will spend or cause to be spent \$45 million for development in its properties over the next twenty (20) years, and will refrain from certain sales practices in the future.

The following questions and answers explain how much money you are entitled to receive, the options you have, and some important information about your land.

Who is entitled to a refund?

Refunds will be made to all customers of Horizon who satisfy the following conditions:

1. You must have purchased a lot from Horizon Corporation at any time from June 1, 1969 to August 31, 1974. If your purchase during this time period was an exchange of a lot purchased prior to June 1, 1969, your partial refund will be based only on the increased contract price.

2. You must have completed paying for your lot *or* be current in your payments to Horizon when the trustee distributes the refunds *or* have defaulted on your contract after paying 75% or more of the cash price. (The cash price is the price of the lot excluding interest.)

3. You will not receive a partial refund if you have already received a reduction in the cash price of your lot of 25% or more, a refund of 25% or more of the cash price of your lot, an exchange for a lot developed with a road and utilities, or an exchange for a lot in Paradise Hills as part of the settlement of the class action suit entitled *O'Neil v. Horizon Corporation*.

Our records show that you are entitled to a refund.

How much money will be refunded?

Horizon will pay \$14.5 million into a trust fund over the next six years. This money, plus the interest earned on it, will be distributed to the eligible customers in two (2) payments. We estimate that each customer will receive about 12% of the cash price of the lot(s) purchased. Of course, your refund may be more or less than that amount depending on such factors as the number of customers seeking refunds.

When will I receive my refund?

You will receive part of your refund in July 1984. The rest will be paid in July 1987.

What do I have to do to receive my refund?

You must sign the attached notice and return it to Horizon in the self-addressed envelope within ninety (90) days. **IMPORTANT** - by signing this notice you give up any right you may have to sue Horizon for all claims of any kind arising from the transaction for your purchase of land, that is, the manner in which the land was marketed, the purchase contract and the circumstances in which the contract was signed. If you have questions, we suggest you consult a lawyer before you sign this.

You must also keep us informed of any changes in your address. This is important. If we cannot find you when we mail out the refund checks, you will lose your right to a refund. An address change form is enclosed in this letter for your convenience. You do not have to use this form so long as you tell us either in person or by mail each time you move.

What should I do if I do not receive my checks?

If you have not received your first check by August 1, 1984 or have not received your second check by August 1, 1987 you should write to us as soon as possible.

Do I have to give back my land?

No. You do not have to give back the land to receive this refund.

What are the plans for developing my lot?

The lot you have purchased is completely undeveloped. Unless your lot is located in Waterwood, Horizon has no plans to develop your lot. If your lot is in Waterwood, consult your contract. In properties other than Whispering Ranch your lot is or will be accessible by a road, paved in Waterwood and unpaved in the other properties. It may or may not be possible to develop your lot or extend utility lines to it. Your contract may give you the right to exchange your lot for a fully developed lot. An exchange will cost you more money. If you have questions, please refer to your contract or write to Horizon Corporation.

What are Horizon's plans for development?

Horizon will spend, or will assure that others spend, at least \$45 million in development over the next twenty years. This money will be spent for roads, utilities, stores, apartment houses, recreational facilities, civic buildings, or other improvements within the properties. The money will not be used to improve your lot. The improvements may or may not directly benefit you or your lot.

Can I resell my lot?

There is virtually no resale market at the present time for lots which have not been developed with utilities. It is unlikely that you could resell your lot at the present time. There is no certainty that prospects for resale will improve in the future. The

growth of nearby cities may not make resale of your lot any easier. Horizon is not obligated to buy back your lot or help you resell it.

What efforts will Horizon make to reduce my property taxes?

Horizon does not have direct control over the amount of your property taxes. However, Horizon filed suit in El Paso County to reduce property taxes on land in Horizon City. As a result of this suit, property taxes for many lots in Horizon City declined from about \$14.00 per year to \$8.00 per year. Similar efforts are now underway concerning Rio Communities.

What options do I have?

You have three options with respect to your lot.

1. You may accept our refund offer and keep your land. You may also accept our refund offer and exchange your land if your contract permits an exchange. If you have not fully paid for your property, you will have to continue making your payments in order to keep your land or exchange it. See your contract for a full explanation of the exchange privilege that applies to your land.

2. You can refuse to make any further payments that are due under your contract.

If you refuse to make further payments *after* you have already paid 75% or more of the cash price, you will be eligible for the refund described above. If you stop paying *before* you have paid 75% of the cash price, you will *not* be eligible for the refund described above. (Only payments of principal count toward the 75%.)

In either case, you will lose your land and all the payments you have made.

3. Instead of accepting the refund described above, you may seek redress for any injury you believe Horizon has caused you. If you were a member of the class in the *O'Neil* suit or have previously accepted relief from Horizon, you may not be able to choose this option. We recommend that you consult an attorney before you choose this option.

If I have other questions, whom should I contact?

If you have questions about this offer, please write to us at the following address:

Refund Offer
Horizon Corporation
Post Office Box 27324
Tucson, Arizona 85726

We will answer your questions promptly.

We recommend that you keep this letter for future reference.

Sincerely,

Donald C. White
President
Horizon Corporation