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FILED
JUN 18 2004
DEPARTMENT OF REAL ESTATE
By

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	DRE No. H-2631 SD
D.R. HORTON SAN DIEGO HOLDING COMPANY INC. and D.R. HORTON SAN DIEGO MANAGEMENT COMPANY INC.,	OAH No. L-2001100384
Respondents.	

AMENDED DECISION AFTER PETITION FOR WRIT OF MANDATE ONLY AS TO RESPONDENTS D.R. HORTON SAN DIEGO HOLDING COMPANY, INC. AND D.R.HORTON SAN DIEGO MANAGEMENT COMPANY, INC.

* * *

On July 8-12 and September 23-27, 2002, in San Diego, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

James L. Beaver, Counsel, represented Complainant. Valentine S. Hoy, Attorney at Law, represented Respondents D.R. Horton San Diego Holding Company, Inc. and D. R. Horton San Diego Management Company, Inc.

The matter was submitted on February 19, 2003 following the submission of closing briefs by counsel for the parties.

On March 10, 2003, the Administrative Law Judge issued

a Proposed Decision (herein "Proposed Decision") as to D.R. Horton San Diego Holding Company, Inc., D. R. Horton San Diego Management Company, Inc. and an additional Respondent, Marc Robert Perlman.

On April 7, 2003, the Real Estate Commissioner issued a Decision (herein "Decision of April 7, 2003") which adopted the Proposed Decision effective April 29, 2003.

On July 17, 2003, a Verified Petition For Writ of Administrative Mandate was timely filed against the Commissioner of Real Estate in the Superior Court of the State of California, County of San Diego, Case No. GIC814529, by Respondent D.R. Horton San Diego Holding Company, Inc.

On request and stipulation of the parties, and good cause appearing, the Decision of April 7, 2003 is hereby amended as to Respondents D.R. Horton San Diego Holding Company, Inc. and D.R. Horton San Diego Management Company, Inc. as follows:

1. Charles W. Koenig, Deputy Real Estate Commissioner of the State of California (hereafter, "Department") filed Accusation No. H-2631 SD in his official capacity. On May 3, 2001. Respondents filed timely Notices of Defense. On August 10, 2001, J. Chris Graves, Deputy Real Estate Commissioner, filed a First Amended Accusation. Complainant's motion to amend the First Amended Accusation made at the hearing was granted. The term "Accusation" as used herein refers to First Amended Accusation as amended at hearing.

2. Respondents HORTON SAN DIEGO HOLDING COMPANY, INC. and D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC. deny and do not admit the allegations of Paragraphs XXVIII through XXXII, inclusive, in the Accusation, but stipulated, in the interests of expediency and economy, not to further contest the allegations in Paragraphs I through X and XIII through XXVII of the Accusation, but to remain silent with the understanding that, as a result thereof, those factual allegations, without being admitted or denied, will serve as a prima facie basis for the disciplinary action provided for herein.

3. The acts and omissions of Respondents HORTON SAN DIEGO HOLDING COMPANY, INC. and D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC. described in Paragraphs I through X and XIII through XXVII of the Accusation constitute cause to suspend or revoke all license and license rights of D.R. HORTON SAN DIEGO HOLDING COMPANY, INC. and D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC. pursuant to the provisions of Section 10177(g) of the California Business and Professions Code (herein "Code") and

the provisions of Sections 11013.4, 11018.1, 11018.2, and 11022(a) of the Code in conjunction with Section 10177(d) of the Code.

ORDER

1. All licenses and licensing rights of Respondent D.R. Horton San Diego holding Company under the Real Estate Law are suspended for a period of ninety (90) days from the effective date of the Decision herein; provided, however:

a. If Respondent petitions, forty (40) days of said ninety (90) day suspension (or a portion thereof) shall be stayed upon condition that:

(1) Respondent pays a monetary penalty pursuant to Section 10175.2 of the Code at the rate of $250.00 for each day of the suspension for a total monetary penalty of $10,000.00.

(2) Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be received by the Department prior to the effective date of the Decision in this matter.

(3) If Respondent fails to pay the monetary penalty in accordance with the terms and conditions of the Decision, the Commissioner may, without a hearing, vacate and set aside the stay order, and order the immediate execution of all or any part of the stayed suspension.

(4) No final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action against Respondent occurred within two (2) years of the effective date of the Decision herein. Should such a determination be made, the Commissioner may, in his or her discretion, vacate and set aside the stay order, and order the execution of all or any part of the stayed suspension, in which event the Respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

(5) If Respondent pays the monetary penalty and if no further cause for disciplinary action against the real estate license of Respondent occurs within two (2)

years from the effective date of the Decision herein, then the stay hereby granted shall become permanent.

b. Fifty (50) days of said ninety (90) day suspension shall be stayed upon condition that:

(1) No final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action against Respondent occurred within two (2) years of the effective date of the Decision herein.

(2) Should such a determination be made, the Commissioner may, in his or her discretion, vacate and set aside the stay order, and order the execution of all or any part of the stayed suspension, in which event the Respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

(3) If no order vacating the stay is issued, and if no further cause for disciplinary action against the real estate license of Respondent occurs within two (2) years from the effective date of the Decision, then the stay hereby granted shall become permanent.

2. All licenses and licensing rights of Respondent D. R. Horton San Diego Management Company, Inc. under the Real Estate Law are revoked.

This Decision shall become effective at 12 o'clock noon on JULY 9, 2004.

IT IS SO ORDERED June 16, 2004.

JOHN R. LIBERATOR
Acting Real Estate Commissioner

John R Liberator

FILED

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DEPARTMENT OF REAL ESTATE

By

BEFORE THE

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of D.R. HORTON SAN DIEGO HOLDING COMPANY, INC., D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY, and ASTRID GUNHILD LINDHOLM, Respondents.	NO. H-2631 SD OAH NO. L-2001100384

DECISION

The Proposed Decision dated March 10, 2003, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon on APRIL 29, 2003.

IT IS SO ORDERED April 7, 2003.

PAULA REDDISH ZINNEMANN
Real Estate Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of: D. R. HORTON SAN DIEGO HOLDING COMPANY, INC., D. R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY AND ASTRID GUNHILD LINDHOLM, Respondents.	Case No. H-2631 SD OAH No. L2001100384

PROPOSED DECISION

On July 8-12 and September 23-27, 2002, in San Diego, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

James L. Beaver, Counsel, represented complainant.

Valentine S. Hoy, Attorney at Law, represented respondents D.R. Horton San Diego Holding Company, Inc., D. R. Horton San Diego Management Company, Inc., and Marc Robert Perlman.

The matter was submitted on February 19, 2003 following the submission of closing briefs (marked Exhibits 68, 69, and V) by counsel for the parties.

FACTUAL FINDINGS

1. Charles W. Koenig, Deputy Real Estate Commissioner of the State of California (hereafter, "Department") filed Accusation No. H-2631 SD in his official capacity on May 3, 2001. Respondents filed timely Notices of Defense. On August 10, 2001, J. Chris Graves, Deputy Real Estate Commissioner, filed a First Amended Accusation. Complainant's motion to amend the amended accusation made at the hearing was granted.

Prior to the hearing, the Department and respondents Lisa Anne Birney and Astrid Gunhild Lindholm entered into stipulations in settlement of the accusations against them, and neither appeared at the hearing except as witnesses.

2. The Department issued a salesperson license to respondent Marc Robert Perlman on December 21, 1984. The license was terminated on July 8, 1989 at which time the Department issued broker license number 878092 to him. He is currently the licensed officer of D. R. Horton San Diego Holding Company, Inc. and DRH Realty.

The Department issued broker license number 01198401 to D. R. Horton San Diego Management Company, Inc. (hereafter, "Horton Management") effective June 21, 1995, with respondent Perlman the designated officer. The license, the designation of respondent Perlman as the designated officer, and all branch licenses were canceled as of June 18, 1999.

The Department issued broker license number 01253251 to D. R. Horton San Diego Holding Company, Inc. (hereafter, "Horton Holding") effective March 19, 1999, with respondent Perlman the designated officer.

Astrid Lindholm was originally licensed as a salesperson in 1976. Her license was activated in the employ of respondent Perlman on May 18, 1995, and she has remained in his employ, or the employ of respondents Horton Management or Horton Holding since then.

Lisa Anne Birney was originally licensed in 1986 as a salesperson. Her license was activated in the employ of respondent Horton Management on February 2, 1998, and she remained in its employ, or the employ of respondent Perlman until on August 6, 1998. She is presently employed by Landmark Communities, Inc.

3. On August 18, 1994, D. R. Horton San Diego No. 13, Inc. (hereafter, "Horton No. 13") was incorporated under the laws of the State of California. On March 27, 1995, respondent Horton Management and respondent Horton Holding were incorporated under the laws of the State of California. On January 15, 1998, Horton Holding merged a number of its wholly-owned subsidiaries, including Horton No. 13 into itself. On August 5, 1999, Horton Holding merged Horton Management, its wholly-owned subsidiary into itself.

4. Thomas Noon is an employee of D. R. Horton, Inc., a large real estate developer. It is a publicly held corporation incorporated under the laws of Delaware and has its headquarters in Texas. Respondent Horton Holding is a wholly-owned subsidiary of D. R. Horton, Inc. Noon is presently the president of the west region which covers California. On January 1, 1993, Noon opened the San Diego division and started to sell the company's first houses that fall. In 1995, he began to plan the development of a project called Mira Lago at Bernardo Vista Del Lago (hereafter, "Mira Lago") located in the Rancho Bernardo area of San Diego County.

The first person Noon hired was respondent Perlman to help him find property to develop. He also hired John Kerr as a division manager, who later replaced Noon when he

returned to Horton's headquarters in Texas. Kerr became the project manager of the Mira Lago project. Neither Noon nor Kerr are licensed by the Department.

A sales manager for the Mira Lago project was hired. During the time of the sales transactions involved in this case, Katrina Butts, a licensed salesperson, was the sales manager. Birney and Lindholm became salespersons during the course of the project.

Respondent Perlman as the broker was responsible for the sales people and interacted primarily with the sales manager.

The corporate structure created by D. R. Horton, Inc. at first provided respondent Horton No. 13 owned and developed the Mira Lago project and respondent Horton Management acted as the sales arm and hired the employees. All of the various corporations were wholly-owned subsidiaries of D. R. Horton, Inc. For the most part, the employees who testified in this proceeding, including Noon, Birney, Lindholm, and respondent Perlman did not differentiate between the various Horton-owned corporations; they simply worked for "Horton."[1]

5. On May 17, 1995, Horton No. 13 as the subdivider filed a Notice of Intention (Common Interest) containing an Application for a Final Report with the Department seeking to build 15 residential units in the Mira Lago development. The units were to be condominiums. Leslie Hopkins of Chicago Title Company was named the single responsible party ("SRP"). Respondent Perlman was the person designated by the developer as the person to be contacted. The documents submitted in connection with the application were prepared by or under the direction of Nancy T. Scull, an attorney with the law firm of Luce, Forward, Hamilton & Scripps. Noon as vice president of Horton No. 13 signed the application.

According to the application, the plan called for the construction of five buildings in Phase 1, each containing three different units, called Plan 1, Plan 2, and Plan 3. Plan 1 units had a garage for one car and one reserved open parking space. Plans 2 and 3 each had two-car garages. There were to be 13 phases and 147 units built.

6. Included with the application was information regarding a 600A bond. A 600A bond covers more than one project. Hopkins indicated bond number 3SM 800 532 00 in the amount of $250,000.00 had been issued by American Motorist Insurance Co. and the principal was D. R. Horton Inc. She included a copy of the bond with the application. In each of the 12 subsequent applications for final reports, Hopkins included the same information regarding the bond.

There was a discrepancy between the principal listed on the bond (D. R. Horton, Inc.) and the developer of the project (Horton No. 13 and later Horton Holding). Martha Darko

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[1] For purposes of this decision, the term "Horton" will refer to respondent D. R. Horton San Diego Holding Company, Inc., respondent D. R. Horton San Diego Management Company, Inc., D. R. Horton San Diego No. 13, Inc., and all of the employees of the various companies, including the sales agents and respondent Perlman.

was the deputy real estate commissioner assigned to the master file. When a deputy finds something wrong with an application or the supporting documentation, which is called a deficiency, he or she will generally write to the SRP and ask for additional information or a correction. There is no deficiency or letter regarding the discrepancy on the bond in the Department's records.

7. By letter dated December 12, 1996 to the Department, Hopkins as SRP of the Mira Lago project wrote Bond Number 158265105 in the amount of $250,000.00 was issued by American Casualty Company and it replaced the American Motorist Insurance bond. She attached the bond with her letter. The bond was a 600A bond and the principal was listed as respondent Management. By letter dated December 13, 1996, the Department informed Hopkins the American Motorist Insurance bond was cancelled "per their request" effective that day, and the Department would retain the cancelled bond in its files.

8. By letter dated November 19, 1997, the Department informed Hopkins it had received a blanket surety bond and her letter of November 18 informing the Department Bond # JU8662 was being replaced by Bond # 158265105 issued by St. Paul Fire and Marine Insurance Co. The Department further advised Hopkins its files did not disclose a record of Bond # JU8662, and returned Bond #158265105 so it could be submitted together with RE Form 600H.

On March 10, 1998, the Department notified Hopkins the Department had received Bond # JU8662 and became effective that date. That 600A bond in the amount of $250,000.00 had been issued on October 14, 1997, and named D. R. Horton, Inc. as the principal.

The only 600H form in the Department's bond file is dated January 14, 1998 and indicates the subdivider is respondent Horton Holding.

9. Between May 17, 1995 and February 2, 1998, either Horton No. 13 or respondent Horton Holding applied to the Department, and obtained, 13 separate and distinct final reports authorizing respondents to offer for sale, negotiate the sale of, and sell units in the subdivision covered by the public report of each phase, as follows:

Applicant	Phase	Units in Phase	Date Applied	Date Issued
Horton No. 13	1	19-26, 40-45	5/17/95	8/25/95
Horton No. 13	2	13-18, 46-48	11/1/95	11/29/95
Horton No. 13	3	7-12, 49-51	11//1/95	1/11/96
Horton No. 13	4	1-6, 52-54	5/3/96	6/7/96
Horton No. 13	5	34-39	8/21/96	9/20/96
Horton No. 13	6	55-60, 100-102	1/6/97	3/18/97
Horton No. 13	7	61-66, 94-99	1/6/97	3/18/97
Horton No. 13	8	67-72, 85-93	5/30/97	7/22/97
Horton No. 13	9	73-84	5/30/97	7/18/97
Horton No. 13	10	103-111, 145-147	10/23/97	12/29/97

Horton Holding	11	28-33, 134-135	2/2/98	4/17/98
Horton Holding	12	124-135	2/2/98	5/7/98
Horton Holding	13	28-33, 112-123	2/2/98	5/7/98

In connection with phases eight, nine, and ten, an Expedited Amendment Application was submitted which provided respondent Horton Holding was the successor by merger to Horton No. 13. The amendments all occurred on January 30, 1998.

10. Following issuance of the first public report, Horton advertised, solicited and accepted reservations, offered for sale, negotiated the sale of units, and sold all of the 147 units constructed by Horton No. 13 and its successor, respondent Horton Holding. In particular, Horton entered into the following transactions:

Reservation Date	Date Deed Recorded	Purchaser	Unit	Phase
1/18/97	3/7/97	Sparks	53	4
5/23/97	6/19/97	Kayle	8	3
11/24/97	1/2/98	Ansari	92	8
3/7/98	4/29/98	Lisciotti	113	11
3/27/98	4/30/98	Iske	110	10
1/18/98	5/8/98	James	74	9
3/8/98	5/29/98	Hlavay	146	10
3/27/98	6/10/98	Mumper	119	11
5/3/98	10/22/98	Vasquez	131	12

In all of the above transactions, Horton took reservations from the purchasers on the "Reservation Date" and the purchasers signed the "Deposit Receipt, Offer to Purchase Property and Escrow Instructions" form. Horton obtained reservations deposits from the purchasers in the form of checks on or before the "Reservation Date" in each of the above transactions.

In addition, on July 1, 1997, Mumper wrote deposit checks in order to reserve units 89 and 92 in phase 8. She did not complete either transaction.

11. On May 26, 1995, June 5, 1996, November 13, 1996, and August 25, 1997, Horton No. 13 applied for, and the Department issued, preliminary public reports on the Mira Lago project.

12. Cathleen Mumper first became interested in Mira Lago in May 1996. She went to the sales office, picked up written materials regarding the project, and looked at the models. She and the agent discussed prices and configurations of the different plans. The agent gave her a sheet of paper showing costs and monthly payments. She returned several more times to look at the models.

On or about July 1, 1997, Mumper and her mother went to the project and they decided to put down a $2,000.00 deposit. Mumper's mother Anna wrote the check dated

June 29, 1997. They also chose options (air conditioning, maple cabinets, a glass door for the cabinets, and mirrored doors in the master bath) and Anna Mumper wrote a check dated July 1, 1997 in the amount of $2,955.00. Lindholm as the sales agent filled out a Request for Construction Change form and indicated the Mumpers had selected Lot 89, a Plan 2 unit. Later, they decided to buy a different Plan 2 unit, Lot 92. Lindholm prepared another Request for Construction Change and Anna Mumper changed the amount on the original check to $2,930.00. Both units were in Phase 8. Horton deposited the check in the D. R. Horton San Diego operating account. In August 1997, the buyer cancelled the transaction.

Horton's conduct constituted the negotiation of a sale and took place before the final public report for this phase was issued. Horton did not provide the buyer with a copy of the final public report.

13. On March 7, 1998, Theresa Lisciotti wrote a check to D. R. Horton for $2,000.00 which represented a deposit for the purchase of Lot 113, a Plan 2 unit in Phase 11. Lindholm prepared a form entitled "Mira Lago Reservation" on that date which indicated D. R. Horton, Inc acknowledged receipt of the $2,000.00 and Lisciotti agreed to execute a purchase agreement for the purchase of that unit when the "White Report" (final public report) was issued. Lisciotti further agreed to let D. R. Horton hold the deposit until that time. Lisciotti also signed a "Reservation Instrument" on March 7 indicating Horton No. 13 acknowledged receipt of $2,000.00 from her for the reservation of Lot 113 and reserved the lot for the potential buyer. The form indicated Horton No. 13 represented it would ". . . immediately place the deposit and a signed copy of this document in the following neutral escrow depository. . ." The form indicated Continental Escrow located in San Diego was to be the escrow. The form further indicated the instrument did not create a contractual obligation to buy or sell on the part of either the buyer or the seller and either party may cancel at any time without incurring liability to the other, and if a cancellation occurred, the deposit would be immediately returned to the buyer. Lindholm placed a diagonal line through the remainder of the form and Lisciotti signed it. That portion of the form dealt with the earning of interest on the funds deposited with the escrow and costs for the services provided. Lindholm provided Lisciotti a copy of the preliminary report and Lisciotti signed a receipt for it.

On March 21, 1998, Birney prepared a "Buyer Option—Request for Construction Change" form for Lisciotti. The form contained the changes Lisciotti wanted. Birney also prepared an Option Selection Agreement form indicating the cost of the options totaled $4,065.00 and Lisciotti had paid that amount. Lisciotti signed both forms and wrote two checks to D. R. Horton totaling $4,065.00. Both were deposited in the D. R. Horton operating account.

On March 31, 1998, in a form letter, Birney wrote that buyers who purchased lots 103 to 114 could expect to move into their new home the week of April 24-30. She thanked and congratulated the buyers for choosing a D. R. Horton home and indicated they would be monitoring the loan status of the buyers very closely to ensure the loans were in place and funded in a timely manner.

Horton's activities in connection with the Lisciotti transaction between March 7 and 31, 1998 constituted the negotiation of a sale and occurred in advance of the issuance of the final public report.

14. A required part of the notice of intention is, "A true statement of the terms and conditions on which it is intended to dispose of the land, together with copies of any contracts intended to be used." (Bus. & Prof. Code § 11010(b)(5).) To comply with this requirement, Horton No. 13 and/or respondent Horton Holding submitted a document entitled "Deposit Receipt, Offer to Purchase Property and Escrow Instructions." Horton No. 13 and/or respondent Horton Holding, as the seller, agreed to sell the Mira Lago units on the terms and conditions set forth in this document. Each of the subsequent 12 applications contained the same document. However, over time, Horton No. 13 began to add addenda to the document.

In none of the applications submitted in connection with Mira Lago did Horton No. 13 or respondent Horton Holding include a "Buyer Option—Request for Construction Change" form, an "Option Selection Agreement," an "Outside Lender Disclosure" form.

15. The "Buyer Option—Request for Construction Change" form used by Horton in some of the transactions specifies in part that ". . . any and all payments for Options are non refundable." This violates the provisions of Title 10, California Code of Regulations, section 2791.

16. The "Option Selection Agreement" used by Horton in some of the transactions purports to be a contract between the buyer and respondent Management as the contractor who was to provide and install optional items ordered by the buyer. The agreement provides in part:

> *3. Option funds, Liquidated Damages. Except as provided in Section 2 above, Buyer acknowledges and agrees that Contractor will be providing the options provided for under this Option Agreement based on selection made by Buyer and that such option monies shall be applied by Contractor for the costs of the options selected by Buyer. In the event Buyer fails to purchase the Property, such option payments shall be non-refundable once paid by Buyer to Contractor and will be retained by Contractor as liquidated damages as provided below, notwithstanding any subsequent cancellation of the Option Order by Buyer or failure by Buyer to acquire the Property under the Purchase Agreement, either of which events shall be deemed to be a material breach of this Option Agreement.*
>
> *a. BY PLACING THEIR INITIALS HERE, BUYER _____ AND CONTRACTOR _____ AGREE THAT CONTRACTOR SHALL BE ENTITLED TO RETAIN THE AMOUNT DEPOSITED OR PAID TO CONTRACTOR BY BUYER FOR ANY OPTIONS ORDERED BY BUYER AS LIQUIDATED DAMAGES FOR CONTRACTOR'S EXPENSES INCURRED WITH RESPECT THERETO. BUYER AND CONTRACTOR AGREE THAT CONTRACTOR WILL BE DAMAGED BY A BREACH OF THIS OPTION AGREEMENT BY BUYER AND WILL BE ENTITLED*

TO COMPENSATION FOR THEIR DAMAGES, BUT THAT SUCH DAMAGES WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN. BUYER DESIRES TO LIMIT THE AMOUNT OF DAMAGES FOR WHICH BUYER MIGHT BE LIABLE UNDER THIS OPTION AGREEMENT. IN ADDITION, BOTH BUYER AND CONTRACTOR WISH TO AVOID A LAWSUIT TO COLLECT ITS DAMAGES FOR BREACH OF THIS OPTION AGREEMENT BY BUYER; AND

b. THE AMOUNT OF BUYER'S PAYMENTS TO CONTRACTOR UNDER THIS OPTION AGREEMENT REFERENCED IN SECTION 3(a) ABOVE SHALL BE DEEMED TO CONSTITUTUE A REASONABLE ESTIMATE OF CONTRACTOR'S DAMAGES UNDER THE PROVISIONS OF PARAGRAPH 1671, ET SEQ. OF THE CALIFORNIA CIVIL CODE AND SHALL BE DEEMED LIQUIDATED DAMAGES TO CONTRACTOR.

This violates the provisions of Title 10, California Code of Regulations, section 2791.

17. The "Outside Lender Disclosure" form used by Horton in some of the transactions provided in part:

If the Buyer's loan fails to close upon completion of the home, Buyer agrees to assume Seller's cost to carry not to exceed $_____ per day. The cost to carry may be withheld from Buyer's original deposit of $_____ with further authorization. These costs will be charged per day, beginning five (5) days after notice of completion until the escrow is closed. Buyer agree to waive the right to arbitrate as provided in the sales contract. Any remaining funds will be credited to the Buyer at the close of escrow.

This violates the provisions of Title 10, California Code of Regulations, section 2791.

18. In its Notices of Intention for phases 11, 12, and 13 filed with the Department, respondent Holding included a checklist entitled, "Acknowledgement of Receipt for Documents." It contains a list of 20 enumerated documents, plus subparts to two, that were to be furnished to buyers of a Mira Lago unit. The Option Selection Agreement and Outside Lender Disclosure forms were listed.

19. Chris Neri is manager of the subdivisions section of the Department's Sacrament office which administers the Subdivided Lands Act for Northern California. He had worked in the Los Angeles office's subdivision section for seven years as a deputy commissioner. He reviewed the Department's file which contained respondents' filings in connection with the Mira Lago project and testified as an expert on behalf of the Department.

The deputies in his office look for compliance with section 2791 of the Regulations which deals with purchase money disbursements, including liquidated damages. The deputies look for liquidated damages claims procedures in the sales contract. In reviewing respondents' filings, he noted the Option Selection Agreement and Outside Lender Disclosure forms were never submitted to the Department. He further noted the two forms

were listed on the above checklist. He testified it was a mistake for the deputy not to have asked for them.

In Neri's opinion, the Buyer Option—Request for Construction Change form, another form not submitted to the Department for review in any of its applications, was inconsistent with section 2791(c) of the Regulations and with the sales contract because it provided option money was nonrefundable, and if it had been submitted to the Department, it would have been found to be deficient. The form also did not contain a claims procedure for liquidated damages and would have been a cause for a deficiency.

The third paragraph of the Option Selection Agreement form covering liquidated damages was likewise, in Neri's view, inconsistent with the sales contract and it failed to specify a notice procedure for the buyer to dispute a claim. He also noted the form referred to Civil Code section 1671, while the applicable regulation required compliance with Civil Code section 1675. Finally, he felt this form was deficient because the seller and contractor were similar legal entities.

It is the Department's view that where the contractor who installs options is not affiliated with the developer, and the contractor and buyer enter into a contract for options, that contract is not part of the Department's file and the Department is not concerned about it. If, however, there is an affiliation between the developer and the contractor, the Department is concerned about the contract.

20. Linda Katzman had been a deputy real estate commissioner for 12 years, including acting as the manager of the subdivision section in the Los Angeles office for two years. For the last 12 years, she has acted as a consultant providing subdivision processing services to builders/developers, attorneys, and title companies. She has qualified as an expert in court on subdivisions. She reviewed the Department's file and believes respondents' applications were complete and reasonably accurate, and met the standard of care for such filings. She found some errors but they are not unusual.

In her opinion, the Outside Lender Agreement and the Option Selection Agreement forms were not ordinarily submitted to the Department during the years 1996-98. She testified there is no consistent policy as to what addenda have to be attached to contracts. She did not believe the Department had policies and procedures that covered this.

Katzman pointed out the deputy assigned to respondents' filings was meticulous and probably knew of these documents because they were referred to in the escrow instructions. She felt that if the deputy wanted to see them, she would have issued a deficiency notice or request, but she did not do that. Katzman noted that if the documents were requested and not provided, the Department would not issue a final report.

When Katzman worked for the Department, she found the Los Angeles and Sacramento officers handled the application process differently, and in her capacity as a consultant, she has found there are still differences. In her experience, she received more deficiency notices from the Sacramento office. She acknowledged the application process

for subdivisions was a complicated one and brokers typically did not know much about the Subdivided Lands Act.

21. One of the 49 buildings containing the three units Mira Lago was used as a model home. The sales staff used the garage of the model as a sales office. Horton had a three-dimensional model in the office to show potential buyers how the three units fit together and kept brochures and blank forms and supplies in the office for the agents' use.

Lindholm and Birney were Horton's sales agents on site at Mira Lago for most of the period of time covered by this accusation. They reported to Katrina Butts. Typically, when a customer came into the sales office, they would give the customer a brochure and describe what lots were available. If the customer were ready to reserve a home, the agents would complete a reservation instrument, accept the deposit check, and bring all the documents and check to Butts the following Monday. Thereafter, the agents would deal with the customer and complete all the necessary forms and answer any questions.

22. The brochure created by Horton described the features of the Mira Lago planned community and contained floor plans of each of the three plans. They were given to visitors at Mira Lago when they toured the models. The list of features includes "direct access from attached one and two car garage." The drawings did not contain dimensions and did not indicate any scale. The diagram depicting the garage of the plan 2 unit is a rectangle except for an indented, apparently square area in one of the back corners. Within the indented area was the laundry room for the plan 1 unit. There is no indication in the drawing of the distance between the front of the garage to the back of the garage, between the front of the garage to the indented area, or the size of the indented area. The drawing describes the garage as "2 car garage." The price list also refers to the plan 2 unit as having a two-car garage. Nowhere in the brochure is there any suggestion two standard sized cars could or could not fit into the garage of the plan 2 unit.

23. Patricia Davies, a deputy real estate commissioner, measured the garages of the plan 2 units purchased by Mumper, Kayle, Lisciotti, Vasquez, and Sparks. She determined the distance on the short side of the garage ranged between 188.25 and 189.25 inches. She determined the distance on the longer side of the garage ranged between 226 and 228.75 inches.

24. John Bayle purchased a Mira Lago plan 2 unit in 1996. He noticed from the brochure the garage was not evenly spaced and discovered the laundry room protruded into it. He and the sales agent measured it and he realized his 1987 Chevrolet Camaro was longer than the space provided on the short side of the garage. He asked the agent if Horton would accept less money because he felt he could not use half the garage. The agent offered $6,000.00 in incentives towards the closing costs, but Bayle did not think that was enough. Horton refused to take less money. The problem ended when Horton deeded an outside parking space to Bayle.

25. Michael James and his wife began looking at Mira Lago in late 1997 or early 1998, and on January 18, 1998, signed the deposit receipt and wrote a check in the amount of

$500.00 to Continental Escrow for the deposit in order to purchase lot 74, a plan 2 unit. During the course of looking at the brochures, units and the models, they went inside two plan 2 units but did not enter the garages. One of them was lot 74, but the garage was full of building supplies. They looked at the garage from the driveway and James could see there was a wall on one side, but he did not think about that side being shorter or whether cars would fit into the garage. He did not have any discussions with Lindholm, with whom he dealt, about the size of the garage. On another occasion at Mira Lago, he asked Birney about the availability of parking and whether he could park in the driveway. Birney said he could and also could park on the street and in guest parking. He did not have any discussion with Birney about the garage. Up through the time escrow closed on February 26, 1998, no one had told James the garage would hold a standard sized car and a compact, no one called attention to the size of the garage, and he never objected to the size of the garage. He had received a copy of the CC&Rs but he never saw any detailed plans or measured the garage.

After he moved in, James learned some other buyers could not park in their garages and they parked on the street, causing parking problems in the development. James got onto the parking committee in October 1998. He talked about the problem with respondent Perlman and another Horton employee who was on the homeowner's association Board of Directors. At the time he moved in, James owned cars which fit into the garage, but he later bought a 1995 Chrysler Cirrus and found it did not fit on the shorter side. He parked it in the driveway which was a common area, and people left him notes telling him to get it out of the driveway. James' wife owned a Honda Accord and they parked that on the longer side of the garage. James believed the Honda was longer than the Chrysler. To resolve the problem, James received a parking variance which allowed him to park in the driveway.

26. William and April Sparks began looking at Mira Lago in January 1997. On January 18, 1997, they gave Lindholm a check made payable to D. R. Horton in the amount of $2,000.00 for a deposit. Lindholm prepared a Reservation to Reserve Home form which indicated receipt of their check and that the Sparks agreed to execute a purchase agreement for lot 52 on January 25, 1997. The Sparks did not sign the form. The Sparks signed the Deposit Receipt, Offer to Purchase Property and Escrow Instructions on January 21, 1997. They also signed an Outside Lender Disclosure form.

William Sparks received the sales brochure and noted the plan 2 models came with two-car garages. He did not go into a plan 2 garage on his first visit but on the second visit he did. He asked Lindholm about the garage on January 18 and she said it was a two-car garage. He asked if residents could park in the outside parking, and she said they could. It was not until he received the CC&Rs that he learned residents could not park in the outside parking. The Sparks had their walk-through on March 6, and prior to then, they had no further discussions with the sales agents regarding parking or the garage. One time, he was with Lindholm and he was in a plan 2 unit and he wanted to go into the garage but it was locked and he assumed Lindholm did not have a key because she did not open it for him.

During the walk-through, Sparks looked at the garage from the street and walked into it. He did not give any consideration to the size of the garage. He owned a Toyota Tercel and Acura Integra, and both fit on either side of the garage. He learned of the problem when

he tried to park his Ford Pickup and Ford Expedition inside. He found the Expedition fit on the long side but not on the short side; the pickup fit in neither side. He assumed the Expedition would not fit but he thought the pickup would fit. No one ever told him the garage would hold only a standard size car and a compact size car. After he moved in, he obtained a pass from the homeowner's association to park in guest parking. He never asked for a refund or tried to back out of the transaction.

27. Randall Kayle became interested in Mira Lago in 1995 but did not receive permission from his employer until 1997 to move from New Mexico to San Diego. He came to San Diego in May 1997 with the intention of purchasing a unit, in part because it had a two-car garage, and on May 23, he wrote a $2,000.00 to D. R. Horton for a deposit for lot 8, a plan 2 unit. Lindholm filled out a Reservation to Reserve Form indicating receipt of the deposit and setting a reservation of May 24 for Kayle to execute a contract. Kayle returned on May 24, 1997 and signed the Deposit Receipt, Offer to Purchase Property and Escrow Instructions as well as the Outside Lender Disclosure. The only discussion he had with the sales agents regarding the garage was that the garage for lot 8 was a two-car garage. Escrow closed on Kayle's transaction on June 19, 1997.

At the walk-through before escrow closed, Kayle did not go into the garage or look into it from the outside. He had never been in a plan 2 garage before. After the walk-through, he placed some personal items in the garage, checked the door, and saw some paint cans. He knew it was irregularly shaped but did not think there was anything abnormal about it. No one from Horton told him what sized cars would fit in it.

Several months later, Kayle's parents came for a visit and they parked their car on the longer side of the garage. When Kayle tried to park his Honda Accord on the short side, he found it would not fit. Prior to then, he owned a pickup and always parked it on the longer side while he stored personal items on the shorter side. Kayle did not try to rescind the deal. He has had experience buying homes and as a real estate agent himself, and he has never had a problem with the size or configuration of a garage before.

28. Mumper returned to Mira Lago in March 1999 and decided to purchase a plan 2 unit. She wrote a check payable to D. R. Horton in the amount of $2,000.00 on March 27, 1998 for a deposit on lot 122. The check was deposited into the D. R. Horton San Diego Operating Account in May. Birney prepared a Mira Lago Reservation form, initially for lot 122 and then changed to lot 119 on March 29, indicating receipt of the deposit, with Mumper agreeing to execute a purchase agreement on April 30. Birney also prepared a Reservation Instrument which Mumper signed and put a line through paragraphs two through five. She signed a Deposit Receipt, Offer to Purchase Property and Escrow Instructions for lot 119 on April 30 along with the Outside Lender Disclosure, the Buyer Option—Request for Construction Change, and the Option Selection Agreement forms. She understood her option money was nonrefundable. On May 5, Mumper wrote a check in the amount of $2,955.00 to cover the costs of options. Escrow closed on June 10, 1998.

29. Despite all her visits and inspections of the models and units of Mira Lago, Mumper did not know, and was never told, the plan 2 garage held only one full size car. She

had never been in or looked into a plan 2 garage before April 30 and never had any conversation with the sales agents about parking.

Before escrow closed, Mumper went on two walk-throughs. During the first, she found a number of errors. She looked into the garage for the first time and noticed the walls were not painted and there were building supplies on one side of the garage. She did not notice one side of the garage was shorter than the other and did not consider her car might not fit on that side. She did not go into the garage during the second walk-through.

On the day escrow closed, Mumper went to the sales office to pick up her keys. Birney asked her to sign a transfer of Utilities and Key Release form and as she did so, she told Mumper her garage accommodated one full size car and one compact car. She also had Mumper sign a diagram of the plan 2 unit taken from the sales brochures on which Horton had written: "Buyer understands that the Plan 2 garage is designed to accommodate one full size automobile and one compact." Mumper signed both forms. Prior to this, no Horton representative had told Mumper about the garage size.

Mumper owned a 1988 Acura Legend at the time she bought her condo and after she moved in, she found it did not fit on the short side of the garage.

By letter dated November 11, 1998 to Birney and Lindholm, Mumper reported what had occurred when she picked up her keys on June 10 and indicated she felt she needed to sign the copy of the diagram of the plan 2 unit in order to get the keys. She wrote she understood that if she sold her home in the future, she would need to disclose to the buyer that the two-car garage accommodates only one full-size car, not two.

Butts replied to Mumper's letter on November 30. She wrote she was puzzled by her question as it related to the garage because the plan two garage ". . . as designed, built and marketed, accommodates two cars. One space accommodates one full size car and one accommodates a standard compact car." She indicated a buyer should investigate and research the size of such things as the bedrooms, dining rooms, backyards, and garages prior to the purchase of the home.

By letter dated January 11, 1999 to Lindholm, Mumper asked Lindholm why she did not disclose the garage accommodations prior to or during the sales transaction. She wrote again on February 25. On March 3, 1999, Lindholm wrote to Mumper and referred to Butts' letter of November 30, and told Mumper to contact Butts in the future. Mumper then wrote to Butts on May 4 and repeated the question she had asked Lindholm. She also asked if it was Horton's standard procedure to ask a buyer to sign a form disclosing information about the home after escrow had closed and before keys are released to the new homeowner, and if it was not Horton's policy, she asked why it occurred with her. Horton did not reply to this letter.

On May 14, 1999, Mumper signed a Licensee/Subdivider Complaint form and complained about Horton's failure to disclose to her the garage accommodations until after escrow closed, at a time when she wanted to pick up the keys so she could move into her

home. She indicated she was deciding between a plan 2 and plan 3 unit and if she had known the plan 2 unit did not accommodate two full sized cars, she would not have purchased the plan 2 unit. She felt the garage information was deliberately not disclosed.

30. Terry Hlavay first went to Mira Lago in December 1997, and went again with his wife, Judith, in January 1998. They toured the models and reviewed the sales brochure. Judith thought the garages seemed narrow for the Chevrolet Blazer and Toyota Camry they owned. They returned on March 7, 1998 and decided to buy a plan 2 unit. They wrote a check in the amount of $2,000.00 payable to D. R. Horton for the deposit on lot 146. Birney prepared a Reservation Instrument indicating Horton had received $2,000.00 for the reservation of lot 146 and she put a line through paragraphs two through five. She also prepared a Mira Lago Reservation indicating the buyers would execute a purchase agreement on March 10. The Hlavays signed both documents. The check was deposited in a bank on or about March 23 but it cannot be determined from the back of the check into what account the check was deposited.

On March 8, 1998, the Hlavays signed a Deposit Receipt, Offer to Purchase Property and Escrow Instructions showing their purchase of lot 146, as well as the Outside Lender Disclosure. On March 20, they signed the Buyer Option—Request for Construction Change and the Option Flooring Agreements. Escrow closed on May 29, 1998.

Judith Hlavay received and read the CC&Rs and learned they could not park their cars in visitor parking and had to park in the garage. She asked Birney about this. Birney said she could always park in a visitor space for a day or two and move the car around. She was concerned about the width of the garage and asked Birney. Birney told her it would not be a problem. On one occasion while they were looking at a unit, they asked Birney if they could look into a garage but she said they could not because it was locked and there were supplies in it. They asked the sales agents several times to see garages but were told they could not go into a unit during construction for safety reasons and later they were locked. They drove through the project without the agents and could see into the garages, but found the owners would use the short side of the garage for storage, so they never had an unobstructed view.

During the walk-through, the Hlavays went into the garage of their unit and discussed the width of the garage. The depth of it was not a concern to them. This was the first time they were in a plan 2 garage. The person who conducted the walk-through said two standard size cars would fit as far as the width of the cars was concerned. No one ever told them the garage would only accommodate a standard sized car and a compact sized car regarding the length of the cars.

On May 30, 1998, the Hlavays went to the sales office to pick up their keys and talked to Lindholm. Lindholm showed them a copy of the floor plan of a plan 2 unit taken from the sales brochure with the following added: "Buyer acknowledges that the Plan 2 garage accommodates one standard size and one compact size car." Judith refused to sign the form and got the impression from Lindholm they would not get the keys if they did not sign it. This was the first time they knew of a problem relating to the size of the garage.

Terry, although upset by this, signed and dated the form. Judith told Lindholm if their cars did not fit they would see a lawyer.

The Hlavays found their cars barely fit into the garage. They had to park the Camry on the longer side because it would not fit on the shorter side. They found the Blazer barely fit into the shorter space. They put foam cushions on the walls to protect their cars and let them know they were in. They had been leasing the Blazer and when the lease was up and they looked for another car, they had to take the car back to their garage to see if it would fit. They did this two or three times. They ended up with another Blazer. This was a major issue to Judith. On June 23, 1998, the Hlavays wrote a letter to Mike Vredevelt, of Horton's warranty service department regarding their walk-through. They indicated the garage "was not accommodating two cars and inadequate parking in our development is a problem."

After they moved in, they learned about fines the homeowner's association was imposing on residents who parked in guest parking. They were not happy at Mira Lago because of the constant frustration over parking, and they sold their unit. They never asked Horton for their money back so they could walk away from the deal.

31. Tom and Caren Iske began looking at Mira Lago around March 1998 after seeing an ad in a newspaper. They looked at the brochure and sketches of the units and garages. Tom Iske did not see a difference between the plan 2 and plan 3 garages. They went a number of times to the project site and looked at the models at the sales office, but they did not go to look at the unit they purchased. They decided to buy a plan 2 unit; at the time they made their selection, the building had not yet been built. They did look at one garage but it had supplies in it and never inspected it. They never had any conversations with the sales agents about the garages or parking. In Mr. Iske's view, "you don't inspect a 2-car garage." No one told them the garage would hold one standard sized car and one compact sized car.

The Iskes reserved their unit on March 22, 1998 and signed the Deposit Receipt, Offer to Purchase Property and Escrow Instructions on March 27, 1998. They also signed the Outside Lender Disclosure form and the next day signed the Buyer Option-Request for Construction Change and the Option Selection Agreement forms.

Before escrow closed, they did their walkthrough. They entered the garage through the laundry room and Mr. Iske was a little concerned about the width of the garage but did not see a problem. There were supplies stored on the right side of the garage and they did not think one side was shorter than the other. There was no discussion about the garage at the time of the walkthrough, of at the time they picked up their keys.

After the Iskes moved into their unit and finished unpacking, they tried to park their cars in the garage. They owned a Nissan long bed pickup and an Oldsmobile Cutlass Supreme; the pickup was slightly longer than the car. The first time Mr. Iske drove his car into the garage on the shorter side, he hit the wall and caused a dent. Lindholm happened to be walking by and he mentioned to her that she never told him the car would not fit. Lindholm replied she also did not tell him the dining room would hold six chairs either. Mr.

Lindholm replied she also did not tell him the dining room would hold six chairs either. Mr. Iske went to the office later and asked where he could park. Lindholm said he could park in guest parking but the homeowner's association kept ticketing him. He obtained a variance but that did not solve the problem because there were 15 buildings near him and nine parking spots, which led to competition for spaces. On the occasions when he came home late, he could not find a parking spot and had to park on an exterior road, and parking there could not exceed 24 hours.

Mr. Iske has since traded in his Oldsmobile for a Mitsubishi Eclipse, a car that is shorter than the Oldsmobile and would fit on the shorter side of the garage. Nevertheless, he is afraid of putting it into the garage and hitting it, so he parks it on the longer side and leaves the pickup outside.

32. Andrea Vasquez reserved unit 131 on May 3, 1998. Before that, she had looked at the models and the brochures containing the floor plans of the units. She saw a sketch of the garages and noticed one side was shorter but did not think about it. She was interested in a plan 2 unit. At one time she asked Birney if she could see a garage but Birney said they were not available. She owned a Toyota 4x4 with a standard bed and her husband owned a Toyota Tacoma with a standard bed. She told Birney she wanted to make sure the two pickups fit. Birney suggested they drive around the neighborhood and look at garages. Lindholm told her there was plenty of guest parking, implying the guest parking was available to owners. Neither agent offered her an opportunity to go through a completed plan 2 unit either because they had all been sold or none had been started.

Vasquez and her husband signed the Deposit Receipt, Offer to Purchase Property and Escrow Instructions, the Outside Lender Disclosure, and the Option Selection Agreement forms on May 9, 1998. They signed two other Option Selection Agreements and several Buyer Option-Request for Construction Change forms.

By July, Vasquez had driven around the development and had seen garages but did not know their dimensions. She focused on the width of the garage, not the depth, because she was concerned there may be a problem when the truck doors were opened. She relied on the sketch in the brochure and the representation the garage was a 2-car garage and believed the garage was deep enough. She told Lindholm that because the garages were not available for inspection, she wanted to be sure the trucks would fit. Lindholm did not tell her the trucks would or would not fit, but suggested she drive around and reminded her about guest parking.

Prior to escrow closing on October 22, 1998, Vasquez did her walkthrough and spent a few minutes in the garage. This was the first time she had been in a plan 2 garage. She did not think there was much to look at. By this time, no one had told her the garage would accommodate only a standard sized car and a compact sized car.

Parking became an issue after she moved in and she realized one of the trucks would not fit on the shorter side. Vasquez began parking one of the trucks outside and started getting tickets from the homeowner's association. She got a variance but there were not

always parking spaces available, and she often parked in another development. She later bought a BMW 328i and that car fit into the shorter side of the garage.

33. Robert Gilmore is a managing deputy commissioner and responsible for managing the Department's Los Angeles district office including the section that administers the Subdivided Lands Act. Marjorie Burchett is an attorney and partner in the law firm of Luce Forward, a large and well-respected law firm in San Diego. She specializes in real estate transactions, including matters connected with the Department. She was not the primary Luce Forward attorney working on the Mira Lago project, but toward the end of the project, she was asked by the lead attorney to obtain approval from the Department on some documents, including the option selection agreement.

On August 11, 1995, Burchett and Gilmore spoke by telephone. According to Burchett, it is common to call the Department and Gilmore and ask questions. During this conversation, they discussed two matters, including the use of an agreement with a separate entity. She asked Gilmore if Horton could keep all liquidated damages ordered or installed in the home. Gilmore told her the Department did not have jurisdiction if the agreement did not tie into the sales agreement. Burchett said the entity doing the upgrades was an affiliated entity. Burchett believed they arrived at a decision whereby the Department would not have jurisdiction over the option selection agreement and she would not submit it to the Department.

34. Respondent Perlman graduated from SDSU in 1989 with a degree in finance prior to becoming licensed as a broker. He is married and has one child. He presently owns his own company which is involved in residential subdivisions. He has worked for several large real estate development companies before beginning his association with Horton in 1994.

Perlman's first position with Horton was as a vice president and project manager. He did acquisitions, sales, and customer service. He became a designated broker in 1994 and in that role, he reviewed setups, was responsible for the sales staff, and interacted with the sales manager. He eventually became a vice president of the San Diego division in land acquisition and did some project management. By 1997-98, he was acquiring land for different projects but did not manage the projects. He also served on some homeowners associations Boards of Directors. He left Horton in 2002 because he wanted his own company. His company, Marker Development, looks for land opportunities with the goal of subdividing and selling, but he has not built anything yet.

Perlman was not the project manager of Mira Lago. As the broker at the outset of the project, he participated in kickoff meetings with the sales team, received the white reports, and discussed budgets, engineering, title, and sales with the division president. After sales began, he had weekly meetings with management to cover all of Horton's projects, discussed sales issues, and talked to the sales manager about any unusual issues. Katrina Butts was the sales manager. He believed she was a very good manager, and noted she had been honored as the sales manager of the year in the industry in 1999. Perlman went to the Mira Lago sales office frequently. Perlman believed it was better for Horton to have its own sales staff

from both a control point of view and it was better for buyers. He met with Butts and the staff every two weeks and in addition discussed any unusual issues that may have arisen.

Perlman reviewed the subdivision report applications for accuracy but did not write them; Leslie Hopkins of Chicago Title did and attorneys from Luce Forward reviewed them. Others involved in developing the condominium and budget plans also reviewed them. Employees from Horton assisted Hopkins and the Luce Forward attorneys, and he believed his employees were qualified to prepare reports and the outside consultants were the best they could find. Perlman reviewed the initial application in detail because it had the basic information about the project, and the information in it was repeated in subsequent applications. He looked specifically at technical matters and the structure of ownership.

Perlman testified he did not know about the reservation to reserve home form or that sales agents were lining out paragraphs on the reservation instrument and did not review sales documents. They went instead to the escrow coordinator and were signed by the division president. He knew reservation deposits were held until the white report came out and the buyer signed the purchase agreement. Horton changed this practice after this accusation was filed. He knew of no instance where a reservation check was placed in a Horton account before the buyer executed the purchase agreement. Horton handled option funds differently. Regarding the reservation form, Perlman believed it was a form created in the field and was not something he would have had a chance to review.

Perlman testified he believed Horton had filed a bond acceptable to the Department and he had no role in the obtaining or filing of it. He knew of no deficiencies in the bond before the accusation was filed and knew no buyer had made a claim under a bond.

Perlman testified he did not know the option selection agreement had not been submitted to the Department for approval. He relied on the consultants and in house staff and if they did not forward a document to him for review, he would not see it and would not know what was sent to the Department. Perlman knew very little about the Subdivided Lands Act or his responsibilities under it.

According to Horton policy, a buyer could not contract for options until he or she signed a purchase agreement. Perlman learned buyers on two occasions had entered into contracts to purchase options before they signed the purchase agreements.

Perlman testified the outside lender disclosure form was created to address a situation where the buyer's lender, on occasion a family member, did not fund the loan on time and Horton as the seller incurred costs between the time the sales should have closed and the time it did close. He knew of no instance where Horton assessed damages against a buyer under this agreement.

Perlman reviewed the sales brochure before the grand opening. During the pre-sales meeting, no one raised any issue about the size of the plan 2 garage. The diagrams were prepared by the architect and did not say one way or the other whether they were to scale. He did not believe the brochure was misleading or that anyone would be deceived. He felt

anyone working in the field would be clear about the size of the garage. He knew buyers were given condominium plans and they recorded the dimensions. He did not know about any problems relating to the size of the garage until Mumper complained. Thereafter, they began to disclose the matter of the size, but it was never decided it should be disclosed only after escrow closed. Perlman testified he did not draft the disclosure and did not see it until the accusation was filed.

Perlman served as a member of the Board of Directors of the Mira Lago Homeowners Association. In that capacity, the only problem relating to the garage came from Michael James, who complained about parking in the driveway. Horton offered to extend the garage up to 12 inches and had an architect provide a design for this, and the Homeowners Association approved the design. Horton would have paid for the modification, but no homeowner accepted it.

35. Thomas Noon explained some of the reasons behind Horton's policies in connection with the sales of units at Mira Lago. The reservation policy was a convenience to potential buyers to avoid having them wait in line or camp out in order to purchase a unit. Horton did not deposit reservation checks and instead held them with the forms. Horton did not use their money.

Noon knew the garage of the plan 2 unit had one side that was shorter than the other and was a little less than 16 feet long. He felt the garage itself disclosed the difference. He felt it was obvious and could be seen from the street. Garage doors were not installed until construction was almost completed, so anyone could look into a garage. Horton also had models made to scale which showed the size of the garage. In designing the garage, Noon considered the type of buyer who would be attracted to Mira Lago—single people, older people, and singles living together. He did not believe a family with small children would be attracted to Mira Lago because of the small yards, and the recreation room was designed for older people. He considered city requirements. He never considered the size to be an issue, and no one he talked to about the project raised the issue either.

According to Noon, Horton did not put dimensions on the sales brochure because, in his experience, buyers had a difficult time reading plans. There was no policy against buyers having access to homes under construction and, in fact, superintendents were told if they saw potential buyers to give them hard hats and show them around, and to make sure they knew where the sales office was. The sales staff was encouraged to walk around the project and there were no rules against looking into a unit or the garage, unless the garage was used for storage. Noon felt they were disclosing everything.

After the issue was raised, Horton offered to extend the garage by a foot by rebuilding the entry, and had an architect draw up plans. No one took Horton up on the offer. Noon did not see anything wrong with the plan 2 garage, and noted they fit a lot of cars and most people had no problem with the size.

36. In response to an inquiry by the Department, Horton's attorneys forwarded to the Department copies of diagrams of seven plan 2 garages on which the disclosure regarding the size of the garage was added and signed by the buyer.

LEGAL CONCLUSIONS

1. Respondents contend the applicable statute of limitations bars the Department from imposing discipline on them for any acts committed more than three years prior to the filing of the accusation. Respondents appear to use the date of the filing of the amended accusation on August 10, 2001, meaning that only the Vasquez transaction occurred within the applicable limitations period. However, since the accusation was filed on May 3, 1998, the James, Hlavay, and Mumper transactions also occurred within the applicable limitation period. The Department argues Business and Professions Code section 11021 must be interpreted to mean any violation of the Subdivided Lands Act (Business and Professions Code section sections 11000 *et. seq*) which occurred within three years of the recording of the Vasquez' deed may be prosecuted.

Business and Professions Code section 10101 provides:

The accusation provided for by Section 11503 of the Government Code shall be filed not later than three years from the occurrence of the alleged grounds for disciplinary action unless the acts or omissions with which the licensee is charged involves fraud, misrepresentation or a false promise in which case the accusation shall be filed within one year after the date of discovery by the aggrieved party of the fraud, misrepresentation or false promise or within three years after the occurrence thereof, whichever is later, except that in no case shall an accusation be filed later than 10 years from the occurrence of the alleged grounds for disciplinary action.

Business and Professions Code section 11021 provides:

For the purpose of calculating the period of any applicable statute of limitations in any action or proceeding, either civil or criminal involving any violation of this chapter, the cause of action shall be deemed to have accrued not earlier than the time of recording with the county recorder of the county in which the property is situated of any deed, lease or contract of sale conveying property sold or leased in violation of this chapter and which describes a lot or parcel so wrongfully sold or leased.

This section does not prohibit the maintenance of any such action at any time before the recording of such instruments.

The Department focuses on the words ". . . of any deed . . ." to argue the limitations period for every violation is extended until the period beginning with the recording of the deed on the last such violation. The Department points out section 11021 had been amended in 1955. Previously, the statute read ". . . if a deed . . ." had been used, and that meant the limitations period began with the first violation. Thus, by changing the word "a" to "any,"

and not using the word "the," according to the Department, the Legislature signaled its intent to change the commencement of the limitation period to the date of recording of the last deed.

Respondents counter the change in the words from "a" to "any" does not mean what the Department claims it means, and instead focus on the words ". . . of any deed . . . in violation of this chapter and which describes a lot or parcel so wrongfully sold or leased." According to respondents' interpretation, the commencement of the limitations period must be related to the specific act or omission sued upon.

In *People* v. *Thygesen* (1979) 93 Cal.App.3d 895, 905-06, the court considered the 1955 amendment and concluded, "This amendment clearly indicates the legislative intent that whenever "any deed, lease or contract of sale" is recorded in violation of the chapter, a new cause of action accrues. . . Furthermore, as the trial judge aptly pointed out, a contrary interpretation would permit a person to set up a large subdivision, immediately record one deed, wait three years and completely escape prosecution on the subsequent, numerous sales." On the other hand, the language of section 11021 emphasized by respondents demonstrates the statute of limitations on any violation begins to run with the recording of the deed constituting that particular violation. A later act in violation of the Subdivided Lands Act will constitute a new offense and the limitations period on this new and later offense will be calculated from the recording of that deed.

In order to properly construe the language of section 11021, the purpose of the Subdivided Lands Act must be kept in mind. In *In re Sidebotham* (1938) 12 Cal. 2d 434, 436, the court upheld the constitutionality of the act and explained:

> . . . *The object of the present law, prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to such abuses is obviously legitimate; and the method, involving investigation and disclosure of certain essential facts, and a protection for the innocent purchaser against loss of his land by foreclosure of the underlying mortgage, is perfectly reasonable. A safeguard against arbitrary action is provided in the requirement of a public report of the commissioner's investigation and a public hearing on any contemplated prohibitory order. The decisions sustaining regulatory legislation to prevent fraud are numerous, and they fully support the law herein attacked.* . .

To effectuate the intent of the Subdivided Lands Act within the context of a statute of limitations challenge, the inquiry must focus on the nature of the alleged violation. In *Thygesen*, it was alleged sections 11010 and 11018.2 were violated. Section 11010 requires a subdivider to file a notice of intention to sell or lease with the Department and sets forth the requirements the notice must satisfy. Section 11018.2 contains the requirement that a public report must be obtained before a sale of lots or parcels can take place. The court took the view that whenever a deed was recorded at a time when the subdivider was in violation of those statutes, a new limitations period began.

That reasoning does not apply to every violation of the Subdivided Lands Law. Some are unique to a particular transaction and involve a particular buyer; if that is the case, then the

limitations period must commence with the filing of this particular buyer's deed. In *Thygesen*, the defendants were convicted of selling subdivided land without written notification from the Commissioner and this related to every parcel. In this case, respondents filed notices of intention and received written notification from the Commissioner by way of public reports. Some of the alleged violations related to many, if not every transaction, such as the allegation of respondents' failure to post a proper bond, respondents failure to obtain Department approval of certain documents (Option Selection Agreement, Outside Lender Disclosure, and Buyer Option—Request for Construction Change forms), the failure of those documents to comply with applicable statutes and regulations relating to liquidated damages, the making of material representations regarding the size of the plan 2 garage, or the making of material changes in the setup. In these and similar situations, the limitations period would begin to run from the filing of the last deed.

On the other hand, it is alleged that on only two occasions involving Mumper and Lisciotti, respondents offered for sale, negotiated for sale, and/or sold units in the subdivision without first obtaining a final public report authorizing such acts. Since the subdivision in this case involved 147 units, and the Department alleges only two violations of section 11018.2 occurred in this manner, it should be concluded the limitations period on these alleged violations began with the recording of the Mumper and Lisciotti deeds, respectively, and did not begin to run again with the recording of the Vasquez deed.

Accordingly, each allegation in the amended accusation must be examined to determine if it is time barred. It is not appropriate to simply point to the recording date of a transaction and conclude every violation associated with it is or is not barred by the statute of limitations.

2. Respondents contend the accusation must be dismissed because the Department failed to establish by clear and convincing evidence that any respondent willfully violated the law. They argue Business and Professions Code section 10177(d), the statute authorizing the commissioner to suspend or revoke a license if a licensee "willfully disregarded or violated the Real Estate Law . . ." does not impose strict liability on real estate licensees, discipline should not be imposed if a licensee's actions proceeded from an honest mistake or sincere and reasonable difference of factual evaluation, and a willful violation requires awareness of the law. Respondents appear to recognize the cases which have considered these issues have arrived at contrary conclusions, but nevertheless argue cases construing other statutes ought to govern this case.

The Department correctly relies upon *Handeland* v. *Department of Real Estate* (1976) 58 Cal.App.3d 513 for the proposition that section 10177(d) does not require evidence of knowledge in order to establish a willful violation of law. The court reasoned:

> *An interpretation of section 10177, subdivision (d), that does not impose disciplinary sanctions upon a salesman when there is a clear and undisputed violation simply because the salesman asserts that the violation was unintentional does, in fact, emasculate the law since it places the burden of enforcement upon the buyer instead of on the Department as intended by the Legislature. Id.* at 813.

See also *People* v. *Gonda* (1982) 138 Cal.App.3d 774, 779 and cases cited therein; *People* v. *Thygesen, supra* at 904-05; *Norman v. Department of Real Estate* (1979) 93 Cal.App.3d 768, 778.

Based on the above authorities, respondents' contention must be rejected.

3. Title 10, California Code of Regulations, section 2795 provides:

(a) If a subdivider makes application and pays the appropriate fee, a preliminary subdivision public report may be issued by the Department in advance of satisfaction of all requirements for issuance of a final public report when in the judgment of the Commissioner it is reasonable to expect that all of the requirements for the issuance of a final public report will be satisfied in due course.

(b) A subdivider and persons acting on his behalf may solicit and accept reservations to purchase or lease subdivision interests under authority of a preliminary public report if there is compliance with each of the following:

(1) The person making the reservation (potential buyer) has been given a copy of the preliminary public report and has executed a receipt for a copy before any money or other thing of value has been accepted by or on behalf of the subdivider in connection with the reservation.

(2) A copy of the reservation instrument signed by the potential buyer and by or on behalf of the subdivider, along with any deposit taken from the potential buyer, is placed into a neutral escrow depository acceptable to the Commissioner.

(3) The reservation instrument used is a form previously approved by the Department with at least the following provisions:

(A) The right of either subdivider or potential buyer to unilaterally cancel the reservation at any time.

(B) The payment to the potential buyer of his total deposit on cancellation of the reservation by either party.

(C) The placing of the deposit into an interest bearing account for the benefit of the prospective buyer at the prospective buyer's request and upon the prospective buyer's agreement to pay any charges of the escrow depository for this service.

(c) The initial term of a preliminary public report shall not exceed one year from the date of issuance. The authority to use a preliminary public report shall automatically terminate with respect to those subdivision interests covered by a final public report which is issued before the scheduled termination date of the preliminary report.

4. Section 2800 of the regulations provides:

The owner of a subdivision which is the subject of an outstanding public report shall immediately report in writing to the Real Estate Commissioner relevant details concerning any material change in the subdivision itself or in the program for marketing the subdivision interests. A material change in the subdivision or in the offering shall include, but shall not be limited to the following:

(a) The sale, conveyance, including a transfer of title in trust, or the granting of an option to another to acquire, five or more subdivision interests in a subdivision other than a time-share project or twelve or more time-share estates or time-share uses in a time-share project.

(b) Change in the name or organization of the subdividing entity such as incorporation, dissolution of corporation or change in corporate or fictitious business name.

(c) Change in purchase money handling procedures under Section 11013.2 or 11013.4 of the Code including but not limited to a change in name or location of escrow or trust account depository or the creation of a blanket lien or encumbrance affecting a lot, parcel or unit of subdivided land being offered for sale.

(d) Change in methods of marketing or conveyance of subdivision interests, including but not limited to the following:

> *(1) Use of real property sales contracts, lease-option agreements or similar marketing instruments.*
>
> *(2) Special sales inducements involving a financial commitment to purchasers by or on behalf of the subdivider such as buy-back agreements, special interest rates or a short-term basis and prizes, gifts or premiums.*

(e) Inability of the subdivider to fulfill agreements and assurances to purchasers of subdivision interests given by the subdivider to the commissioner in the application for a public report.

(f) Creation or discovery of latent hazards affecting the subdivisions such as adverse geologic conditions not apparent at the time of issuance of the current public report for the subdivision.

(g) Addition of common areas or common facilities for the use and enjoyment of owners in the subdivision which were not contemplated at the time of issuance of the current public report for the subdivision.

(h) A relocation of easements affecting unsold subdivision interests.

(i) The creation of a district, or the annexation of the subdivision into a district, having the power to tax or levy assessments against real property interests within the subdivision.

(j) An increase of 20% or more or a decrease of 10% or more in the regular assessment charged by an Association against owners in a common-interest subdivision over the amount of the regular assessment reflected in the current public report for the subdivision.

(k) Delinquencies in the payment of regular assessments by owners within a common-interest subdivision resulting in the receipt by the Association of income which is more than 10% less than scheduled income from said assessments.

(l) A proposed change in the use for which the subdivision is offered as, for example, from residential to investment or a proposed change from an offering of the sole and exclusive use of a unit in a common-interest subdivision to a program involving the sharing of ownership or use with others as, for example, a time sharing program.

(m) Changes in the means for furnishing potable water, sewage disposal and other public services to lots, parcels or units within the subdivision.

(n) Any change in the configuration of the subdivision interest being offered for sale from the configuration according to the subdivision map or parcel map upon which the current public report for the subdivision was based.

(o) An amendment to the CC&Rs or other governing instruments for the subdivision or for an association of owners of subdivision interests.

(p) Failure by the subdivider as an owner of interests in a common interest subdivision to pay regular assessments where:

> *(1) Assessments are payable on a monthly basis and the subdivider has failed to pay three or more months of such assessments.*
>
> *(2) Assessments are not payable on a monthly basis and the subdivider has failed to pay such assessments within three months after such assessments become due and payable.*

(q) A program which does not comply with Section 2792.10 in which the subdivider undertakes to subsidize the cost of operating and maintaining common areas and of providing services in lieu of payment of regular assessments by the subdivider.

(r) The affiliation by a single-site time-share project as defined in Section 11003.5 of the Code with: 1) other time-share projects or accommodations under a contractual

or membership program through a mandatory reservation system or 2) a mandatory reservation system.

5. It was not established respondents violated sections 2795(b)(3) and 2800 of the Regulations and Business and Professions Code section 11012 in connection with the reservation instrument as alleged in paragraphs XXI(a) and XXII of the amended accusation. Respondents did not make a material change to the Reservation Instrument when Birney or Lindholm placed a diagonal line through a portion of the document. The evidence established the agents explained the entire reservation instrument to each buyer, the buyers knew they had the opportunity to earn interest, the buyers decided not to have their reservation deposits placed in an interest-bearing escrow account, and the line recorded that decision. The Mira Lago Reservation form did not replace the Reservation Instrument and was merely used to make appointments with buyers for them to return to sign the purchase agreement, to assure buyers Horton would hold their reservations until that time, and to inform them Horton would cancel their reservations after that date. It did not constitute a material change in the setup.

6. It was not established respondents violated sections 2795(b)(2) and 2800 of the Regulations as alleged in paragraph XXI(b) and XXII of the amended accusation. The evidence established respondents routinely accepted reservation deposit checks, usually in the amount of $2,000.00 and held them pending either the execution of a purchase contract or the cancellation of the reservation. Respondents did not place the reservation deposit checks and Reservation Instrument into an escrow account prior to the execution of the purchase contract. If the reservation were canceled, respondents returned the reservation deposit checks without cashing them or depositing them in any account.

Section 2795(b)(2) of the Regulations requires a copy of the signed reservation instrument and any deposit taken from the potential buyer be placed in a neutral escrow depository. The wording of the regulation suggests it is a mandatory requirement. However, section 2795(b)(2) must be considered in conjunction with section 2795(b)(3). That regulation requires the reservation instrument must be a form previously approved by the Department and containing three provisions. Section 2795(b)(3)(C) requires the reservation instrument contain a provision concerning ". . . the placing of the deposit into an interest bearing account for the benefit of the prospective buyer <u>at the prospective buyer's request</u>. . ." The emphasized portion suggests a buyer has a choice whether to have the deposit placed in an interest bearing account. Given that a prospective buyer will have to pay any charges to the escrow depository for this service, and the amount of interest a prospective buyer would earn would rarely, if ever, cover the cost of the service, a reasonable prospective buyer would never choose to have the deposit placed in an escrow if there were some other, appropriate way to handle the reservation deposit.

Gilmore testified he was aware of a practice in the industry for a developer to hold reservation checks and not cash them. Less Hess is a corporate broker and has been licensed since 1978. He has offered expert testimony in the field of tract sales for decades. He has written articles on the subject and testified as an expert in court more than one hundred times. He testified it is common for a seller to hold a deposit check and not cash it. He

pointed out this practice gave the buyer an opportunity to change his or her mind, and if the buyer wanted this done, a broker should honor that request. He added this practice benefited both the buyer and seller; the buyer if he or she chose to back out of the deal would not have to cancel a check but rather simply got the check back, while the seller is assured the buyer is serious about going ahead with the transaction. Hess also pointed to the commissioner's reference book as sanctioning this practice.[2]

If a subdivider is required to give notice to a prospective buyer that he or she may request to have a deposit placed in an interest bearing account, that must mean the buyer has the choice not to have that done. Where the buyer chooses not to have the deposit placed in an escrow account, a practice has developed for the subdivider to hold the deposit check for a short period of time pending further action by the parties. That is a reasonable way to handle the situation and does not constitute a violation of the regulations.

7. The allegations contained in paragraphs XXIII and XXIV of the amended accusation relate to the Mumper and Lisciotti transactions. Cause to suspend or revoke respondents' licenses for violation of Business and Professions Code sections 11018.1, 11018.2 and 10177(d) in connection with the Mumper transaction was established by reason of Finding 12. For the reasons set forth in Legal Conclusion 1, these allegations relating to the Lisciotti transaction are dismissed because they were not filed within the limitations period.

8. Section 2791 of the Regulations provides:

(a) The Contract proposed to be used by an applicant for a public report (Subdivider) for the sale or lease of subdivision interests shall provide that if the escrow for sale or lease of a subdivision interest does not close on or before the date set forth in the contract, or a later closing date mutually agreed to by subdivider and the prospective buyer or lessee (Buyer), within 15 days after the closing date set forth in the contract or an extended closing date mutually agreed to by Subdivider and Buyer, Subdivider shall, except as provided in subdivision (c), order all of the money remitted by Buyer under the terms of the Contract for acquisition of the subdivision interest (Purchase Money) to be refunded to Buyer.

(b) The Contract may provide for disbursements or charges to be made against Purchase Money for payments to third parties for credit reports, escrow services, preliminary title reports, appraisals and loan processing services by such parties provided that the Contract includes:

(1) Specific enumeration of all of the disbursements or charges that may be made against Purchase Money, and

(2) The Subdivider's estimate of the total amount of such disbursements and charges.

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[2] No portion of the book was produced at the hearing to corroborate this testimony.

(c) (1) Any contractual provision which calls for a disbursement or a charge against Purchase Money based upon Buyer's alleged failure to complete the purchase of the subdivision interest must conform with Civil Code Sections 1675 (including either subsection (c) or subsection (d) thereof), 1676, 1677 and 1678.

(2) Except for a disbursement made following substantial compliance with the procedures set forth in paragraph (4) below or pursuant to a written agreement of the parties which either cancels the Contract or is executed after the final closing date specified by the parties, a disbursement or charge against Purchase Money as liquidated damages may be done only pursuant to a determination by a court of law, or by an arbitrator if the parties have so provided by contract, that Subdivider is entitled to a disbursement or charge against Purchase Money as liquidated damages.

(3) A contractual provision for a determination by arbitration that Subdivider is entitled to a disbursement or charge against Purchase Money as liquidated damages shall require that the arbitration be conducted in accordance with procedures that are equivalent in substance to the commercial arbitration rules of the American Arbitration Association, that any arbitration include every cause of action that has arisen between Buyer and Subdivider under the Contract, and that the Subdivider remit the fee to initiate arbitration with the costs of the arbitration ultimately to be borne as determined by the arbitrator.

(4) The contract of sale may include a procedure under which Purchase Money may be disbursed by the escrow holder to the Subdivider as liquidated damages upon Buyer's failure to timely give the escrow holder Buyer's written objection to disbursement of Purchase Money as liquidated damages. This procedure shall contain at least the following elements:

> *(A) The Subdivider shall give written notice, in the manner prescribed by Section 116.340 of the Code of Civil Procedure for service in a small claims action, to escrow holder and to Buyer that Buyer is in default under the Contract and that Subdivider is demanding that escrow holder remit $____ from the Purchase Money to Subdivider as liquidated damages unless, within 20 days, Buyer gives escrow holder Buyer's written objection to disbursement of Purchase Money as liquidated damages.*
>
> *(B) Buyer shall have a period of 20 days from the date of receipt of the Subdivider's 20-day notice and demand in which to give escrow holder Buyer's written objection to disbursement of Purchase Money as liquidated damages.*

(5) The Contract may not make Buyer's failure to timely give the escrow holder the aforesaid written objection a waiver of any cause of action the Buyer may have against the Subdivider under the Contract unless the waiver is conditioned upon service of the Subdivider's 20-day notice and demand in the manner prescribed by Section 116.340 of the Code of Civil Procedure for service in a small claims action.

(6) If the Subdivider has had the use of Purchase Money pending consummation of the sale or lease transaction under authorization by the Department pursuant to subdivision (c) or (d) of Section 11013.2 of the Code or subdivision (b) or (c) of Section 11013.4 of the Code, Subdivider shall immediately upon alleging the default of Buyer, transmit to the escrow holder, funds equal to all of the Purchase Money paid by Buyer.

Civil Code section 1675 provides:

(a) As used in this section, "residential property" means real property primarily consisting of a dwelling that meets both of the following requirements:

(1) The dwelling contains not more than four residential units.

(2) At the time the contract to purchase and sell the property is made, the buyer intends to occupy the dwelling or one of its units as his residence.

(b) A provision in a contract to purchase and sell residential property which provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer's failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check, including a postdated check, is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and of subdivision (c) or (d) of this section.

(c) If the amount actually paid pursuant to the liquidated damages provision does not exceed 3 percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that such amount is unreasonable as liquidated damages.

(d) If the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.

(e) For the purposes of subdivisions (c) and (d), the reasonableness of an amount actually paid as liquidated damages shall be determined by taking into account both of the following:

(1) The circumstances existing at the time the contract was made.

(2) The price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if such sale or contract is made within six months of the buyer's default.

Civil Code section 1676 provides:

Except as provided in Section 1675, a provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is valid if it satisfies the requirements of Section 1677 and the requirements of subdivision (b) of Section 1671.

Civil Code section 1677 provides:

A provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to complete the purchase of the property is invalid unless:

(a) The provision is separately signed or initialed by each party to the contract; and

(b) If the provision is included in a printed contract, it is set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type.

Civil Code section 1678 provides:

If more than one payment made by the buyer is to constitute liquidated damages under Section 1675, the amount of any payment after the first payment is valid as liquidated damages only if (1) the total of all such payments satisfies the requirements of Section 1675 and (2) a separate liquidated damages provision satisfying the requirements of Section 1677 is separately signed or initialed by each party to the contract for each such subsequent payment.

9. It was not established respondents violated Business and Professions Code section 11012 or section 2800(c), (d) or (d)(1) of the Regulations as alleged in paragraphs XXV(a) and XXV(a), (b), and (c) of the amended accusation. Those paragraphs allege respondents failed to submit the Option Selection Agreement, Outside Lender Disclosure, and Buyer Option—Request for Construction Change forms to the Department and thereafter materially changed the setup.

The evidence established there is considerable discretion given to deputies when they process subdivision applications, and as a result, there is a disparity in how applications are processed depending on whether the application is filed in Northern California or Southern California. Further, there is no consistent policy, regulation, or guideline which informs subdividers or those who perform work for them that addenda such as these must be filed with the Department along with all the other documents required by Business and Professions Code section 11010.

In addition, there was evidence to suggest the deputy knew of the forms and did not request them. She clearly had a right to request them and a failure on respondents' part to furnish them upon request would have been cause for the issuance of a deficiency. There was certainly no evidence to indicate respondents tried to hide them from the Department.

According to Neri, the deputy's failure to request them was a mistake. Under these circumstances, it cannot be concluded there was clear and convincing evidence to establish respondents committed a willful violation of the Subdivided Lands Act or the regulations.

10. Cause to suspend or revoke respondents' licenses for violating section 2791 of the Regulations and Business and Professions Code section 10177(d), as alleged in paragraph XXV(a) of the amended accusation, was established by Findings 15, 16, 17 and 19.

This violation is not barred by the statute of limitations. Respondents routinely used these forms in the conduct of its business. The violations were not related to any specific transaction nor were they unique to any particular buyer. Under *Thygesen*, the Department may impose discipline for respondents' use of these documents.

In mitigation, no evidence was introduced to show any buyer was harmed by the provisions contained in these documents. Respondents never assessed liquidated damages or any penalties pursuant to the provisions of these documents nor withheld any reservation deposit money from any potential buyer.

11. Cause to suspend or revoke respondents' licenses for violating Business and Professions Code sections 11013.2 and/or 11013.4 and 10177(d), as alleged in paragraphs XXV(b) and XXVI(d) of the amended accusation, was established by Findings 6, 7, and 8.

In mitigation, the error should have been caught by either Hopkins or the Department's deputy. Neri testified the discrepancy between the name on the bond and the name of the applicants was a mistake and should have been noted by the Department's deputy. No one ever complained about this mistake. No one was harmed by it. No one filed a claim against the bond. There was no evidence to suggest respondents committed the act in order to avoid responsibility for its actions. While the parties expend considerable energy arguing this issue in their briefs, and consumed hours of hearing time on the issue, it was in truth inconsequential.

12. Business and Professions Code section 11022(a) provides:

> *It is unlawful for an owner, subdivider, agent or employee of a subdivision of other person, with intent directly or indirectly to sell or lease subdivided lands or lots or parcels therein, to authorize, use, direct, or aid in the publication, distribution, or circularization of an advertisement, radio broadcast, or telecast concerning subdivided lands, that contains a statement, pictorial representation, or sketch that is false or misleading.*

13. Cause to suspend or revoke respondents' licenses for violating Business and Professions Code sections 11022(a) and 10177(d), as alleged in paragraph XXVII of the amended accusation, was established by Findings 5, 10, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, and 36.

Section 11022(a) prohibits the use of advertisements pertaining to subdivided lands containing a statement or sketch this is false or misleading. The claim the garage held two cars is not false. The garage in fact held two cars: one standard sized car and one car commonly described as a compact sized car.

The evidence established, however, eight of the 47 purchasers of the plan 2 units were misled by respondents' claim the garage was a two-car garage. After escrow closed on each transaction, they learned either by experience of by untimely disclosures that their standard sized cars would not fit on the short side of the garage. None were ever told prior to purchasing their homes that many standard sized cars would not fit in the space or that only compact cars would fit in that space.

Respondents argue various real estate licensees would consider the plan 2 garage to be a two-car garage. Respondents point to the wrong population. As noted above, the Subdivided Lands Act was designed to protect the public. The evidence showed the public was misled into believing two cars would fit in the garage when a significant number of cars would not fit in the shorter side of the garage. As Tom Iske put it, "you don't inspect a two-car garage."

Respondents point to the scale of the drawing in the brochure. There is no indication it was to scale. Even if it were, and someone took the time to measure it and determine the short side measured about 16 feet, that does not translate into information as to whether a given car might or might not fit. That person would then either have to measure the length of his or her car, or drive the car into a garage to see if it fit. That is unlikely.

Both Noon and Perlman testified they did not consider the size of the garage to be a problem and did not know a problem existed until some purchasers started complaining. If two experienced men in the field of residential development were unconcerned about the size of the plan two garage, how could respondents expect unsophisticated buyers, some of them first time home buyers, to measure the garage and consider the size of it in relation to the size of their cars. However, the testimony of Noon and Perlman on this issue is not credible. They both knew the length of the garage on the longer side was about 20 feet (the minimum depth of a parking space in San Diego), clearly large enough to accommodate any standard sized car, and many SUVs, minivans, station wagons, and pickups. They both knew, however, that Horton had designed a laundry room, not just the more common water heater, to encroach on a portion of the plan 2 garage, and that reduced the depth of the space to less than 16 feet. According to the City of San Diego, the minimum depth of "small car spaces" (Exhibit I) is 15 feet. It is simply inconceivable that Noon and Perlman would not have at least suspected some cars would not fit into this oddly-shaped garage. It is far more likely they knew some cars would not fit, and chose, for whatever business reasons they had, to withhold that information from the public until they were forced to disclose it after complaints about the garage were made.

Under these circumstances, respondents had a responsibility to inform potential buyers that some cars might not fit into the "two-car garage." No evidence was offered to show respondents ever did that in a timely manner. Most of the buyers involved in this case

did not find out about the problem until they tried parking cars in the garage after they moved in. Mumper and Hlavay were asked to sign a disclosure after escrow closed. The most either of the sales agents did in response to an inquiry about the size the garage was to tell the buyer to drive around the neighborhood and look in the garages. That was not enough.

14. Business and Professions Code section 10176 provides in part:

The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

(a) Making any substantial misrepresentation.

. . .

(c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen.

. . .

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

Business and Professions Code section 10177 provides in part:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

. . .

(d) Willfully disregarded or violated the Real Estate Law (Part I (commencing with Section 10000)) or Chapter I (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter I (commencing with section 11000) of Part 2.

(g) Demonstrated negligence of incompetence in performing any act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

. . .

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

15. Respondents argue the limitations period set forth in Business and Professions Code section 10101 applies to the allegations contained in the second cause of action, and the limitation period is not extended by section 11021. Since the accusation was filed on May 3, 2001, the question is what acts constituting cause for discipline did respondents commit on or after May 3, 1998. The second cause of action alleges respondents participated individually and jointly in a fraudulent common plan or scheme to intentionally induce buyers to purchase a plan two unit by concealing, failing to disclose, making material misrepresentations, or committing acts constituting fraud or dishonest dealing relating to the size of the garage.

Within the scope of this proceeding, respondents' alleged misconduct began on May 17, 1995 when Horton No. 13 filed the Notice of Intention with the Department and represented the plan two units included a two-car garage. Respondent during the entire period it sold plan 2 units in the Mira Lago project advertised the plan 2 unit as including a two-car garage, and to this day maintains it properly described it that way. Respondents argue all the alleged wrongful acts occurred before May 3, 1998, pointing out all nine purchasers received the Mira Lago brochure, eight of them signed purchase and sales contracts, and five of the purchasers closed escrow before that date. Respondents argue the escrow closing dates are irrelevant and the only meaningful dates are when the wrongful acts occurred. Those acts include providing the buyers with the sales brochure and any representations by Birney and Lindholm that the garage was a two-car garage. The Department argues the date escrow closed on each transaction is the relevant date for statute of limitations purposes because respondents' plan to mislead each of them continued until the buyers completed the purchase of their homes. Neither party cites any authority to support their arguments.

The failure of a broker acting as the agent for a seller to fully disclose prior to the sale of property to the seller the identity of a prospective purchaser is a breach of a fiduciary duty and comes within the definition of fraud and dishonest dealing. *Abell* v. *Watson* (1957) 155 Cal. App. 2d 158, 160-61; *Buckley* v. *Savage* (1960) 184 Cal. App. 2d 18, 27.

Respondents acted as brokers for Horton, the seller, not the purchasers of the Mira Lago units. Nevertheless, "California cases recognize a fundamental duty on the part of a realtor to deal honestly and fairly with all parties in the sale transaction." *Norman I. Krug Real Estate Investments, Inc.* v. *Praszka* (1990) 220 Cal.App.3d 35, 42. That duty includes a duty of disclosure to prospective purchasers of material facts which they should know

through the exercise of reasonable diligence. This duty is construed as a general duty of honesty and fairness and a statutory duty of fair and honest dealing imposed by the Real Estate Law on licensees. *Nguyen* v. *Scott* (1988) 206 Cal.App.3d 725, 735-36.

For statute of limitations purposes, if the allegations of misconduct contained in the amended accusation were limited to affirmative acts of misrepresentations such as the handing out of the sales brochures or oral representations by Lindholm and Birney to prospective buyers, then respondents' analysis that the statute of limitations began to run when those acts were committed would be correct. However, the amended accusation alleges respondents concealed and failed to disclose relevant information about the size of the plan two garages, and that information should have been disclosed prior to the time the purchasers completed the purchase of their homes. Since the failure to disclose is just as much a part of the charges of fraud, dishonest dealing, and substantial misrepresentation as the affirmative acts, and the obligation to disclose is an ongoing one, it must be concluded the limitations period commenced only when respondents' obligation to disclose the relevant information ended, and that occurred when the transactions were completed. Prior to then, if respondents had disclosed the relevant information about the size of the plan two garages, they would not have violated their obligations as licensees. Since the James, Hlavay, Mumper, and Vasquez transactions were completed during the limitations period, the allegations of misconduct related to them may constitute grounds for discipline. The other transactions occurred outside the limitations period and cannot be considered for disciplinary purposes.

16. Cause to suspend or revoke respondents' licenses for violating Business and Professions Code sections 10176(a), (c), and (i), and 10177(j), as alleged in paragraphs XXVIII-XXXII of the amended accusation, was established by Findings 5, 10, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, and 36 and Legal Conclusion 13. It was not established respondents' conduct constituted fraud within the meaning of sections 10176(i) and 10177(j). However, their conduct did constitute material misrepresentations (§10176(a)), a continued and flagrant course of misrepresentation (§10176(c)), and dishonest dealing (§§ 10176(i) and 10177(j)).

As far back as 1996, it is reasonable to conclude respondents knew about concerns relating to the size of the plan 2 garage. John Bayle purchased his home then and testified at the hearing he and a sales agent measured the garage to see if his 1987 Chevrolet Camaro would fit in the space, and determined his car was longer than the space on the short side of the garage. He tried to negotiate a settlement, and the agent offered him $6,000.00 in incentives toward the closing costs. It is unlikely a sales agent would make an offer like that without approval of someone much higher in the Horton organization.

About two years passed before respondents began disclosing to prospective buyers the plan 2 garage accommodated a standard sized car and a compact sized car. In the Hlavay and Mumper transactions which closed in May and June 1998, both disclosures came after escrow closed, when the buyers went to the sales office to pick up their keys. Those were not timely disclosures. Respondents submitted seven disclosure forms to the Department in a letter by respondents' attorney in 1999. One of them was Mumper's. The other six appear to

be unrelated to this proceeding. Some are dated. No other evidence was offered in connection with these disclosures, so it cannot be determined if the disclosures occurred before escrow closed, and therefore were timely, or, like in the Mumper and Hlavay cases, occurred after escrow closed.

There was no evidence to suggest respondents through their sales agents provided any useful information to prospective buyers prior to the implementation of the written disclosures. Indeed, the testimony demonstrated respondents consistently placed roadblocks in the way of efforts by buyers to obtain information about the garage. Judith Hlavay was concerned about the width of the plan 2 garage. After she read the CC&Rs and learned cars had to be parked in the garage and not in visitor parking, she asked Birney about the garage. Birney told her the width would not be a problem and she could always park in a visitor space for a day or two, and move the car around. One time Hlavay asked to see a garage but it was locked and there were supplies in it. On other occasions, when she asked an agent to look in a garage she was told she could not during construction for safety reasons. When Andrea Vasquez asked Birney if she could look into a garage, Birney told her to drive around the neighborhood and look at garages. She asked Lindholm about her concern about the size of the garage. Lindholm also told her to drive around the neighborhood and reminded her about guest parking. When the Iskes did their walkthrough, there were supplies on the short side of the garage. The garages attached to the sales office could not be inspected and in some instances, buyers entered into sales agreements before construction on their units had even begun. No one ever testified that an agent accompanied a prospective buyer into an empty garage to alleviate any concern a buyer might have.

By the time Vasquez was about to close escrow on the purchase of her plan 2 unit, respondents had learned from at least Bayle, James, Mumper, Hlavay, and Iske in one way or another about the problem with the plan 2 garage, and respondents had already disclosed the size of it to Hlavay and Mumper, although in an untimely fashion. In fact, Lindholm told Hlavay in May they had received many complaints and this was why they were having buyers sign the disclosure. Yet respondents did not disclose anything to Vasquez.

The only reasonable conclusion to be drawn from the evidence is that respondent's actions were intentional. They were aware of the problem. They did not disclose the plan 2 garage would accommodate only one standard sized car and one compact sized car in a timely way to any of the buyers who testified in this proceeding, and they made it difficult for the buyers to inspect the garages themselves. Their actions occurred over a period of years.

17. Cause to suspend or suspend respondent Perlman's license for violating Business and Professions Code sections 10177(d) and (h) in conjunction with section 10159.2, as alleged in paragraphs XXXIII and XXXVI of the amended accusation, was established by Findings 5, 10, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, and 36 and Legal Conclusions 13 and 16. As the broker, respondent Perlman was responsible for respondents' representation that the plan 2 garage was a two-car garage and was responsible for respondents' failure to disclose it would accommodate only one standard sized car and one compact sized car.

It was not established respondent Perlman violated section 10177(g).

18. In assessing the appropriate penalty to be imposed in this matter, the findings of misconduct must first be separated. One the one hand, the Department established several violations of the technical requirements of the Subdivided Lands Act (Legal Conclusions 7, 10 and 11). There was no evidence of any harm. Respondents hired experienced attorneys and consultants to perform the work for them. The severity of these violations is minimal. For these violations, respondents should be publicly reproved pursuant to Business and Professions Code section 495.

The most significant portion of this case concerned respondents' sale of plan 2 units without proper disclosure of the problem relating to the size of the garages (Legal Conclusions 13, 16 and 17). Findings 25, 29, 30, 32 show the difficulties those buyers encountered after they moved into their new homes. Those difficulties were no different from those encountered by the buyers who purchased their homes outside the limitation period (Findings 24, 26, 27, and 31).

In mitigation, there was evidence respondents offered to extend the length of the garage after the buyers complained, but the quality of that offer was not explored in this proceeding. None of the buyers accepted the offer. There was also testimony from Hess that the odd size of the garage has not affected the market value of the plan two units. He found the plan two units have appreciated in value to the same extent as other units have.

Horton's reason for designing the triplex as it did, with the resulting encroachment into the plan 2 garage by the laundry room for the plan 1 unit was not explained. Certainly part of the reason was economic. It makes sense, therefore, to suspend the licenses of respondent Holding and respondent Perlman, with a monetary penalty in lieu of the suspension pursuant to Business and Professions Code section 10175.2. The maximum monetary penalty permitted is $250.00 for each day of suspension and $10,000.00 per decision. It is appropriate that the maximum monetary penalty be imposed.

Since the license of respondent Management was canceled as of June 18, 1999, that license should be revoked.

ORDER

1. All licenses and licensing rights of respondent Marc Robert Perlman under the Real Estate Law are suspended for a period of ninety (90) days from the effective date of this Decision pursuant to Legal Conclusions 13, 16, 17, and 18; provided, however, that if respondent Perlman petitions, said suspension shall be stayed upon condition that:

a. Respondent Perlman pays a monetary penalty pursuant to Section 10175.2 of the Business and Professions Code at the rate of $250.00 for each day of the suspension for a total monetary penalty of $10,000.00.

b. Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be delivered to the Department prior to the effective date of the Decision in this matter.

c. No further cause for disciplinary action against the real estate license of respondent Perlman occurs within one year from the effective date of the Decision in this matter.

d. If respondent Perlman fails to pay the monetary penalty in accordance with the terms and conditions of the Decision, the Commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension in which event the Respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

e. If respondent Perlman pays the monetary penalty and if no further cause for disciplinary action against the real estate license of respondent Perlman occurs within one year from the effective date of the Decision, the stay hereby granted shall become permanent.

2. Respondent Perlman is hereby publicly reproved pursuant to Legal Conclusions 7, 10, 11 and 18.

3. All licenses and licensing rights of respondent D. R. Horton San Diego Holding Company, Inc. under the Real Estate Law are suspended for a period of ninety (90) days from the effective date of this Decision pursuant to Legal Conclusions 13, 16, and 18; provided, however, that if respondent Horton Holding petitions, said suspension shall be stayed upon condition that:

a. Respondent Horton Holding pays a monetary penalty pursuant to Section 10175.2 of the Business and Professions Code at the rate of $250.00 for each day of the suspension for a total monetary penalty of $10,000.00.

b. Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be delivered to the Department prior to the effective date of the Decision in this matter.

c. No further cause for disciplinary action against the real estate license of respondent Horton Holding occurs within one year from the effective date of the Decision in this matter.

d. If respondent Horton Holding fails to pay the monetary penalty in accordance with the terms and conditions of the Decision, the Commissioner may, without a hearing, order the immediate execution of all or any part of the stayed

suspension in which event respondent Horton Holding shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

e. If respondent Horton Holding pays the monetary penalty and if no further cause for disciplinary action against the real estate license of respondent Horton Holding occurs within one year from the effective date of the Decision, the stay hereby granted shall become permanent.

4. Respondent Horton Holding is hereby publicly reproved pursuant to Legal Conclusions 7, 10, 11, and 18.

5. Both respondents Perlman and Horton Holding shall be responsible for payment of the monetary penalty unless both respondents choose to accept the suspension. If one respondent chooses to accept the suspension, the other shall be responsible for the entire amount of the monetary penalty.

6. All licenses and licensing rights of respondent D. R. Horton San Diego Management Company, Inc. under the Real Estate Law are revoked.

DATED: March 10, 2003

ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

Department of Real Estate
P. O. Box 187000
Sacramento, CA 95818-7000

Telephone: (916) 227-0789

FILED
SEP 12 2002
DEPARTMENT OF REAL ESTATE
By

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of D.R. HORTON SAN DIEGO HOLDING COMPANY, INC., D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY and ASTRID GUNHILD LINDHOLM, Respondents.	No. H-2631 SD STIPULATION AND AGREEMENT

It is hereby stipulated by and between Respondents LISA ANNE BIRNEY (hereinafter "BIRNEY"), and ASTRID GUNHILD LINDHOLM (hereinafter "LINDHOLM"), individually and by and through David S. Bright, Esq., attorney of record herein for Respondents, and the Complainant, acting by and through James L. Beaver, Counsel for the Department of Real Estate, as follows for the purpose of settling and disposing of the First Amended Accusation filed on August 10, 2001 in this matter (hereinafter "the Accusation"):

1. All issues which were to be contested and all evidence which was to be presented by Complainant and Respondents

at a formal hearing on the Accusation, which hearing was to be held in accordance with the provisions of the Administrative Procedure Act (APA), shall instead and in place thereof be submitted solely on the basis of the provisions of this Stipulation and Agreement.

2. Respondents have received, read and understand the Statement to Respondent, the Discovery Provisions of the APA and the Accusation filed by the Department of Real Estate in this proceeding.

3. On August 17, 2001, Respondents each filed a Notice of Defense pursuant to Section 11505 of the Government Code for the purpose of requesting a hearing on the allegations in the Accusation. Respondents hereby freely and voluntarily withdraw said Notice of Defense. Respondents acknowledge that Respondents understand that by withdrawing said Notice of Defense Respondents will thereby waive Respondents' right to require the Commissioner to prove the allegations in the Accusation at a contested hearing held in accordance with the provisions of the APA and that Respondents will waive other rights afforded to Respondents in connection with the hearing such as the right to present evidence in defense of the allegations in the Accusation and the right to cross-examine witnesses.

4. This Stipulation is based on the factual allegations contained in Paragraphs I through XXVII and XXXV, inclusive, in the Accusation. In the interests of expediency and economy, Respondents choose not to contest these allegations in said Paragraphs I through XXVII and XXXV, but to remain silent

and understand that, as a result thereof, these factual allegations, without being admitted or denied, will serve as a prima facie basis for the disciplinary action stipulated to herein. The Real Estate Commissioner shall not be required to provide further evidence to prove said factual allegations. The parties hereto stipulate that Respondents deny and do not admit the allegations of the Paragraphs XXVIII through XXXII, inclusive, in the Accusation.

5. It is understood by the parties that the Real Estate Commissioner may adopt the Stipulation and Agreement as her decision in this matter, thereby imposing the penalty and sanctions on Respondents' real estate license and license rights as set forth in the "Order" below. In the event that the Commissioner in her discretion does not adopt the Stipulation and Agreement, it shall be void and of no effect, and Respondents shall retain the right to a hearing and proceeding on the Accusation under all the provisions of the APA and shall not be bound by any admission or waiver made herein.

6. This Stipulation and Agreement shall not constitute an estoppel, merger or bar to any further administrative or civil proceedings by the Department of Real Estate with respect to any matters which were not specifically alleged to be causes for accusation in this proceeding.

DETERMINATION OF ISSUES

By reason of the foregoing stipulations, admissions and waivers and solely for the purpose of settlement of the pending

Accusation without hearing, it is stipulated and agreed that the following Determination of Issues shall be made:

I

The acts and omissions of Respondents as described in the Accusation are grounds for the suspension or revocation of the licenses and license rights of Respondents under the following provisions of the California Business and Professions Code (hereinafter "the Code") and/or Chapter 6, Title 10, California Code of Regulations (hereinafter "the Regulations"):

(a) as to Paragraphs XXI and XXII in the First Cause of Accusation and Respondents BIRNEY and LINDHOLM under Section 11012 of the Code and Sections 2795 and 2800 of the Regulations in conjunction with Section 10177(d) of the Code;

(b) as to Paragraphs XXIII and XXIV in the First Cause of Accusation and Respondents BIRNEY and LINDHOLM under Sections 11018.1 and 11018.2 of the Code in conjunction with Section 10177(d) of the Code; and

(c) as to Paragraph XXVII in the First Cause of Accusation and Respondents BIRNEY and LINDHOLM under Section 10177(g) of the Code and Section 11022(a) of the Code in conjunction with Section 10177(d) of the Code.

ORDER

I

All licenses and licensing rights of Respondent LISA ANNE BIRNEY under the Real Estate Law are suspended for a period of thirty (30) days, provided, however, said suspension shall be

stayed upon condition that:

(a) No final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action against Respondent occurred within two (2) years of the effective date of this Decision. Should such a determination be made, the Commissioner may, in his or her discretion, vacate and set aside the stay order, and order the execution of all or any part of the stayed suspension, in which event the Respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

(b) If no further cause for disciplinary action against the real estate license of Respondent occurs within two (2) years from the effective date of the Decision, then the stay hereby granted shall become permanent.

II

All licenses and licensing rights of Respondent ASTRID GUNHILD LINDHOLM under the Real Estate Law are suspended for a period of thirty (30) days, provided, however, said suspension shall be stayed upon condition that:

(a) No final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action against Respondent occurred within two (2) years of the effective date of this Decision. Should such a determination be made, the Commissioner may, in his or her discretion, vacate and set aside the stay order, and order the execution of all or any part of the stayed suspension, in which event the Respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for

money paid to the Department under the terms of this Decision.

(b) If no further cause for disciplinary action against the real estate license of Respondent occurs within two (2) years from the effective date of the Decision, then the stay hereby granted shall become permanent.

July 3, 2002
DATED

JAMES L. BEAVER, Counsel
Department of Real Estate

* * *

I have read the Stipulation and Agreement and have discussed its terms with my attorney and its terms are understood by me and are agreeable and acceptable to me. I understand that I am waiving rights given to me by the California Administrative Procedure Act (including but not limited to Sections 11506, 11508, 11509, and 11513 of the Government Code), and I willingly, intelligently, and voluntarily waive those rights, including the right of requiring the Commissioner to prove the allegations in the Accusation at a hearing at which I would have the right to cross-examine witnesses against me and to present evidence in defense and mitigation of the charges.

7/1/02
DATED

Lisa Anne Birney
LISA ANNE BIRNEY
Respondent

7-1-02
DATED

Astrid Gunhild Lindholm
ASTRID GUNHILD LINDHOLM
Respondent

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* * *

I have reviewed the Stipulation and Agreement as to form and content and have advised my clients accordingly.

7-1-02
DATED

DAVID S. BRIGHT, ESQ.
Attorney for Respondents

* * *

The foregoing Stipulation and Agreement is hereby adopted by as my Decision in this matter and shall become effective at 12 o'clock noon on OCTOBER 3, 2002.

IT IS SO ORDERED September 6, 2002.

PAULA REDDISH ZINNEMANN
Real Estate Commissioner

FILED

JUL 18 2002

DEPARTMENT OF REAL ESTATE

By

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of
D.R. HORTON SAN DIEGO HOLDING COMPANY, INC., D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY, AND ASTRID GUNHILD LINDHOLM,

Respondents

Case No. H-2631 SD

OAH No. L-2001100384

FIRST CONTINUED
NOTICE OF HEARING ON ACCUSATION

To the above named respondents:

You are hereby notified that a hearing will be held before the Department of Real Estate at **THE OFFICE OF ADMINISTRATIVE HEARINGS, 1350 FRONT STREET, SUITE 6022, SAN DIEGO, CA 92101** on **SEPTEMBER 23 THROUGH 27, 2002**, at the hour of **9:00 A.M.**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: JULY 18, 2002

By
JAMES L. BEAVER, Counsel

FILED

MAR 13 2002

DEPARTMENT OF REAL ESTATE

By: Laurie L. Jin

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of
D.R. HORTON SAN DIEGO HOLDING COMPANY, INC., D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY, AND ASTRID GUNHILD LINDHOLM,

Respondents

Case No. H-2631 SD

OAH No. L-2001100384

FIRST AMENDED NOTICE OF HEARING ON ACCUSATION

To the above named respondents:

You are hereby notified that a hearing will be held before the Department of Real Estate at **THE OFFICE OF ADMINISTRATIVE HEARINGS, 1350 FRONT STREET, SUITE 6022, SAN DIEGO, CA 92101** on **JULY 8 THROUGH 12, 2002**, at the hour of **9:00 A.M.**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: MARCH 13,2002

By James L. Beaver
JAMES L. BEAVER, Counsel

FILED

DEC 19 2001

DEPARTMENT OF REAL ESTATE

By Laurie A. Gan

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of
D.R. HORTON SAN DIEGO HOLDING COMPANY, INC., D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY, AND ASTRID GUNHILD LINDHOLM,

Respondents

Case No. H-2631 SD

OAH No. L-2001100384

NOTICE OF HEARING ON ACCUSATION

To the above named respondents:

You are hereby notified that a hearing will be held before the Department of Real Estate at **THE OFFICE OF ADMINISTRATIVE HEARINGS, 1350 FRONT STREET, SUITE 6022, SAN DIEGO, CA 92101** on **MARCH 18 THROUGH 22, 2002**, at the hour of **9:00 A.M.**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: DECEMBER 19, 2001

By James L. Beaver
JAMES L. BEAVER, Counsel

JAMES L. BEAVER, Counsel (SBN 60543)
DEPARTMENT OF REAL ESTATE
P. O. Box 187000
Sacramento, CA 95818-7000
Telephone: (916) 227-0789
(916) 227-0788 (Direct)

FILED
AUG 10 2001
DEPARTMENT OF REAL ESTATE
By Laurie A. Jean

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of D.R. HORTON SAN DIEGO HOLDING COMPANY, INC., D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY, and ASTRID GUNHILD LINDHOLM, Respondents.	No.: H-2631 SD FIRST AMENDED ACCUSATION

The Complainant, J. Chris Graves, a Deputy Real Estate Commissioner, for cause of Accusation against Respondents D.R. HORTON SAN DIEGO HOLDING COMPANY, INC. (hereinafter "HOLDING"), a California Corporation, D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC. (hereinafter 'MANAGEMENT"), a California corporation, MARC ROBERT PERLMAN (hereinafter "PERLMAN"), LISA ANNE BIRNEY (hereinafter "BIRNEY"), and ASTRID GUNHILD LINDHOLM (hereinafter "LINDHOLM"), is informed and alleges as follows:

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PRELIMINARY ALLEGATIONS

I

Respondents HOLDING, MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM (hereinafter collectively "Respondents") are presently licensed and/or have license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code (hereinafter "Code").

II

The Complainant, J. Chris Graves, a Deputy Real Estate Commissioner of the State of California, makes this Accusation against Respondents in his official capacity.

III

At all times mentioned herein, HOLDING was and now is a corporation organized and existing under the laws of the State of California. At all times herein mentioned from and after March 18, 1999, HOLDING was and now is licensed by the Department as a corporate real estate broker by and through PERLMAN as designated officer-broker of HOLDING to qualify said corporation and to act for said corporation as a real estate broker.

IV

At all times mentioned herein to and until January 15, 1998, D.R. Horton San Diego No. 13, Inc. ("No. 13, Inc."), was a corporation organized and existing under the laws of the State of California, was a wholly - owned subsidiary of HOLDING, and

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was operated and controlled by HOLDING. On January 15, 1998, HOLDING merged No. 13, Inc. into itself and assumed all the obligations thereof.

V

At all times mentioned herein to and until August 5, 1999, MANAGEMENT was a corporation organized and existing under the laws of the State of California, was a wholly - owned subsidiary of HOLDING, and was operated and controlled by HOLDING. At all times herein mentioned to and until June 21, 1999, MANAGEMENT was licensed by the Department of Real Estate of the State of California (hereinafter "the Department") as a corporate real estate broker by and through PERLMAN as designated officer-broker of MANAGEMENT to qualify said corporation and to act for said corporation as a real estate broker. On June 21, 1999, MANAGEMENT's corporate real estate broker expired and was not renewed. On August 5, 1999, HOLDING merged MANAGEMENT into itself and assumed all the obligations thereof. Pursuant to the provisions of Section 10103 of the Code, the lapsing of MANAGEMENT's license and/or license rights does not deprive the Department of jurisdiction to proceed herein against such license.

VI

At all times herein mentioned, PERLMAN was and now is licensed by the Department as a real estate broker, individually and: (a) to and until June 21, 1999 as designated officer-broker of MANAGEMENT; and (b) from and after March 18, 1999 as designated officer of HOLDING. As said designated officer-

broker, PERLMAN was responsible pursuant to Section 10159.2 of the Code for the supervision of the activities of the officers, agents, real estate licensees and employees of MANAGEMENT and HOLDING for which a license is required.

VII

At all times herein mentioned, BIRNEY and LINDHOLM were and now are licensed by the Department as real estate salespersons.

VIII

Whenever reference is made in an allegation in this Accusation to an act or omission of HOLDING, such allegation shall be deemed to mean that the officers, directors, employees, agents and real estate licensees employed by or associated with HOLDING or a corporation which HOLDING thereafter merged into itself and assumed all the obligations thereof committed such act or omission while engaged in the furtherance of the business or operations of such corporate Respondent and while acting within the course and scope of their corporate authority and employment.

IX

Whenever reference is made in an allegation in this Accusation to an act or omission of MANAGEMENT, such allegation shall be deemed to mean that the officers, directors, employees, agents and real estate licensees employed by or associated with MANAGEMENT committed such act or omission while engaged in the

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furtherance of the business or operations of such corporate Respondent and while acting within the course and scope of their corporate authority and employment.

X

At all times mentioned herein Respondents were owners or subdividers or agents of the owners or subdividers of subdivided lands as defined in Sections 11000 and 11004.5(c) of the Code. Said subdivided lands are known as or commonly called "MIRA LAGO AT BERNARDO VISTA DEL LAGO" and consist of approximately 147 condominium units and common areas and properties located at Caminito Pasadero within the city limits of San Diego, San Diego County, California (hereinafter "the subdivision"). At all times mentioned herein to and until January 15, 1998, No. 13, Inc. was a subdivider or agent of the owner or subdivider of the subdivision.

XI

At all times herein mentioned, MANAGEMENT and PERLMAN, and Respondents BIRNEY and LINDHOLM acting as real estate salespersons employed by MANAGEMENT and PERLMAN, engaged in the business of, acted in the capacity of, advertised, or assumed to act as real estate brokers within the State of California within the meaning of Sections 10131(a) of the Code, including the operation and conduct of a real estate sales brokerage business with the public wherein, on behalf of No. 13, Inc. and/or HOLDING, for compensation or in expectation of compensation, such Respondents sold and offered to sell, bought and offered to buy, solicited prospective sellers and purchasers of, solicited

and obtained listings of, and negotiated the purchase and sale of real property.

XII

From on or about May 17, 1995 through on or about May 7, 1998, in course of the activities described in Paragraphs X and XI, above, PERLMAN, No. 13, Inc. and/or HOLDING applied to the Department for, and obtained, thirteen separate and distinct final public reports authorizing Respondents to offer for sale, negotiate the sale and sell units in the subdivision covered by the public report for such phase, and in support of these applications for final public reports the applicants submitted public report questionnaires and additional supporting documents and information. The identity of the corporate applicant, the number of the phase, the identity of the condominium units covered by the final public report for the phase, the date of the application, the date of issuance, and the Department's file number for each such final public report are tabulated below:

CORPORATE APPLICANT	**PHASE NUMBER**	**UNITS IN PHASE**	**DATE APPLIED**	**DATE ISSUED**	**DRE FILE NUMBER**
No 13 Inc	One	19-26, 40-45	5/17/95	8/25/95	073317 LA F00
No 13 Inc	Two	13-18, 46-48	11/1/95	11/29/95	073901 LA F00
No 13 Inc	Three	7-12, 48-51	11/1/95	11/11/96	073902 LA F00
No 13 Inc	Four	1-6, 52-54	5/3/96	6/1/96	074603 LA F00

CORPORATE APPLICANT	PHASE NUMBER	UNITS IN PHASE	DATE APPLIED	DATE ISSUED	DRE FILE NUMBER
No 13 Inc	Five	34-39	8/21/96	9/20/96	075086 LA F00
No 13 Inc	Six	55-60, 100-102	1/6/97	3/18/97	075395 LA F00
No 13 Inc	Seven	61-66, 94-99	1/6/97	3/18/97	075539 LA F00
No 13 Inc	Eight	67-72, 85-93	5/30/97	7/22/97	076253 LA F00
No 13 Inc	Nine	73-84	5/30/97	7/28/97	076254 LA F00
No 13 Inc	Ten	103-111, 145-147	10/23/97	12/29/97	077002 LA F00
Holding	Eight	67-72, 85-93	1/30/98	1/30/98	076253 LA A01
Holding	Nine	73-84	1/30/98	1/30/98	076254 LA A01
Holding	Ten	103-111, 145-147	1/30/98	1/30/98	077002 LA A01
Holding	Eleven	28-33, 112-123	2/2/98	4/17/98	077443 LA F00
Holding	Twelve	124-135	2/2/98	5/7/98	077444 LA F00
Holding	Thirteen	28-33, 112-123	2/2/98	5/7/98	077445 LA F00

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XIII

In course of the applications for final public reports described in Paragraph XII, above, in order to induce the Department to issue its final public reports, No. 13, Inc. and PERLMAN:

(a) Submitted proposed purchase and sale agreements in exemplar form (hereinafter "the exemplar sales agreements") and represented to the Department that purchase and sale agreements conforming in all material respects to the exemplar sales agreements would be used by Respondents in each and every sale of units in the subdivision; and

(b) Represented to the Department that Respondents would comply with the requirements of Sections 11013.2 and/or 11013.4 of the Code by posting a bond with the Department in favor of the State of California providing, subject to specified conditions, for the return to purchasers of the entire sum of money paid or advanced by a purchaser to Respondents for or on account of the purchase of a unit in the subdivision, or by impounding such money in a neutral escrow depository at the San Diego, California, branch of Continental Escrow Company.

XIV

From on or about May 26, 1995 through on or about May 7, 1998, in course of the activities described in Paragraphs X, XI and XII, above, No. 13, Inc. and PERLMAN applied to the Department for, and obtained, four separate and distinct preliminary public reports authorizing Respondents, subject to the requirements of Section 2795 of Chapter 6, Title 10,

California Code of Regulations (hereinafter "the Regulations"), to advertise and solicit and accept reservations to purchase or lease units in phases in the subdivision for which no public report had yet been issued, and in support of these applications for preliminary public reports No. 13, Inc. and PERLMAN submitted public report questionnaires and additional supporting documents and information. The identity of the corporate preliminary public report applicant, the date of the application, the date of issuance, and the Department's file number for each such preliminary public report are tabulated below:

CORPORATE APPLICANT	DATE APPLIED	DATE ISSUED	DRE FILE NUMBER
No 13 Inc	5/26/95	5/26/95	073316 LA S00
No 13 Inc	6/5/96	6/5/96	07391 LA S02
No 13 Inc	11/13/96	11/13/96	075395 LA F00
No 13 Inc	8/25/97	8/25/97	075395 LA S01

XV

In course of said applications for preliminary public reports, in order to induce the Department to issue its preliminary public reports, No. 13, Inc. and PERLMAN represented that:

(a) Reservation forms conforming in all material respects to exemplar reservation forms submitted by Respondents to the Department would be used by Respondents in each and every reservation of units in the subdivision; and

(b) Each deposit received from potential purchasers in connection with the taking of reservations for lots or units in the subdivision, together with a completed and executed "Reservation Instrument" and a completed and executed "Reservation Deposit Handling Agreement" for the reservation transaction conforming to said exemplar reservation forms, would be immediately placed into a neutral escrow depository at the San Diego, California, branch of Continental Escrow Company, subject to the right of each potential purchaser to receive back the full amount that he or she has deposited at any time.

XVI

The preliminary public reports described in Paragraph XIV, above, authorized Respondents only to advertise and solicit and accept reservations to purchase or lease units in the subdivision, and required Respondents to refrain, pending issuance of final subdivision public reports for a phase, from offering for sale, negotiating the sale and selling units in such phase in the subdivision. Said preliminary public reports each stated in part:

(a) "Under this Preliminary Public Report, seller is authorized only to advertise and take reservations";

(b) "The seller may not negotiate the sale or lease of lots or units with you until a FINAL PUBLIC REPORT has been issued by the Department of Real Estate (DRE)";

(c) "If you or the seller cancel the reservation, the subdivider must return your deposit to you or arrange for the escrow depository to do so. Alternatively, you may go directly

directly to the escrow depository to obtain a refund of your deposit"; and

(d) "RESERVATION MONEY HANDLING. If you reserve a lot/unit, the seller must place all funds received from you, together with completed and executed Reservation Instrument (RE 612) and Reservation Deposit Handling Agreement (RE 612A) in a neutral escrow depository at: Continental Escrow ... San Diego CA 92128, subject to the conditions of the reservation instrument. If you cancel the reservation, you may go to the seller or directly to the escrow depository to get a full refund of your deposit".

XVII

Between on or about January 18, 1997 and on or about October 22, 1998, commencing on or about the dates tabulated below, in course of the activities described in Paragraphs X and XI, above, Respondents advertised, solicited and accepted reservations, offered for sale, negotiated the sale and/or sold the units to the purchasers tabulated below, and, thereafter, as tabulated below, caused grant deeds to be recorded with the county recorder of San Diego County, California, describing and conveying such unit:

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COMMENCING	DATE DEED RECORDED	PURCHASER	UNIT	PHASE
1/18/97	3/7/97	William & April Sparks	53	Four
5/23/97	6/19/97	Randall Kayle	8	Three
7/1/97	None	Cathleen Marie Mumper	92	Eight
7/1/97	None	Cathleen Marie Mumper	89	Eight
11/24/97	1/2/98	Mitra Ansari	92	Eight
3/7/98	4/29/98	Theresa Lisciotti	113	Eleven
3/27/98	4/30/98	Tom & Caren Iske	110	Ten
1/18/98	5/8/98	Michael & Rosemary James	74	Nine
3/7/98	5/29/98	Terry & Judy Hlavay	146	Ten
3/27/98	None	Cathleen Marie Mumper	122	Eleven
3/27/98	6/10/98	Cathleen Marie Mumper	119	Eleven
5/3/98	10/22/98	Guillermo&Andrea Vazquez	131	Twelve

XVIII

For the purpose of calculating the period of any applicable statute of limitations in this proceeding pursuant to the provisions of Section 11021 of the Code, in each of the transactions described in Paragraph XVII, above, the property was sold, as described below, in violation of the Subdivided Lands Law, Part 2 of Division 4 of the Code:

FIRST CAUSE OF ACCUSATION

XIX

There is hereby incorporated in this First, separate and distinct Cause of Accusation, all of the allegations contained in Paragraphs I through XVIII, inclusive, above, with the same force and effect as if herein fully set forth.

XX

In course of the activities described in Paragraphs X, XI, and XVII, above, on or about the dates tabulated below, Respondents took reservations from the purchasers of the units tabulated below, and in each such transaction solicited and obtained a reservation deposit from the purchasers in the form of a check made payable to HOLDING or MANAGEMENT or No. 13, Inc.:

DATE	PURCHASER	UNIT	PHASE
1/18/97	William & April Sparks	53	Four
5/23/97	Randall Kayle	8	Three
7/1/97	Cathleen Marie Mumper	92	Eight
7/1/97	Cathleen Marie Mumper	89	Eight
11/24/97	Mitra Ansari	92	Eight
3/7/98	Theresa Lisciotti	113	Eleven
3/7/98	Terry & Judy Hlavay	146	Ten
3/27/98	Cathleen Marie Mumper	122	Eleven
3/27/98	Cathleen Marie Mumper	119	Eleven
5/3/98	Guillermo & Andrea Vazquez	131	Twelve

XXI

In each of the transactions described in Paragraph XX, above:

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(a) Respondents failed to use the "Reservation Instrument" and "Reservation Deposit Handling Agreement" forms described above, but instead used reservation forms that differed materially from the exemplar reservation forms described above, and failed to comply with the requirements of Section 2795(b)(3) of the Regulations; and

(b) Respondents violated the provisions of Section 2795(b)(2) of the Regulations by failing to place any of the reservation deposits received from potential purchasers in connection with the taking of reservations into a neutral escrow depository at Continental Escrow Company, and by failing to place any completed and executed "Reservation Instrument" for the reservation transaction conforming to said exemplar reservation forms into a neutral escrow depository at Continental Escrow Company.

XXII

In committing the acts and omissions described in Paragraphs XX and XXI, inclusive, above:

(a) Respondents effected a material change, within the meaning of subsection (d) and (d)(1) of Section 2800 of the Regulations, in the use of marketing instruments and the methods of marketing interests in the Subdivision;

(b) Respondents effected a material change, within the meaning of subsection (c) of Section 2800 of the Regulations, in purchase money handling procedures;

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(c) Respondents failed, within the meaning of subsection (e) of Section 2800 of the Regulations, to fulfill agreements and assurances to purchasers of subdivision interests given to the Department in the application for the preliminary public reports;

(d) Respondents failed to report in writing to the Department any information concerning the material changes described in Paragraph XXI and subparagraphs (a), (b), and (c) of this Paragraph XXII;

(e) HOLDING violated Section 2800 of the Regulations;

(f) Respondents willfully disregarded the provisions of Section 2800 of the Regulations; and

(g) Respondents, after the setup of the offering of interests was submitted to the Department in the applications for the preliminary public reports, violated Section 11012 of the Code by knowingly changing the setup of the offering of interests in the Subdivision without first notifying the Department in writing of such intended change.

XXIII

In course of the activities described in Paragraphs X, XI, and XVII, above, on or about the dates tabulated below, in the transactions tabulated below, Respondents offered for sale, negotiated for sale, and/or sold units in the subdivision without first obtaining a final public report authorizing Respondents to offer for sale, negotiate for sale and/or sell such units in such phase, as required by Section 11018.2 of the Code:

DATE	PURCHASER	UNIT	PHASE
7/1/97	Cathleen Marie Mumper	92	Eight
7/1/97	Cathleen Marie Mumper	89	Eight
3/7/98	Theresa Lisciotti	113	Eleven

XXIV

In each of the transactions described in Paragraph XXIII, above, Respondents failed to give to the prospective purchaser a copy of a final public report prior to the execution of a binding contract or agreement for the sale or lease of a unit in the subdivision, in violation of Section 11018.1 of the Code.

XXV

In each of the transactions described in Paragraph XVII, above, Respondents:

(a) Solicited and obtained the execution by the purchasers of written sales agreements for the purchase of units in the subdivision that differed materially from any exemplar sales agreement described in Paragraph VIII, above, in that Respondents caused the written sales agreements executed by the purchasers to include provisions for imposing charges against purchase money for optional improvements to the property being sold or for delays in obtaining purchase money financing that had not been submitted to the Department for review and that violated the provisions of Section 2791 of the Regulations; and

(b) Caused purchasers to pay money to Respondents for or on account of the purchase of a unit in the subdivision, failed to post a bond with the Department in favor of the State

of California providing, subject to specified conditions, for the return to purchasers of such money, failed to deposit said money in a neutral escrow depository at the San Diego, California, branch of Continental Escrow Company, but instead deposited such money into the "D.R. Horton San Diego Operating Account", account number 14264-00610, maintained by Respondents at the Costa Mesa, California, branch of Bank of America.

XXVI

In committing the acts and omissions described in Paragraph XXV, above, Respondents HOLDING, MANAGEMENT and PERLMAN:

(a) Effected a material change, within the meaning of subsections (c), (d) and (d)(1) of Section 2800 of the Regulations, in purchase money handling procedures and the use of marketing instruments and the methods of marketing interests in the Subdivision;

(b) Failed, within the meaning of subsection (e) of Section 2800 of the Regulations, to fulfill agreements and assurances to purchasers of subdivision interests given by Respondents to the Department in the applications for the final public reports;

(c) Failed to report in writing to the Department any information concerning the material changes described in Paragraphs XXV and subparagraphs (a) and (b) of this Paragraph XXVI;

(d) Violated Sections 11013.2 and/or 11013.4 of the Code and Sections 2791 and 2800 of the Regulations; and

(e) After the setup of the offering of interests was submitted to the Department in the applications for the preliminary public reports, violated Section 11012 of the Code by knowingly changing the setup of the offering of interests in the Subdivision without first notifying the Department in writing of such intended change.

XXVII

In each of the transactions identified by tabulation in Paragraph XVII, above, Respondents violated Section 11022(a) of the Code, in that:

(a) Each condominium unit so sold included a garage designed to accommodate only one full size automobile and one compact size automobile.

(b) Respondents, with intent directly or indirectly to sell the condominium units to the purchasers so identified, authorized, used, directed, or aided in the publication, distribution or circularization of advertisements concerning the subdivision that contained a statement, pictorial representation and/or sketch representing that the condominium unit so identified included a two-car garage; and

(c) The statement, pictorial representation and/or sketch so representing that the condominium unit so identified included a two-car garage was false or misleading, in that the statement, pictorial representation or sketch concealed and failed to disclose that the condominium unit so identified included a garage designed to accommodate only one full size automobile and one compact size automobile.

SECOND CAUSE OF ACCUSATION

XXVIII

There is hereby incorporated in this second, separate and distinct Cause of Accusation, all of the allegations contained in Paragraphs I through XXVII, inclusive, above, with the same force and effect as if herein fully set forth.

XXIX

In each of the transactions identified in Paragraph XVII, above, Respondents participated individually and jointly and as the agent of one another in a fraudulent common plan or scheme wherein Respondents intentionally induced the purchasers to purchase the condominium unit by representing to the purchasers that the condominium unit so identified included a two-car garage, while concealing and failing to disclose that the condominium unit so identified included a garage designed to accommodate only one full size automobile and one compact size automobile.

XXX

In acting as described in Paragraph XXIX, above during the three year period next preceding the filing of the original Accusation herein, Respondents made a substantial misrepresentation of a material fact.

XXXI

The acts and omissions of Respondents HOLDING, MANAGEMENT and PERLMAN described in Paragraphs XXIX and XXX, above, during the three year period next preceding the filing of the original Accusation herein constituted a continued and

flagrant course of misrepresentation through real estate agents or salesmen.

XXXII

The acts and omissions of Respondents described in Paragraphs XXIX through XXXI, inclusive, above, during the three-year period next preceding the filing of the original Accusation herein constituted fraud and/or dishonest dealing.

THIRD CAUSE OF ACCUSATION

XXXIII

There is hereby incorporated in this third, separate and distinct Cause of Accusation, all of the allegations contained in Paragraphs I through XXXII, inclusive, above, with the same force and effect as if herein fully set forth.

XXXV

In course of the activities of Respondents described above during the three year period next preceding the filing of the original Accusation herein, PERLMAN failed to exercise reasonable supervision over the acts of MANAGEMENT in such a manner as to allow the acts and omissions described in Paragraphs I through XXXII, inclusive, above, to occur.

XXXVI

The facts alleged above are grounds for the suspension or revocation of the licenses and license rights of Respondents under the following provisions of the Code and/or the Regulations:

(a) As to Paragraphs XXI and XXII in the First Cause of Accusation and Respondents HOLDING, MANAGEMENT, PERLMAN,

BIRNEY and LINDHOLM, under Section 11012 of the Code and Sections 2795 and 2800 of the Regulations in conjunction with Section 10177(d) of the Code;

(b) As to Paragraphs XXIII and XXIV in the First Cause of Accusation and Respondents HOLDING, MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM, under Sections 11018.1 and 11018.2 of the Code in conjunction with Section 10177(d) of the Code;

(c) As to Paragraphs XXV and XXVI in the First Cause of Accusation and Respondents HOLDING, MANAGEMENT, and PERLMAN, under Section 11012, 11013.2 and/or 11013.4 of the Code and Sections 2791 and 2800 of the Regulations in conjunction with Section 10177(d) of the Code;

(d) As to Paragraph XXVII in the First Cause of Accusation and Respondents HOLDING, MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM, under Section 11022(a) of the Code in conjunction with Section 10177(d) of the Code;

(e) As to Paragraphs XXIX and XXX in the Second Cause of Accusation and Respondents HOLDING, MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM, under Section 10176(a) of the Code;

(f) As to Paragraphs XXIX through XXXI, inclusive, in the Second Cause of Accusation and Respondents HOLDING, MANAGEMENT and PERLMAN under Sections 10176(a) and 10176(c) of the Code;

(g) As to Paragraphs XXIX through XXXII, inclusive, in the Second Cause of Accusation and Respondents HOLDING, MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM, under Section 10176(i) and/or 10177(j) of the Code; and

(h) As to Paragraph XXXIV of the Third Cause of Accusation and PERLMAN under Section 10177(g) and/or Section 10177(h) of the Code and Section 10159.2 of the Code in conjunction with Section 10177(d) of the Code.

WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondents under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), and for such other and further relief as may be proper under other provisions of law.

J. Chris Graves

J. CHRIS GRAVES
Deputy Real Estate Commissioner

Dated at San Diego, California,
this 2nd day of August, 2001.

JAMES L. BEAVER, Counsel (SBN 60543)
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(916) 227-0788 (Direct)

FILED
MAY - 3 2001
DEPARTMENT OF REAL ESTATE
By Laurie A. Jan

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of D.R. HORTON SAN DIEGO HOLDING COMPANY, INC., D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC., MARC ROBERT PERLMAN, LISA ANNE BIRNEY, and ASTRID GUNHILD LINDHOLM, Respondents.	No.: H-2631 SD ACCUSATION

The Complainant, Charles W. Koenig, a Deputy Real Estate Commissioner, for cause of Accusation against Respondents D.R. HORTON SAN DIEGO HOLDING COMPANY, INC. (hereinafter "HOLDING"), successor by merger to D.R. Horton San Diego No. 13, Inc., a corporation, D.R. HORTON SAN DIEGO MANAGEMENT COMPANY, INC. (hereinafter "MANAGEMENT"), a corporation, MARC ROBERT PERLMAN (hereinafter "PERLMAN"), LISA ANNE BIRNEY (hereinafter "BIRNEY"), and ASTRID GUNHILD LINDHOLM (hereinafter "LINDHOLM"), is informed and alleges as follows:

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Respondents HOLDING, MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM (hereinafter collectively "Respondents") are presently licensed and/or have license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code (hereinafter "Code").

II

The Complainant, Charles W. Koenig, a Deputy Real Estate Commissioner of the State of California, makes this Accusation against Respondents in his official capacity.

III

At all times herein mentioned to and until June 21, 1999, Respondent MANAGEMENT was licensed by the Department of Real Estate of the State of California (hereinafter "the Department") as a corporate real estate broker by and through Respondent PERLMAN as designated officer-broker of Respondent MANAGEMENT to qualify said corporation and to act for said corporation as a real estate broker.

IV

At all times herein mentioned from and after March 18, 1999, Respondent HOLDING was and now is licensed by the Department as a corporate real estate broker by and through Respondent PERLMAN as designated officer-broker of Respondent HOLDING to qualify said corporation and to act for said corporation as a real estate broker.

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V

At all times herein mentioned, Respondent PERLMAN was and now is licensed by the Department as a real estate broker, individually and: (a) to and until June 21, 1999 as designated officer-broker of Respondent MANAGEMENT, and (b) from and after March 18, 1999 as designated officer of Respondent HOLDING. As said designated officer-broker, Respondent PERLMAN was responsible pursuant to Section 10159.2 of the Code for the supervision of the activities of the officers, agents, real estate licensees and employees of Respondents MANAGEMENT and HOLDING for which a license is required.

VI

At all times herein mentioned, Respondents BIRNEY and LINDHOLM were and now are licensed by the Department as real estate salespersons.

VII

Whenever reference is made in an allegation in this Accusation to an act or omission of Respondent HOLDING, such allegation shall be deemed to mean that the officers, directors, employees, agents and real estate licensees employed by or associated with Respondent HOLDING committed such act or omission while engaged in the furtherance of the business or operations of such corporate Respondent and while acting within the course and scope of their corporate authority and employment.

VIII

Whenever reference is made in an allegation in this Accusation to an act or omission of Respondent MANAGEMENT, such

allegation shall be deemed to mean that the officers, directors, employees, agents and real estate licensees employed by or associated with Respondent MANAGEMENT committed such act or omission while engaged in the furtherance of the business or operations of such corporate Respondent and while acting within the course and scope of their corporate authority and employment.

IX

At all times mentioned herein Respondents were the owners or subdividers or agents of the owners or subdividers of subdivided lands as defined in Sections 11000 and 11004.5(c) of the Code.

X

At all times herein mentioned, Respondents MANAGEMENT and PERLMAN, and Respondents BIRNEY and LINDHOLM acting on behalf of Respondents MANAGEMENT and PERLMAN, engaged in the business of, acted in the capacity of, advertised, or assumed to act as real estate brokers within the State of California within the meaning of Sections 10131(a) of the Code, including the operation and conduct of a real estate sales brokerage business with the public wherein, on behalf of Respondent HOLDING, for compensation or in expectation of compensation, such Respondents sold and offered to sell, bought and offered to buy, solicited prospective sellers and purchasers of, solicited and obtained listings of, and negotiated the purchase and sale of real property.

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XI

Said subdivided lands are known as or commonly called "MIRA LAGO AT BERNARDO VISTA DEL LAGO" and consist of approximately 147 condominium units and common areas and properties located at Caminito Pasadero within the city limits of San Diego, San Diego County, California (hereinafter "the subdivision").

XII

Between on or about January 1, 1997 and on or about October 22, 1998, in course of the activities described above, Respondents solicited purchasers, offered and negotiated to sell, and sold condominium units in the subdivision under authority of public reports issued by the Department pursuant to the provisions of the Subdivided Lands Act, Part 2 of Division 4 of the Code, including but not limited to the condominium units tabulated below offered and sold by Respondents to the purchasers tabulated below on or about the dates tabulated below:

	DATES	**CONDOMINIUM UNITS**	**PURCHASERS**
(a)	03/01/97	18760 Caminito Pasadero	John Bayle
(b)	03/07/97	18772 Caminito Pasadero	William & April Sparks
(c)	06/19/97	18778 Caminito Pasadero	Randall Kayle
(d)	01/02/98	18544 Caminito Pasadero	Mitra Ansari
(e)	04/29/98	18626 Caminito Pasadero	Terri Lisciotti
(f)	04/30/98	18614 Caminito Pasadero	Tom & Caren Iske
(g)	05/08/98	18588 Caminito Pasadero	Michael & Rosemary James

	DATES	CONDOMINIUM UNITS	PURCHASERS
(h)	05/29/98	18616 Caminito Pasadero	Judy & Terry Hlavey
(i)	06/10/98	18638 Caminito Pasadero	Cathleen Mumper
(j)	10/22/98	18662 Caminito Pasadero	William & Andrea Vazquez

XIII

In course of each of the transactions identified by tabulation in Paragraph XII, above, Respondents violated Section 11022(a) of the Code, in that:

(a) The condominium unit so identified included a garage designed to accommodate only one full size automobile and one compact size automobile;

(b) Respondents, with intent directly or indirectly to sell the condominium units to the purchasers so identified, authorized, used, directed, or aided in the publication, distribution or circularization of advertisements concerning the subdivision that contained a statement, pictorial representation and/or sketch representing that the condominium unit so identified included a two-car garage; and

(c) The statement, pictorial representation and/or sketch so representing that the condominium unit so identified included a two-car garage was false or misleading, in that the statement, pictorial representation or sketch concealed and failed to disclose that the condominium unit so identified included a garage designed to accommodate only one full size automobile and one compact size automobile.

XIV

In course of each of the transactions identified by tabulation in Paragraph XII, above, a grant deed was recorded on the date so tabulated in the office of the County Recorder of San Diego County, California, describing the condominium unit so tabulated and conveying the condominium unit to the purchasers so tabulated.

XV

During the three year period next preceding the filing of this Accusation, in course of each of the transactions identified by tabulation in subparagraphs (g) through (j), inclusive, of Paragraph XII, above, Respondents intentionally induced the purchasers to purchase the condominium unit by representing to the purchasers that the condominium unit so identified included a two-car garage, while concealing and failing to disclose that the condominium unit so identified included a garage designed to accommodate only one full size automobile and one compact size automobile.

XVI

In acting as described above, Respondents made a substantial misrepresentation of a material fact.

XVII

The acts and omissions of Respondents described above constituted fraud and/or dishonest dealing.

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XVIII

Respondent PERLMAN failed to exercise reasonable supervision over the acts of Respondent MANAGEMENT in such a manner as to allow the acts and omissions described in Paragraphs I through XVII, inclusive, above, to occur.

XIX

The facts alleged above are grounds for the suspension or revocation of the licenses and license rights of Respondents under the following provisions of the Code and/or the Regulations:

(a) As to Paragraphs I through XIV, inclusive, above, and Respondents HOLDING, MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM, under Section 11022(a) of the Code in conjunction with Section 10177(d) of the Code;

(b) As to Paragraphs I through XVI, inclusive, above, and Respondents MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM, under Section 10176(a) of the Code;

(c) As to Paragraphs I through XVII, inclusive, above, and Respondents MANAGEMENT, PERLMAN, BIRNEY and LINDHOLM, under Section 10176(i) of the Code;

(d) As to Paragraphs I through XVII, inclusive, above, and Respondent HOLDING, under Section 10177(j) of the Code; and

(e) As to Paragraph XVIII, and Respondent PERLMAN, under Section 10177(g) and/or Section 10177(h) of the Code and Section 10159.2 of the Code in conjunction with Section 10177(d) of the Code.

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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondents under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), and for such other and further relief as may be proper under other provisions of law.

CHARLES W. KOENIG
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 3rd day of May, 2001.