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NO. 66422-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JWO LLC and BROOK GLEN, LLC,

Respondents/Cross Appellants,

v.

JAMES D. MATTILA and DIANE J. MATTILA,

Appellants/Cross Respondents.

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**BRIEF OF APPELLANTS**

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## **I. STATEMENT OF THE CASE**

### **A. Introduction.**

In 2005, Appellants/Cross-Respondents James and Diane Mattila were looking for a home to buy. They found a unique house in Mountlake Terrace located between two streams.

The property was served by an easement for ingress, egress and utilities over adjacent property owned by Robert Singleton. The access at the time consisted of a gravel driveway which culminated in a turn-around in front of the house that Mattilas were evaluating.

That house was owned by Donald Whitney and his wife. Whitney, owner of the dominant estate with regard to the easement, was friends with the owner of the servient estate, Singleton. Singleton wanted to develop his parcel. When Whitney purchased the house, he and Singleton came to a loose “handshake” agreement to the effect that the driveway could later be relocated in an unspecified way to accommodate Singleton’s development. The real estate contract between them said, “Easement will be relocated with future subdivision.” That language was not included in the fulfillment deed that was recorded a few months later.

Although Singleton later tried to get Whitney to execute documents relocating the easement prior to Whitney's sale to Mattila, Whitney declined to do so. Mattila bought the property from Whitney believing that Whitney and Singleton had negotiated for, but never reached, an agreement to move the easement.

Singleton defaulted on an secured obligation for which he had used his property as collateral. JWO, LLC bought an assignment of the note and deed of trust and proceeded with foreclosure. There were no other bidders at the foreclosure sale, and JWO became the owner of the property.

JWO requested that Mattila execute documents to relocate and reconfigure the easement, including by eliminating the turnaround that served Mattila's house. Mattila refused. This litigation followed.

#### **B. A Note on References to the Parties**

As between himself and his wife, James Mattila was the principal actor with regard to the property, and for ease of reference he will be referred to here as though he were the sole purchaser, although the property was purchased by James and Diane Mattila. Similarly, although Robert Singleton and Donald Whitney were both married, and although Singleton

acted in concert with others, each will be referred to although he acted alone.

Finally, JWO, LLC assigned its interest in the property to Brook Glen, LLC in November, 2007, well after all the events giving rise to this litigation. Both companies are wholly owned by John and Erika O'Neil. For simplicity, both limited liability companies are referred to here as "JWO."

### **C. Statement of Facts**

Donald Whitney (Mattila's predecessor in interest) and Robert Singleton entered into a real estate contract (Ex. 1) by which Whitney bought a house from Singleton. Singleton retained adjacent undeveloped property. The gravel driveway that served Whitney's house sat upon the property that Singleton retained. The driveway culminated in a turn-around loop at Whitney's house. (RP page 6, line 8 though page 7, line 7)

Whitney and Singleton prepared their real estate contract without the services of a real estate agent or lawyer. (RP page 29, line 22 through page 30, line 3) The real estate contract fully described the easement based on the centerline of the existing gravel road. It also contained the following statement after the description of the easement: "(Easement will

be relocated with future subdivision).” There was no more substance than that to their understanding. Singleton testified:

A ...We had pretty much a gentlemen’s agreement that we would supply everything to Mr. Whitney that would make his property valuable and he would agree to whatever we needed to make our development go along.

RP 7, lines 13-17.

Q Did you and he talk about the gravel driveway and what would happen to the gravel driveway?

A Only in the same sense that we talked about everything else... In other words, when the development went in, he would be provided with a new source of water, a new source of natural gas, a new source of electricity, phone, cable, exotic kind of things that go along with unforeseen cable things, I don’t know what they would be, but that kind of stuff. We were going to supply all of those things to him with a new driveway, and I don’t think we specifically talked one way or another about what would happen to the driveway.

RP 8, lines 3-14.

Singleton did not remember even telling Whitney about where the access would ultimately be located. He testified (at RP 14, lines 20-25), “I didn’t — I can’t remember taking my map and showing him exactly where the new street was going to be, but I’m assuming he kept up with it.”

Whitney's testimony (RP page 56, line 18 through page 57, line 6) was

to the same effect:

Q And would you agree with me that your agreement with Mr. Singleton was essentially to do whatever he was going to need to do to accommodate his development?

A Yes.

Q And his plans in fact — his plans in fact changed over time, didn't they?

A Yes, they did.

\* \* \*

Q ...Do you know whether any of the changes adjusted the location of the road?

A Almost all of them did.

Q And it was always okay with you wherever the road ended up; is that correct?

A Yes.

Whitney paid off the real estate contract quickly, and on April 15, 1997 a statutory warranty deed was recorded in fulfillment of the real estate contract. (Ex. 2) That deed did not carry over the language of the purchase and sale agreement, "Easement will be relocated with future subdivision." Rather, the deed described the existing easement, and contained no language of any kind suggesting that it would be relocated.

Singleton continued with his plans to develop the property, and Mountlake Terrace ultimately approved his plan of development. Thus, “Conditions of Approval Brook Glen – Final Planned Unit Development” were recorded in 2002. (Ex. 4)

The Conditions of Approval do not state, suggest or disclose that the easement serving Whitney’s property is to be relocated or altered. The words *easements*, *roadways*, *driveway* and *access* appear in the Conditions of Approval at items A4, B6, B7 and B12, D3c and D4, but none of those items specifies anything about the location or configuration of the driveway. There is no survey or site plan that accompanies the recorded conditions of approval. No one examining the document would conclude that the existing driveway easement was to be relocated.

In 2004, two years after the Conditions of Approval were recorded, Singleton asked Whitney to execute the documents that would extinguish Whitney’s existing easement and establish a new one. Those documents included a boundary line adjustment that would alter the parcels owned by Whitney and Singleton. Singleton communicated with Whitney by a letter (Ex. 6) dated June 12, 2004. The letter states in part:

Hi Don,

\* \* \*

The city will allow the lot line adjustment or borderline adjustment will be recorded; the access and utility easements (3 above) will be extinguished, and new Brook Glen PUD easements in your favor for access and utilities on the new proposed street will go into effect. Your property will become a totally separate property and we will get construction permits!! The new easements in your favor have been sent to the city for their approval, I'm sure they will let you take a look at them if you want.<sup>1</sup>

The next event is highly important: in 2005, a few months before the sale to Mattila closed, Whitney and Singleton formally signed, certified and recorded the boundary line adjustment. That document consisted of a survey that explicitly located Whitney's access easement. It located the easement *not* at some new or changed location, but where it had always been, and where Mattila now maintains that it still is.

The survey is Ex.5. For ease of reference, a copy has been supplied as an appendix to this brief. It was recorded, and the upper left-hand corner of the first page contains a notarized "Certificate of Consent," signed by Whitney and Singleton, which states:

We the undersigned owners of the property herein described request a boundary line adjustment on the property pursuant to RCW 58.17.040 and declare the attached drawings to be a graphic representation of the same and certify that this boundary line

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<sup>1</sup>No proposed easements were introduced at trial.

adjustment is made with free consent and in accordance with the desire of the owners.

The document consists primarily of a survey that shows Whitney's and Singleton's lots as modified by the boundary line adjustment. The following prominently appears on the survey, with an arrow pointing to the existing easement:

Ingress, egress & utility easement center line of existing gravel drive per AF No. 9704150272

The auditor's file number is that of the statutory warranty deed by which Singleton conveyed the house to Whitney, Ex. 2. In other words, the survey shows the easement in its original configuration. This was recorded a few months before Mattila purchased.

Although Singleton's letter to Whitney of June, 2004 (Ex. 6) indicates that the easement documents had already been prepared for Whitney's signature, those documents remained unsigned a year later, even after Whitney had signed the boundary line adjustment certification in the meantime. Whitney had signed other formal documents for Singleton in the meantime as well: in February, 2005 Whitney signed a Declaration of Water Line Easement (Ex. 7) and also a Declaration of Sewer Easement (Ex. 22, exception 10). Despite all of this activity to facilitate Singleton's

development, Whitney had never signed the easement documents that Singleton requested.

At this point Mattila enters the story. Whitney put the house on the market, and on May 12, 2005, less than 60 days after Whitney and Singleton recorded the survey identifying the existing easement as the easement serving the house (Ex. 5), Mattila and Whitney met face-to-face when Mattila presented Whitney with a purchase offer. (RP 156, lines 4-8) That resulted in a purchase and sale agreement, Ex. 9.<sup>2</sup>

The purchase and sale agreement contains a provision requested by Mattila which states, “Seller shall provide Buyer with a copy of the most recent survey of the property.” (Ex. 9, second page.) That provision was in the purchase and sale agreement at Mattila’s request. (RP 156, line 11)

Mattila was provided with the survey — the same document that was admitted as Ex. 5, with its explicit designation of the existing driveway.<sup>3</sup> Mattila examined the survey in detail. (RP 156, lines 15-24)

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<sup>2</sup>Ex. 9 intentionally omits pages of the original that are not relevant to the dispute.

<sup>3</sup>Mattila also received the same survey from his own real estate agent (RP 156, lines 19-20), and it also appears twice in Mattila’s Preliminary Commitment for Title Insurance (Ex. 22).

Before Mattila entered into the purchase and sale agreement, he talked to Mountlake Terrace Planning Department staff about the status of the project. However, there is no evidence that Mattila was told anything that contradicted the information in the title documents of record, including the survey he was provided that explicitly located the easement. Mattila learned from the City of Mountlake Terrace and from Whitney's real estate agent that Whitney and Singleton were working on finalizing an agreement about the easement. (RP page 160, line 161 through page 163, line 3) The kernel of that testimony by Mattila is the following:

A They [planning staff] showed me that there were problems with the easements and that the gentlemen had to resolve those for the project to move forward.

Q Were you ever provided any information regarding any completed understanding or agreement between Mr. Whitney and Mr. Singleton in connection with Paragraph 3 of the purchase and sale agreement?

A No, to the contrary.

No member of the Mountlake Terrace Planning Department staff testified at trial. No document was entered into evidence from the Planning Department file indicating that there was any plan to relocate or reconfigure the easement. The only evidence at trial as to the Planning Department staff's state of knowledge at the time Mattila talked to the

staff is the Conditions of Approval for the development (Ex. 4), which do not reference any relocation of the easement.

After his discussion with Planning Department staff and his review of the Conditions of Approval, Mattila had knowledge only that Whitney and Singleton had engaged in negotiations, but not that they reached any final resolution regarding the relocation or configuration of the easement, which they in fact had not.

This state of Mattila's knowledge is clearly reflected in an addendum to the purchase and sale agreement (Ex. 9, second page), which states:

This offer is conditioned on Buyers review and approval of any & all agreements that Seller (Whitney) makes with the neighbor regarding the condo project which affect the property at 23923 Cedar Way. Seller shall provide Buyer with copies of all agreements made.

This language was approved by Whitney, who initialed the addendum separately. The language is inconsistent with the suggestion that Whitney and Singleton had a final agreement at the time.

Mattila obviously understood that Whitney had the ability, before the sale closed and while Whitney was still owner, to sign documents that would affect the location of the easement. Since Mattila had no control

over that, he included another provision in the purchase and sale agreement:

This offer is conditioned on the Buyer not having to pay for any fees (hook up, etc.) and/or any assessments as a result of utilities being brought to the property from the *new easement proposal* of the neighbors condo project.<sup>4</sup>

Ex. 9; italics added.

Whitney also furnished a Seller Disclosure Statement to Mattila. (Ex. 17) He expressly disavowed any encroachments, boundary agreements, boundary disputes, or limitations in rights of way, easements or access that might affect Buyer's use of the property. Nothing in the Disclosure Statement suggests that there was any issue regarding the access.

In connection with his purchase and sale agreement, Mattila obtained a Commitment for Title Insurance from First American Title Insurance Company (Ex. 22) Note that the description of the property insured explicitly includes the existing easement, described by reference to the existing gravel driveway:

A non-exclusive easement for ingress and egress, 20 feet wide the centerline of which following the centerline of the existing gravel

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<sup>4</sup>The Trial Court, in Finding of Fact 10, says that this language shows that Mattila knew of the agreement to relocate the easement. However, language cannot carry that freight and the italicized language shows that the Finding is not based on substantial evidence.

driveway, said driveway lying within the South half of the South half of the Northwest quarter of the Southwest quarter of said Section 34.

During the time that Whitney was marketing his property and negotiating with Mattila, Singleton was trying to get Whitney to execute easements, but Whitney, who now had a lawyer, refused. Singleton's testimony about this is as follows:

Q ... In any event, you were trying to get documents from Mr. Whitney, he said he wanted his attorney to review them, and you weren't getting any further response; is that accurate?

A Yes, uh-huh.  
...

Q And what did he say to you?

A He said it was in the hands of his attorney and he hadn't heard from his attorney.

Q And did this go on in part prior to Mr. Whitney's sale to Mr. Mattila [in June, 2005]?

A Well, it went on most of I'd say April and May and June, yes.

In an attempt to establish at trial just what it was that Whitney had purportedly agreed to, JWO presented Ex. 15. That document is a "Water Plan Record Drawing" that the City of Mountlake Terrace approved years after Mattila's purchase. Despite the fact that the drawing is explicitly a water plan, JWO characterized it as the configuration of the access

easement that Mountlake Terrace had approved. Here is the testimony of Singleton regarding Ex. 15:

Q On Exhibit 15 it shows the street location, do you see that?

A Yes.

Q Is that the location that the city approved in the plat process we described?

A Yes.

...

Q And do you know if Mr. Whitney was aware of that street location?

A I assume he was. I don't know that. I didn't -- I can't remember taking my map and showing him exactly where the new street was going to be, but I'm assuming he kept up with it, yeah.

RP page 14, lines 11-25.

JWO posits that this is the plan for relocation of the easement that Mattila knew of and is bound by. However, the Water Plan Record Drawing was created in November, 2009, more than four years after Mattila's purchase.<sup>5</sup> The Water Plan was not something that Mattila could have known about when he bought because it did not then exist.

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<sup>5</sup>That date appears in the lower right hand corner, where the following appears: "Drawn by JCM Date 11/17/09." Ex. 15

JWO produced no document from any source that purported to show any access plan or configuration for the easement at the time of Mattila's purchase, other than the 2005 survey showing the driveway in its original location and explicitly labeling it as the access for the property. The Conditions of Approval (Ex. 4) do not mention any alternate access configuration; the survey that Whitney and Singleton placed of record a few months before Mattila's purchase validates the existing configuration; and the Water Plan (Ex. 15) was not prepared until four years after Mattila purchased.

Whitney's decision not to sign the easement documents as Singleton requested was deliberate. Whitney himself had requested an addendum to his purchase and sale agreement with Mattila that stated:

Buyer [Mattila] will not agree with the adjoining property owner to extinguish the existing access easements and establish a new access easement without seller's [Whitney's] consent.

Ex. 9; RP 162, lines 11-12. Thus, contrary to the suggestion that Whitney viewed himself as bound by contract with Singleton when he sold to Mattila, Whitney was actually concerned that Mattila, his buyer, might arrive at the contract with Singleton that resolved the easement dispute.

The sale from Whitney to Mattila closed on June 24, 2005 by the issuance to Mattila of a statutory warranty deed (Ex. 10). Consistent with the preliminary commitment for title insurance, the warranty deed conveyed:

A non-exclusive easement for ingress and egress, 20 feet wide the centerline of which following the centerline of the existing gravel driveway...

At the time of the conveyance to Mattila, Whitney had not signed any documents extinguishing the existing easement that he had been granted under that very same legal description in 1997. He had in fact declined to do so when requested by Singleton and while represented by a lawyer.

Singleton later defaulted on the payments of his note and deed of trust (RP 19, lines 4-6), and this is where JWO becomes involved. John O'Neil was a principal and, with his wife Erika, the sole owner of JWO. (RP 100, lines 5-8). He determined that the holders of the note did not want to be involved in the development of the property, but instead wanted to sell their position. (RP page 100, line 25 through page 101, line 20) JWO bought the note and stepped into the shoes of the secured party under the deed of trust. (Exs. 11 and 12) JWO paid \$400,000 for assignment of the note and deed of trust. (RP page 104, line 25 through page 105, line 1)

O'Neil believed the property was worth \$700,000 as raw land at the time.  
(RP 10, lines 6-10)

Construction liens had been recorded against the property totaling about \$150,000 to \$200,000, and O'Neil's plan was to foreclose upon the property and eliminate any requirement that he pay the workers who generated those construction liens. (RP 126, lines 5-16) O'Neil knew that Mattila, who owned the adjacent property, was opposed to the Brook Glen development. O'Neil's plan was to meet with Mattila and settle the matter. (RP 128, lines 18-20)

The property went through foreclosure sale and JWO acquired it as the beneficiary of the deed of trust when there were no other bidders. Ex. 13. A few months later, JWO's interest was conveyed to Brook Glen LLC. Both entities were wholly owned at the time by John O'Neil and his wife. Ex. 16.

#### **D. Procedural History**

The case originally arose as a claim against Mattila only for interference with JWO's business expectancy at the foreclosure sale. By its Second Amended Complaint, JWO added a claim to quiet title in a relocated and reconfigured easement.

The case was tried before the Honorable Ronald L. Castleberry. Judge Castleberry granted the request of the Plaintiffs to quiet title in them to the relocated easement, and dismissed their other claims. Findings of Fact, Conclusions of Law and Judgment Quieting Title entered on November 17, 2010. (CP 80, 81) Mattila timely appealed the Judgment Quieting Title. Thereafter, JWO LLC and Brook Glen LLC timely appealed the dismissal of their remaining claims.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in entering Finding of Fact No. 2, stating that Whitney and Singleton “agreed” that the easement would be relocated, where the evidence establishes only that the parties had a mere unenforceable agreement to agree in the future. The same characterization in Findings of Fact 3, 4, 5, 8, 10 and 11 and Conclusions of Law 1 and 2, to the effect that Whitney and Singleton “agreed” or reached an “agreement,” are likewise in error for the same reason.

The trial court erred in Finding of Fact No. 10 in characterizing Mattila as a “knowledgeable purchaser” and “not naive,” where the evidence establishes the specific facts known to Mattila at the time of his purchase

from Whitney, and none of those facts was sufficient to deprive him of the protection afforded by the Recording Act, RCW 65.08.

The trial court erred in Finding of Fact No. 10 in stating that Mattila reviewed plans showing the relocation of the easement that had been approved by the City of Mountlake Terrace, where there is no substantial evidence of that fact and the only documents admitted from the City's files were Ex. 4, which did not indicate that the easement would be relocated, and Exhibit 15, which was prepared four years after Mattila's purchase.

The trial court erred in Finding of Fact No. 10 in stating that Mattila negotiated terms and financial concessions in his purchase and sale agreement showing he knew of the "agreement" to relocate the easement, where the purchase and sale agreement explicitly allowed Mattila to review and approve "any and all agreements that the Seller makes with the neighbor" and expressly refers to the neighbor's "new easement proposal."

The trial court erred in entering Finding of Fact No. 11 in stating that Mattila was aware of and did not object to the "agreed" relocation of the easement, there having been no substantial evidence that Mattila had any knowledge, opportunity or right to object.

The court erred in entering Finding of Fact No. 18, which states that the relocated street does not detract in any material way from the access previously provided by the gravel driveway, where the gravel driveway included a turn-around that will no longer be available to Mattila, and where such a factor is not a basis in Washington law authorizing the relocation of an easement.

The trial court erred in entering Conclusion of Law No. 1, which states that the terms of the real estate contract between Whitney and Singleton were not merged in the fulfillment warranty deed.

The trial court erred in entering Conclusion of Law No. 1, in concluding that an agreement between Singleton and Whitney, even if it was not fully expressed, was nonetheless established by “their mutual reliance and performance,” where the parties had never reached an agreement as to all mutual terms.

The trial court erred in entering Conclusion of Law No. 1 in dismissing Mattila’s defenses of the statute of frauds, vagueness, merger and unenforceable contract, with regard to the purported agreement between Whitney and Singleton.

The trial court erred in entering Conclusion of Law No. 2 in ruling that Mattilas are estopped to object to the relocation of their driveway.

The trial court erred in entering Conclusion of Law No. 3 and in the Judgment Quieting Title that implements that Conclusion of Law, which relocates the easement serving Mattila's property and quiets title in the relocated easement in favor of Plaintiff.

The trial court erred in entering Conclusion of Law No. 5, stating that judgment shall enter quieting title in Plaintiffs, and in the Judgment Quieting Title which implements such Conclusion of Law.

The court erred in failing to afford to Mattila the protection of the Recording Act, RCW 65.08.070.

The trial court erred in allowing JWO, a mere foreclosing lender not in privity with Singleton, to enforce the purported agreement to which JWO was not a party.

### **III. ISSUES**

Did Mattila's predecessor in interest, Whitney, and Whitney's neighbor, Singleton, reach an actual agreement as to all material terms regarding the future relocation of an easement that served Whitney's property? (They did not.) If they did arrive at an agreement, is that

agreement enforceable under the statute of frauds? (It is not.) If an agreement existed that withstands the statute of frauds, did Mattila have actual or constructive knowledge that his seller's title was impaired such that Whitney could not convey complete title to the existing easement? (He did not, and Whitney could and did convey complete title.) If Whitney conveyed title to Mattila, can Mattila be compelled by specific enforcement to perform an agreement of his predecessor to relocate the easement? (He cannot.) Is Mattila protected against the claims of JWO, which asserts an unrecorded interest in property, by the doctrine of comparative innocence? (He is.)

If Whitney and Singleton had an enforceable agreement, can that agreement be asserted by JWO, who is the foreclosing lender under Singleton's deed of trust, and was not a party to the agreement it seeks to enforce? (It cannot.)

#### **IV. STANDARD OF REVIEW**

Where the trial court has weighed the evidence, the appellate court's review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *Org. to Pres. Agric. Lands v. Adams*

*County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996). Questions of law are reviewed de novo. *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 436-37, 971 P.2d 936 (1999).

## **V. ARGUMENT**

### **A. Washington Law Does Not Permit the Judicial Relocation of an Easement**

In some states, a court may order the relocation of an easement on certain equitable grounds, but this approach has been expressly rejected in Washington.

In *Crisp v. VanLaecken*, 130 Wn. App. 320, 122 P.3d 926 (2005), the owners of the servient estate sought to relocate an easement that prevented them from building a house on their lot. The court rejected that invitation, stating:

Section 4.8(3) of the Restatement sets forth a minority view:

Unless expressly denied by the terms of an easement, ... the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

- (a) significantly lessen the utility of the easement,
- (b) increase the burdens on the owner of the easement in its use and enjoyment, or

(c) frustrate the purpose for which the easement was created.

In *MacMeekin v. Low Income Housing, Inst., Inc.*, 111 Wn. App. 188, 190, 45 P.3d 570 (2002), Division One declined to adopt this minority view, noting:

Washington appellate courts have not adopted the approach of Restatement (Third) of Property (Servitudes) (2000) under which an easement generally may be relocated by the owner of the servient estate, regardless of how the easement was acquired, so long as the relocation will not significantly lessen the utility of the easement, increase the burdens on the owner of the easement in its use and enjoyment, or frustrate the purpose for which the easement was created. We decline to adopt the Restatement (Third) approach, and adhere to the traditional rule that easements may not be relocated absent mutual consent of the owners of the dominant and servient estates, regardless of how the easement was created.

*Crisp* at 323-326.

Finding of Fact 18 (CP 80) states that the relocated driveway does not detract from Mattila's ingress and egress. Under *Crisp*, that is not a basis to relocate the easement. It is also factually incorrect where Mattila would lose his turnaround. Compare Ex. 5 showing the describe easement with Ex. 23 showing the easement as now configured.

Because Washington does not permit the court to relocate an easement, the burden is on JWO to prove that Whitney and Singleton had an enforceable agreement to relocate the easement; that the burdens of that purported agreement can be imposed upon Whitney's successor in interest,

Mattila; and that the benefits of the purported agreement are enforceable by a lender who foreclosed upon Singleton's interest, JWO. JWO fails at each point.

**B. Under *Berg v. Ting* JWO Must Establish a Right to Specific Performance Against Mattila**

JWO requested that the court quiet title to the relocated easement, glossing over the legal theory and mechanism that would produce the result. *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995) clearly establishes that the legal path that JWO must follow is to establish the right of specific performance against Mattila.

*Berg* is discussed in some detail elsewhere below in connection with the statute of frauds. For our purposes here, the facts in the case can be distilled to this: one party sought to quiet title in an easement over his neighbor's property where the easement had been purportedly created by a formal written grant prepared by an attorney. However, the easement had been described as existing over certain lots in a future subdivision "when the same is approved and recorded." The court found that this violated the statute of frauds and was unenforceable.

Importantly, after the servient estate owners executed the "Grant of Easement," they sold their property, and the quiet title action was brought

against their successor in interest.<sup>6</sup> The court said:

The Tings [successors in interest] were not parties to the agreement. However, specific performance may be granted with respect to subsequent purchasers where the subsequent purchasers have notice of the rights of another under a contract conveying an interest in land.

*Berg* at 555.

The court ruled, however, that the Tings were not subject to specific performance because the agreement sought to be enforced against them violated the statute of frauds. The court also recognized that an issue existed whether Tings were bona fide purchasers for value, and “if so, specific performance should not be granted<sup>7</sup>.” *Berg* at 555.

**C. The Purported Agreement Between Singleton and Whitney Lacked Essential Terms and Does Not Give Rise to an Enforceable Contract**

The first step is to analyze the enforceability of the purported agreement between Whitney and Singleton as though the question were whether Singleton could enforce it directly against Whitney. He could not.

Whitney and Singleton had only a generalized understanding that they

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<sup>6</sup>Similarly, Whitney purportedly agreed to extinguish at some future time, the easement that served his property, and then he sold his property to Mattila.

<sup>7</sup>The court ruled for Tings without considering their status as bona fide purchasers..

would arrive at a detailed agreement in the future. They did not fix the future location and configuration of the easement. They had a mere agreement to agree.

A meeting of the minds as to all material terms is required for the formation of a contract in the first instance. In *Keystone Land & Development Company, v. Xerox Corporation*, 152 Wn. 2d 171, 94 P.3d 945 (2004) the court said:

An agreement to agree is “an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.” *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957). Agreements to agree are unenforceable in Washington.

*Keystone* at 176. The court went on to say:

Washington follows the objective manifestation test for contracts. *Wilson Court Ltd. P' ship v. Tony Maroni's, Inc.*, 134 Wn. 2d 692, 699, 952 P.2d 590 (1998). Accordingly, for a contract to form, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn. 2d 371, 388, 858 P.2d 245 (1993). Moreover, the terms assented to must be sufficiently definite. *Sandeman*, 50 Wn. 2d at 541, 314 P.2d 428 (observing if a term is so “indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties,” there cannot be an enforceable agreement).

*Keystone* at 177-178.

In *Hubbell v. Ward*, 40 Wn. 2d 779, 246 P.2d 468 (1952), the court held that a provision in a purchase and sale agreement that contemplated a

later document, but which lacked all the terms of that later document, could not be specifically enforced. *Hubbell* was analyzed in a later case, *Hagensen v. Petersen*, 29 Wn. App. 721, 630 P.2d 1374 (1981). Here is the discussion of the point from *Hagensen*:

It was held in *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952), that an earnest money agreement “in so far as it looks to the preparation and execution of a future real estate purchase contract upon which the minds of the parties have not met, is not sufficiently definite and certain and cannot be specifically enforced.” *Hubbell v. Ward*, supra at 787, 246 P.2d 468.... The court noted 13 matters material to the rights and obligations of the parties which could not be ascertained from the earnest money agreement: (1) time of transfer of title, (2) provisions for forfeiture, (3) risk of loss, (4) who is to carry insurance, (5) who is to pay taxes, (6) who is responsible for repair, (7) who pays utility charges, (8) the right of the purchaser to make capital improvements without consent of the seller, (9) the seller’s protection against liens created by the purchaser, (10) the purchaser’s right to remove furniture without the seller’s permission, (11) the purchaser’s right to use the building for other purposes, (12) time and place of monthly payments, and (13) whether the purchaser is an indemnitor of the seller against claims of third parties. *Hubbell v. Ward*, supra at 782-83, 246 P.2d 468. In a later case which followed *Hubbell*, the court stated: “Where the parties have not reached agreement, there is nothing for equity to enforce.” *Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.2d 953 (1963).

*Hagensen* at 722–723.

In the instant case, the purported agreement with which JWO seeks to burden Mattila is lacking almost all terms, including, by way of a partial list, the fundamental question of where the easement would be located;

how Mattila would protect his lender, which holds a deed of trust served by the existing easement; how Mattila would be protected from encumbrances created by Singleton after Mattila's purchase, including the deed of trust of Singleton's lender if one existed at the time the old easement was extinguished and a new one granted; whether the servient owner would indemnify Mattila should rights of third parties become involved; whether and how Mattila would be entitled to the protection of title insurance with regard to the supposed new easement; and what obligations Mattila would have with regard to the maintenance of a new paved driveway shared with multiple other residents.

If the purported agreement between Singleton and Whitney were held to be enforceable on vague oral understandings to the effect that the parties would later arrive at the express terms of a conveyance, the court would thereby adopt a concept foreign to Washington law as it now exists, and would inject uncertainty into real estate transactions.

#### **D. The Purported Agreement Between Whitney and Singleton Violates the Statute of Frauds**

In *Friedl v. Benson*, 25 Wn.App. 381, 609 P.2d 449 (1980), where the issue was whether a writing related to an agreement to enter into a lease (and which was therefore subject to the statute of frauds) was sufficient.

The court held it was not, saying:

A memorandum or memoranda of an agreement for a lease, in order to satisfy the statute of frauds, must embody all of the essential and material parts of the contemplated lease with sufficient clarity and certainty to show that the minds of the parties have met on all material terms and with no material matter left for future agreement or negotiation. 72 Am.Jur.2d *Statute of Frauds* § 341, at 865 (1974). As held in *Bharat Overseas, Ltd. v. Dulien Steel Prods., Inc.*, 51 Wn.2d 685, 687, 321 P.2d 266, 267 (1958):

The rule relating to the sufficiency of memoranda as stated in 37 C.J.S. Frauds, Statute of § 181, p. 666, is:

“Thus the note or memorandum must disclose the subject matter of the contract . . .; the parties thereto . . .; ***the promise or undertaking . . .; the terms and conditions . . .***; and, in some but not all jurisdictions, the price or consideration.”

*Friedl* at 387; ellipses original, emphasis supplied.

In *Berg v. Ting, supra*, a property owner resolved a dispute with his neighbor by entering into a formal Grant of Easement in property that was described as lots in a future subdivision. After that subdivision was completed, the neighbor who would have benefitted from the easement tried to establish that the easement existed. The court held that it did not, because the purported agreement violated the statute of frauds.

The written Grant of Easement made reference to an application for a short subdivision that had been submitted to the City of Seattle, and then it described the easement as a private driveway:

the exact location of which shall be determined by reference to the conditionally granted Application as the same is finally approved and recorded...

*Berg* at 548.

Thereafter, the owners of the putative servient estate sold their property to Tings, who declined to acknowledge the easement across their property. The owner who wanted to use the easement brought suit to quiet title to the purported easement. The court said:

As discussed hereafter, a grant of easement must describe a specific subservient estate; that is an absolute. Here, the grant of easement attempts to describe the subservient estate by reference to a future “finally approved” short plat application. That document did not exist until almost 4 years after the grant.<sup>8</sup>

*Berg* at 549. The court went on to say:

Here, the writing describes the interest conveyed as “a perpetual nonexclusive easement in, under and over” two tracts of land, tract A and tract B. These tracts are described as certain portions of the lots of the conditionally granted short subdivision application “when the same is finally approved and recorded” and “as the same is finally approved and recorded ...”. Clerk’s Papers, at 203. The granting clause thus refers to a description of the encumbered property as the same is approved in the future, and refers to a then nonexistent instrument as defining the servient estate. The grant thus did not contain a sufficient description of the land nor did it reference an instrument which did contain such a description.

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<sup>8</sup>Similarly, the real estate contract between Whitney and Singleton said that the easement “will be relocated with future subdivision.” The servient estate was unknown because a boundary line adjustment was required, as Singleton explained in Ex. 6 and as accomplished in Ex. 5.

*Berg* at 551.

The policy basis for requiring that the conveyance of an easement must satisfy the statute of frauds was clearly stated by the court in *Berg*:

It is essential to the integrity of the recording system and the stability of real estate titles that we reject the contention that it was adequate to append the description of the entire Cahill [servient] tract. We have recognized that the legislative purpose in enacting RCW 65.08.070 was “to give greater stability to land titles, by authorizing prospective purchasers or encumbrancers to rely upon the title as disclosed by the record.” (Italics ours.) *Adams v. Mignon*, 197 Wash. 293, 298, 84 P.2d 1016 (1938); accord *Lazov v. Black*, 88 Wn.2d 883, 886, 567 P.2d 233 (1977).

The Legislature has recognized the vital importance of being able to determine the exact legal description from the record.

*Berg* at 553.

The purported agreement between Whitney and Singleton, even if it contained all material terms (which it did not) is unenforceable under the statute of frauds because both the location of the future easement and the identity of the servient estate are impossible to determine at the time of the purported agreement.

**E. The Language of the Real Estate Contract Was Merged in the Deed**

In considering the state of Mattila’s actual or constructive knowledge at the time he acquired his property, the first step is to note that the

language of the 1996 real estate contract between Whitney and Singleton, which says, “Easement will be relocated with future subdivision,” is not determinative or even relevant. The real estate contract (Ex. 1) was recorded, but it was paid off quickly and a fulfillment warrant deed was issued. The real estate contract does not appear as a title exception on Ex. 22, Mattila’s Commitment for Title Insurance. That is because the real estate contract is merged in the deed. In *Jones v. National Bank of Commerce of Seattle*, 66 Wn. 2d 341, 402 P.2d 673 (1965), the court said:

A deed made in full execution of a contract for the sale of land merges the provisions of the contract. This rule extends to and includes all prior negotiations and agreements leading up to the execution of the deed.

*Jones* at 677.

The Statutory Warranty Deed that Singleton issued to Whitney (Ex. 2) expressly states: “This deed is given in fulfillment of that certain real estate contract between the parties...” It unconditionally conveys an express easement. The suggestion that the easement was not actually granted, or that it was conditional, is directly contradictory to the language of the deed.

In *Barnhart v. Gold Run, Inc.*, 68 Wn.App. 417, 843 P.2d 545, (1993), the court said:

Generally, “[a] deed made in full execution of a contract of sale of land merges the provisions of the underlying contract ...”. *Kunkel v. Meridian Oil, Inc.*, 54 Wn.App. 675, 678, 775 P.2d 470 (1989) (citing *Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969)), overruled on other grounds, 114 Wn.2d 896, 792 P.2d 1254 (1990). An exception to the general rule exists for “ ‘stipulations in the contract which are not contained in, not performed by, and not inconsistent with the deed and which are held to be collateral to or independent of the obligation to convey.’ ” *Kunkel*, 54 Wn.App. at 679, 775 P.2d 470 (quoting *Snyder v. Roberts*, 45 Wn.2d 865, 872, 278 P.2d 348, 52 A.L.R.2d 631 (1955)).

Here, Gold Run seeks attorney fees in connection with the Barnharts’ action to enforce the alleged agreement to convey an easement in the platted roadway. The basis of the Barnharts’ action is central, not collateral, to the agreement to convey. Thus, Gold Run’s contractual right to fees for such an action ended when the deed was issued in 1984.

*Barnhart* at 423-424.

The Statutory Warranty Deed that Singleton issued to Whitney in fulfillment of the contract expressly grants Whitney an easement over the existing gravel driveway. No other language of the deed qualifies or modifies that easement. Under JWO’s argument, the prior purported agreement between Whitney and Singleton was inconsistent with the grant of easement. As such, any such agreement would have merged in the deed.

The proof of this is to consider what would have been the result if

Singleton had sued Whitney for failing to extinguish the easement, and had also sought attorney's fees. He would not have been entitled to fees – that is the holding of *Barnhart* – because the contract merges in the deed. The unconditional conveyance of the easement inheres in the deed, and the contract and prior negotiations are merged in the deed.

**F. The Facts Known to Mattila Were Wholly Consistent With Whitney's Right to Convey the Existing Easement**

When Mattila acquired his property from Whitney, record title established that Whitney held an easement over the existing gravel driveway. The Recording Act, RCW 65.08, protects one who relies on record title and who buys in good faith. The purpose of the statute was stated in *Tacoma Hotel, Inc. v. Morrison & Co.*, 193 Wash. 134, 140, 74 P.2d 1003 (1938):

The purpose of the recording statute is to make the deed first recorded superior to any outstanding unrecorded conveyance of the same property unless the mortgagee or purchaser had actual knowledge of the transfer not filed of record.

In *Levien v. Fiala*, 79 Wn.App. 294, 902 P.2d 170 (1995) the court said:

Whether a person is a bona fide purchaser is a mixed question of law and fact. [Citing cases]; *Peoples Nat'l Bank v. Birney's Enters., Inc.*, 54 Wn.App. 668, 674, 775 P.2d 466 (1989) (what a purchaser knew is a question of fact but the legal significance of

what he knew is a question of law). A bona fide purchaser of an interest in real property is entitled to rely on record title; the protection afforded him by the real property recording statute, RCW 65.08.070, is unaffected by the vendor's lack of good faith or by matters of which the vendor has notice. *Hendricks v. Lake*, 12 Wn.App. 15, 20-21, 528 P.2d 491 (1974), review denied, 85 Wn.2d 1004 (1975).

*Levien* at 299-300.

Mattila did not have knowledge that Singleton had any claimed interest superior to Whitney's recorded interest in the existing easement. A court cannot, merely by positing a general duty to inquire, attribute perfect knowledge to a person with the duty. Rather, the court must look at the specific facts known to the person charged with a duty of inquiry, and determine from those specific facts whether a further duty to inquire arose, and if so, what that further inquiry would have disclosed.. This is clear from *Paganelli v. Swendsen*, 50 Wn.2d 304, 311 P.2d 676 (1957).

In *Paganelli*, property was sold twice, first by the owner at the time, and seven years later, after the seller had died, by his personal representative. The first purchasers of the property did not record their deed, and the dispute was between the first and second purchasers. It revolved around whether the second purchaser had inquiry notice of the first purchasers' interest, by virtue of some known and observable circumstances.

The trial court held for the first purchasers because the second purchaser had been told by the personal representative that the personal representative “had written over to Yakima to find out about or to clear the title to the property” and because of the cumulative effect of the following:

(1) the [first purchasers] improved the property; (2) Blacktop Pavers, Inc., [the first-purchasers’ business] parked its trucks there; (3) Marie Stewart [the first-purchasers’ agent] placed two of her “For Sale” signs on the property; (4) [the second purchaser] knew that [the personal representative] did not sell [adjacent property] through a real estate agency; (5) the [first-purchasers’] fruit stand was open for three weeks in July, 1954; and (6) the records of the King county treasurer’s office showed that tax statements had been mailed to [the first-purchasers’ business], care of Frank Paganelli [the first purchaser], at Yakima.

*Paganelli* at 307.

The Supreme Court analyzed each circumstance and determined that none of them excited further inquiry. The court framed its analysis thus:

It is not enough to show that diligent inquiry by [the second purchaser] would have disclosed that the [first purchasers] were the owners of the property; the issue is: did the [first purchasers] establish circumstances that would raise a duty to inquire?

We stated in *Daly v. Rizzutto*, 1910, 59 Wash. 62, 65, 109 P. 276, 278, 29 L.R.A.,N.S., 467, that

“It [notice] need not be actual, nor amount to full knowledge, but it should be such ‘information from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry.’ [Citing cases.] It follows, then, that it is not enough to say that diligent inquiry

would have led to a discovery, but it must be shown that the purchaser had, or should have had, knowledge of some fact or circumstance which would raise a duty to inquire.”(Italics ours.)

See also: *Diimmel v. Morse*, 1950, 36 Wn.2d 344, 218 P.2d 334; *Bernard v. Benson*, 1910, 58 Wash. 191, 196, 108 P. 439, 441. In the latter case, the court said:

“What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell.”

*Paganelli* at 307-308.

The *Paganelli* court said that it was immaterial that the personal representative had told the second purchaser that he was trying to clear title. The court said this would justify the second purchaser “in concluding that he had succeeded in clearing title.” The court found the other factors similarly unavailing: vacant buildings are not notice of anything; the presence of trucks and “for sale” signs were not inconsistent with the personal representative’s title; there was no proof that the second purchaser knew what was in the Treasurer’s tax records and, “If he were put on inquiry, the records of the auditor’s office are certainly more conclusive...than those of the treasurer’s office.”<sup>9</sup>

The Court concluded:

Neither, taken one at a time or cumulatively, can any circumstance

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<sup>9</sup>All quoted material appears in *Paganelli* at 309-310.

relied on by the [first purchasers] as constituting constructive notice be considered as indicating that [the second purchaser] did not have a right to rely on the record title and the willingness of the title company, after its inquiry, to insure title in [the personal representative].

*Paganelli* at 310.

In this light, consider what was known to Mattila when he purchased the property from Whitney. None of it leads to the conclusion that Whitney and Singleton had reached actual and final agreement to relocate the easement, nor that Whitney lacked the complete ability to convey the easement.

- The Statutory Warranty Deed from Singleton to Whitney created an easement of the existing gravel driveway. This is the beginning point and it is the record title on which Mattila is entitled to rely.
- The recorded “Conditions of Approval Brook Glen – Final Planned Unit Development,” (Ex. 4) recorded in 2002 did not indicate that the easement for ingress, egress and utilities had to be relocated.
- By an instrument recorded less than 90 days before Mattila’s purchase, Ex. 5, Singleton and Whitney each expressly certified that the easement was located and configured in its original position.
- Whitney had signed formal water and sewer easements in February,

2005<sup>10</sup> that were clearly intended to accommodate Singleton's development, yet there was no document signed that related to relocation of the easement.

- Whitney expressly disavowed, in the Seller Disclosure Statement (Ex.17) any encroachments, boundary agreements, boundary disputes, or limitations in rights of way, easements or access that might affect Buyer's use of the property.

- Mattila made the purchase and sale agreement with Whitney conditional "on Buyers review and approval of any & all agreements that Seller (Whitney) makes with the neighbor," and he provided that the "new easement proposal" of the neighbor would not result in hook-up charges. (Ex. 9) These are both inconsistent with any existing agreement.

- Whitney requested a clause in the Mattila purchase and sale agreement stating:

Buyer will not agree with the adjoining property owner to extinguish the existing access easements and establish a new access easement without seller's consent,

which is inconsistent with of any existing agreement between Whitney and Singleton to the same effect.

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<sup>10</sup>Ex. 7, a water easement appearing as exception 11 in Mattila's title report, Ex. 22, and a sewer easement appearing there as exception 10.

- Mattila's title insurance company contracted, in its Preliminary Commitment for Title Insurance (Ex. 22), to insure Mattila's ownership of that easement as established in the 1997 Singleton to Whitney deed. (Note that the title company's analysis was a fact important to the court in *Paganelli* supporting the buyers right to believe that the seller could convey title).

Just as in *Paganelli*, where every fact known to the second purchaser was consistent with the personal representative's right to convey the property, every fact known to Mattila was consistent with the lack of any final agreement between Whitney and Singleton. Everything led to the fact that Whitney and Singleton had never consummated their negotiations.

In connection with Mattila's duty to inquire, Ex. 5 is of overwhelming importance. In that instrument, both Singleton and Whitney identified the easement serving the property. Their instrument so doing was executed with formality and was recorded. When Mattila purchased, it was only a few months old. Ex. 5 was in the chain of title and it is inconsistent with any suggestion that Mattila had a duty to inquire about the location of the driveway or some encumbrance that would require its relocation.

Had Mattila undertaken such a thorough inquiry that he had unearthed all of the facts surrounding the discussions between Whitney and Singleton that were later adduced at trial, he would have known that they arrived at nothing more than an agreement to agree in the future.

Consider also the implication of the fact that the only document in the entire record that JWO can point to as establishing the purported agreed location of the new easement is Ex. 15, a “Water Plan Record Drawing” that was created on November 17, 2009, more than four years after Mattila purchased. At the time of his purchase, there was nothing to discover other than Whitney’s thoughts, and his thoughts that no final agreement with Singleton had been reached appear clearly in the words of the purchase and sale agreement with Mattila that he signed.

#### **G. JWO Is Not in Privity With Singleton**

JWO did not acquire the property from Singleton, but from Singleton’s lender, by the assignment of Singleton’s promissory note and deed of trust (Exs. 11 and 12), and then by the foreclosure of that deed of trust.

In 17A Am Jur 2d, *Contracts*, § 425, the following appears:

Ordinarily, the obligations arising out of a contract are due only to those with whom it is made; a contract cannot be enforced by a person who is not a party to it or in privity with it, except under a real party in interest statute or, under certain circumstances, by a

third-party beneficiary. As a general rule, whenever a wrong is founded upon a breach of contract, the plaintiff suing in respect thereof must be a party or privy to the contract, and none but a party to a contract has the right to recover damages for its breach against any of the parties.

The purported contract between Whitney and Singleton was not intended to benefit Singleton's foreclosing lender. Whitney and Singleton were friends when Whitney bought the property (RP 27, lines 15-18), and they had no reason to benefit Singleton's foreclosing lender.

Moreover, look carefully at the legal description set forth in the "Assignment of Beneficiary's Interest In Deed of Trust," Ex. 12. The legal description is followed by this language:

(Also known as Lot A of City of Mountlake Terrace Boundary Line Adjustment recorded under Auditor's File Number 200503175002.)

That document is the survey associated with the boundary line adjustment that Whitney and Singleton completed shortly before Whitney's sale to Mattila (Ex. 5). In other words, the property that JWO acquired through the assignment and foreclosure of the Skagen deed of trust was, *by the express terms of the assignment*, the 2005 configuration of Singleton's lot, explicitly subject to the existing access easement at its original location.

#### **H. If JWO Were in Privity with Singleton, It Inherits Singleton's Deficiency Under the Rule of Comparative Innocence**

Assume, *arguendo*, that, notwithstanding its lack of privity, JWO stepped into the shoes of Singleton. JWO's request for relief is still defeated by the rule of comparative innocence.

That rule was applied in *Paganelli v. Swendsen*, *supra*, involving property that was sold twice to two different purchasers. The first purchasers did not record their deed. The court said:

The [first purchasers] are seeking equitable relief; yet, if they had recorded their deed, or, if plaintiff Paganelli had answered [the personal representative] Swendsen's letter, the [second purchasers] would not be in their present position. When applying the rule of comparative innocence, it is impossible for us to escape the conclusion that the [first purchasers] were negligent and should bear the loss.

*Paganelli* at 310-311.

The case is replete with Singleton's negligence and his lost opportunities to prevent the issue from arising, if his view (that he and Whitney had a contract) is correct:

- Singleton approached the creation of a right to relocate the easement by using the services not of a real estate agent or lawyer but of a "friend," to arrive at the language. RP 7, lines 3-7.
- Singleton failed to incorporate the language he relied upon into the

warranty deed that was issued in fulfillment of the real estate contract.

- Singleton failed to present the easement documents to Whitney in December, 2004 when he had Whitney sign the boundary line adjustment documents, Ex. 5, or in February, 2005, when Whitney signed water and sewer easements.

- Singleton, a few months before Whitney sold to Mattila, expressly certified in a recorded instrument, Ex. 5, that the easement was located and configured in its original position.

- Singleton, although he knew Whitney was engaged in marketing and selling the property, and although he knew that Whitney was represented by a lawyer and was declining to sign the easement documents, did not commence an action and file a lis pendens, but allowed the sale to Mattila to close.

Singleton, in short, neglected at every turn any right he might otherwise have had to relocate the easement. JWO — if it has any right to the benefits of Singleton's purported contract — is also stuck with the corresponding deficiencies in Singleton's position.

## **VI. CONCLUSION**

JWO became the owner of the Singleton property because it saw an

opportunity to make a profit. It is not subject to criticism on that account, but neither is it entitled to dispensation from those laws that protect the certainty of real estate titles. There is no unfairness in this, just as there was no unfairness in JWO's using a deed of trust foreclosure to extinguish the construction liens of those who had worked to make the property more valuable. In the broadest sense, JWO benefits from having well defined rules that govern who owns just what rights in real estate. Under those well defined laws, when Singleton and Whitney had not, by the time of Mattila's purchase, encumbered Mattila's property with any obligation to relocate the access easement, then Mattila was entitled to promote his own interest, and to protect the increased value that accrues to his property if the easement remains as it was when he bought.

Whitney and Singleton never reached an agreement as to all material terms regarding the future relocation of the existing easement that served Whitney's property. If they did arrive at an agreement, that agreement violated the statute of frauds. If an agreement did arise that withstands the statute of frauds, Mattila had no actual or constructive knowledge that would lead him to learn that Whitney lacked the ability to convey complete title to the existing easement. Mattila cannot be compelled by

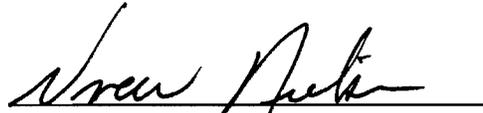
specific enforcement to perform an agreement of his predecessor in title, and he is protected against the unrecorded claim of Singleton by the doctrine of comparative innocence.

If Whitney and Singleton had an enforceable agreement, that agreement cannot be asserted by JWO, the mere foreclosing lender under Singleton's deed of trust, and not a party to the agreement it seeks to enforce.

The Court's Judgment quieting title in Plaintiffs to a relocated easement should be reversed and Plaintiffs' claims dismissed.

RESPECTFULLY SUBMITTED this 8th day of June, 2011.

NIELSEN & NIELSEN, INC. P.S.

A handwritten signature in cursive script, appearing to read "Drew Nielsen", is written over a horizontal line.

DREW NIELSEN, WSBA 7026, Of  
Attorneys for Appellants Mattila

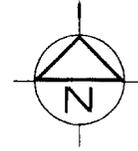
## **VII. APPENDIX**

For ease of reference, attached as an appendix is a copy of the Boundary Line Adjustment and Survey that was admitted at trial as Exhibit No. 5.

**CITY OF MOUNTLAKE TERRACE  
BOUNDARY LINE ADJUSTMENT  
NO. PLLO40001**

NOTES:  
INSTRUMENT DATA: LEITZ 4B (5" DIRECT READING  
THEODOLITE WITH E.O.M.)  
PRECISION OF CONTROL TRAVERSE IS AT HIGHER  
LEVEL THAN MINIMUM STANDARDS REQUIRED BY  
WAC 332-130-090.

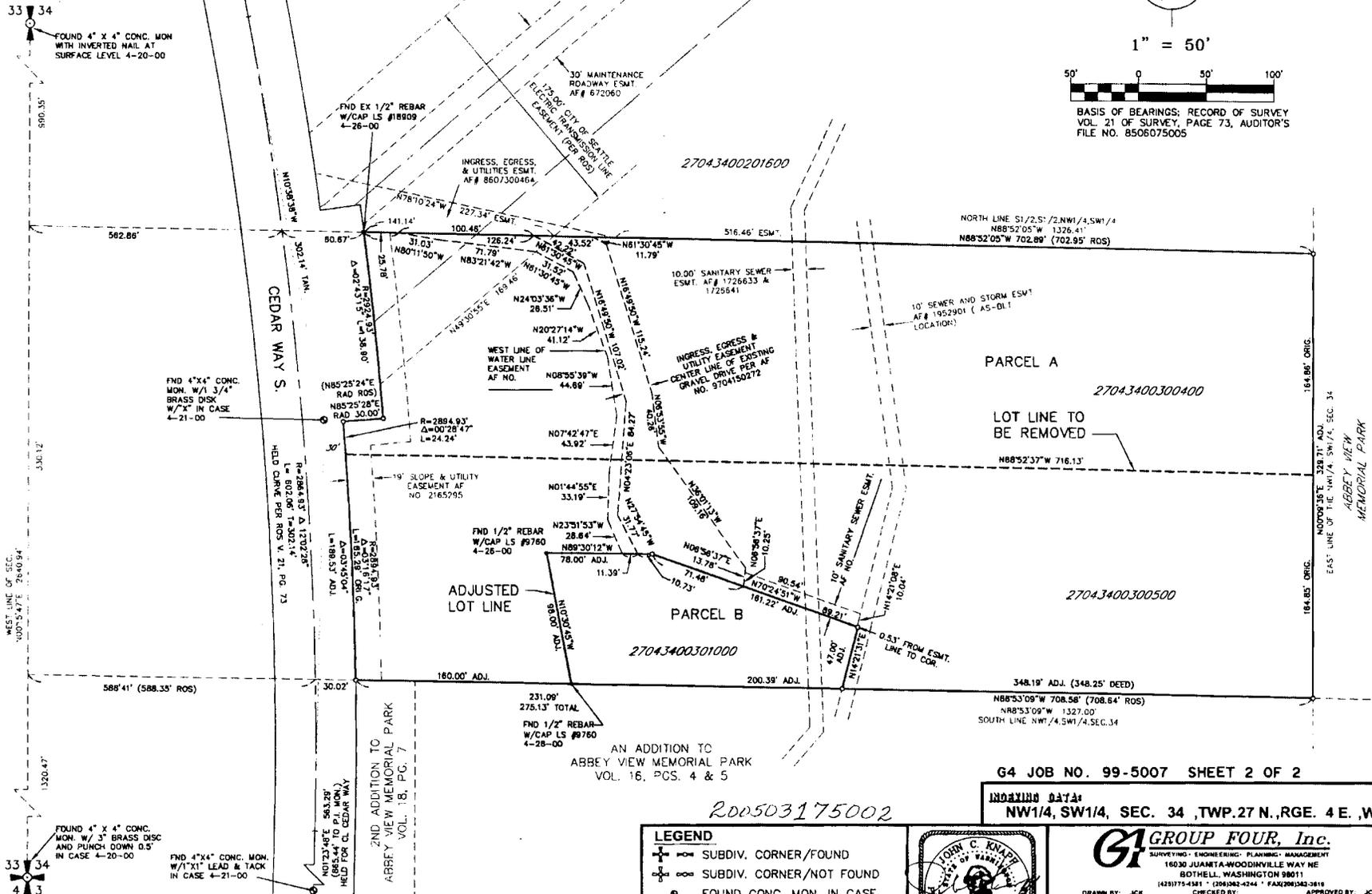
AREA ORIGINAL ADJUSTED  
PARCEL 1 115,145 SQ. FT. 215,250 SQ. FT.  
PARCEL 2 117,330 SQ. FT. 17,226 SQ. FT.



1" = 50'



BASIS OF BEARINGS: RECORD OF SURVEY  
VOL. 21 OF SURVEY, PAGE 73, AUDITOR'S  
FILE NO. 8506075005

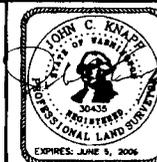


G4 JOB NO. 99-5007 SHEET 2 OF 2

INSTRUMENT DATA:  
NW1/4, SW1/4, SEC. 34, TWP. 27 N., RGE. 4 E., W.M.

200503175002

- LEGEND**
- ⊕ SUBDIV. CORNER/FOUND
  - ⊕ SUBDIV. CORNER/NOT FOUND
  - FOUND CONC. MON. IN CASE
  - FOUND SURFACE MON.
  - EXISTING CAPPED REBAR
  - SET CAPPED REBAR LS #30450
  - RAD RADIAL BEARING



12-9-04

**GROUP FOUR, Inc.**  
SURVEYING ENGINEERING PLANNING MANAGEMENT  
16030 JUANITA WOODINVILLE WAY NE  
BOTHELL, WASHINGTON 98011

DRAWN BY: JACK DATE: 09-24-04  
CHECKED BY: DATE:  
APPROVED BY: JACK DATE:

**BOUNDARY LINE ADJUSTMENT  
FOR  
BROOK GLEN  
CITY OF MOUNTLAKE TERRACE WASHINGTON**

CITY OF MOUNTLAKE TERRACE  
 BOUNDARY LINE ADJUSTMENT  
 NO. PLLO40001

**APPROVAL**

EXAMINED, FOUND TO BE IN CONFORMITY WITH APPLICABLE ZONING AND OTHER LAND USE CONTROLS, AND APPROVED THIS 16 DAY OF March, 2005.

Annita L. Juska  
 CITY MANAGER

**APPROVAL NOTES:**

APPROVAL OF THIS BOUNDARY LINE ADJUSTMENT DOES NOT CONSTITUTE A TRANSFER OF OWNERSHIP. IT IS THE RESPONSIBILITY OF THE PROPERTY OWNERS TO COMPLETE THE CONVEYANCE PROCESS.

**CERTIFICATE OF CONSENT**

WE THE UNDERSIGNED OWNERS OF THE PROPERTY HEREIN DESCRIBED REQUEST A BOUNDARY LINE ADJUSTMENT ON THE PROPERTY PURSUANT TO RCW 58.17.040 AND DECLARE THE ATTACHED DRAWINGS TO BE A GRAPHIC REPRESENTATION OF THE SAME. AND CERTIFY THAT THIS BOUNDARY LINE ADJUSTMENT IS MADE WITH FREE CONSENT AND IN ACCORDANCE WITH THE DESIRE OF THE OWNERS.

Robert B. Singleton  
 ROBERT B. SINGLETON

Nancy L. Singleton  
 NANCY L. SINGLETON

Kathleen C. Singleton  
 KATHLEEN C. SINGLETON

Donald M. Whitney  
 DONALD M. WHITNEY

**ACKNOWLEDGMENTS**

STATE OF WASHINGTON)

COUNTY OF Pierce) SS

I CERTIFY THAT I KNOW OR HAVE SATISFACTORY EVIDENCE THAT ROBERT B. SINGLETON AND NANCY L. SINGLETON, HUSBAND AND WIFE SIGNED THE DECLARATION AND ACKNOWLEDGED IT TO BE [HIS/HER] FREE AND VOLUNTARY ACT FOR THE USES AND PURPOSES MENTIONED IN THE INSTRUMENT.

DATED 12-22-04

SIGNATURE OF Amber K. DePietro  
 NOTARY PUBLIC  
 PRINTED NAME OF  
 NOTARY PUBLIC Amber K. DePietro  
 TITLE Notary Public  
 MY APPOINTMENT EXPIRES 7-29-07



STATE OF WASHINGTON)

COUNTY OF Pierce) SS

I CERTIFY THAT I KNOW OR HAVE SATISFACTORY EVIDENCE THAT KATHLEEN L. SINGLETON, SIGNED THE DECLARATION AND ACKNOWLEDGED IT TO BE [HIS/HER] FREE AND VOLUNTARY ACT FOR THE USES AND PURPOSES MENTIONED IN THE INSTRUMENT.

DATED 12-22-04

SIGNATURE OF Amber K. DePietro  
 NOTARY PUBLIC  
 PRINTED NAME OF  
 NOTARY PUBLIC Amber K. DePietro  
 TITLE Notary Public  
 MY APPOINTMENT EXPIRES 7-29-07



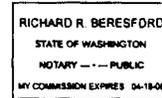
STATE OF WASHINGTON)

COUNTY OF Snohomish) SS

I CERTIFY THAT I KNOW OR HAVE SATISFACTORY EVIDENCE THAT DONALD M. WHITNEY, SIGNED THE DECLARATION AND ACKNOWLEDGED IT TO BE [HIS/HER] FREE AND VOLUNTARY ACT FOR THE USES AND PURPOSES MENTIONED IN THE INSTRUMENT.

DATED 2-18-05

SIGNATURE OF Richard R. Beresford  
 NOTARY PUBLIC  
 PRINTED NAME OF  
 NOTARY PUBLIC Richard R. Beresford  
 TITLE  
 MY APPOINTMENT EXPIRES 4-8-08



**LEGAL DESCRIPTION**

**PARCEL A (ORIGINAL)**

THE SOUTH HALF OF THE SOUTH HALF OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 34, TOWNSHIP 27 NORTH, RANGE 4 EAST, W.M., IN SNOHOMISH COUNTY, WASHINGTON, LYING EASTERLY OF CEDAR WAY SOUTH;

EXCEPT THE SOUTH HALF THEREOF.

TOGETHER WITH AN EASEMENT FOR INGRESS, EGRESS AND UTILITIES AS RECORDED UNDER AUDITOR'S FILE NUMBER B607300464, RECORDS OF SAID COUNTY.

**PARCEL B (ORIGINAL)**

THE SOUTH HALF OF THE SOUTH HALF OF THE SOUTH HALF OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 34, TOWNSHIP 27 NORTH, RANGE 4 EAST, W.M., IN SNOHOMISH COUNTY, WASHINGTON, LYING EASTERLY OF CEDAR WAY SOUTH;

CONTACT PERSON: JOHN MIRANTE  
 GROUP FOUR, INC.  
 16030 JUANITA-WOODINVILLE WAY NE  
 BOTHELL, WA 98011  
 PHONE: (425) 775-4581  
 FAX: (206) 362-3819

G4 JOB NO. 99-5007 SHEET 1 OF 2

INDEXING DATA:  
 NW1/4, SW1/4, SEC. 34, TWP. 27 N., RGE. 4 E., W.M.

200503175002

**LEGEND**

- ✚ SUBDIV. CORNER/FOUND
- ∞ SUBDIV. CORNER/NOT FOUND
- ⊕ FOUND CONC. MON. IN CASE
- ⊙ FOUND SURFACE MON.
- EXISTING CAPPED REBAR
- SET CAPPED REBAR LS #30450
- SET LINE STAKE

**RECORDING CERTIFICATE**

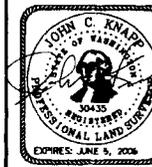
FILED FOR RECORD BY GROUP FOUR, INC.  
 THIS 17<sup>th</sup> DAY OF MARCH 2005 A.D., AT 39  
 MINUTES PAST 9 O'CLOCK P. M.; AND RECORDED  
 UNDER AUDITOR'S FILE NO. 200503175002  
 RECORDS OF SNOHOMISH COUNTY, WASHINGTON

Bob Terwilliger COUNTY AUDITOR  
Janell Roman DEPUTY AUDITOR

**SURVEYORS CERTIFICATE**

THIS BOUNDARY LINE ADJUSTMENT CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN THE CONFORMANCE WITH REQUIREMENTS OF THE SURVEY RECORDING ACT, AT THE REQUEST OF ROBERT SINGLETON THIS 9<sup>th</sup> DAY OF DECEMBER 2004

Robert K. Taylor L.S. NO. 30435  
 REGISTERED LAND SURVEYOR



16030 JUANITA-WOODINVILLE WAY NE  
 BOTHELL, WASHINGTON 98011  
 (425) 775-4581 • (206) 362-4264 • FAX: (206) 362-3819  
 DRAWN BY: JCK DATE: 02-24-04  
 CHECKED BY: JCK DATE:  
 APPROVED BY: JCK DATE:

**BOUNDARY LINE ADJUSTMENT FOR BROOK GLEN CITY OF MOUNTLAKE TERRACE WASHINGTON**

