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No. 70663-2-I

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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CITY OF WOODINVILLE, WASHINGTON,  
a municipal corporation of the State of Washington,

Plaintiff/Appellant,

v.

THE LANZ FIRM, P.S., a Washington Corporation; and  
WOODINVILLE VILLAGE ASSOCIATES, L.L.C., a Washington  
Corporation, WOODINVILLE VILLAGE PARTNERS, LLC,

Defendants/Respondents.

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BRIEF OF RESPONDENTS WOODINVILLE VILLAGE PARTNERS,  
LLC AND WOODINVILLE VILLAGE ASSOCIATES, LLC

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## I. INTRODUCTION

This is a lien priority dispute between the City of Woodinville (the “City”) and Woodinville Village Partners, LLC (“Partners”). In 2005, Frontier Bank loaned to Defendant Woodinville Village Associates, L.L.C. (“Associates”), \$15,580,000 (the “Loan”) to acquire property (the “Property”) and construct improvements for a project commonly known as Woodinville Village (the “Project”). To secure the Loan, Frontier Bank recorded a first position deed of trust on the Property (the “Deed of Trust”).

In conjunction with the Project, the City and Associates entered into a Development Agreement, which was recorded just prior to the Deed of Trust. The Development Agreement sets forth the general parameters for the proposed Project. In the Development Agreement, the parties agreed to negotiate a second, separate agreement — to be called the Tourist District Roundabout Improvement Project Agreement (“TRIP Agreement”).

The parties entered into the separate TRIP Agreement in 2006, and it was recorded in 2007. The TRIP Agreement outlined certain traffic improvement contributions that Associates would make to the City, if

Associates elected to proceed with the Project.

The financial recession had a material impact on the Project; Associates could not proceed and defaulted on the Loan. Despite this, the City installed traffic improvements near the Project and demanded that Associates pay a share. Associates was unable to do so and the City obtained a judgment against Associates for \$1.075 million, which was recorded against the Property on October 19, 2010 (the “Judgment”).

Union Bank succeeded to Frontier Bank’s interest in the Loan and Deed of Trust and initiated non-judicial foreclosure proceedings in 2011. The City filed this action in July 2011, seeking to enjoin the trustee’s sale, alleging that the City had obtained an interest in the Property because of the Judgment, which the City argues has priority over the Deed of Trust. In the alternative, the City alleged unjust enrichment.

Union Bank later sold the Loan and assigned the Deed of Trust to Partners (the “Assignment of Deed of Trust”). Subsequently, Partners and Union Bank successfully moved to substitute Partners for Union Bank in this action.

On cross-motions for summary judgment, the trial court granted Partners’ motion and dismissed all of the City’s claims with prejudice. On appeal, the City argues that the trial court erred in granting Partners’

requested relief and denying the City's motion. The assignments of error are meritless. The Deed of Trust has priority over any and all subsequent liens, including but not limited to the City's claim concerning transportation mitigation, which it liquidated to Judgment. There is no basis for the City's claim that the Judgment relates back in time to the recording of the Development Agreement. Moreover, there is no basis for the City's alternative claim for unjust enrichment. The trial court's rulings were correct on the merits. Respondents respectfully request that this Court affirm the rulings of the trial court in all respects.

## **II. ISSUES ON APPEAL**

The issues on appeal are:

1. The City liquidated its claim for traffic mitigation to Judgment. Can a Judgment in favor of the City have priority over a Deed of Trust that was recorded years prior to the Judgment? (No.)
3. Do signatures of Bank officials on a binding site plan provide any other legal basis for the City's argument that the City's Judgment has lien priority over the Deed of Trust? (No.)
4. Can the City support its claim for unjust enrichment when Associates and Partners have received no benefit from the City's decision to implement traffic improvements which the City had contemplated for

many years? (No.)

5. Does the City have a right of subrogation as to a personal Guaranty that Associates member, Michael J. Raskin, executed in favor of Union Bank? (No.)

6. Is Tract X secured by the Deed of Trust? (Yes.)

7. Does the Deed of Trust have priority over the Judgment as to the Pisani Property? (Yes.)

### III. STATEMENT OF THE CASE

#### A. The Material Facts are Contained in Five Unambiguous Documents

The material facts in this case are contained within the following documents.

Development Agreement	Recorded December 22, 2005
Deed of Trust	Recorded December 29, 2005
TRIP Agreement	Recorded October 4, 2007
Judgment	Recorded November 19, 2010
Assignment of Deed of Trust	Recorded October 10, 2012

#### 1. The Development Agreement

Associates and the City entered into a Development Agreement on December 13, 2005, which was recorded on December 22, 2005. CP 18-

114. Under the Development Agreement, Associates or its assignees have a right, but not an obligation, to develop the Property. CP 22-23, 25, 38. The Development Agreement outlines the requirements for the Project in the event that Associates elects to proceed with development. CP 22-23, 25, 36-37. Only once Associates proceeds with development may the Development Agreement bind Associates.

The Development Agreement leaves many specific requirements of development to future negotiation and agreement, and subject to compliance with City codes. CP 27-28, 35-36. Even then, none of the provisions convey any economic lien to the City; all economic obligations to the City are contingent on future development, if any. CP 31. Specifically, the Development Agreement calls for the parties to cooperate in negotiating and entering into the TRIP Agreement, a separate contract with terms to be independent and distinct from the Development Agreement. CP 31.

Section 8.3.2. of the Development Agreement provides:

8.3.2 Roundabout Design. The City, other neighboring properties and Developer have agreed to work together for the development of the Tourist District Roundabout Improvement Project (TRIP). TRIP consists of the design and construction of a system of three (3) roundabouts and associated road improvements to improve traffic flow and

reduce traffic congestion on SR 202 (NE 145<sup>th</sup> Street and Woodinville-Redmond Road) in the vicinity of the NE 145<sup>th</sup> Street and Woodinville-Redmond Road intersection. **Funding for TRIP shall be addressed in a separate contract executed by the implicated parties, and shall remain independent and distinct from this Development Agreement.**

CP 30 (emphasis added).

In addition, Section 9.1.2 provides:

9.1.2 TRIP. The City and the Developer shall execute an agreement to coordinate their work on TRIP, City roads (NE 142nd Street), and interior streets (primary and secondary access roads within the Project) connected to WSDOT facilities in order to assure the timely completion of the improvements needed to serve the Project and to mitigate its traffic impacts.

CP 31.

Moreover, Section 12.0, entitled “Future

Cooperation,” provides:

The Parties acknowledge the potential to cooperate in constructing infrastructure and other improvements not required as mitigation for the Project and which may contribute additional public benefits in relation to the Project. **The specifications, location, and funding of any such improvements shall be addressed as appropriate in a separate contract executed by the implicated parties, and shall remain independent and distinct from this Development Agreement.**

CP 35 (emphasis added).

Section 17.1 emphasizes the economic independence of the Developer prior to developing the Project, specifically contemplating that the owner of the Property may finance the acquisition and construction and that such financing shall not be infringed by this Agreement. It provides specifically:

17.1 Authority to Transfer. Pursuant to Chapter 36.70B RCW, the Developer's right to sell, transfer, mortgage, hypothecate, convey or take any other similar action regarding the title to or financing for the Property **shall not be infringed by this Agreement**, provided however that any such transfer, sale, etc. shall be subject to the term and conditions, rights and obligations of this Development Agreement and all attachments thereto. Within 30 days of the effective date of any such transfer, the Developer shall (1) formally notify the transferee of this Development Agreement, and (2) formally notify the City of the intended transfer.

CP 36 (emphasis added).

The Development Agreement itself does not create an independent economic obligation. Rather, fees and contributions made by the Developer are required to be made only as the Project permit process progresses. CP 32.

Finally, nothing in the Development Agreement provides that agreements reached in the future, such as the TRIP Agreement, shall relate back in time as if entered into at the time of the Development Agreement.

The parties amended the Development Agreement on March 21, 2006 when they executed the First Addendum to Development Agreement (the "First Addendum"). CP 164-94. The First Addendum was later recorded on October 4, 2007. CP 164. The First Addendum was required in order to add an "Adjacent Parcel," commonly known as the Pisani Property. CP 168. Other than adding the Pisani Property to the Project, the material terms, conditions and provisions of the Development Agreement did not change. CP 164-94.

## 2. The Deed of Trust

In 2005, Associates granted to Frontier Bank a Deed of Trust in the Property as security for the Loan. CP 196-205. The Deed of Trust was recorded on December 29, 2005. CP 196. When Union Bank subsequently acquired the Loan, Union Bank succeeded to Frontier's rights in the Deed of Trust. CP 8.

In conjunction with the First Addendum to the Development Agreement, which added the Pisani Property to the Project, the parties modified the Deed of Trust to include the Pisani Property as security for

the Loan. CP 218-22. The Modified of Deed of Trust was recorded in 2008 (the “Modified Deed of Trust”). CP 218.

In 2011, Union Bank commenced non-judicial foreclosure proceedings pursuant to the Deed of Trust. CP 261-66, 268-70.

3. The TRIP Agreement

The parties executed the TRIP Agreement on February 6, 2006 and recorded it on October 4, 2007. CP 207-16.

The TRIP Agreement is an independent agreement, separate and distinct from the Development Agreement, as emphasized in its preamble:

WHEREAS, Pursuant to the Development Agreement between the parties dated August 29, 2005 (via Resolution No. 302) and approved by the Woodinville City Council on February 6, 2006, the City and MJR Development **agreed to enter into an additional agreement** regarding infrastructure and other improvements related to and adjacent to the Project which is the subject of the Development Agreement.

CP 208 (emphasis added.)

The last “WHEREAS” describes the personal nature of TRIP Agreement. “[T]he City and Developer wish to implement a formal agreement to affirm each other’s commitment with regard to the intersection improvements.” CP 209.

The give-and-take nature of the TRIP Agreement is further described in Section 5 of the TRIP Agreement, which provides that while the Developer “shall be solely responsible for” traffic impact fees, frontage improvement costs, and dedicating and developing additional rights of way, the Developer is also entitled to Project credits for such contributions. CP 210-12.

The TRIP Agreement contains no language that would suggest the obligations in the TRIP Agreement run with the land, that such obligations are in any way secured by the Property, or that the parties’ personal commitment to construct road improvements could lien or encumber the Property. CP 207-16. Accordingly, the TRIP Agreement neither includes, nor references, any legal descriptions, and the title company insuring the transactions did not include the TRIP Agreement as Schedule B exceptions to title on the commitments for and policies of title insurance. Id.; CP 936, 946-58.

Finally, no provision of the TRIP Agreement states or implies that it is intended to relate back in time and be effective as of the date of the Development Agreement. Indeed, the TRIP Agreement expressly allows the Developer to withdraw the Project from permitting consideration:

**7.0 Project withdrawal.** In the event that Developer withdraws the Project from permitting consideration by the City of Woodinville prior to building permit issuance for the Project, Developer shall not be obligated to pay any Traffic Impact Fees or Frontage Improvement Costs until such time as a complete building permit application is received, processed and approved by the City of Woodinville.

CP 213.

4. The Judgment

The financial recession had a material impact on the Project; Associates could not proceed and defaulted on the Loan. CP 625. Nonetheless, the City installed traffic improvements near the Project and demanded that Associates pay a share. Id. Associates and the City disagreed about the amount that Associates would be required to pay under the TRIP Agreement, and on April 8, 2010, the City filed an action against Associates in King County Superior Court No. 10-2-13306-2 SEA (the “TRIP Litigation”). CP 963-88.

In the TRIP Litigation, the City demanded \$1.075 million for the traffic improvements, and its attorneys’ fees and costs. However, the City never alleged that the amount sought was secured by the Property or that the City had any other lien against the Property. Id. The City obtained a judgment for the \$1.075 million in traffic improvements on October 15,

2010. CP 253-55. The City later obtained a separate judgment for attorneys' fees and costs on November 15, 2010. CP 258-59. Both were recorded on November 19, 2010 (collectively, the "Judgment"). CP 252, 257.

5. Assignment of Deed of Trust to Partners

After it obtained the Loan and Deed of Trust from Frontier Bank, Union Bank offered the Loan for purchase through a bidding process. CP 995-96. In 2012, Partners and Union Bank entered into agreements to sell/purchase the Loan and assign the Deed of Trust. CP 1010-14; 1038-54. The Assignment of Deed of Trust was recorded on October 10, 2012. CP 1051.

**B. Facts Specific to Tract X**

One distinct subject on appeal relates to a parcel known as "Tract X." Prior to Associate's acquisition of the Property, owners of two parcels commonly known as the "Friemuth Parcel" and the "Redwood Parcel" each owned undivided one-half interests in Tract X. CP 1147.

As indicated on the Binding Site Plan, the Friemuth Parcel was composed of three separate lots identified as Lots A, B and C. Id.; CP 117. The Redwood Parcel is illustrated on the same page and is identified as Lot D, Short Plat SPA96-016. Id.

The Binding Site Plan was recorded December 22, 2005. CP 1147. The Binding Site Plan included the Friemuth Parcel lots as well as other parcels, but did not include the Redwood Parcel. Id. The properties included in the Binding Site Plan were redefined as Parcels A – F. CP 119.

Associates purchased the Friemuth Parcel (Lots A, B and C) in December 2005 and funded that transaction with the Loan. CP 1147-48. The Deed of Trust adopted the Parcel designation in the Binding Site Plan as the legal description for the Property. CP 205. The undivided one-half interest in Tract X vested in Lot B of the Friemuth Parcel was accordingly included as security for the Deed of Trust.

TMR Associates, LLC purchased the Redwood Parcel in March 2007, together with the undivided interest in Tract X. CP 1147. This acquisition was funded by a separate loan from Sterling Savings Bank. Id. The Redwood Parcel was not part of the Binding Site Plan. Id. In October 2008, TMR Associates, by Quit Claim Deed, conveyed the Redwood Parcel undivided one-half interest in Tract X to Associates. CP 1147; 1161-62.

The Second Amendment to Binding Site Plan recorded in November 2008 accomplished two purposes. CP 1148, 224-30. First, it

further subdivided Parcels A through F. Id. Second, it incorporated Tract X from City of Woodinville Short Plan Number SPA 96-016 into the Binding Site Plan. Id. As a result, Parcels A through F were again subdivided and lot lines of such Parcels were rearranged into 18 individual lots as illustrated in the Second Amendment to Binding Site Plan. Id.

Accordingly, Lots A through F are the same Property as Lots 1 through 18, the only difference being the subdivision into different individual lots. CP 943-61.

**C. Procedural History**

1. The City's Declaratory Judgment Action

The City filed this action in July 2011, seeking to enjoin the trustee's sale that was initiated by Union Bank, the successor to Frontier Bank. In the action, the City alleged that it obtained an interest in the Property because of the Judgment, which the City argues has priority over the Deed of Trust. CP 13-14. In the alternative, the City alleged unjust enrichment. CP 16.

2. Partners' Substitution for Union Bank

On March 6, 2013, the trial court entered an order to substitute Partners for Union Bank, and Union Bank was dismissed from the action. CP 374-76.

3. The Trial Court's Summary Judgment Ruling

In June 2013, the trial court granted Partners' motion for summary judgment, dismissing all of the City's claims with prejudice. CP 1193-1197. Concurrently, the trial court denied the City's motion for summary judgment, including but not limited to the City's position that (i) the Development Agreement and TRIP Agreement should be read as a single agreement; (ii) that read together, the TRIP Agreement has priority over the Deed of Trust; (iii) alternatively, that the City is entitled to unjust enrichment as a matter of law; and (iv) that the City has a right of equitable subrogation which was prejudiced. Id.

**IV. ARGUMENT**

**A. Standard of Review**

In reviewing a summary judgment order, this Court undertakes the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court is to consider all evidence in the light most favorable to the non moving party, and "the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." Id. Review is confined to the issues the parties raised and the trial court considered. Babcock v. State, 116 Wn.2d 596, 606, 809 P.2d 143 (1991).

Summary judgment is appropriate if there are no issues of material fact, such that the moving party is entitled to judgment as a matter of law. Wilson, 98 Wn.2d at 437. “A material fact is one upon which the outcome of the litigation depends.” In re Estate of Black, 153 Wn.2d 152, 160, 102 P.3d 796 (2004) (quotations omitted).

**B. The Deed of Trust has Priority Over the Judgment Liquidating the City’s Claim for Traffic Mitigation**

The City’s Judgment represents the liquidation of its claim for traffic mitigation. CP 253-55, 258-59, 963-88. Therefore, when the City recorded the Judgment in November 2010, the Judgment attached as a lien on the Property. CP 252, 257. However, the Judgment was second in time to the Deed of Trust, which was recorded in 2005. CP 196. Because the City’s lien attached after Frontier Bank recorded the Deed of Trust, the Deed of Trust has lien priority. The only way the City’s Judgment could have priority over the Deed of Trust is if the TRIP Agreement were a covenant with obligations that run with the land, and which related back to the recording date of the Development Agreement. Because the TRIP Agreement is neither a covenant that runs with the land, nor a contract that relates back to the Development Agreement, the City’s claims fail as a

matter of law. The City's claim that the City intended otherwise is inadmissible extrinsic evidence.

1. The Deed of Trust Created a Priority Lien on the Property

A deed of trust is subject to all laws relating to mortgages on real property. RCW 61.24.020. Indeed, the state supreme court has stated that a deed of trust is "in general a species of mortgage." Boeing Employees' Credit Union v. Burns, 167 Wn. App. 265, 272, 272 P.3d 908, 912, review denied, 175 Wn. 2d 1008, 285 P.3d 885 (2012) (citing Rustad Heating & Plumbing Co. v. Waldt, 91 Wn.2d 372, 376-77, 588 P.2d 1153 (1979)).

Thus, a bona fide lender's recorded security interest in property will generally take priority over subsequently recorded encumbrances. Zervas Grp. Architects, P.S. v. Bay View Tower LLC, 161 Wn. App. 322, 325-26, 254 P.3d 895, 897 (2011) (citing Seattle Mortg. Co., Inc. v. Unknown Heirs of Gray, 133 Wn. App. 479, 495, 136 P.3d 776 (2006)).

When Associates obtained the Loan to acquire the Property, it gave Frontier Bank a Deed of Trust, which was recorded on December 29, 2005. CP 196-205. Years later, Associates and the City disputed the amount Associates owed under the TRIP Agreement for traffic mitigation, which ultimately resulted in the Judgment. CP 253-55, 258-59, 963-88. Because the Judgment was recorded in November 2010, nearly five years

after the Deed of Trust, the Deed of Trust takes priority over the later encumbrance.

2. The TRIP Agreement is Not a Covenant Which Runs With the Land

The City's claim that Associates' obligations under the TRIP Agreement (as recorded in the Judgment) relate back to the recording of the Development Agreement and are therefore superior to the Deed of Trust fails as a matter of law because the TRIP Agreement is merely a contract right that pertains to land as opposed to a covenant running with land. A covenant must meet several requirements to bind successors as a running covenant. Among others, the covenant must "touch and concern" the Property, and the parties must have intended to bind successors in interest. Brenmeyer Excavating v. McKenna, 44 Wn. App. 267, 269, 721 P.2d 567 (1986) (holding an agreement to provide labor and materials to fill a parcel of land amounted to a personal contract, not a covenant) (citation omitted).

The TRIP Agreement does not "touch and concern" the Property because it imposes obligations on Associates, but does not burden the land. To satisfy the "touch and concern" requirement, "the agreement must have rendered less valuable [Associates'] legal interest in his land

and rendered more valuable the legal interest of [the City] in his land.”  
Feider v. Feider, 40 Wn. App. 589, 593, 699 P.2d 801 (1984). If the agreement does not touch or concern the land, but simply pertains to the land, it is only the personal obligation of the grantor; it does not run with the land. Bremmeyer Excavating, 44 Wn. App. at 269; see also Mullendore Theatres, Inc. v. Growth Realty Investors Co., 39 Wn. App. 64, 691 P.2d 970 (1984) (holding that a promise to pay a security deposit for the benefit of a leased property did not amount to a covenant). Here, the TRIP Agreement created in Associates a personal obligation to pay a portion of the transportation improvements if (and only if) Associates’ building permit application was approved, and nothing more.

Moreover, it is evident that the City knew that the TRIP Agreement did not run with the land because the City required that the Development Agreement specifically include the legal description of the Property and that all signatures be acknowledged in order to satisfy the statute of frauds, but failed to impose the same requirements with the TRIP Agreement. CP 40, 43. “A development agreement shall be recorded with the real property records of the county in which the property is located. During the term of the development agreement, the agreement is binding on the parties and their successors....” RCW 36.70B.190. To

comply with the statute of frauds, the document must be in deed form, written, signed, and acknowledged. RCW 64.04.010, .020. Although Washington has not conclusively decided whether real covenants must comply with the statute of frauds, “[a]s a practical matter ... real covenants should be created in an acknowledged document, so that they may be recorded.” Stoebuck, 17 Wash. Prac., Real Estate § 3.2 (2d ed.).

The City adhered to this caution, ensuring that the Development Agreement, which would bind Associates’ successors, was acknowledged by a notary public. CP 40. However, the City did not take the same precautions with the TRIP Agreement, evidence that the City never intended for the TRIP Agreement and its obligations to bind successors. CP 207-16.

Indeed, the fact that the City never intended to bind the TRIP Agreement’s successors is evident from the language, or lack thereof. Parties that intend for a covenant to run with the land will include express words of intent, such as “this covenant is intended to be a running covenant, burdening and benefiting the parties’ successors and assigns.” Stoebuck, 17 Wash. Prac., Real Estate § 3.4 (2d ed.). Contrary to language in the Development Agreement which states that “successors and assigns, shall be bound by and shall comply with the terms and conditions

of this Development Agreement,” there is no comparable language in the TRIP Agreement that would suggest the parties intended for the obligations in the TRIP Agreement to run with land. CP 25, 38, 207-16.

3. The TRIP Agreement Does Not Express Any Intention to “Relate Back” to the Development Agreement

The City’s claim that Associates’ obligations under the TRIP Agreement (as evidenced by the Judgment) relate back to the recording of the Development Agreement and are therefore superior to the Deed of Trust also fails as a matter of law because the parties never agreed that the later negotiated and recorded TRIP Agreement would relate back to the recording date of the Development Agreement.

“The touchstone of contract interpretation is the intention of the parties, which Washington courts attempt to determine by focusing on the objective manifestations of agreement.” Dept. of Ecology v. Tiger Oil Corp., 166 Wn. App. 720, 761, 271 P.3d 331 (2012) (quoting State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783, 211 P.3d 448 (2009)). The primary goal in interpreting a contract is to ascertain the parties’ intent from the ordinary meaning of the words in the contract. Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). In doing so, courts “focus[ ] on the objective manifestations of the

agreement, rather than on the unexpressed subjective intent of the parties.”  
Id. “Thus, when interpreting contracts, the subjective intent of the parties  
is generally irrelevant if the intent can be determined from the actual  
words used.” Id. at 503-04. Courts will not interpret what was intended to  
be written but what was actually written. Id. at 504.

There is no evidence in the Development Agreement or the TRIP  
Agreement that suggests the parties intended that the TRIP Agreement  
recording date would “relate back” to the Development Agreement.  
Rather, the language in both agreements emphasizes that the TRIP  
Agreement and Development Agreement are to be separate and distinct  
agreements. Specifically, the Development Agreement provides:  
“Funding for TRIP shall be addressed in a separate contract executed by  
the implicated parties, and shall remain independent and distinct from this  
Development Agreement.” CP 30 (emphasis added). The independence of  
the two agreements is reiterated in Section 12, which provides: “The  
specifications, location, and funding of any such [traffic] improvements  
shall be addressed as appropriate in a separate contract executed by the  
implicated parties, and shall remain independent and distinct from this  
Development Agreement.” CP 35 (emphasis added).

Similar language is found in the TRIP Agreement, which provides:  
“Pursuant to the Development Agreement ... the City and MJR  
Development agreed to enter into an additional agreement regarding  
infrastructure and other improvements related to and adjacent to the  
Project which is the subject of the Development Agreement.” CP 208.

The independence of the two agreements is echoed by the City’s  
failure to allege its “relation back” theory in the TRIP Litigation it  
initiated to liquidate the amounts the City claimed that Associates owed  
under the TRIP Agreement. CP 963-88. This latter fact is important  
because had the City litigated this claim in the TRIP Litigation, it would  
have no reason to allege its “relation back” theory here. The City had the  
opportunity to litigate in the TRIP Litigation both the issue of security in  
the real property and the issue of priority, but failed to do so.  
Accordingly, its attempt to do so here should be barred.

Finally, the City’s reliance on Columbia Park Golf Course, Inc. v.  
City of Kennewick, 160 Wn. App. 66, 248 P.3d 1067 (2011) is off point  
completely. There, a jury determined that damages were available to a  
developer with an exclusive development option after a city subsequently  
negotiated with another developer for the same property. Id. at 77-78.  
One of the issues which the court answered affirmatively on appeal was

whether damages were available for what the trial court determined was a “contract to negotiate,” a matter of first impression. Id. at 83. It did not involve (despite the City’s suggestion otherwise), a discussion regarding whether the option was a covenant, or whether the developer’s damages had lien priority over a deed of trust recorded years beforehand. Whether the Development Agreement is an agreement to negotiate, and whether damages are therefore available, is not at issue because the parties did negotiate. That negotiation led to a separate, independent contract — the TRIP Agreement — which the City has already litigated to Judgment.

4. The City’s “Incorporation by Reference” Theory, Raised for the First Time on Appeal, Fails as a Matter of Law

Contentions not made to the trial court in its consideration of a summary judgment motion need not be considered on appeal. See Concerned Coupeville Citizens v. Town of Coupeville, 62 Wn. App. 408, 413, 814 P.2d 243 (1991). For the first time on appeal, the City veers from its “relation back” theory to one of “incorporation by reference.” Because this argument was never raised with the trial court, the City may not pursue it on appeal. Notwithstanding, even were the Court to consider the City’s “incorporation by reference” theory for the first time on appeal, the City’s argument fails as a matter of law because the TRIP Agreement

did not exist at the time the parties entered into the Development Agreement, and even if it had existed, because there is no evidence that Associates agreed to incorporate the TRIP Agreement into the Development Agreement.

Incorporation by reference allows the parties to “incorporate contractual terms by reference to a separate ... agreement to which they are not parties, and including a separate document which is unsigned.” Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 120 Wn. App. 488, 194-95, 7 P.3d 861 (2000) (citation omitted). “But incorporation by reference is ineffective to accomplish its intended purpose where the provisions to which reference is made do not have a reasonably clear and ascertainable meaning.” Id. Incorporation by reference must be clear and unequivocal. Id. “[I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms[.]” Id. (citation omitted).

The incorporation by reference doctrine does not apply here because the TRIP Agreement did not exist at the time the parties entered into the Development Agreement. The Development Agreement was executed in December 2005. CP 22. The Trip Agreement was executed in February 2006. CP 208. Thus, the two agreements were not part of the

same transaction. Contra Kenney v. Read, 100 Wn. App. 467, 474, 997 P.2d 455 (2000) (“When several instruments are made as part of one transaction, they will be read together and construed with reference to each other.”). Moreover, even if it had existed, there is no evidence that Associates agreed to incorporate the TRIP Agreement into the Development Agreement. To the contrary, uncontroverted evidence in both the Development Agreement and TRIP Agreement proves that the parties intended for the two agreements to remain independent and distinct from one another. Contra Cedar River Water & Sewer Dist. v. King County, No. 86293-I, 2013 WL 5760654 at \*9 (Wash. Ct. App. Oct. 24, 2013) (“the settlement agreement states ... ‘[t]he proposed Development Agreement is set forth in Exhibit A, which is attached hereto and incorporated herein.’”).

Finally, the City’s claimed subjective intent “that the TRIP Agreement was intended to clarify the transportation mitigation requirement” is irrelevant. Although extrinsic evidence may be used whether or not contract language is ambiguous, such evidence may not be used (1) to establish a party’s unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word.

U.S. Life Ins. Co. v. Williams, 129 Wn.2d 565, 569, 919 P.2d 594 (1996);  
Hollis v. Garwall, Inc., 137 Wn.2d 683, 695–96, 974 P.2d 836,  
reconsideration denied (1999).

**C. The Deed of Trust Has Priority Over the City’s Judgment Even Though Bank Officials Signed the Binding Site Plan**

Absent any authority whatsoever, the City makes the argument that, by signing binding site plans related to the Project, representatives of the Union Bank “recognized the priority of the obligations of WVA.” The City’s argument is confusing at best. That said, there is no evidence whatsoever that Union Bank agreed with the City’s position regarding authority. Indeed, all evidence suggests that Union Bank shares Partners’ position. Before the Court substituted Partners for Union Bank in this action, Union Bank filed its own motion for summary judgment. See Appendix A. There, Union Bank sets forth almost identical positions and arguments as Partners, making clear that the Deed of Trust has priority over the Judgment. Id.

**D. The City’s Claim for Unjust Enrichment Fails Because Associates and Partners Received No Benefit from the City’s Decision to Implement the Traffic Improvements it had Envisioned for Many Years**

Just as the City’s lien priority argument fails as matter of law, so too does the City’s alternate claim of unjust enrichment. The City cannot

establish that Associates or Partners unjustly benefitted in any way from the frontage improvements. As a result, the City's unjust enrichment claim should be dismissed.

1. The City Did Not Confer Any Benefit on Associates or Partners

Unjust enrichment requires proof that (1) the person receiving a benefit was unjustly enriched, and (2) the party conferring the benefit was not a volunteer. Lynch v. Deaconess Medical Center, 113 Wn.2d 162, 776 P.2d 681 (1989); Trane Co. v. Randolph Plumbing & Heating, 44 Wn. App. 438, 722 P.2d 1325 (1986). For the first element, the plaintiff must base the claim on the premise that the defendant has been unjustly enriched on some recognized equitable principle such as money paid under mistake, coercion, duress, fraud, illegality of contract, impossibility of performance, or failure to perform a fiduciary duty, and the defendant must retain the money received or the benefit of the money received so as to be enriched. Farwest Steel Corp. v. Mainline Metal Works, Inc., 48 Wn. App. 719, 741 P.2d 58 (1987) (holding while contractor was enriched through material supplied to its material supplier by plaintiffs, there was no showing that enrichment was unjust).

This is not a situation where Associates or Union Bank stood idly by and accepted benefits by way of improvements mistakenly made to property owned by them. Here, the improvements were installed by the City on property dedicated to the City by Associates pursuant to the TRIP Agreement. CP 625. The obligation of Associates to pay for its allocable portion of the cost is governed by contract – the TRIP Agreement. Associates may or may not have breached that contract by failing to pay; however, the City already liquidated that claim when it obtained the Judgment against Associates. CP 253-55, 258-59. As for Partners, the City has no valid claim for unjust enrichment because Partners does not own the property, only the underlying note. CP 1038-49.

2. The City Voluntarily Constructed the Traffic Improvements

Even if Associates and Partners had been unjustly enriched (which they have not), the City's claim fails because the City's decision to make traffic improvements was done on a volunteer basis. Whether the party conferring the benefit is a volunteer depends on the circumstances of each case, including (1) whether benefits were conferred at the request of the party benefited, (2) whether the party benefited knew of the payment but stood back and let the party make the payment, and (3) whether the

benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefited by the payment. Ellenburg v. Larson Fruit Co., Inc., 66 Wn. App. 246, 835 P.2d 225 (1992).

For years, the City had planned to construct the traffic improvements, regardless of whether Associates developed the Property. CP 321, 518-19, 625. In its recitals, the TRIP Agreement notes that “the SR 202/148th Avenue NE intersection is one of the City’s highest congestion intersections” and “the project has been listed in the top scoring transportation priority projects since the City first adopted its Capital Improvement Plan.” CP 208. The City even admitted that the “general public and all properties in the area including those related to the Project will benefit from the successful completion of the roundabout project.” CP 209-210, 533, 537 (“[W]e are going to be able to make some really awesome traffic improvements for our citizens....”). Finally, the City made it clear that it had complete control over the traffic improvements. Indeed, “[t]he timing of such improvements and the source of the City’s revenue shall be at the City’s sole discretion.” CP 212.

In summary, the traffic improvements did not unjustly benefit Associates or Partners. Any and all benefits from the City’s unilateral

decision to install traffic improvements were, and are, enjoyed by the City and all surrounding properties. Thus, the alternative claim for unjust enrichment fails as a matter of law, just as the City's claim of priority fails as a matter of law.

**E. The City Does Not Have a Right of Subrogation as to the Personal Guaranty Raskin Executed in Favor of the Bank**

Relying on MGIC Fin. Corp. v. H.A. Briggs Co., 24 Wn. App. 1, 600 P.2d 573 (1979), the City argues that it had subrogation rights in the personal Guaranty Raskin gave to the Bank, and that the City was in some way damaged as a result. MGIC does not so hold. Indeed, there is no basis whatsoever for the City's subrogation claim.

MGIC does not apply to this case because MGIC involved the sale of property not the sale of a promissory note, as is the case here. Id. at 2-3. There, MGIC loaned Briggs money, secured by a deed of trust on several parcels and a personal guarantee. Id. Later, the Davises purchased one of the parcels, but did not assume the deed of trust. Id. at 2. MGIC then forgave the debt, relieving Briggs and the guarantor from liability in exchange for the secure property. Id. at 3. Apparently realizing that one parcel had already been conveyed to the Davises, MGIC subsequently sued the Davises for their parcel, but the court held that the Davises should

not have “to forfeit their land to satisfy a debt for which the principal debtor already has been released.” *Id.* at 3-4, 7. Here, no property has changed hands. The Property is still owned by Associates. Therefore, the rights of a subsequent purchaser of the Property have not been prejudiced.

Second, Raskin had no liability under the Guaranty to any party except for Union Bank. Union Bank’s rights are governed by the terms of the Guaranty and Union Bank’s rights to collect on the Guaranty under RCW Chapter 61.24 et seq. CP 298-300. At no time was Raskin liable to the City under any theory related to the Guaranty. The Judgment is against Associates and there was and is no claim by the City that Raskin was individually a party to or liable under the TRIP Agreement. Nor is Raskin individually liable under the Note. Raskin’s sole and exclusive liability was to Union Bank in the event that Union Bank elected to pursue its rights under the Guaranty. After Partners purchased the Note from Union Bank, any obligation that Raskin owed as guarantor would have been to Partners, not to Union Bank. See RCW 61.24.100. Accordingly, whether Partners elected to release him from or pursue collection from him as guarantor is irrelevant.

Finally, subrogation is an equitable assignment of the debt and mortgage; the subrogee stands in the shoes of the creditor he has paid and

therefore is allowed to exercise the remedies that person could have exercised. William B. Stoebuck & John W. Weaver, 18 Wash. Prac., Real Estate § 18.33 (2d ed.). Therefore, even assuming, arguendo, that the City could be subrogated to the rights of Union Bank/Partners, those subrogation rights would only accrue if the City fully satisfied the Loan. Because there is no evidence that the City has done so, the City's argument fails as a matter of law.

**F. The City's Judgment is Not a Priority Lien Over the Pisani Property**

The City's argument that the Judgment has priority over the Deed of Trust on the Pisani Property is based on the same "relation back" theory it argues with respect to the rest of the Property. This argument fails with respect to the Pisani Property for the same reasons set forth above in section A.3.

The Development Agreement was amended and recorded in October 2007. CP 164-94. The reason for the amendment was to incorporate the Pisani Property into the Project. Id. Frontier Bank also financed that acquisition and the Loan was modified and increased to accommodate the acquisition. CP 218-22. The transaction did not close until February of 2008, at which time the parties modified the Deed of

Trust to add the Pisani Property as additional collateral for the Loan. Id. Since the Judgment was not obtained and recorded until October 2010, it is clearly subordinate to the Deed of Trust and Modification to Deed of Trust recorded several years earlier.

**G. Tract X is Secured by the Deed of Trust**

Finally, the City's claim that Tract X was not included in the Deed of Trust as security for the Loan fails. Tract X was a parcel owned as an undivided one-half interest by two separate owners (Friemuth and Redwood). CP 1147. By December 2005, the Friemuth/Redwood one-half interest in Tract X was included as security for the Deed of Trust. Id. Thus, when Associates acquired the other undivided one-half interest in Tract X from TMR in October 2008, the Deed of Trust encumbered all of Associates' interest. CP 1147-48.

The City confirmed its understanding that Tract X was fully incorporated into the Project when it executed the Second Amendment to the Binding Site Plan in November 2008. CP 224-30, 1148.

Because the City did not record its Judgment until October 2010, after the Deed of Trust was modified in 2008, the City's Judgment is subordinate to the Deed of Trust as to all of the Property, including Tract X.

## V. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the trial court's order on cross-motions for summary judgment.

DATED this 29th day of January, 2014.

TOUSLEY BRAIN STEPHENS PLLC

By: 

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*Attorneys for Defendants/Respondents,  
Woodinville Associates, L.L.C., and  
Woodinville Village Partners, LLC*

**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 29th day of January, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

---

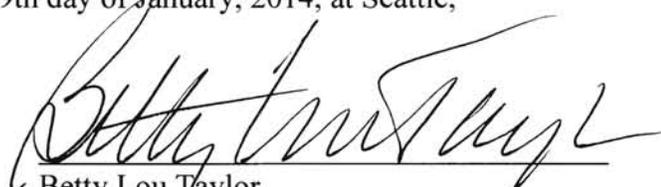
Greg A. Rubstello, WSBA #6271	<input type="checkbox"/>	U.S. Mail, postage prepaid
Michael G. Wickstead, WSBA #5402	<input checked="" type="checkbox"/>	Hand Delivered
Kristin Nicole Eick, WSBA #40794	<input type="checkbox"/>	Overnight Courier
OGDEN MURPHY WALLACE, P.L.L.C.	<input type="checkbox"/>	Facsimile
901 Fifth Avenue, Suite 3500	<input type="checkbox"/>	Electronic Mail
Seattle, WA 98164		

*Attorneys for Plaintiff*

---

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 29th day of January, 2014, at Seattle, Washington.

  
Betty Lou Taylor

# APPENDIX A

COPY

The Honorable John P. Erlick  
Date of Hearing: Friday, March 23, 2012  
Time of Hearing: 10:15 a.m.

Moving Party: Defendants Union Bank, N.A. and The Lanz Firm

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

CITY OF WOODINVILLE, WASHINGTON,  
a municipal corporation of the State of  
Washington,

Plaintiff,

vs.

UNION BANK, N.A., a subsidiary of  
UnionBanCal Corporation; THE LANZ  
FIRM, P.S., a Washington Corporation; and  
WOODINVILLE VILLAGE ASSOCIATES,  
L.L.C., a Washington Corporation,

Defendants.

No. 11-2-24773-2 SEA

**DEFENDANTS UNION BANK, N.A.  
AND THE LANZ LAW FIRM'S  
MOTION FOR SUMMARY  
JUDGMENT**

**I. RELIEF REQUESTED**

Defendants Union Bank, N.A. (the Bank) and The Lanz Firm (Trustee) move the Court for summary judgment dismissing all of Plaintiff City of Woodinville's (the City) claims seeking to restrain a nonjudicial foreclosure sale, impose the obligations of the Tourist District Roundabout Improvement Project Agreement (TRIP Agreement) and an associated judgment on a successor-in-interest, and recover money by unjust enrichment. This lawsuit is really a lien priority dispute, and the Bank's lien has priority. The City does not assert any failure by the Bank or Trustee to comply with the nonjudicial foreclosure statute. Because the Bank and Trustee do not own the subject property, nor are they parties to the various agreements upon which the City sues, the City's claims against them fail as a matter of law.

DEFENDANTS UNION BANK, N.A. AND THE LANZ  
FIRM'S MOTION FOR SUMMARY JUDGMENT - 1

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Telephone 206.622.1711 Fax 206.292.0460

1 **II. STATEMENT OF GROUNDS**

2 In 2004, MJR Development (the Developer)<sup>1</sup> began planning to develop a piece of  
3 property (the Property) in the City of Woodinville for mixed-use commercial, retail, and  
4 residential purposes. The Developer and the City executed two agreements related to the  
5 Property: (i) a Development Agreement executed in 2005, which reserved the Developer's  
6 right to build on the Property in a manner consistent with the Woodinville Municipal Code;  
7 and (ii) a Tourist District Roundabout Improvement Project (TRIP) Agreement executed in  
8 2007, which set forth a schedule for improvements to public transportation in the  
9 surrounding neighborhood. *See City's Complaint, Attachment A (Development Agreement)*  
10 *and Attachment E (TRIP Agreement).*

11 Neither the Bank nor the Trustee are parties to the Development Agreement or the  
12 TRIP Agreement (collectively, the Agreements). Neither the Bank nor the Trustee owns the  
13 Property at-issue in the Agreements. The Bank's only interest in the Property is through a  
14 deed of trust that was executed in consideration for a loan that was made to the Developer.  
15 *See City's Complaint, Attachment D (Deed of Trust).* In April 2009, the Developer ceased  
16 making payments to the Bank and defaulted on the loan. The Bank seeks to proceed with  
17 nonjudicial foreclosure on the Property pursuant to RCW Chapter 61.24 *et seq.* The City has  
18 filed this lawsuit in an attempt to interfere with the non-judicial foreclosure.

19 The City has not put forward a valid basis for enjoining the Bank and the Trustee  
20 from proceeding with the foreclosure sale. *See City's Complaint.* The Bank has a statutory  
21 right to seek remedies under its deed of trust and to proceed with nonjudicial foreclosure.  
22 *See RCW 61.24 et seq.* The Agreements between the Developer and the City do not affect  
23 Union Bank's right to foreclose on the Property. Defendants acknowledge that the

24 <sup>1</sup> MJR Development originally proposed developing the property. MJR Development later assigned  
25 the property to another developer, Woodinville Village Associates, LLC. For the purposes of clarity  
26 and because the identity of the specific developer does not affect the analysis in this motion for  
summary judgment, Defendants shall refer to these entities simply as the Developer throughout this  
motion.

1 Development Agreement may be a covenant that runs with the Property; but it is an elective  
2 obligation such that any successive developer must act under the terms of the Development  
3 Agreement *if and only if* the owner pursues development of the Property in the manner  
4 proposed in the Development Agreement. Neither the Developer nor any of its successors-  
5 in-interest are *required* to develop the Property in the manner proposed in the Development  
6 Agreement, or at all for that matter. The Development Agreement simply sets forth the  
7 conditions of developing the Property in the manner contemplated and approved therein.

8 As the City asserts in its Complaint, the TRIP Agreement is “independent and  
9 distinct” from the Development Agreement. *See* City’s Complaint, ¶ 2.7. It is not a  
10 covenant that runs with the property; it is merely a personal contract between the Developer  
11 and the City that extinguishes upon nonjudicial foreclosure. The City already sued the  
12 Developer on the TRIP Agreement and reduced its obligations to a judgment. The Bank and  
13 Trustee were not parties to that action. The judgment lien was recorded against the  
14 Developer’s property. The Court should dismiss the City’s claim that any terms or  
15 obligations contained within the TRIP Agreement will be imposed on a successor-in-interest  
16 following nonjudicial foreclosure.

17 Finally, the City’s unjust enrichment claim fails, because any benefit arising from the  
18 traffic improvements was not unjustly retained. Neither Union Bank nor the Trustee have  
19 been conferred any benefit for the simple reason that neither party owns the Property or was  
20 a signatory to either of the Agreements. As a creditor to the Developer, the Bank sits in the  
21 same position as the City vis-à-vis the Property—that is, they both have liens against the  
22 Property. Moreover, the City had been planning to make traffic improvements in the area,  
23 regardless of whether the Developer was able to develop the property. The City cannot  
24 “clearly and unequivocally” establish their claim for unjust enrichment, because the City has  
25 acknowledged the importance of this project to the “general public and all properties in the  
26 area.” *See* City’s Complaint, Attachment E (TRIP Agreement, ¶ 3.0).

DEFENDANTS UNION BANK, N.A. AND THE LANZ  
FIRM’S MOTION FOR SUMMARY JUDGMENT - 3

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1 The real issue in this lawsuit is whose lien has priority. The priority ranking of the  
2 competing liens is determined by the recording date. Union Bank recorded its Deed of Trust  
3 well-before the City's judgment lien against the Developer's property. Therefore, Union  
4 Bank has priority.

5 The City is understandably frustrated that the Developer was unable to follow-  
6 through on the proposed development and offset the costs of the traffic improvements in the  
7 neighborhood. But the City's frustration is not a basis to interfere with the Bank's statutory  
8 right to proceed with nonjudicial foreclosure on its Deed of Trust. Nor can the City impose  
9 the TRIP Agreement, or its terms, on any successors-in-interest to the property or command  
10 that a successor-in-interest develop the Property in the manner originally proposed in the  
11 Development Agreement. The Bank and Trustee ask the Court to dismiss the City's claims  
12 on summary judgment and declare that they are entitled to proceed with nonjudicial  
13 foreclosure free of any of the terms or obligations contained within the TRIP Agreement or  
14 the City's judgment thereon.

### 15 16 **III. STATEMENT OF ISSUES**

17 **A. Right to Foreclose:** Having failed to allege any violation of the Non-  
18 Judicial Foreclosure Act, should the Court dismiss the City's claim seeking to  
19 restrain the Bank from pursuing nonjudicial foreclosure on the Property  
because the Bank has the statutory right to do so under RCW 61.24 *et seq.*?

20 **B. Right to Proceed with Sale:** Should the Court find that the City has  
21 not presented a valid basis for restraining the nonjudicial foreclosure and  
therefore order that the Bank and Trustee may proceed with the sale?

22 **C. Development Agreement:** Should the Court order that the  
23 Development Agreement, while it may constitute a covenant that will survive  
24 nonjudicial foreclosure, is an elective obligation such that a successor-in-  
interest must act under the terms of the agreement *if and only if* such  
successor pursues development of the property in the manner set forth in the  
Development Agreement?

25 **D. Extinguishment of TRIP Agreement:** Should the Court dismiss the  
26 City's claims regarding the TRIP Agreement and order that the TRIP  
Agreement is not binding on any successors-in-interest to the Property as a

DEFENDANTS UNION BANK, N.A. AND THE LANZ  
FIRM'S MOTION FOR SUMMARY JUDGMENT - 4

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1 result of nonjudicial foreclosure because:

- 2 1. The TRIP Agreement by its express terms is separate and  
3 distinct from the Development Agreement;
- 4 2. The TRIP Agreement, including any judgment arising from the  
5 agreement, does not constitute a covenant that runs with the  
6 land; and
- 7 3. Junior liens, if any, arising from or related to the TRIP  
8 Agreement, including the City's judgment lien, extinguish  
9 upon nonjudicial foreclosure?

10 E. Unjust Enrichment: Should the Court dismiss the City's claim for  
11 unjust enrichment because: (i) there is no benefit unjustly conferred upon the  
12 Bank or the Trustee, (ii) neither owns the Property, (iii) neither is a party to  
13 either of the Agreements, and (iv) the City had been planning on making  
14 traffic improvements in the neighborhood for the benefit of the general public  
15 and other properties in the area, regardless of whether the Developer was able  
16 to develop the Property?

#### 17 **IV. EVIDENCE RELIED UPON**

18 Defendants rely upon the pleadings and exhibits submitted in this matter, and the  
19 Declaration of Andrew Bemby and the exhibits thereto.

#### 20 **V. STATEMENT OF FACTS**

21 This lawsuit relates to the Bank's statutory right to proceed with nonjudicial  
22 foreclosure on property in Woodinville where the Developer defaulted on its Deed of Trust.  
23 See City's Complaint Attachment D (Deed of Trust) and Attachment F (2008 modification to  
24 Deed of Trust). The City of Woodinville is frustrated because the Developer was not able to  
25 fulfill a personal obligation to develop the Property in the manner proposed under the  
26 Development Agreement and to contribute to the costs of the transportation improvements  
made in the neighborhood.

The following undisputed material facts support this motion for summary judgment:

- The City is suing for an order declaring that any successor-in-interest to the Property would be "subject to the Development Agreement, TRIP Agreement, and Judgments [against the Developer Woodinville Village Associates]" and that the "[nonjudicial] foreclosure sale... be restrained until the claims" are decided. See City's Complaint, ¶¶ 4.1-4.10.
- Neither the Bank nor the Trustee are parties to the TRIP Agreement or the

DEFENDANTS UNION BANK, N.A. AND THE LANZ  
FIRM'S MOTION FOR SUMMARY JUDGMENT - 5

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1 Development Agreement. *See* City's Complaint, Attachment E (TRIP Agreement)  
and Attachment A (Development Agreement).

2 • Neither the Bank nor the Trustee owns the Property. *See* City's Complaint,  
3 Attachment D (Deed of Trust).

4 • The Bank is a creditor, whose only interest in the property is via its Deed of  
Trust. *See* City's Complaint, Attachment D (Deed of Trust).

5 • The Trustee is an entity created solely for the purpose of nonjudicial  
foreclosure. *See* RCW 61.24.005(16).

6 • The Development Agreement, while it may constitute a covenant that may  
7 survive nonjudicial foreclosure, is an elective obligation such that it "establishes the  
Developer's right to develop the Property in accordance with said standards, plans,  
8 and requirements for the duration specified hereunder[.]" *See* City's Complaint,  
Attachment A (Development Agreement) (emphasis added).

9 • The TRIP Agreement is "independent and distinct from [the] Development  
Agreement." *See* City's Complaint, ¶ 2.7.

10 In 2004, the Developer approached the City of Woodinville with a development  
11 concept for property in the Tourist Business zoning district in Woodinville. *See* City's  
12 Complaint, ¶ 2.2. The Developer's concept was to build tourist-related facilities and mixed-  
13 use facilities, including some residential development. *See id.*

14 Development of the Property without the residential component did not require a  
15 development agreement. *See* Woodinville Municipal Code (WMC) 21.04.090. The zoning  
16 in place in the Tourist Business zoning district allowed for multiple uses, including wineries,  
17 tasting rooms, retails, and grocery stores, but it did not allow for residential development.  
18 *See* WMC 21.04.090. On December 13, 2004, the Woodinville City Council voted to allow  
19 residential development in addition to the other previously allowed uses in the Tourist  
20 Business district, but only on condition that a formal development agreement was first  
21 approved by the City Council.

22 The Developer and the City began negotiating a Development Agreement to govern  
23 the terms of the proposed development. On or around December 22, 2005, the Developer  
24 and the City executed a Development Agreement. *See* City's Complaint, Attachment A  
25 (Development Agreement). The "Development Agreement [] establish[ed] the Developer's  
26

1 right to develop the Property in accordance with said standards, plans and requirements for  
2 the duration specified hereunder[.]” *See id.* (emphasis added). The Development Agreement  
3 reserves the Developer’s right to develop the Property in a manner agreed to by the parties,  
4 should the Developer elect to proceed with the development. *See id.*, ¶ 2.7. Emphasis  
5 added). The Development Agreement does not compel the Developer to develop the  
6 Property. *See id.*

7 On December 29, 2005, the Developer executed a Deed of Trust in connection with a  
8 loan on the Property naming Frontier Bank as beneficiary and First American Title Insurance  
9 Company as trustee. *See City’s Complaint, Attachment D (Deed of Trust).* The Deed of  
10 Trust was recorded in King County (recording no. 200512290022313). *See id.* The Deed of  
11 Trust describes the Property as collateral for a loan agreement between the Developer and the  
12 beneficiary, Frontier Bank. *See id.* The Bank is the successor beneficiary of the Deed of  
13 Trust. *See Declaration of Andrew Bembry (“Bembry Decl.”), ¶ 2 (Union Bank’s allonge to*  
14 *the promissory note attached as Exhibit A).*

15 On October 4, 2007, consistent with long-planned traffic improvements in the area,  
16 the City and the Developer executed a TRIP Agreement, which set forth some terms for  
17 transportation and infrastructure improvements. *See City’s Complaint, Attachment E (TRIP*  
18 *Agreement).* The City’s plans for improvements included three new roundabouts and street  
19 improvements along the intersection of State Route 202 and 148<sup>th</sup> Avenue NE. *See id.* As  
20 acknowledged in the TRIP Agreement, the area had long-been “one of the City’s highest  
21 congestion intersections” and “the project has been listed in the top scoring transportation  
22 priority projects since the City first adopted its Capital Improvement Plan.” *See id.* at 1. The  
23 TRIP Agreement is “independent and distinct from [the] Development Agreement.” *See*  
24 *City’s Complaint, ¶ 2.7.*

25 The last interest payment made by the Developer on the Promissory Note was on  
26 April 15, 2009. *See Bembry Decl., ¶ 3.* On or around October 5, 2009, the promissory note

1 matured. *See* Bemby Decl., ¶ 3 (Notice of Default attached as Exhibit B). The Developer  
2 failed to make payments on the underlying loan for the Property and went into default under  
3 the terms of the Deed of Trust. *See id.*

4 In 2010, the City brought a lawsuit (separate from the instant lawsuit) against the  
5 Developer, Woodinville Village Associates, in King County Superior Court (Case No. 10-2-  
6 13306). *See* City's Complaint, ¶ 2.23. The City was granted summary judgment against  
7 Developer Woodinville Village Associates, and the Court entered judgment for just over  
8 \$1 million dollars. *See id.* The judgment was recorded on October 15, 2010 and became a  
9 lien on the Property. *See id.* The Bank and Trustee were not parties to the City's prior action  
10 to enforce the TRIP Agreement. *See id.*

11 The City now brings this lawsuit seeking to impose the personal obligations of  
12 Developer Woodinville Village Associates under the TRIP Agreement on the Bank, Trustee  
13 and any successors-in-interest to the Deed of Trust.

## 14 VI. AUTHORITY AND ARGUMENT

### 15 A. Summary Judgment Standard.

16 Summary judgment "shall be rendered forthwith if the pleadings [and evidence] show  
17 that there is no genuine issue as to any material fact and that the moving party is entitled to  
18 judgment as a matter of law." *See* CR 56(c). "The purpose of a motion for summary  
19 judgment pursuant to CR 56 is to examine the sufficiency of the evidence behind the  
20 plaintiff's formal allegations in the hope of avoiding an unnecessary trial where no genuine  
21 issue as to a material fact exists." *Zobrist v. Culp*, 18 Wn. App. 622, 637, 570 P.2d 147  
22 (1977). Once a party moving for summary judgment has made an initial showing that there  
23 is no genuine issue of material fact, "the adverse party may not rest merely on allegations in  
24 the pleadings, but must set forth specific facts showing there is a genuine issue for trial."  
25 *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "Conclusory allegations,  
26 speculative statements, or argumentative assertions that unresolved factual matters remain

1 are not sufficient to preclude an order for summary judgment.” *Turngren v. King County*, 33  
2 Wn. App. 78, 84, 649 P.2d 153 (1982).

3 Even without the additional evidentiary support submitted in the Declaration of Andy  
4 Bemby filed herewith, the Bank and Trustee submit that summary judgment in their favor is  
5 warranted simply by analysis of the documents attached to and made part of Plaintiff’s  
6 Complaint.

7 **B. The Bank has a Statutory Right to Seek Remedies on its Deed of**  
8 **Trust and is Entitled to Proceed with Nonjudicial Foreclosure.**

9 The City’s Complaint includes a request for relief that the “Court should order that  
10 the foreclosure sale intended by the TRUSTEE be restrained until the claims” are resolved.  
11 See Plaintiff’s Complaint, ¶ 4.9 (capitals in original). The Bank has a statutory right to seek  
12 the remedies available to it under its Deed of Trust. See RCW 61.24 *et seq.* The Court  
13 should declare that the Bank is entitled to exercise its right to seek remedies and foreclose on  
14 the Property and dismiss the City’s claim suggesting that the foreclosure sale be postponed  
15 any further.

16 “[A] statutory deed of trust is indeed a species of mortgage” and, specifically, a three-  
17 party mortgage with “the power of sale vested in a third person, the trustee, rather than in the  
18 mortgagee.” *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 375-76, 588 P.2d  
19 1153 (1979). The “Grantor” means a person, or its successors, who executes a deed of trust  
20 to encumber the person’s interest in property as security for the performance of all or part of  
21 the borrower’s obligations.” RCW 61.24.005(7). The deed of trust creates a lien in favor of  
22 the beneficiary. See RCW 61.24.005(2). This lien is held by the trustee, who may either  
23 satisfy the lien, RCW 61.24.110, or foreclose the lien in accordance with the beneficiary’s  
24 instructions. See RCW 61.24.040. “A deed conveying real property to a trustee in trust to  
25 secure the performance of an obligation of the grantor or another to the beneficiary may be  
26 foreclosed by trustee’s sale.” See RCW 61.24.020.

1 The statutory duties of the trustee are to “reconvey... the property encumbered by the  
2 deed of trust to the person entitled thereto on written request of the beneficiary.” See RCW  
3 61.24.110. In the event of a default by the grantor, “a deed conveying real property to a  
4 trustee to secure the performance of an obligation of the grantor... may be foreclosed by  
5 trustee’s sale.” See RCW 61.24.020; *Helbling Bros., Inc. v. Turner*, 14 Wn. App. 494, 542  
6 P.2d 1257 (1975). The trustee may proceed with a nonjudicial foreclosure if the deed of trust  
7 contains the requisite provisions, including: (a) a power of sale, (b) a nonagricultural clause,  
8 (c) a default in one of the covenants, (d) commencement of no other action to seek  
9 satisfaction of the obligation, and (e) recordation of the deed of trust in each county in which  
10 the land or some part thereof was situated. See RCW 61.24.030(1)-(5).

11 In the instant case, the Developer is the grantor of the Deed of Trust on the Property  
12 naming Frontier Bank as beneficiary, and recorded on December 29, 2005. See City’s  
13 Complaint, Attachment D (Deed of Trust). The Deed of Trust describes the Property as  
14 collateral for a loan agreement between the Developer and Frontier Bank. See *id.* at 2. The  
15 Bank is the successor beneficiary of the Deed of Trust as later amended. See Bembry Decl.,  
16 ¶ 3 (allonge attached as Exhibit A).

17 The Developer missed multiple payments on the Property and went into default under  
18 the terms of the Deed of Trust. See Bembry Decl., ¶ 4 (Notice of Default attached as Exhibit  
19 B). Under the Deed of Trust, Union Bank is entitled to execute a nonjudicial foreclosure on  
20 the Property. The Bank meets each of the requisites identified in RCW 61.24.030(1)-(5),  
21 including: the Developer granted the Trustee the “power of sale” (Attachment D, page 2); the  
22 Deed of Trust was recorded with the King County Auditor’s Office (Attachment D, page 2);  
23 the Property is not used for agricultural purposes (Attachment D, p. 2); there was a payment  
24 default by the Developer (Exhibit B); and there has been no other action to seek satisfaction  
25 of the obligation. See Bembry Decl., ¶ 5. The Bank has demonstrated the prerequisites for a  
26 nonjudicial foreclosure and therefore has a statutory right to seek the remedies available to it

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1 under the Deed of Trust. The City does not allege otherwise. *See generally* City's  
2 Complaint.

3 **C. The City has not Demonstrated a Basis for Enjoining the**  
4 **Nonjudicial Foreclosure Sale.**

5 The City has not alleged nor can it articulate a factual or legal basis to restrict  
6 foreclosure, so the Court should dismiss the City's baseless claims to obstruct the sale. *See*  
7 Plaintiff's Complaint, ¶ 4.9.

8 Proper grounds for enjoining a trustee's sale include: (1) that the debt was paid or  
9 tendered; (2) that the deed of trust is not in default; (3) that the deed of trust was obtained by  
10 fraud; (4) that notice was not properly provided; (5) that the trustee's sale was held at an  
11 improper place or time, or (6) that collusive bidding depressed the sale price. *See* RCW  
12 61.24.130; *see also* Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust  
13 in Washington, 59 Wash.L.Rev. 323, 326 (1984).

14 The City's Complaint contains no allegations that provide a valid basis for enjoining  
15 the nonjudicial foreclosure. The City's only contention for why the sale should be restrained  
16 is that it wants to see its junior lien survive foreclosure. This is not a legitimate ground for  
17 an injunction, so the Court should dismiss the City's claims to enjoin the Bank and Trustee  
18 from proceeding with the nonjudicial foreclosure sale.

19 **D. The Development Agreement May Run With the Property, but it**  
20 **is an Elective Obligation that may be Withdrawn.**

21 The City contends that the Development Agreement is a covenant that runs with the  
22 Property. The City fails to understand or acknowledge that the Development Agreement is  
23 an elective obligation such that a successor-in-interest must act under the terms of the  
24 agreement *if and only if* it chooses to pursue development of the Property in the manner  
25 proposed in the agreement. Neither the Developer nor a successor-in-interest is *required* to  
26 develop the Property in the manner proposed in the Development Agreement, or at all for  
that matter. The Development Agreement simply described the conditions under which

1 development pursuant to the Development Agreement could occur.

2 The Development Agreement provides: “This Development Agreement [] establishes  
3 the Developer’s right to develop the Property in accordance with said standards, plans and  
4 requirements for the duration specified hereunder[.]” See City’s Complaint, Attachment A  
5 (Development Agreement, ¶ 2.7) (emphasis added). It provides a right, not an obligation.  
6 The City takes an unfounded and frankly remarkable position that anytime a lender  
7 forecloses on a deed of trust, it must develop the lien property in accordance with the  
8 terms negotiated by its defaulting borrower. The Bank and Trustee are not in the business of  
9 real property development, and this Court cannot require that they develop the Property.

10 The Bank and Trustee ask that the Court’s order properly reflect this limited  
11 obligation that a successor-in-interest must act under the terms of the Development  
12 Agreement *if and only if* the Property owner pursues development of the Property in the  
13 manner proposed in the agreement.

14 **E. The TRIP Agreement does not Run with the Land; it is not a**  
15 **Security Interest or Covenant Restricting Real Property but**  
16 **Merely a Personal Contract.**

17 Notwithstanding the fact the Developer’s obligations under the TRIP Agreement have  
18 already been reduced to a judgment, the City’s Complaint contends that the TRIP Agreement  
19 is a covenant and that its obligations run with the land beyond the foreclosure sale. See  
20 City’s Complaint, ¶ 4.4. In fact, the TRIP Agreement is a personal contract that does not run  
21 with the land such that a successor-in-interest is subject to any of its terms. See discussion  
22 *infra*, at pp. 12-15. The Bank and Trustee ask the Court to dismiss the City’s claim that the  
23 TRIP Agreement or any judgment arising from the TRIP Agreement constitutes either a  
24 security interest or a covenant running with the land.

24 **1. The TRIP Agreement is separate and distinct from the**  
25 **Development Agreement.**

26 The City contends that “[b]y its reference in the Development Agreement, the TRIP

1 Funding Agreement was also part of the covenants running with title to the Property[.]” See  
2 City’s Complaint, ¶ 2.16. The City bases this argument on the “anticipated” agreements  
3 within the Development Agreement. See City’s Complaint, ¶ 2.7.

4 Yet, as acknowledged by the City, the TRIP Agreement is a “separate contract,”  
5 which is “independent and distinct from [the] Development Agreement.” See City’s  
6 Complaint, ¶ 2.7. To the extent that the parties to the Development Agreement agreed in  
7 principle to mitigation provisions within the Development Agreement, such terms were  
8 neither binding nor did they represent a future covenant. “An agreement to agree is ‘an  
9 agreement to do something which requires a further meeting of the minds of the parties and  
10 without which it would not be complete.’” *Keystone Land & Development v. Xerox Corp.*,  
11 152 Wn.2d 171, 175, 94 P.3d 945 (2004) (citation omitted). “Agreements to agree are  
12 unenforceable in Washington.” *Id.* In the instant case, the parties to the Development  
13 Agreement merely displayed an intention to negotiate in the future on a TRIP Agreement.  
14 Under Washington law, the parties’ intention cannot be interpreted as an agreement nor can  
15 they be considered a covenant. Moreover, neither the Bank nor the Trustee are parties to the  
16 Development Agreement or the TRIP Agreement. The Court should reject the City’s  
17 invitation to find that the Bank or Trustee are bound by an agreement to agree via the  
18 Development Agreement.

19 **2. The TRIP Agreement is Not a Covenant.**

20 An agreement concerning real property, which is enforceable by or binds successors,  
21 referred to as a running covenant, must meet the following requirements:

- 22 (1) [T]he covenants must have been enforceable between the original  
23 parties, such enforceability being a question of contract law except insofar  
24 as the covenant must satisfy the statute of frauds; (2) the covenant must  
25 ‘touch and concern’ both the land to be benefitted and the land to be  
26 burdened; (3) the covenanting parties must have intended to bind their  
successors in interest; (4) there must be vertical privity of estate, i.e.,  
privity between the original parties to the covenant and the present  
disputants; and (5) there must be horizontal privity of estate, or privity

1 between the original parties.  
2 *Bremmeyer Excavating v. McKenna*, 44 Wn. App. 267, 269, 721 P.2d 567 (1986) (holding an  
3 agreement to provide labor and materials to fill a parcel of land was held to be a personal  
4 burden, not a covenant) (citation omitted). The TRIP Agreement fails to constitute a  
5 covenant because (i) the TRIP Agreement does not touch and concern the land; and (ii) the  
6 TRIP Agreement was not intended to bind successors to the property.

7 First, the City's argument fails because the TRIP Agreement does not "touch and  
8 concern" the land. For covenants to pay money, the critical issue is the "touch and concern"  
9 requirement. See 5 Richard R. Powell, *Powell on Real Property* para. 675[2][a] (1988). To  
10 satisfy the "touch and concern" requirement, "the agreement must have rendered less  
11 valuable [the Developer's] legal interest in his land and rendered more valuable the legal  
12 interest of [the City] in his land." *Feider v. Feider*, 40 Wn. App. 589 (a right of first refusal  
13 fails as a covenant) (citing 5 R. Powell, *Powell on Real Property* 673[2][a], at 60-41 (1984)).  
14 If the agreement "does not touch or concern the occupation or enjoyment of the land, it is the  
15 collateral and personal obligation of the grantor or lessor and does not run with the land."  
16 *Bremmeyer Excavating*, 44 Wn. App. at 269; see also *Mullendore Theatres, Inc. v. Growth*  
17 *Realty Investors Co.*, 39 Wn. App. 64, 691 P.2d 970 (1984) (holding that a promise to pay a  
18 security deposit for the benefit of a leased property did not amount to a covenant).

19 No legal interest in land is created by a personal obligation; only personal rights are  
20 affected. The TRIP Agreement created a personal obligation on the part of the Developer to  
21 pay some portion of the transportation improvements *if* the Developer's building permit  
22 application was eventually "received, processed and approved." See City's Complaint,  
23 Attachment E (TRIP Agreement, ¶ 7.0). The terms of the TRIP Agreement were discussed  
24 with a focus on the Developer's obligations and not on an interest in the Property. The TRIP  
25 Agreement recitals provide:  
26

1 [T]he Developer has agreed to support the roundabout project, which  
2 support includes assisting in coordination with adjacent property owners,  
3 development of the private project design, coordination with the public  
4 road design, and a financial contribution[.]

5 *See* City's Complaint, Attachment E (TRIP Agreement, p. 2) (emphasis added). The TRIP  
6 Agreement imposes a burden on the Developer personally, not on the Property. This  
7 personal obligation fails to touch and concern the land, as required to be considered a  
8 covenant, such that it would extend to any successors-in-interest through nonjudicial  
9 foreclosure.

10 Notably, the City already sued the Developer on the TRIP Agreement and obtained a  
11 judgment thereon, which judgment became a lien against the Property. Neither the Bank nor  
12 the Trustee were parties to that suit; and neither the Bank nor Trustee own the Property  
13 subject to the judgment lien. The City has already obtained relief on the TRIP Agreement  
14 against the sole party, the Developer.

15 Second, the TRIP Agreement does not constitute a covenant because the parties (the  
16 City and the Developer) did not intend to bind their successors in interest. There must be an  
17 intention by the parties to have a covenant run with the land, read in the light of the  
18 circumstances of the transaction's formulation. The presence of the word "assigns"  
19 constitutes strong evidence of intent. In Washington, parties use the following words to  
20 indicate their intent that a covenant run with the land: "This covenant is intended to be a  
21 running covenant, burdening and benefitting the parties' successors and assigns." Stoebuck,  
22 *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 875 (1977); *see also Lake*  
23 *Arrowhead Club v. Looney*, 112 Wn.2d 288, 770 P.2d 1046 (1989) (holding the parties  
24 intended the covenant to bind their successors in interest because the agreement explicitly  
25 provided that "[t]hese covenants are to run with the land and shall be binding on all parties  
26 and all persons claiming under them.")

1 Here, the City and the Developer were well aware of the need to express such intent.  
2 In the Development Agreement, the parties stated: “The Developer and the City, and their  
3 successors and assigns shall be bound by and shall comply with the terms and conditions of  
4 this Development Agreement.” See City’s Complaint, Attachment A (Development  
5 Agreement, ¶ 5.3). No such “assigns” or similar language referring to successors was used  
6 in the TRIP Agreement. No portion of the TRIP Agreement can be read as an expression of  
7 the parties’ intent for the TRIP Agreement to constitute a covenant. The Court should find  
8 that the parties (the City and the Developer) intentionally omitted using any “assigns”  
9 language in the TRIP Agreement and conclude that, based on the plain language of the  
10 agreement, the parties did not intend for this personal obligation to constitute a covenant  
11 running with the land. The City’s judgment lien on the TRIP Agreement underscores this  
12 point: why create an encumbrance on real property if such encumbrance already exists?

13 **3. Foreclosure extinguishes the City’s judgment lien based on**  
14 **its suit to enforce the TRIP Agreement.**

15 The City contends that the judgment arising from the TRIP Agreement survives  
16 nonjudicial foreclosure on the Property. See City’s Complaint, ¶ 3.3. In fact, under  
17 nonjudicial foreclosure, the Property is conveyed free and clear of any junior liens on the  
18 Property, including the City’s judgment arising from the TRIP Agreement. See *Woolworth v.*  
19 *Micol Land Company*, 55 Wn. App. 671, 677, 780 P.2d 264 (1989); see also RCW 61.24.050  
20 and Court Actions Contesting The Nonjudicial Foreclosure of Deeds of Trust in Washington,  
21 59 Wash.L.Rev. 323, 325, (1984). Defendants ask the Court for an order dismissing the  
22 City’s claim that the City’s judgment against the Developer now be imposed on the  
23 Property’s successor-in-interest.

24 Foreclosure is a process by which the mortgagor’s interest in the property is  
25 terminated. See RCW 61.12.040. A property sold at a foreclosure sale is sold to satisfy the  
26 debt. See RCW 61.12.040. “RCW 61.24, the Washington trust deed act, was designed to

1 avoid time-consuming judicial foreclosure proceedings.” *Woolworth*, 55 Wn. App. at 676;  
2 *see also Country Express Stores v. Sims*, 87 Wn. App. 741, 943 P.2d 374 (1997) (Under  
3 “Washington’s deeds of trust act, RCW 61.24, ... the nonjudicial foreclosure process should  
4 remain efficient and inexpensive.”). The nonjudicial foreclosure of a deed of trust  
5 extinguishes the interest of any subordinate lienholder. *See Woolworth*, 55 Wn. App. at 677  
6 (a “junior lien [is] extinguished by the completion of the foreclosure sale, under state law.”);  
7 *see also* RCW 61.24.050.<sup>2</sup> Thus, foreclosure will extinguish a junior lien. *Id.*

8 In the instant case, the Bank’s Deed of Trust was originally executed and recorded on  
9 December 29, 2005, and modified on September 19, 2007 and February 27, 2008. The  
10 City’s judgment against the Developer awarding the City the amount owed by the Developer  
11 under the TRIP Agreement was recorded on October 15, 2010, almost five years after the  
12 original Deed of Trust and two years after modifications were made to the Deed of Trust.  
13 The Bank’s Deed of Trust has first position in recording priority, ahead of the City’s junior  
14 lien. The City’s junior lien is extinguished upon nonjudicial foreclosure, so the Court should  
15 dismiss the City’s contrary claims against the Bank and Trustee.

16 **F. The City is not Entitled to Damages against the Bank or Trustee**  
17 **for Unjust Enrichment.**

18 Lacking any legal or factual basis to prevent the foreclosure from proceeding or  
19 attaching the TRIP Agreement to the conveyance, the City alternatively seeks a damages  
20 award for unjust enrichment. *See City’s Complaint*, ¶ 4.8. The City cannot demonstrate that  
21 the TRIP Agreement or related improvements amount to unjust enrichment to the Bank or  
22 Trustee, so this claim should be dismissed.

23 “Three elements must be established in order to sustain a claim based on unjust  
24 enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or

25 \_\_\_\_\_  
26 <sup>2</sup> A prior perfected security interest in personal property collateral has priority over a judicial lien  
creditor’s interest in the same collateral. *See* RCW 62A.9-317.

1 knowledge by the defendant of the benefit; and the acceptance or retention by the defendant  
2 of the benefit under such circumstances as to make it inequitable for the defendant to retain  
3 the benefit without the payment of its value.” *Bailie Communciations, Ltd., v. Trend Business*  
4 *Systems*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991) (quoting BLACK’S LAW  
5 DICTIONARY 1535-36 (6<sup>th</sup> ed. 1990)); see also *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d  
6 162, 165, 776 P.2d 681 (1989) (stating elements as “the enrichment of the defendant must be  
7 unjust; and ... the plaintiff cannot be a mere volunteer.”)

8 The City’s unjust enrichment claim fails because neither the Bank nor the Trustee  
9 own the Property, neither of these defendants is a party to the TRIP Agreement or  
10 Development Agreement, and the City has not conferred any benefit on the Bank or the  
11 Trustee.

12 The City’s unjust enrichment claim also fails because the City had planned to  
13 construct traffic improvements at the subject intersection, regardless of whether the  
14 Developer developed the Property. In its recitals, the TRIP Agreement explains that “the SR  
15 202/148<sup>th</sup> Avenue NE intersection is one of the City’s highest congestion intersections” and  
16 “the project has been listed in the top scoring transportation priority projects since the City  
17 first adopted its Capital Improvement Plan.” See Exhibit E (TRIP Agreement) at p. 1. The  
18 City acknowledged that the “general public and all properties in the area including those  
19 related to the Project will benefit from the successful completion of the roundabout project.”  
20 See Exhibit E (TRIP Agreement), ¶ 3.0. The City had been working on potential traffic  
21 improvements including multiple roundabout designs for many years prior to the  
22 Developer’s interest in the Property.

23 The terms of the Agreements made clear that the proposed development was just that,  
24 a proposal. Yet, recognizing the importance of the transportation project to the general  
25 public and the other properties in the area, the City proceeded with the improvements.  
26

1 Under Washington law “a person who has conferred a benefit upon another, by the  
2 performance of a contract with a third person, is not entitled to restitution from the other  
3 merely because of the failure of performance by the third person.” *Farwest Steel Corp. v.*  
4 *Mainline Metal Works, Inc.*, 48 Wn. App. 719, 732, 741 P.2d 58 (quoting 66 Am. Jur. 2d  
5 Restitution and Implied Contracts, § 16, at 960), review denied, 109 Wn.2d 1009 (1987).  
6 “The conclusion that retention without restitution would be unjust is a conclusion of law, not  
7 a finding of fact.” *Town Concrete*, Wn. App. at 502 (citing *Lloyd v. Ridgfield Lumber Ass’n*,  
8 38 Wn.2d 723, 735, 231 P.2d 613 (1951)).

9 The City is not entitled to unjust enrichment from a third party (the Bank or Trustee)  
10 because the Developer allegedly failed to perform under the terms of the TRIP Agreement.  
11 *Farwest Steel Corp.*, 48 Wn. App. at 732. In *Farwest Steel Corp.*, a metal company agreed  
12 to provide metal items to a contractor for a project. 48 Wn. App. at 720-21. The metal  
13 company then contracted with material company to supply the materials needed to create the  
14 metal items. *Id.* After receiving the materials, creating the metal items, and providing them  
15 to the contractor, the metal company subsequently went bankrupt. *Id.* The material  
16 company filed a lawsuit against the third-party contractor for unjust enrichment. *Id.* The  
17 Court of Appeals found that the third-party contractor had not been unjustly enriched by the  
18 metal company and affirmed dismissal of the claim. *Id.* Similar to the analysis in *Farwest*,  
19 the Bank “did not acquiesce in or encourage the contract ... did not mislead the [party  
20 seeking recovery] in any fashion ... did not contribute in any fashion to [the plaintiff’s] loss.”  
21 48 Wn. App. at 733. As in the *Farwest* case, Plaintiff’s claim for unjust enrichment towards  
22 an incidental, third-party (ironically, another creditor) should be denied. *Id.*

23 Finally, equity can intervene to find unjust enrichment only when “the character,  
24 terms and existence of a contract can be clearly and unequivocally established to the  
25 satisfaction of the court.” *Kirk v. Tomulty*, 66 Wn. App. 231, 237, 831 P.2d 792, review  
26 denied, 120 Wn.2d 1009, 841 P.2d 47 (1992) (emphasis added). In this instance, the City

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FIRM’S MOTION FOR SUMMARY JUDGMENT - 19

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1 cannot "clearly and unequivocally" establish their claim for unjust enrichment against two  
2 non-parties to the Agreements, the Bank and Trustee, that do not own the Property. The  
3 Court should dismiss the City's claims for unjust enrichment against the Bank and Trustee.

#### 4 5 **VII. CONCLUSION**

6 The Developer's failure to fulfill a personal obligation to the City is not a basis to  
7 interfere with the Bank's statutory authority to proceed with nonjudicial foreclosure on its  
8 Deed of Trust. The Bank and Trustee respectfully request that the Court dismiss the City's  
9 claims to the extent such claims constitute an attempt to do so.

10 The agreements executed between the Developer and the City do not affect the  
11 Bank's right to foreclose on the Property. Even if the Development Agreement runs with the  
12 land, it is an elective obligation such that any successor-in-interest must act under the terms  
13 of the agreement *if and only if* such successor pursues development of the Property in the  
14 manner proposed in the agreement. There is no obligation to develop the Property.

15 The TRIP Agreement is not a covenant that runs with the Property; it is merely a  
16 personal contract between the Developer and the City, and the City has already obtained a  
17 monetary judgment against the Developer on this agreement in a suit to which the Bank and  
18 Trustee were not parties. The judgment against the Developer arising from the TRIP  
19 Agreement is a junior lien against the Property, which may be extinguished upon foreclosure.

20 Finally, the City's unjust enrichment claim also fails because any benefit arising from  
21 the traffic improvements was not conferred upon or unjustly retained by the Bank or Trustee,  
22 neither of whom were parties to the Agreements nor owners of the Property. The City had  
23 been planning to make traffic improvements in the area, regardless of whether the Developer  
24 was able to develop the property. And to the extent that a benefit was retained by the  
25 Developer, an incidental third-party beneficiary like the Bank or the Trustee cannot be held  
26 liable as between a personal contract between the City and the Developer.

1 In sum, the Bank and Trustee ask the Court to dismiss the City's claims against them  
2 on summary judgment and permit the Trustee to proceed with the Bank's nonjudicial  
3 foreclosure of the Bank's Deed of Trust secured by the Property, consistent with the Bank  
4 and Trustee's rights and obligations under RCW Chapter 61.24 *et seq.*

5  
6 Dated this 14<sup>th</sup> day of February, 2012.

7 SCHWABE, WILLIAMSON & WYATT, P.C.

8  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of February, 2012, I caused to be served the foregoing *Defendants Union Bank, N.A. and The Lanz Firm's Motion for Summary Judgment* on the following parties at the following addresses:

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- other (specify) \_\_\_\_\_

  
Jennifer Hicok