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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

DEPUTY

NO. 37451-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

16th STREET INVESTORS, LLC,
a Washington limited liability company;
GEORGE KILLIAN, ELAINE KILLIAN;
LANCE KILLIAN; and BERNHARDT ASSOCIATES, INC.,
d/b/a COLDWELL BANKER COMMERCIAL JENKINS-BERNHARDT
ASSOCIATES, a Washington corporation,

Respondents,

v.

JOSEPH W. MORRISON,

Appellant.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv
Assignments of Error	1
Statement of Issues	5
I. Summary Introduction	6
II. Statement of Facts	13
A. <u>Joe Morrison was Willing to Sell His Property in Vancouver for Development by Others, But Only if The Terms of the Deal Protected His Retirement Dream of A Residence With a Magnificent View and Easy Access to the Downtown.</u>	13
B. <u>In October 2005, Morrison Signed What He Understood to Be a Preliminary Agreement for the Sale of His Property, Including a Memorandum Generally Describing the Terms to be Included in an Option Agreement for the Desired Residential Unit, To Bob Bernhardt Associates -- NOT to the Killian Interests, Who Only Later Received an Assignment of Bernhardt's Rights Under Bernhardt's Agreement with Morrison.</u>	15
C. <u>The Sale Failed to Close, When the Attorneys Failed to Reach Agreement on a Final Form for Morrison's Option.</u>	24
D. <u>The Section 1031 Exchange Imbroglio</u>	29
III. Standard of Review.....	31

IV.	Argument	32
A	<u>The Trial Court Erred in Ordering Specific Performance of the Purchase and Sale Agreement Contract, Based on the Supposed "Intent" of Someone Who Was Not -- Indeed, Who Took Care Not to Be -- A Party to the Contract, and Who Only Later Was Assigned the Buyer's Rights Under the Contract. The Parties to the PSA Manifested An Intent, Confirmed by Their Mutual Contemporaneous Understanding, that Morrison Would Not be Obligated to Sell His Property Unless Agreement was Later Reached on the Terms for Granting Morrison an Option for a Residential Unit. The Parties Failed to Reach Agreement on Those Terms, And Morrison Therefore was Entitled To Terminate the Transaction</u>	32
1.	<u>The Killians' Interpretation of the Purchase and Sale Agreement Contract was Legally Irrelevant to Determining Whether the Parties to that Contract Intended that The Terms of Morrison's Option Were to Be the Subject of Additional Negotiation, Because the Killians Were Not -- and By Their Own Choice -- Parties to the Contract</u>	33
2.	<u>The Balance of the Record Before the Trial Court Should have Compelled the Conclusion that the Parties to the Purchase and Sale Agreement Contract Intended, by Their Attachment of Greg Call's Memorandum Discussion of Morrison's Option, to Acknowledge That Agreement Would Need to be Reached on the Terms of Such an Option In Order to Form a Final and Binding Contract for the Sale of Morrison's Property</u>	35

3.	<u>At Bottom, The Purchase and Sale Agreement Contract Was Nothing More than an "Agreement to Agree," And Morrison Was Entirely Within his Rights to Cancel the Sale of His Property When the Parties Failed to Agree on the Terms Of an Option Needed to Give Rise to a Contract that Could Have been the Proper Subject for a Decree of Specific Performance</u>	39
B	<u>The Trial Court Also Erred in Awarding Damages to the Killian Interests for the Failure of Their Planned Section 1031 Exchange</u>	43
V.	Request for Attorney’s Fees Under RAP 18.1	45
VI.	Conclusion	45
Appendix		

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Table of Cases</u>	
 <u>Washington Cases</u>	
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990).....	39
<i>Herzog Alum., Inc. v. General Am. Windows Corp.</i> , 39 Wn. App. 188, 692 P.2d 867 (1984).....	45
<i>Hoskins v. Reich</i> , 142 Wn. App. 557, 174 P.3d 1250 (Div. II 2008).....	31
<i>Keystone Land & Development Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004).....	40, 41, 42
<i>Kruse v. Hemp</i> , 121 Wn.2d 715, 853 P.2d 1373 (1993).....	43
<i>Nadeau v. Beers</i> , 73 Wn.2d 608, 440 P.2d 164 (1968).....	44
<i>Paradiso v. Drake</i> , 135 Wn. App. 329, 143 P.3d 859 (Div. II 2006), <i>rev. denied</i> , 160 Wn.2d 1024, 163 P.3d 794 (2007).....	31
<i>Ross v. Harding</i> , 64 Wn.2d 231, 391 P.2d 526 (1964).....	43
<i>Sandeman v. Sayres</i> , 50 Wn.2d 539, 314 P.2d 428 (1957).....	41
<i>Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.</i> , 120 Wn.2d 573, 844 P.2d 428 (1993).....	34, 36
<i>Stieneke v. Russi</i> , __ Wn. App. __, __ P.3d __, 2008 WL 2582977 (Div. II, July 1, 2008).....	31
<i>Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.</i> , 102 Wn. App. 488, 7 P.3d 861 (Div. II 2000), <i>rev. denied</i> , 143 Wn.2d 1003, 21 P.3d 292 (2001).....	34
 <u>Other Cases</u>	
<i>McClintock v. Robinson</i> , 18 Cal.App.2d 577, 64 P.2d 749 (1937).....	45, 46

Federal Cases

*Bonneville Power Administration v. Washington Public
Power Supply System*, 952 F.2d 1497
(9th Cir. 1992)34

Rules

RAP 10.4(c)1
RAP 18.145

Other Authorities

Res. (2d) of Agency § 18635
Red. (2d) of Contracts § 336(2)35

Assignments of Error

Defendant and Appellant Joseph W. Morrison ("Morrison") hereby assigns error to the following rulings and decisions of the trial court:

1. The trial court erred when it found that "[t]he PSA [i.e., the Real Estate Purchase and Sale Agreement at issue in this action] was entered into by the parties[,]" to the extent that the phrase "the parties" was intended to refer to any of the plaintiffs in this action. *See* Finding of Fact ("FOF") No. 1, as set forth in the trial court's Findings of Fact and Conclusions of Law ("Findings & Conclusions") (CP 928).¹

2. The trial court erred when it found that "Bernhardt's status as purchaser under the agreement changed contemporaneously with Bernhardt's signature on the PSA, as Bernhardt immediately assigned the PSA to Killian Pacific, LLC." *See* FOF No. 1 (CP 928).

3. The trial court erred when it found that "16 Street manifested its intent to accept all terms of the PSA offer when it directed Bernhardt to sign the PSA offer without modifications, by agreeing to the immediate assignment of the PSA from Bernhardt to Killian Pacific, LLC, by conducting due diligence, and by tendering the earnest money promissory

¹ To assure full compliance with the requirements of RAP 10.4(c), Morrison has attached a copy of the Findings & Conclusions as Exhibit A of the Appendix to this Brief. Where Morrison assigns error to a Finding or Conclusion in its entirety, Morrison is relying on that attachment to satisfy his obligations to reproduce the text of that finding or conclusion.

note of \$50,000. This conduct evidences 16 Street's intent that the signing of the PSA constitutes the final agreement of the parties." *See* FOF No.3 (CP 929).

4. The trial court erred in making Finding of Fact No. 4. *See* (CP 929).

5. The trial court erred in making Finding of Fact No. 5. *See* FOF No. 5 (CP 929).

6. The trial court erred when it found that "16 Street provided defendant with notice on April 10, 2006, that it intended to close the transaction on May 29, 2006." *See* FOF No. 6 (CP 929).

7. The trial court erred when it found that the defendant "communicated to 16 Street" regarding his desired "option." *See* FOF No. 8 (CP 929-930).

8. The trial court erred when it found that Mr. Call, on behalf of Morrison, "expressed defendant's desire for a more formal option agreement[.]" *See* FOF No. 11 (CP 930).

9. The trial court erred when it found that "[t]he PSA provided" that three percent of the commission to be paid to Bernhardt would "be paid by 16 Street." *See* FOF No. 17 (CP 931).

10. The trial court erred in making Conclusion of Law No. 2. *See* (CP 931).

11. The trial court erred when it concluded that "[o]nce the buyer accepted the PSA offer, including the Call memorandum, the offer contained all of the required elements for a purchase and sale contract. Among other items, 16 Street was entitled to rely upon sections 22(a) and 22(b), consisting of an integration clause and a provision that the terms of the PSA would not be deemed to merge in the deed at closing." *See* Conclusion of Law ("COL") No. 3 (CP 931).

12. The trial court erred in making Conclusion of Law No. 4. *See* (CP 931-32).

13. The trial court erred in making Conclusion of Law No. 5. *See* (CP 932).

14. The trial court erred in concluding that "[t]here is no statutory or otherwise legally required form for an option agreement. The PSA, which included the Call memorandum, created a legal obligation on the part of defendant to sell the property at issue, and a legal obligation on the part of 16 Street to sell to defendant a condominium or residential unit, if 16 Street chose to develop condominiums or residential units on the property, and if defendant then chose to purchase a condominium or residential unit. The PSA constitutes a binding and specifically enforceable contract, including the Call memorandum. If 16 Street develops the property with condominiums or residential units, and if

defendant elects to purchase such a condominium or residential unit, 16 Street may demand a cash sale. The PSA contains the necessary terms for a cash sale option, those being a legal description and a method of determining the purchase price. Other terms which may be necessary are matters that can be determined by resort to common practices." *See* COL No. 6 (CP 932).

15. The trial court erred in making Conclusion of Law No. 7. *See* COL No. 7 (CP 932).

16. The trial court erred in making Conclusion of Law No. 8. *See* (CP 932).

17. The trial court erred in making Conclusion of Law No. 9. *See* (CP 933).

18. The trial court erred in making Conclusion of Law No. 10. *See* (CP 933).

19. The trial court erred in making Conclusion of Law No. 11. *See* (CP 933).

20. The trial court erred in making Conclusion of Law No. 12. *See* (CP 933-34).

21. The trial court erred in making Conclusion of Law No. 13. *See* (CP 934).

22. The trial court erred in making Conclusion of Law No. 14. *See* (CP 934).

23. The trial court erred in entering a judgment in favor of plaintiffs. *See* (CP 965-68) (Copy attached as Exhibit B of the Appendix to the Brief).

Statement of Issues

The following issues pertain to the assignments of error:

1. Contract Formation. Whether a trial court errs in determining whether the parties to a real estate purchase and sale agreement intended that agreement to be a final and complete agreement, by considering the interpretation given to that agreement's terms by the assignee of rights under the agreement, when: (1) the assignee was not a party of the original agreement; and (2) the parties to the original agreement both understood that the agreement was not complete, because further negotiation would be needed to reach agreement on the form of an option term? (Assignments of Error Nos. 1-23.)

2. Specific Performance. Whether a trial court errs in ordering specific performance of an agreement for the purchase and sale of real estate, when: (1) the agreement as entered into is not complete, because the parties must reach a further agreement on the form of an option term that is also a material condition of the transaction, and (2) the parties

subsequently and despite their best good faith efforts are unable to reach agreement on that term? (Assignments of Error Nos. 1-23.)

I. Summary Introduction

This appeal presents a case of fundamental confusion about basic principles of contract formation, which has fatally tainted the trial court's judgment.

Joe Morrison, a long-time resident of Vancouver, Washington, had for many years been acquiring property close to the city's downtown. He hoped to see the property developed in a way that would contribute to the downtown's revival. But he also wished to assure that this development was done such that he might realize his dream of a residence with a magnificent view of Mt. Hood to the south, and within walking distance of the city center.

Morrison was working with a real estate agent, Jim Justin, associated with the real estate brokerage firm of Coldwell Banker Commercial Bob Bernhardt Associates. In the Fall of 2005, Justin was approached by Wally Hornberger, one of his colleagues at Bernhardt Associates. Hornberger explained that he had a client interested in acquiring Morrison's property. The client was George Killian and his son Lance, prominent real estate developers in the Vancouver area. The Killians, however, did not want *their* interest to be known. Any sale

transaction would be carried out with another party as buyer, from whom the Killians would then receive the property via an assignment of the rights under any purchase and sale agreement contract entered into between Morrison and that other party. That other party, moreover, would be Bernhardt Associates -- the very brokerage firm where Justin and Hornberger both worked.

Morrison knew nothing of this. He did not because everyone privy to this arrangement -- including Morrison's own agent, Jim Justin -- agreed to keep it confidential and not disclose the facts of the arrangement to anyone else, including Morrison.

Although Morrison did not know of the arrangement worked out to keep him from knowing that it was the Killians who were trying to acquire his property, Morrison did suspect that whomever he sold the property to would "flip" it to some third party, who would actually develop it. Morrison had no objection *per se* to such an outcome. But he *was* concerned that such an outcome could jeopardize his dream of a residence with a view and easy access to downtown. Any sale would therefore have to be so structured as to bind any successor i interest to the immediate purchaser, *and* assure that Morrison's residence rights -- which would take the form of an option for a residential unit -- could not be extinguished just because residences were not part of the initial development *or* because the

developer chose to develop with apartments first and only convert to condominiums later.

When Justin's first effort at drafting option language proved inadequate, Morrison turned to attorney Greg Call. Call drafted a memorandum that addressed several aspects of any purchase and sale agreement contract, including a paragraph stating that Morrison "would like an option to purchase a condominium," which "would provide for the purchase of one (1) residential unit to be located on an upper level floor and on the south side or on the southwest corner of the building[.]" *See* Ex. 4 (copy of Call memorandum). Call gave the memorandum to Justin, who passed it along to Hornberger, who in turn passed it along to Lance Killian (who had been charged by his father with responsibility for handling their efforts to acquire Morrison's property). Killian approved including the memorandum as part of a purchase and sale agreement contract (the balance of which consisted of a Bernhardt Associates form). But the Killians, consistent with their determination to be anonymous, stayed off the contract. Instead -- and as planned -- Bernhardt Associates would be the buyer, and Bob Bernhardt would sign on behalf of his firm.

Justin attached Call's memorandum to the purchase and sale agreement document, and presented the resulting consolidated document to Morrison for his signature. Morrison duly signed on October 22, 2005.

Some three weeks later, on November 9, 2005, Bernhardt signed on behalf of his firm as buyer. The document listed Justin as agent for Morrison, and Hornberger as agent for Bernhardt Associates. No reference was made to the Killians, or any of their development entities. The contract did contain a boilerplate term authorizing assignment if the signatories checked the appropriate box. Morrison and Bernhardt had checked that box, and Bernhardt (on the same day he signed the purchase and sale agreement) also signed a separate document assigning his firm's rights to Killian Pacific LLC (a Killian-controlled entity) "and/or Assigns." The fact of this assignment, however, was not disclosed to Morrison.

Was the Call Memorandum's discussion of an option agreement for a residential unit intended to be the actual option agreement? Or was the incorporation of the Call memorandum into the purchase and sale agreement contract merely recognition that the parties would need to reach agreement on the specific terms of such an option, before the deal would be final and the sale could close?

Morrison (the seller under the purchase and sale agreement), Bernhardt (the buyer under that agreement), along with Justin and Hornberger (listed as agent for buyer and seller, respectively, under that agreement) *all* testified that the memorandum discussion was *not* intended to be the actual option agreement, and that the parties *did* need to reach

agreement on the terms of the actual option (presumably, through their attorneys) before the transaction could close. Lance Killian, on the other hand, testified that the Call memorandum *was* intended to be the actual option agreement. But by the Killians' choice, neither Lance Killian, nor any entity for which Lance Killian served as the managing agent, was a party to the purchase and sale agreement contract of which the Call memorandum formed a part.

The transaction proceeded apace towards closing, eventually set for May 30, 2006. But when the escrow agent circulated the proposed closing documents, things fell apart. Realizing that the papers included no option agreement, Morrison balked. Morrison's attorney (Greg Call) and the Killians' attorney (David Weiner) attempted to reach agreement on a form of option. (By now, the fact that the Killians had received an assignment of Bernhardt Associates' contract rights, and intended to close the sale using "16th Street Investors," an entity recently formed for that purpose, was known to Morrison.) The efforts by Call and Weiner to reach agreement foundered on the very issues that had been of such concern to Morrison: Although the Killians would agree to a recorded option, they insisted that the option be triggered only if the property was initially developed with residences, and then only if the residences were condominiums. (What the Killians did not tell Morrison was that they had

no intention of initially developing the property with condominiums -- which meant that, if Morrison did agree to their proposed form, Morrison would be receiving an option that would never be triggered.)

Morrison refused to agree to the Killians' proposed option, and terminated the sale. The Killians sued for specific performance, and were joined in their suit by Bernhardt Associates (which demanded that Morrison be ordered to pay the brokerage firm's commission). Clark County Superior Court (Hon. Robert A. Bennett) granted specific performance to the Killians, and awarded Bernhardt Associates its commission. (The court also awarded the Killians damages for a failed "Section 1031" property exchange -- which they blamed on Morrison's supposedly wrongful refusal to close -- and attorney's fees and costs under the prevailing party fee clause of the purchase and sale agreement.)

This Court should reverse. Ordering specific performance of a contract is only appropriate where the contract terms are established clearly and definitely. Here, the contract -- the purchase and sale agreement -- was materially incomplete. The parties to this contract (Morrison, and Bernhardt Associates) left agreement on the terms of Morrison's option to further negotiation, understanding that reaching agreement on that option was a condition to closing. That agreement was not reached, and that fact should have foreclosed specific performance relief for the Killians (as well

as an award of a commission to Bernhard Associates, as its claim was legally dependent on the court finding a specifically enforceable agreement.)

The trial court nonetheless ordered specific performance. The court found that the Killians intended that the purchase and sale agreement -- including the Call memorandum's discussion of Morrison's desired option -- was to be accepted as written, and therefore was the parties' binding contract. The court then ruled that the Killians' intent was controlling and ordered specific performance based on that intent, concluding that Morrison was not entitled to refuse to close because of the Call-Weiner disagreement over the terms of an option, as Morrison had already bound himself to the terms for an option (the terms set forth in the Call memorandum) when he signed the purchase and sale agreement.

Yet the Killians' intent, whatever it may have been, could have no bearing on determining the intent of the parties to the purchase and sale agreement contract, because the Killians -- by their own choice -- *were not parties to that contract*. Having worked so assiduously and successfully to stay off that contract, the Killians should not have been allowed to turn around and have their "intent" (more precisely, their preferred reading of the Call memorandum's discussion of Morrison's desired option) treated as final and binding. The evidence established that the parties to the

purchase and sale agreement contract understood that the Call memorandum was *not* intended to be the actual option agreement, and that the parties (through their lawyers) would need to work out the terms of that agreement if the transaction was to close. Those lawyers could not do so, because the Killians (their intent to purchase finally disclosed) would not agree to a form of option satisfactory to Morrison. Morrison therefore was entitled to pull the plug on a sale of his property to the Killians. This Court should recognize that right, reverse the trial court's decree of specific performance (as well as its ancillary award of Bernhardt's commission, and damages to the Killians for the failed 1031 exchange), and award Morrison his fees and costs incurred before the trial court and on appeal.

II. Statement of Facts

A. Joe Morrison was Willing to Sell His Property in Vancouver for Development by Others, But Only if The Terms of the Deal Protected His Retirement Dream of A Residence With a Magnificent View and Easy Access to the Downtown.

Defendant and Appellant Joseph W. Morrison has lived in Vancouver, Washington, since 1959. RP (I) 178:19-21 (Morrison).²

² The Report of the Proceedings of the trial in this case is 896 pages. The Report is sequentially paginated 1 through 896, split up into five volumes. To assist the Court in locating the relevant volume, Morrison will indicate it by a parenthetical reference to its Roman numeral. Thus, the citation "RP (I) 178" means page 178 of the Report of Proceedings, found in Volume I of the transcript.

Presently the owner of the "Main Street Trader" (a solid wood furniture and collectibles store), from 1959 to 1993 Morrison worked for the Bonneville Power Administration. RP (I) 178:22-179:8 (Morrison). At the BPA, Morrison dealt for many years with BPA's property acquisitions and related property issues (e.g., right-of-ways for power lines). RP (I) 179:10-22 (Morrison). Morrison became familiar with the various kinds of documents affecting legal title, the process of acquiring rights through the process of recorded option agreements, and the importance of ensuring that such agreements were complete in every detail. RP (I) 179:23-181-3 (Morrison).

Starting in 1971, Morrison began to acquire the Vancouver property at issue in this case. He did so in stages, from 1971 through 1987. RP (I) 181:13:182:7 (Morrison). Morrison supported the revival of downtown Vancouver through encouraging mixed commercial and residential development, and wanted to see his combined holdings developed so they contributed to that goal. RP (I) 183:13-20 (Morrison). Morrison also dreamed of acquiring a residential unit through such a development, with a magnificent south view of Mt. Hood and easy access to the downtown and public transportation. RP (I) 185:18-186:3 (Morrison). Morrison did not feel up to developing the property himself and therefore hoped to see it developed by others. RP (I) 183:21-184:4 (Morrison). But he did not

want to sell the property for development unless he was satisfied the deal would protect his dream, by providing him an option to acquire the desired residential unit. RP (I) 193:9-22 (Morrison).

B. In October 2005, Morrison Signed What He Understood to Be a Preliminary Agreement for the Sale of His Property, Including a Memorandum Generally Describing the Terms to be Included in an Option Agreement for the Desired Residential Unit, To Bob Bernhardt Associates -- NOT to the Killian Interests, Who Only Later Received an Assignment of Bernhardt's Rights Under Bernhardt's Agreement with Morrison.

In the late Summer of 2005, Morrison was approached by Mr. Jim Justin, about the possibility of Morrison selling his property to an anonymous buyer. RP (I) 194:6-18 (Morrison). Justin worked as a real estate broker in association with the brokerage firm of Coldwell Banker Commercial Bob Bernhardt Associates ("Bernhardt Associates").³ Justin testified that he was approached by Mr. Wally Hornberger, a colleague at Bernhardt Associates, with an unsolicited offer to purchase Mr. Morrison's property from an unidentified buyer. *See* Justin Dep. at 12:17-18:15 (Ex. 71).⁴ Hornberger was working on behalf of George Killian and his son

³ Justin worked at Bernhardt Associates alongside Mr. Wally Hornberger and Mr Bob Bernhardt (the principal of the brokerage). As described more fully below, Mr. Hornberger acted as agent for the Killian interests while Mr. Bernhardt would sign the Purchase & Sale Agreement as the representative of his brokerage firm, the listed purchaser of the property under that agreement. At trial the parties disputed whether Justin should be treated as Morrison's agent or as co-agent for the Killian interests. The trial court found that Justin was Morrison's agent. *See* Finding of Fact No. 7 (CP 929). Morrison is not challenging that finding in this proceeding.

⁴ The depositions of several witnesses were admitted into the record (as trial exhibits).

Lance, local developers interested in acquiring Morrison's property. *See* Hornberger Dep. at 5:15-25 (Ex. 70).

The Killians, however, did not want their interest in Morrison's property disclosed to Morrison.⁵ Hornberger therefore would act as the "conduit" for any proposals and responses to proposals to and from Morrison, while Bernhardt's firm would be the buyer who entered into any purchase and sale agreement. *See, e.g.*, Hornberger Dep. at 5:9-18 (Ex. 70). Justin would continue to serve as Morrison's agent, but he agreed that he would not disclose to his client that the Killians were the ones interested in buying his property. *See* Justin Dep. at 14:6-13 (Ex. 71).

Everyone at Bernhardt Associates (Justin, Hornberger, and Bernhardt himself), as well as Lance Killian, soon understood that a material condition of any sale for Morrison was his receipt of an option agreement giving him the right to a residential unit in any mixed commercial/residential development. *See* Justin Dep. at 14:24-15:9 (Ex. 71); Hornberger Dep. at 12:24-13:15 (Ex. 70); RP (Vol. I) 130:12-19 (Bernhardt); RP (Vol. I) 78:19-22 (L. Killian). The issues on which the closing of the sale would turn would prove to be *what sort* of residential

⁵ Lance Killian testified that he and his father did not want their interest in Morrison's property to be disclosed to Morrison, lest the fact of their interest (as well-known developers) be used to extract a higher price. *See* RP (I) 38:14-39:8.

unit, and the circumstances that could trigger Morrison's right to that unit (or, alternatively, extinguish that right).

Although Morrison did not know that the Killians were behind Hornberger's approach to Justin, Morrison expected that the initial purchaser would "flip" the property to someone else, who would do the actual development. *See* RP (II) 199:3-6 (Morrison). Morrison therefore wanted a recordable agreement, which would put anyone interested in buying the property from the initial purchaser on notice of Morrison's option rights. RP (II) 199:4-20 (Morrison). Morrison was also concerned about apartment-to-condominium conversions, and wanted to insure that his option right could not be wiped out if the developer chose to do apartments initially, followed by a conversion to condominiums. RP (II) 205:14-206:2 (Morrison). When Justin's first attempt at drafting option language fell short,⁶ Morrison asked attorney Greg Call to prepare a memorandum that would outline what Morrison wanted to see in a formal option agreement, which would then be passed along to Justin and from Justin presumably through Hornberger to the (as yet unknown) purchaser. *See* RP (II) 217:21-218:3 & 220:22-221:10 (Morrison).

⁶ A copy of Justin's effort was introduced into evidence as Plaintiff's Exhibit 2.

Call prepared the memorandum, addressing it to Jim Justin.⁷ A copy of the memorandum was introduced into evidence as Plaintiff's Exhibit 4, and a copy of this exhibit is attached as Exhibit C of the Appendix to this Brief. The memorandum consisted of a single page, with three paragraphs of text. The first paragraph discussed the purchase price (\$580,000 based on \$20,000 per square foot), a refundable earnest money deposit (\$50,000 to be paid into escrow within three days of acceptance by both parties), and the payment of the balance (in cash, at closing, subject to instructions consistent with Morrison's intent to do a "1031 Exchange").⁸ The third paragraph discussed the assignment of Morrison's landlord obligations, the buyer's obligation to indemnify and hold Morrison harmless for certain claims and related defense costs, and a

⁷ Call's memorandum was dated October 19, 2005. Morrison and Call both testified about a meeting they said they had with Justin on October 18, 2005 (at Dulin's Café restaurant in downtown Vancouver), at which Morrison fully outlined his concerns. Justin could not recall such a meeting. The trial court noted the controversy, but did not resolve it. *See* Court's Memorandum Ruling at 3:8-22 (CP 870). Morrison would agree that this controversy also need not be resolved in order for this Court to grant Morrison the relief he seeks in this proceeding. Morrison also notes that the documentary evidence reflects that Justin provided to Call a copy of Justin's first attempt at drafting an option agreement, by a fax sent at 4:30 p.m. on the afternoon of October 18 -- the same day when Morrison and Call said that Morrison had outlined his concerns in detail to Justin in the meeting at Dulin's held earlier that day. *See* Fax Transmittal cover sheet with transmittal stamp of "Oct. 18. 2005 4:30PM Coldwell Banker Commercial" at top of page (page 1 of Plaintiff's Exhibit 2).

⁸ A "1031 Exchange" is a property exchange device, authorized by the federal Internal Revenue Code and which can result in substantial tax savings. The Killians were awarded damages for what they claimed was a failed exchange caused by Morrison's wrongful refusal to close. Morrison has assigned error to this award, and will address the matter later in this Brief.

warranty by Morrison regarding any current claims pertaining to the condition of the property.

The second paragraph addressed the option agreement. This portion of the memorandum stated that, "[a]s additional consideration, Mr. Morrison *would like an option* to purchase":

...a condominium if Buyer, at Buyer's election, decides to include residential units in the construction and development of the property. The option would provide for the purchase of one (1) residential unit to be located on an upper floor level and on the south side or on the southwest corner of the building with the square footage of the unit to be the greater of the size of the largest residential unit included in the design or twice the size of the smallest unit planned for the design, but under no circumstances less than 1,600 square feet. The purchase price under the option would be based on Seller's cost per square foot of construction of the selected unit including inside walls, ceilings, windows, plumbing, wiring, ventilation, and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings. Buyer and Seller shall agree on a location of electrical outlets, ventilation and plumbing.

Ex. 4 (emphasis added).

Call's memorandum was given to Justin, who passed it along to Hornberger, who passed it along to George Killian's son Lance, who had full authority on behalf of the Killian interests regarding the terms and conditions governing any acquisition of Morrison's property. *See* L. Killian Dep. at 12:23-13:19 (Ex. 73). Killian reviewed the memorandum and approved its inclusion as part of a Purchase and Sale Agreement

contract to be presented to Morrison for his acceptance. *See* L. Killian Dep. at 25:21-25:12 (Ex. 73).⁹ Justin then attached Call's memorandum to a proposed "Purchase and Sale Agreement" document (the balance of which was taken from a Bernhardt Associates form), and presented the result to Morrison for his signature. *See* copy of Purchase and Sale Agreement contract with attachments, introduced into evidence as Plaintiff's Ex. 3 (copy of Ex. 3 attached as Exhibit D of the Appendix to this Brief).

Morrison, as seller, initialed and signed the Purchase and Sale Agreement contract on October 22, 2005. *See* Ex. 3 (initials on each page, and signature on page 8 of the Bernhardt Associates form). Bob Bernhardt, whose firm now appeared as the buyer of record, initialed and signed on November 9. *See id.* The agreement described Justin as representing Morrison, and described Hornberger as representing Bernhardt Associates. *See id.* (numbered paragraph 19 of the Bernhardt Associates form, entitled "Agency Disclosure," found on page 6 of the form). The Call memorandum was attached to the back of the contract

⁹ The cited portion of the transcript of Lance Killian's deposition refers to an "Exhibit 3" which became a part of an "Exhibit 1." During depositions, the parties used a copy of the Call memorandum designated as Exhibit 3, and a copy of the Purchase and Sale Agreement designated as Exhibit 1. At trial, a copy of the Purchase and Sale Agreement was entered into evidence as Plaintiff's Exhibit 3, and a copy of the Call memorandum was entered into evidence as Plaintiff's Exhibit 4.

document, behind a face sheet reading "Exhibit B (Condominium Purchase Agreement) Attached Memorandum from Sellers [sic.] Attorney." *See id.* (second to last page of agreement document, followed by copy of memorandum).

Morrison, and the three broker witnesses involved in the formation of the purchase and sale agreement contract, all testified that they did not consider Call's memorandum discussion of the option agreement to constitute the actual option agreement, and that additional documentation therefore would be required (presumably to be worked out prior to closing by the attorneys for buyer and seller):

- Morrison testified that the attachment of Call's memorandum "put notice to somebody that something needed to happen" (although Morrison also believed that the parties "would reach agreement on an option..."). RP (II) 235:7-23 (Morrison).

- Justin testified that he did not believe that the Call memorandum "itself was the option[,] that he only intended the memorandum "to be a transmittal to the buyer of an interest of the seller for an option agreement[,] and that he "expected that Mr. Morrison's attorney and the attorney representing the 16th Street, LLC would hammer out the option agreement." *See* Justin Dep. at 6:25-7:6, 7:21-8:3 & 8:12-16 (Ex. 71).

- Hornberger testified that he did not "think that th[e Call]...memorandum constituted the option agreement" but only a state[ment of] what...the [seller's] wishes and desires were." *See* Hornberger Dep. at 21:10-13 (Ex. 70).

- Bernhardt (who signed on behalf of his firm as the buyer) testified that he "definitely" did "not...recognize [the Call memorandum]...as an option agreement[,]" and that it was instead "a request and part of a counteroffer essentially telling the buyers that they [i.e., Morrison] wanted to have an option." *See* Bernhardt Dep. at 20:3-12 & 25:14-26:2 (Ex. 69).¹⁰

Neither Lance nor George Killian signed the agreement. The agreement made no reference of any kind to any entity (e.g., Killian Pacific, LLC) owned or otherwise controlled by the Killians. The agreement did provide that it could be assigned, *see* numbered paragraph 20 of the Bernhardt Associates form entitled "assignment" (page 6 of the form), showing the "assignable" box marked with an "X" (Ex. 3), and there is no dispute that Morrison expected that Bernhardt would assign his

¹⁰ There is no dispute that the Killian interests took issue with this understanding, insisting instead that the Call memorandum constituted the option agreement and that no further documentation was required because the memorandum was a complete and accurate reflection of the parties' understandings regarding the terms and conditions of that option. Morrison will fully address the Killian contentions in this regard, as well as whether those contentions should be given any weight when interpreting the intent of the parties to the Purchase and Sale Agreement contract, in the Argument section of this Brief.

firm's interests to someone, at some point. But (as previously discussed) Morrison had no way of knowing that the assignment would be to the Killians or one of their development entities, because of the Killians' insistence that their identity not be revealed to Morrison.

On November 9, 2005, the same day that Bernhardt signed the Purchase and Sale Agreement contract on behalf of his firm as the buyer, Bernhardt executed a document entitled "Assignment and Assumption of Agreement." *See* Ex. 5 (copy of assignment, with Bernhardt's signature appearing on p. 2) (copy attached as Ex. E of the Appendix to this Brief). The document recited that "CB" (Bernhardt's firm) had entered into the Purchase and Sale Agreement contract "as an agent for Killian as an undisclosed principal[.]" *Id.* (assignment, p.1). The document further recited that CB was now assigning "all liability pursuant to" the Purchase and Sale Agreement to Killian Pacific, LLC (a Washington limited liability company) "and/or Assigns." *Id.* The assignment was not, and could not, have been to Plaintiff and Respondent 16 Street Investors, LLC, because that entity did not exist at the time of the formation of the Purchase and Sale Agreement contract.¹¹

¹¹ Lance Killian testified that 16th Street Investors was formed in May 2006. *See* RP (I) 19-24. The trial court nonetheless found that "16 Street manifested its intent to accept all terms of the PSA offer when it directed Bernhardt to sign the PSA offer without modifications[.]" *see* Finding of Fact No. 3 (CP 929), even though -- as Lance Killian himself acknowledged -- 16th Street Investors would not come into existence until

Consistent with the Killians' intent to keep their identity a secret, the assignment expressly provided that its terms were not to be disclosed to Morrison prior to closing. *Id.* (numbered paragraph 3, "Confidentiality"). There is no dispute that neither the fact of this assignment, nor its terms, were disclosed to Morrison at the time he entered into the Purchase and Sale Agreement contract.

C. The Sale Fails to Close, When the Attorneys Fail to Reach Agreement on a Final Form for Morrison's Option.

Following the signing of the Purchase and Sale Agreement contract, the due diligence process proceeded apace.¹² In April of 2006, Bernhardt Associates gave notice of an intention to close on May 29, 2006 (subsequently moved to May 30, because May 29 turned out to be Memorial Day). *See* Ex. 9 (copy of letter from Bernhardt Associates to Morrison, giving notice that "Buyer" intended to close on May 29); Ex. 12 (copy of e-mail from Killian Pacific to Hornberger, sent May 10, 2006,

eight months after the formation of the Purchase and Sale Agreement contract. Morrison respectfully submits that this finding (and several others which describe actions as taken by 16th Street Associates when that entity did not yet exist) cannot withstand substantial evidence scrutiny, and should be given no weight by this Court.

¹² Thus, on November 29, 2005, Bernhardt Associates gave notice that it ("Buyer") had satisfied the agreement's "Inspection Contingency," *see* Ex. 6 (copy of letter from Bob Bernhardt to Morrison), and on December 9, 2005, Bernhardt gave notice that it ("Buyer") had determined that no "Permitted Exceptions" would be required regarding title. *See* Ex. 7 (copy of letter from Bob Bernhardt to Morrison). Morrison notes that, throughout this process, Bernhardt Associates continued to claim the status of buyer even though the firm had already assigned its rights to the Killians.

2:53 p.m., noting the need to move the closing to May 30 due to the holiday).

On May 24, 2006, Ms. Jennifer Lyke of Chicago Title (the escrow company handling the closing) sent an e-mail to Morrison, attaching copies of the closing documents "for [Morrison's]...review." See Ex. 18 (copy of e-mail, and attachments). Morrison reviewed the documents, and noted the absence of any proposed form of agreement setting forth the terms and conditions of his residential unit option. RP (II) 240:16-241:17 (Morrison). Morrison contacted Ms. Lyke to express his concern about the missing option agreement. RP (II) 241:18-241:5 (Morrison).

In response, Mr. David Weiner, the Killians' attorney, prepared an "acknowledgment" of Morrison's option:

16 STREET INVESTORS, LLC, having acquired the West 42 feet of Lot 2 in Blocks 3, 4, 5, 6 and 7, BLOCK 71, CITY OF VANCOUVER (commonly known as EAST VANCOUVER) according to the Plat thereof recorded in Volume "C" of Plats, Page 070, Records of Clark County, Washington, hereby acknowledge [sic.] the provisions of that certain Memorandum attached hereto and by this reference incorporated herein. 16 Street Investors, LLC agrees that if it includes *residential units* in the construction and development of the aforementioned property, Joseph W. Morrison will be provided the option to acquire a unit as described in the attached Memorandum.

Ex. 20 (copy of acknowledgment) (emphasis added) (copy attached as Ex. F of the Appendix to this Brief). Weiner signed the acknowledgment, and

transmitted it to Ms. Lyke with a cover letter stating that he had signed the acknowledgment "as Manager of 16 Street Investors, LLC in connection with the Morrison Option" and asserting that "[n]othing in this Memorandum [i.e., the Call memorandum] requires the recording of any document at this time." *See id.* (copy of cover letter).

Ms. Lyke promptly transmitted the Acknowledgement and cover letter to Morrison. *See* Ex. 21 (e-mail from Lyke to Morrison, May 25, 2006 1:55 p.m.). The Acknowledgment did not adequately address Morrison's concerns, and on June 5¹³ Morrison's attorney Greg Call sent Jim Justin a proposed form of an option agreement, along with a cover memorandum setting forth Morrison' concerns and inviting the Killian interests' counsel (Mr. Weiner) to contact Call directly about the matter. *See* Ex. 23 (copy of fax transmittal to Justin, enclosing cover memo and draft of option agreement) (copy of draft option agreement attached as Ex. G of the Appendix to this Brief); *see also* Finding of Fact No. 12 (CP 930)

¹³ By this time, the closing date of May 30 had come and gone. Mr. Call testified to his understanding that this event triggered a need for a formal extension of the Purchase and Sale Agreement (while making clear that Morrison was prepared to agree to such an extension if agreement could be reached on the terms of Morrison's option). *See* RP (III) 545:10-24; *see also* Finding of Fact No. 12 (CP 930) (stating that after May 30, "defendant [i.e., Morrison] was taking the position that the PSA expired on May 30, 2006, when closing did not take place"). Morrison will address the impact of this development on his rights and obligations pertaining to the Killians' hoped-for Section 1031 exchange, in the Argument section of this Brief.

(noting the provision of the draft option agreement on June 5, and citing to Ex. 23).

Weiner responded with a handwritten mark-up, followed a few days later with a red-line document clarifying the handwritten changes. *See* Ex. 24 (handwritten mark-up, sent by fax) (copy of mark-up attached as Ex. H of the Appendix to this Brief); Ex. 26 (red-line document, sent by e-mail attachment) (copy of red-line attached as Ex. H of the Appendix to this Brief). A comparison of these documents shows that the Killians had acceded to having the option agreement recorded. Morrison and the Killians, however, were at odds over the following two points:

- Consistent with Weiner's use of the term "residential units" in his May 25 acknowledgment, Call's draft used the term "residential unit" to describe Morrison's option right. *See* Ex. 23 (draft "Real Estate Purchase Option" document, referring several times to "residential unit..." in § 2, "Grantee's Right to Purchase"). Weiner, however, modified all of these references to limit Morrison's right to a "residential *condominium* unit." *See* Ex. 26 (red-line version of Call's draft, showing revision of all references to "residential unit..." to "residential condominium unit...").
- Call's draft provided that Morrison's option right would be triggered "if Option Grantor or its successors or assigns elects to develop or redevelop the real property...under any plan that includes residential

housing[.]" See Ex. 23 (draft option document, introductory paragraph). Besides inserting the term "condominium," Weiner also *struck* the phrase "or redevelop" and *inserted* the word "initially" before the word "elects," so that Morrison's option right would be triggered only "if Option Grantor, or its successor or assigns, *initially* elects to develop the real property...under any plan that includes residential condominium units." See Ex. 26 (red-line version of Call's draft, showing the deletion of "or redevelop" by a strike-through line and the addition of the word "initially") ("initially" underscored in the original).

Thus, under the Killians' version of the option, Morrison would have had an option right only to a condominium, and only if the initial development of the property included condominiums. If the initial development did not include condominiums, or if it included residential units other than condominiums (e.g., apartments, which might later be converted to condominiums), Morrison would receive nothing.

What the Killians did not disclose was that -- as their counsel knew -- *they had no intention of building residential condominium units on the property.* See Weiner Dep. at 39:4-10. Had Morrison agreed to the Killians' version, he would have been effectively (if unknowingly) giving up his dream of a view residence with easy access to downtown Vancouver.

In the event, Morrison would not agree to the Killians' version of the option agreement because it placed unacceptable limitations on his option rights, and on June 20 he terminated further negotiations with the Killians because he was not prepared to sell without an acceptable option. *See* Ex. 36 (copy of memorandum from Greg Call to June 20, 2000, stating that "Mr. Morrison wishes to terminate negotiations with 16th Street LLC" because "it appears that the parties cannot agree on certain material terms for the option to be provided to Mr. Morrison under the earnest money agreement"); *see also* Finding of Fact No. 13 (CP 930) (noting that the parties "were unable to reach agreement" on a "mutually acceptable option agreement") & No. 15 (CP 931) (noting that "[d]efendant terminated all negotiations concerning the transaction on June 20," citing Ex. 36).

D. The Section 1031 Exchange Imbroglia.

The Purchase and Sale Agreement contract provided that each party should "cooperate" in the completion of a Section 1031 property exchange "[i]f either Buyer or Seller intends to be a part" of such an exchange. *See* Ex. 3 (numbered paragraph 4.d of the Bernhardt Associates form, found on page 3 of the form). Morrison received no notice that "the Buyer" would in fact pursue a 1031 exchange until shortly before the scheduled closing date of May 30, when he received the proposed closing documents from escrow agent Chicago Title. *See* Ex. 18 (copy of e-mail from

Jennifer Lyke to Morrison, May 24, 2006 12:16 p.m., attaching copies of closing documents); *see also* Finding of Fact No. 9 (noting that these documents included "material making clear that the buyer was going to participate in a 1031 exchange," citing Ex. 18).¹⁴

Moreover, while Morrison received notice shortly before the scheduled closing date of May 30 that the buyer intended to pursue a 1031 exchange, he did not receive notice until the afternoon of Friday, June 16, that if the transaction did not close by the following Tuesday, June 20, the buyer would not be able to consummate its 1031 exchange (and would lose the tax benefits associated with such an exchange). *See* Ex. 30 (cut-and-paste of e-mail from Weiner to Call, June 16, 2006, 2:18 p.m., stating that "Tuesday [i.e., June 20] is too late as this property is the 2nd [sic.] leg of an exchange and Tuesday is the 180th day").¹⁵ And Morrison received

¹⁴ This transmittal also appears to be the first notice Morrison received that an entity called "16th Street Investors, LLC" would be the actual purchaser of his property. *See* Real Estate Excise Tax Affidavit, listing "16th Street Investors, LLC" as the "Buyer/Grantee," part of the documents e-mailed to Morrison on May 24 (copy introduced into evidence as part of Ex. 18).

¹⁵ Although the record reflects a flurry of telephone and e-mail communications relating to the option agreement and attempting to close "as soon as possible" due to the upcoming exchange deadline, *see* Exs. 28, 30, 31 and 32 (copies of e-mails, in some cases with later handwritten notations regarding telephone calls and messages), the trial court determined that Morrison did not receive notice of the buyer's need to close by June 20, in order to preserve the buyer's 1031 exchange, until attorney Weiner's e-mail to attorney Call, sent the afternoon of June 16, which specifically raised the issue. *See* Finding of Fact No. 14 (CP 930) (noting that "[on June 16, 2006, Mr. Weiner informed Mr. Call that the transaction needed to close by June 20, 2006, as that was the deadline for the buyer's 1031 exchange," citing Ex. 30).

this notice in the context of a demand from the Killians that he accept their version of the option agreement -- a version that (as previously discussed) limited his option rights to a condominium, which would be triggered only if condominiums were included in the property's initial development. Faced with this ultimatum, Morrison chose instead to terminate the transaction.

III. Standard of Review

A trial court's findings of fact are reviewed for substantial evidence. *E.g., Stieneke v. Russi*, __ Wn. App. __, __ P.3d __, 2008 WL 2582977, *9 (Div. II, July 1, 2008) (citation omitted) (holding substantial evidence did not support the trial court's factual findings on plaintiff's breach of contract claim). The court's conclusions of law are reviewed *de novo*. *Id.* (citation omitted). A trial court's determination to order specific performance of a real estate purchase contract is reviewed for an abuse of discretion. *Paradiso v. Drake*, 135 Wn. App. 329, 335, 143 P.3d 859 (Div. II 2006), *rev. denied*, 160 Wn.2d 1024, 163 P.3d 794 (2007) (citations omitted) (affirming decree). A trial court abuses its discretion when it "bases its ruling on an erroneous view of the law." *Hoskins v. Reich*, 142 Wn. App. 557, 566, 174 P.3d 1250 (Div. II 2008) (finding error of law). The underlying question of law is reviewed *de novo*. *Id.* (citation omitted).

IV. Argument

A. The Trial Court Erred in Ordering Specific Performance of the Purchase and Sale Agreement Contract, Based on the Supposed "Intent" of Someone Who Was Not -- Indeed, Who Took Care Not to Be -- A Party to the Contract, and Who Only Later Was Assigned the Buyer's Rights Under the Contract. The Parties to the PSA Contract Manifested An Intent, Confirmed by Their Mutual Contemporaneous Understanding, that Morrison Would Not be Obligated to Sell His Property Unless Agreement Was Later Reached on the Terms for Granting Morrison an Option for a Residential Unit. The Parties Failed to Reach Agreement on Those Terms, And Morrison Therefore Was Entitled To Terminate the Transaction.

The trial court found the Purchase and Sale Agreement contract to be enforceable against Morrison. The court recognized that the PSA could only be enforced if the Call memorandum's discussion of Morrison's option did not (as the trial court put it) "constitute or contain a condition precedent that either party would prepare a separate option agreement prior to closing." *See* Conclusion of Law No. 4 (CP 931). To reach the conclusion that the memorandum's option agreement discussion did *not* "constitute or contain [such] a condition precedent," the court gave controlling effect to the Killians' claim that the memorandum's discussion constituted the option itself, and that no further agreement was necessary:

16 Street, through the Killians, intended that the purchase and sale agreement be accepted as written, and as the parties' binding contract. *Their intent is controlling.* The objective representations that were made by defendant in the PSA offer were agreed to by the Killians, and are therefore binding on the parties.

Conclusion of Law No. 6 (CP 932) (emphasis added).

But the Killians were not parties to the PSA. Accordingly, their "intent" concerning any provision of the PSA (including the Call memorandum discussion of Morrison's option) was entitled to no weight in determining the intended import of any provision of the PSA (including the discussion of Morrison's option). Moreover, once the Killians' views are disregarded (as they should be), the remaining record compels the conclusion that the parties to the PSA intended that the sale of the Morrison property could not close without further agreement on the terms of the Morrison option. And since no such agreement was reached, the trial court should have concluded that Morrison was entitled to terminate the transaction to sell his property, and that the Killians were not entitled to a decree of specific performance.

1. The Killians' Interpretation of the Purchase and Sale Agreement Contract was Legally Irrelevant to Determining Whether the Parties to that Contract Intended that The Terms of Morrison's Option Were to Be the Subject of Additional Negotiation, Because the Killians Were Not -- and By Their Own Choice -- Parties to the Contract.

Morrison does not dispute that the trial court was entitled to find, as a matter of substantial evidence, that the Killians understood the PSA to be a final and complete agreement, and particularly that the Call memorandum's discussion of Morrison's option constituted a final and complete resolution of the scope of Morrison's option rights. Be that

understanding as it may have been (and as the trial court found it to be), the issue is whether that understanding -- that "intent," as the trial court put the matter -- was legally relevant to determining the import of any provision of the Purchase and Sale Agreement contract, and particularly of the Call memorandum's discussion of Morrison's option rights.

And the answer to that question must be no, under the most basic principles of contract law. As our state Supreme Court has put the matter, "the touchstone of contract interpretation is the intent *of the parties*." *Scott Galvanizing, Inc., v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990); *Bonneville Power Administration v. Washington Public Power Supply System*, 952 F.2d 1497, 1505 (9th Cir. 1992) (applying Washington law)) (emphasis added). By treating the Killians' (so-called) "intent" as "controlling," the trial court violated this touchstone rule. Compare *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 497, 7 P.3d 861 (Div. II 2000), *rev. denied*, 143 Wn.2d 1003, 21 P.3d 292 (2001) (affirming the trial court's decision to strike the declaration of a witness who presumed to testify about the intent of the parties, "because he was not a party to the...[c]ontract"). The Killians, having worked so assiduously and successfully to "stay off" the Purchase and Sale Agreement contract,

should have been compelled to accept the bitter half of their efforts -- that their private interpretation of that contract was entitled to be given no weight in determining what the parties intended by any term of that contract, including what they intended when they made Greg Call's memorandum discussion of Morrison's option a part of their contract.

2. The Balance of the Record Before the Trial Court Should have Compelled the Conclusion that the Parties to the Purchase and Sale Agreement Contract Intended, by Their Attachment of Greg Call's Memorandum Discussion of Morrison's Option, to Acknowledge That Agreement Would Need to be Reached on the Terms of Such an Option In Order to Form a Final and Binding Contract for the Sale of Morrison's Property.

Because the trial court erroneously treated the Killians' intent as controlling, the court failed to determine what the *parties* to the Purchase and Sale Agreement contract intended when *they* attached Greg Call's memorandum (including its discussion of Morrison's option) to the Bernhardt Associates' "Purchase and Sale Agreement" form.¹⁶ To do so,

¹⁶ The trial court concluded that, because Bernhardt Associates had entered into the Purchase and Sale Agreement contract pursuant to an agency agreement with the Killians, under which Bernhardt would sign the PSA and then promptly assign its rights over to the Killians, Bernhardt's understanding of the agreement's terms was rendered irrelevant to determining the scope of the Killians' rights and obligations as an assignee of Bernhardt's rights and obligations. See Conclusion of Law No. 2 (CP 931). This conclusion ignores that neither the fact of Bernhardt's agency relationship with the Killians nor its assignment to its rights under the PSA to the Killians had been disclosed to Morrison, as well as the well-established rules of agency law which hold that an undisclosed principal is bound by the terms and conditions of the contract made for the principal by its agent. See Res. (2d) of Agency, § 186 ("An undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority"); Res. (2d) of Contracts, § 336 (2) ("The right of an assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment...").

the court should have begun with the words of that agreement, and then read those words in the context of the transaction at hand. As Justice Utter put the matter, in his opinion for our Supreme Court in *Scott Galvanizing (supra)*:

In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

120 Wn.2d at 580 (other citations omitted).

The words of attorney Call's discussion of Morrison's option do not favor the Killians' preferred reading of that discussion. The paragraph opens with the statement that Mr. Morrison "would like an option to purchase[.]" *See* Ex. 4. One would think the future-oriented statement, that Morrison "would like" an option, would leave little doubt that the parties were committing to see if they could meet that condition by crafting an option to Morrison's satisfaction. The Killians insist that this statement, indicating that Morrison wanted to see an option included in any sale of his property, somehow morphed into the option *itself* just because it was initialed and then attached to Bernhardt Associates'

purchase and sale agreement form. *See* L. Killian Dep. at 26:22-27:15 (Ex. 73). This attempted "spin" on what the parties intended, when they made the Call memorandum a part of the Purchase and Sale Agreement contract, is belied by the actual circumstances surrounding the making of the Purchase and Sale Agreement contract. For (and as discussed more fully in the Statement of the Facts) all of the witnesses to the formation of that agreement -- Morrison, Justin, Hornberger, and Bernhardt -- testified that the Call memorandum discussion of the Morrison option would have to be supplemented by actual option terms (presumably worked out by the lawyers for the parties) before the deal could close.¹⁷

Moreover, the Killians' subsequent conduct, as an assignee of Bernhardt Associates' contract rights, contradicts their claim that the Call memorandum's option discussion was intended to constitute the final and definite statement of that option's terms. As Morrison has previously discussed in the Statement of Facts, the Killians insisted that attorney Call's draft of a recordable option agreement be modified so as to limit all references to "residential unit" to "residential condominium unit," *and* to

¹⁷ The trial court's memorandum ruling criticized Bob Bernhardt's recollection and instead placed great weight on the contrary view of the Killians' attorney, David Weiner. *See* Memorandum Ruling at 8-9 (CP 875-76) (praising Weiner) & 10-11 (CP 877-78) (criticizing Bernhardt). Yet, as Lance Killian admitted, Weiner played no role in the formation of the Purchase and Sale Agreement contract. *See* L. Killian Dep. at 13:20-14:12 (Ex. 73 (admitting that Weiner "didn't have any involvement" in the transaction, other than drafting the assignment document, prior to May 2006)).

require that the option right would only be triggered if the property was initially developed with such units. Call's memorandum discussion, however, contained no reference whatsoever to a right limited to how the property was "initially" developed. And while Call's memorandum discussion does use the terms "condominium" and "residential unit," the notion advanced by the Killians -- that this plainly and unambiguously shows that only a right to a residential *condominium* unit was intended -- is belied by the ordinary meaning of those terms, which supports giving a broader scope to the intended option based on the broader meaning of the term "residence." *See, e.g.*, the Merriam-Webster Online Dictionary definitions for "residence" (which implicates the expansive meaning of "dwelling") and "condominium" (which is limited to a unit in a multiunit structure that in turn is owned in common).¹⁸

In short, the Killians own conduct during the (failed) effort to reach agreement on the form of a recordable option agreement confirms what all of the rest of the relevant evidence indicates: that the Morrison-Bernhardt Associates Purchase and Sale Agreement contract was not intended to be a

¹⁸ The trial court apparent solution to this problem was to invoke the hoary rule of construction of *contra proferentem*, and apply it against Morrison. *See* Conclusion of Law No. 4 (CP 931-32) {holding that any ambiguity in the memorandum's language "must be construed against defendant, as it was defendant, his real estate agent, and his attorney who prepared the PSA offer"}. In doing so, the trial court ignored both the overwhelming weight of the relevant evidence of intent, and our Supreme Court's caution

complete and enforceable agreement for the sale of Morrison's property. The parties instead intended that any obligation on the part of Morrison to transfer his right, title and interest in his property was conditioned on the parties reaching agreement on the form of an option, consistent with the concepts set forth in Greg Call's memorandum discussion. The Killians, as the assignee of Bernhardt Associates' rights, sought to emerge from the negotiations over that option with an agreement that would satisfy Morrison, while actually leaving them free to develop the property in a fashion that would render Morrison's option a substantive nullity. In the end, the Killians only succeeded in convincing Morrison that no satisfactory option agreement could be obtained from these particular would-be buyers. With his contractual condition to closing unmet, Morrison exercised his rights to cancel the sale.

3. At Bottom, The Purchase and Sale Agreement Contract Was Nothing More than an "Agreement to Agree," And Morrison Was Entirely Within his Rights to Cancel the Sale of His Property When the Parties Failed to Agree on the Terms Of an Option Needed to Give Rise to a Contract that Could Have been the Proper Subject for a Decree of Specific Performance.

Because the parties intended that any obligation to close the deal was conditioned on a subsequent agreement on the form of a Morrison's option, their Purchase and Sale Agreement contract must be understood as

against giving too great a weight to such maxims of construction. *See Berg v. Hudesman*, 115 Wn.2d 657, 664-665, 801 P.2d 222 (1990) (citations omitted).

nothing more than an "agreement to agree," which could not be the basis for an action *either* for damages or specific performance. Our Supreme Court's recent decision in *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), is both instructive in its explication of the law in this area, and controlling given the similarity of its facts to the facts of this case.

Keystone, like this case, involved a dispute between the owner of real property and a would-be buyer of that property. Xerox had decided to sell and lease back a facility it owned in Tukwila, Washington. 152 Wn.2d at 174. Xerox's broker sent information packets to prospective buyers, requesting letters of intent containing a proposed purchase price and key deal points. *Id.* *Keystone*, a development company, expressed interest, and negotiations (through the parties' brokers) ensued. *Id.* at 174-75. Eventually, Xerox informed *Keystone* that Xerox was "prepared to negotiate a Purchase and Sale Agreement...subject to two modifications" of *Keystone's* latest proposal. *Id.* at 175. *Keystone's* president responded by acknowledging and accepting the modifications. *Id.* When Xerox did not go through with a sale to *Keystone*, *Keystone* sued Xerox for damages, claiming (in relevant part) that *Keystone's* acceptance of Xerox's proposed modifications obligated Xerox to prepare a purchase and sale agreement. *Id.*

Writing for a unanimous court, Justice Chambers began by "distinguishing between three different but similar types of agreement":

The first type of agreement is an agreement to agree. An agreement to agree is "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete." *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957). The second type of agreement is an agreement with open terms. Under an agreement with open terms, the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source, such as the Uniform Commercial Code. The third type of agreement is a contract to negotiate. In a contract to negotiate, the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time.

Keystone, 152 Wn.2d at 175-76. The immediate issue before the court was whether Keystone could establish that a contract to negotiate had been formed, and if so whether Washington would recognize such a contract. The Supreme Court determined that it need not decide whether to recognize the enforceability of such contracts, because Keystone had only established that the parties had an agreement to agree, and agreements to agree "are unenforceable in Washington." *See id.* at 176 (citing *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957)).

Here, too, the relevant record establishes that Morrison and Bernhardt Associates entered only into an agreement to agree. Indeed, this case is the mirror image of *Keystone*. In *Keystone*, the parties had

resolved the question of conditions (Keystone accepted Xerox's "subject to" demand of certain "modifications" to its proposal), but had yet to agree on the terms of the overall purchase and sale agreement. Here, Morrison and Bernhardt Associates had agreed on the terms of the overall purchase and sale agreement, while recognizing that further negotiations would be required to come to an agreement on the form of Morrison's option, and that a satisfactory resolution of this effort was a material condition to closing the sale. The substantive outcome, however, should be the same in both cases. In the words of our Supreme Court in *Keystone*, Morrison and Bernhardt Associates had agreed "to do something which require[d] a further meeting of the minds of the parties and without which it [i.e., their overall agreement] would not be complete." *See* 152 Wn.2d at 176.¹⁹ And just as the agreement to agree between Keystone and Xerox could not be enforced against Xerox, so the agreement to agree between Morrison and Bernhardt Associates cannot be enforced against Morrison by Bernhardt's assignee, the Killians.

This conclusion is of particular force in this case, since the legal deficiencies in "agreements to agree" make them especially inappropriate

¹⁹ Even if one could somehow find that the Morrison-Bernhardt Associates agreement was sufficiently definite to constitute more than a mere "agreement to agree," the requirement of a satisfactory option agreement would then become a condition precedent to Morrison's obligation to perform, and the failure to reach agreement on that

as the subject of a suit in equity for specific performance. To be the proper subject of a decree for specific performance, the party seeking such relief must offer "clear and unequivocal evidence...that leaves no doubt as to the terms, character, and existence of the contract." *E.g., Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993 (reversing decree of specific performance for lack of definiteness of contract terms). Here, the only thing *not* "left in doubt" by the relevant record is: (1) these parties had agreed that they needed to reach a further agreement on an option (in order to have an enforceable agreement); and (2) the would-be seller and the assignee of the would-be buyer subsequently failed to do so. Under these circumstances, the trial court decision to issue a decree compelling Morrison to transfer all of his right, title, and interest in his Vancouver property to the Killian interests was a manifest abuse of discretion and should be reversed.²⁰

B. The Trial Court Also Erred in Awarding Damages to the Killian Interests for the Failure of Their Planned Section 1031 Exchange.

The trial court's award of damages to the Killians for the failure of their planned Section 1031 exchange fails for two reasons.

option would excuse Morrison's performance. *See, e.g., Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964) (citation omitted).

First, any duty to cooperate that Morrison could have owed relating to that exchange was derivative of the Purchase and Sale Agreement contract. Yet since that agreement was nothing more than an agreement to agree, Morrison's duty to cooperate never ripened into anything beyond an inchoate potentiality.²¹

Second, even assuming (*arguendo*) that Morrison's duty to cooperate could somehow be deemed separately enforceable, the trial court should have found no breach of that obligation on the record before it. It is undisputed that Morrison did not learn of any actual intent by the Killians to pursue a 1031 exchange until just days before the scheduled May 30 closing, and -- even more important -- did not learn of the Tuesday, June 20 deadline for effecting the exchange until the afternoon of Friday, June 16. A duty to cooperate cannot reasonably be said to have been breached when the party to whom the duty is owed does not give notice of the need for cooperation until the very last minute, and also

²⁰ It follows, as well, that if the Killians may not enforce the agreement because it is nothing more than an "agreement to agree," Bernhardt Associates may not collect a commission for a sale that Morrison was not obligated to close.

²¹ Moreover, the Killians had allowed the closing date of May 30 to pass by their initial insistence that no recordable option agreement was even required. And contrary to Lance Killians' evident belief that the closing date was not a material term, *see* L. Killian Dep. at 85:9-22 (Ex. 73), the "time is of the essence" clause of the Purchase and Sale Agreement contract (*see* last sentence of numbered paragraph 7 of the Bernhardt Associates form, at page 4 of the form (Ex. 3)), was strictly enforceable under long-established Washington law. *See, e.g., Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968).

presumes to couple that demand for cooperation with a separate demand for acquiescence on an entirely unrelated matter. Even if this Court should determine to affirm the decree of specific performance, this Court should vacate the award of damages for the failed 1031 exchange, because the failure of that transaction cannot fairly be blamed on any breach by Morrison of any duty to cooperate with effecting the exchange.

V. Request for Attorney's Fees Under RAP 18.1

The trial court awarded the Killians their attorney's fees and costs, pursuant to the prevailing party provisions of the Purchase and Sale Agreement contract. *See* Conclusion of Law No. 13 (CP 934). Morrison is entitled to recover the fees and costs he has incurred in having to defend and ultimately prevail against the Killians' claims made under the putative authority of that agreement. *E.g., Herzog Alum., Inc. v. General Am. Windows Corp.*, 39 Wn. App. 188, 196-97, 692 P.2d 867 (1984) (party who successfully defends against a claim on a contract by establishing the absence of an enforceable contract is entitled to an award of attorney's fees under the contract's prevailing party fees clause).

VI. Conclusion

In *McClintock v. Robinson*, 18 Cal.App.2d 577, 64 P.2d 749 (1937), the California Court of Appeal observed that an unidentified principal cannot undo the contract made by the principal's agent, based on the

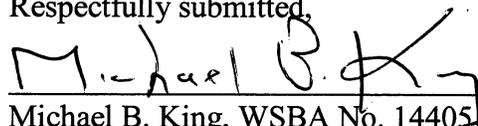
supposed authority of the principal's preferred interpretation of that contract:

The principal must either disaffirm the unauthorized act of the agent or ratify the unauthorized contract in the form his agent made it. He [the principal] cannot reform the contract *to conform to his own secret purposes*.

64 P.2d at 752 (emphasis added). Here, the Killians authorized their agent, Bernhardt Associates, to enter into the Purchase and Sale Agreement contract with Morrison, based on their secret interpretation of the Call memorandum's discussion of Morrison's option rights. The Killians should not have received the benefit of that interpretation. This Court therefore should: (1) reverse the decree of specific performance in favor of the Killians, the award of damages to the Killians, and the award of a sales commission to Bernhardt Associates; and (2) award Morrison his reasonable attorney's fees and costs incurred for having been forced to defend against this action in the trial court and on appeal.

DATED this 25th day of August, 2008.

Respectfully submitted,


Michael B. King, WSBA No. 14405

Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661
Attorneys for Appellant

APPENDIX

List of Exhibits

Exhibit A – Findings of Fact & Conclusions of Law (CP 927-35)

Exhibit B – Judgment (CP 965-68)

Exhibit C – Call Memorandum (Plaintiff's Ex. 4)

Exhibit D – Purchase and Sale Agreement contract document (Plaintiff's Ex. 3)

Exhibit E – Assignment (Plaintiff's Ex. 5)

Exhibit F – May 25 Acknowledgment (Plaintiff's Ex. 20)

Exhibit G – Call draft of recordable Option Agreement (Plaintiff's Ex. 23) (extract)

Exhibit H – Weiner handwritten markup of Call draft (Plaintiff's Ex. 24) (extract)

Exhibit I – Weiner redline of markup of Call draft (Plaintiff's Ex. 26) (extract)

1 The witnesses who testified at trial for plaintiff were: Lance Killian, George Killian,
2 David Weiner, Jim Justin, Bob Bernhardt, and Wally Hornberger. The witnesses who testified at
3 trial for defendant were: Joseph Morrison and Greg Call. Jennifer Lyke testified by deposition.
4 The exhibits which were offered, admitted into evidence, and considered by the Court are set
5 forth in the list on file with the Clerk of the Court.

6 On December 26, 2007, the undersigned Judge issued his written ruling. ~~A true copy of~~
7 ~~this ruling is attached hereto and incorporated herein.~~ (PP)

8 Based on the evidence presented at trial, the Court makes the following:

9 **FINDINGS OF FACT**

10 1. The PSA was entered into by the parties with an effective date of October 10,
11 2005 (Exhibit 4). Defendant signed the PSA on October 22, 2005. Bernhardt executed the PSA
12 as purchaser on November 9, 2005. Bob Bernhardt, of plaintiff Bernhardt, was 16 Street's agent
13 for the sole purpose of signing the PSA on behalf of 16 Street and its principals, the Killians.
14 Mr. Bernhardt had no authority to substitute his own judgment with respect to the PSA or to take
15 any action independently of being directed to do so by the Killians. Bernhardt's status as
16 purchaser under the agreement changed contemporaneously with Bernhardt's signature on the
17 PSA, as Bernhardt immediately assigned the PSA to Killian Pacific, LLC. Exhibit 5. Killian
18 Pacific, LLC ultimately assigned the agreement to plaintiff 16 Street.

19 2. On October 19, 2005, defendant's attorney, Greg Call, wrote a memorandum to
20 defendant's real estate agent, Jim Justin. Exhibit 4. Mr. Justin attached Exhibit 4 to the PSA as
21 Exhibit B "(Condominium Purchase Agreement)" prior to presenting the PSA to defendant for
22 signature and prior to transmitting it to 16 Street for review and signature. Defendant agreed to
23 the memorandum being made a part of the PSA and initialed it, along with every other page of
24 the PSA, at the time he signed the PSA on October 22, 2005. Defendant did this without
25 consulting his attorney. By incorporating the memorandum into the PSA, however, defendant

1 converted the memorandum into a term of the PSA offer. The buyer accepted the PSA offer.
2 without changes or further negotiation, including the Call memorandum, when Bernhardt signed
3 the PSA on November 9, 2005.

4 3. Defendant manifested his intention that the Call memorandum serve as a material
5 term of the PSA offer when he initialed the memorandum after it had been attached to the PSA
6 offer by Mr. Justin. 16 Street manifested its intent to accept all terms of the PSA offer when it
7 directed Bernhardt to sign the PSA offer without modifications, by agreeing to the immediate
8 assignment of the PSA from Bernhardt to Killian Pacific, LLC, by conducting due diligence, and
9 by tendering the earnest money promissory note of \$50,000. This conduct evidences 16 Street's
10 intent that the signing of the PSA constitute the final agreement of the parties.

11 4 16 Street satisfied the inspection contingency in the PSA on November 29, 2005.
12 Exhibit 6.

13 5. 16 Street accepted the preliminary title report pursuant to section 6(b) of the PSA
14 on November 9, 2005. Exhibit 8.

15 6. 16 Street provided defendant with notice on April 10, 2006, that it intended to
16 close the transaction on May 29, 2006. Exhibit 9. The parties agreed to move the closing date to
17 May 30, 2006, because May 29 was a legal holiday.

18 7. Mr. Justin served as defendant's agent alone in the course of this transaction. He
19 was not acting as the buyer's agent. He was not acting as the agent of Bernhardt in connection
20 with this transaction. Accordingly, any information that was given to Mr. Justin by defendant or
21 his representatives is not deemed to be imputed to either Bernhardt or 16 Street, absent evidence
22 that Mr. Justin actually communicated any such information to them.

23 8. There was no communication between the parties regarding any terms of the PSA,
24 including the option set forth in the Call memorandum, until the latter part of May 2006. The
25

1 only thing that had been communicated to 16 Street by defendant regarding his desired option
2 was the Call memorandum itself.

3 9. On May 24, 2006, Jennifer Lyke of Chicago Title provided defendant with copies
4 of the closing documents. Those documents included materials making clear that the buyer was
5 going to participate in a 1031 exchange as part of this transaction. Exhibit 18.

6 10. On May 25, 2006, David Weiner provided defendant, through Ms. Lyke, with a
7 written document acknowledging defendant's option to acquire a residential unit pursuant to the
8 Call memorandum. Exhibit 20. Mr. Weiner provided this acknowledgement as manager of 16
9 Street. He also served as counsel to 16 Street in May and June 2006 in connection with this
10 transaction.

11 11. Within a few days before the May 30, 2006, closing date, Mr. Call and
12 Mr. Weiner spoke by telephone. Mr. Call expressed defendant's desire for a more formal option
13 agreement, and offered to draft a proposed option agreement for Mr. Weiner's review.

14 12. Mr. Call did not provide 16 Street, Mr. Weiner, or the real estate agents with a
15 proposed option agreement by the closing date of May 30, 2006. It was not until June 5, 2006,
16 that Mr. Call provided Mr. Justin with his draft of defendant's proposed option agreement.
17 Exhibit 23. By that time, defendant was taking the position that the PSA expired on May 30,
18 2006, when closing did not take place, and that a mutually acceptable option agreement and an
19 extension agreement would be required in order for the transaction to close.

20 13. The parties, through their respective attorneys, attempted to negotiate a mutually
21 acceptable option agreement through the middle of June, 2006. However, they were unable to
22 reach agreement.

23 14. On June 16, 2006, Mr. Weiner informed Mr. Call that the transaction needed to
24 close by June 20, 2006, as that was the deadline for the buyer's 1031 exchange. Exhibit 30.
25

1 15. Defendant terminated all negotiations concerning the transaction on June 20,
2 2006. Exhibit 36.

3 16. The Killhans' tax liability as the result of the 1031 exchange failing to timely close
4 totaled \$100,689.

5 17. The PSA provided that Bernhardt would be entitled to a commission of six
6 percent of the sales price, three percent to be paid by defendant and three percent to be paid by
7 16 Street. Defendant's share of that commission is \$17,400.

8 **CONCLUSIONS OF LAW**

9 1. Because Mr. Justin was not Bernhardt's agent for the purposes of the transaction
10 at issue, information known to Mr. Justin is not imputable to Bernhardt under the principle of
11 implied knowledge through agency relationship.

12 2. Because Bernhardt was 16 Street's agent for the sole purpose of signing the PSA
13 on behalf of 16 Street and its principals, neither Bernhardt's knowledge nor his understanding of
14 the PSA are imputable to or binding upon 16 Street or its principals.

15 3. The Call memorandum, Exhibit 4, became a term of the PSA offer when it was
16 attached to the PSA offer by Mr. Justin and initialed by defendant. Once the buyer accepted the
17 PSA offer, including the Call memorandum, the offer contained all of the required elements of a
18 purchase and sale contract. Among other terms, 16 Street was entitled to rely upon sections
19 22(a) and 22(b), consisting of an integration clause and a provision that the terms of the PSA
20 would not be deemed to merge in the deed at closing.

21 4. The Call memorandum does not constitute or contain a condition precedent that
22 either party would prepare a separate option agreement prior to closing. The PSA does not
23 contain language communicating an intent by the parties that there would be an additional option
24 agreement created in the future. If there is any ambiguity in that regard in the Call
25 memorandum, such ambiguity must be construed against defendant, as it was defendant, his real

1 estate agent, and his attorney who prepared the PSA offer. Similarly, the cover page to the PSA
2 (entitled "Exhibit B. (Condominium Purchase Agreement)") supports an interpretation that the
3 Call memorandum was intended to be the option agreement.

4 5. 16 Street, through the Killians, intended that the purchase and sale agreement be
5 accepted as written, and as the parties' binding contract. Their intent is controlling. The
6 objective representations that were made by defendant in the PSA offer were agreed to by the
7 Killians, and are therefore binding on the parties.

8 6. There is no statutory or otherwise legally required form for an option agreement.
9 If there is an offer and acceptance, with adequate consideration, a contract for an option may be
10 formed. The PSA, which included the Call memorandum, created a legal obligation on the part
11 of defendant to sell the property at issue, and a legal obligation on the part of 16 Street to sell to
12 defendant a condominium or residential unit, if 16 Street chose to develop condominiums or
13 residential units on the property, and if defendant then chose to purchase a condominium or
14 residential unit. The PSA constitutes a binding and specifically enforceable contract, including
15 the Call memorandum. If 16 Street develops the property with condominiums or residential
16 units, and if defendant elects to purchase such a condominium or residential unit, 16 Street may
17 demand a cash sale. The PSA contains the necessary terms for a cash sale option, those being a
18 legal description and a method of determining the purchase price. Other terms which may be
19 necessary are matters that can be determined by resort to common practices.

20 7. The right to an option, as proposed by defendant and accepted by the buyer, was
21 neither illusory nor a nullity. The PSA, including the Call memorandum concerning an option, is
22 enforceable.

23 8. Defendant's failure to close the purchase and sale transaction constituted a breach
24 of contract on the part of defendant.
25

1 9. The negotiations between the parties which occurred subsequent to the closing
2 date of May 30, 2006, are legally irrelevant. At the close of business on May 30, 2006,
3 defendant was in breach of the PSA. All of the negotiations and discussions that took place after
4 May 30, 2006, are immaterial to the issue of defendant's breach. If those negotiations and
5 discussions have any relevance, they are to establish 16 Street's good faith effort to mitigate
6 damages.

7 10. 16 Street is entitled to a judgment and decree of specific performance of the PSA.
8 Defendant is entitled to an option as set forth in the Call memorandum.

9 11. Defendant was on notice that the buyer was going to pursue a 1031 exchange. He
10 was initially on notice by section 4(d) of the PSA, requiring the parties to cooperate in one
11 another's 1031 exchanges. He was also put on notice when he received the closing documents in
12 May 2006, and was then notified of the exact 1031 exchange deadline on June 16, 2006.
13 Defendant's failure to close the transaction not only constitutes a breach of his contractual
14 obligation to close the transaction, but also a breach of his contractual duty to cooperate in the
15 Killians' 1031 exchange. For purposes of defendant's 1031 exchange liability, 16 Street and the
16 Killians are treated as one and the same. Defendant's breach of contract caused damages to the
17 Killians in the principal sum of \$100,689. They are entitled to a money judgment against
18 defendant in that amount. The Killians are also entitled to prejudgment interest on that sum from
19 December 20, 2006, the date they were joined as parties plaintiff in this case and provided
20 defendant with notice of their claim. Prejudgment interest is awarded through February 1, 2008,
21 in the amount of \$13,473 (407 days, at 12 percent simple interest per annum). Should judgment
22 not be entered by February 1, 2008, prejudgment interest will continue to accrue at the rate of
23 \$33.10 per day.

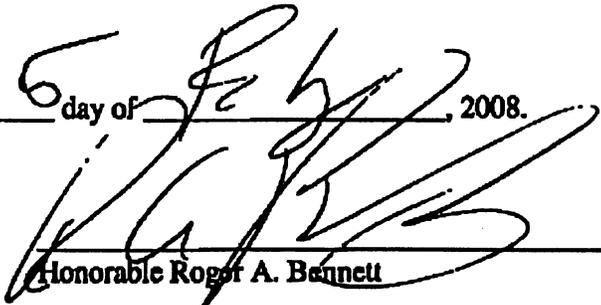
24 12. Defendant's breach of contract also caused damages to Bernhardt for the loss of
25 its commission. Upon performance and closing of the PSA, Bernhardt will be entitled to recover

1 a commission from plaintiff in the amount of \$17,400. That sum represents the damages to
2 Bernhardt which resulted from defendant's breach of contract. Bernhardt is entitled to a money
3 judgment against defendant in the principal amount of \$17,400. Bernhardt is also entitled to
4 prejudgment interest on that sum at the statutory rate from May 30, 2006, through February 1,
5 2008, in the amount of \$3,495.25. Should judgment not be entered by February 1, 2008,
6 Bernhardt will be entitled to additional prejudgment interest through the date of judgment in the
7 amount of \$9.57 per day.

8 13. Plaintiff 16 Street is entitled to an award of reasonable attorney fees. These fees
9 are awardable under section 21 of the PSA. The Court finds that 16 Street is the prevailing party
10 in this matter, that the hourly rates for plaintiff's attorneys are reasonable, that the time spent on
11 this matter by those attorneys is reasonable, and that a total fee award of \$51,350 is reasonable.

12 14. Plaintiffs are also entitled to an award of taxable costs. The costs to be awarded
13 total \$2,580.75.

14 DONE IN OPEN COURT this 15 day of February, 2008.

15
16
17 
Honorable Roger A. Bennett

18 PRESENTED BY:

19 HEURLIN, POTTER, JAHN,
20 LEATHAM & HOLTSMANN, P.S.

21 
22 Stephen G. Leatham, WSBA #15572
23 Of Attorneys for Plaintiffs
24
25

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 8

Heurlin Potter, Jahn, Leatham & Holtmann, P.S.
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PO Box 611
Vancouver, WA 98666-0611

Facsimile

0-000000934

1 APPROVED AS TO FORM; COPY RECEIVED:
2 NOTICE OF PRESENTATION WAIVED

3 HALL & HOLLAND

4 
5 James J. Holland, WSBA #33674
6 Of Attorneys for Defendant

(with reservation of objections to substance)
over objection to incorporation by
reference of memorandum decision
in final findings & conclusions.)

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PLAINTIFF'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 9

Heunin, Potter, John, Leatham & Holmann, P S
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VANCOUVER WA 98101

Facsimile 0-000000935

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FILED

FEB 15 2008

Sherry W. Parker, Clerk, Clark Co.

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

16 STREET INVESTORS, LLC, et al.,)	NO. 06-2-04175-9	
)	08-9-01092-8	A
Plaintiffs,)	JUDGMENT	
)	08-9-01093-6	B
vs.)		
)	08-9-01094-4	C
JOSEPH W. MORRISON,)		
)		
Defendant.)		

MONEY JUDGMENT SUMMARY

Judgment Debtor:	Joseph W. Morrison
Judgment Creditors:	George Killian, Elaine Killian, and Lance Killian A
Attorney:	Stephen G. Leatham
Principal Amount of Judgment:	\$100,689.00
Prejudgment Interest:	\$13,473.00
Reasonable Attorney Fees:	\$-0-
Taxable Costs:	\$-0-
Post-Judgment Interest	12% simple interest per annum on the principal judgment amount of \$100,689.00
TOTAL JUDGMENT:	\$114,162.00

JUDGMENT - J

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 PO Box 611
 Vancouver, WA 98666-0611
 (360) 750-7547

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Exhibit B

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MONEY JUDGMENT SUMMARY

Judgment Debtor: Joseph W. Morrison
Judgment Creditor: Bernhardt Associates, Inc., dba Coldwell Bankor ϕ
Commercial Jenkins-Bernhardt Associates
Attorney: Stephen G. Leatham
Principal Amount of Judgment: \$17,400.00
Prejudgment Interest: \$3,495.25
Reasonable Attorney Fees: \$-0-
Taxable Costs: \$-0-
Post-Judgment Interest 12% simple interest per annum on the principal judgment amount of \$17,400.00
TOTAL JUDGMENT: \$20,895.25

MONEY JUDGMENT SUMMARY

Judgment Debtor: Joseph W. Morrison
Judgment Creditor: 16 Street Investors, LLC \mathcal{C}
Attorney: Stephen G. Leatham
Principal Amount of Judgment: \$-0-
Prejudgment Interest: \$-0-
Reasonable Attorney Fees: \$51,350.00
Taxable Costs: \$3,215.96
Post-Judgment Interest 12% simple interest per annum on the total judgment amount of \$53,930.75
TOTAL JUDGMENT: \$54,565.96

1 **JUDGMENT**

2 THIS MATTER came on regularly for hearing before the undersigned Judge at the
3 request of plaintiffs for the entry of judgment against defendant, following the trial of this matter
4 to the Court on October 29-31 and November 20, 2007. The Court considered the pleadings on
5 file, the Affidavit of Stephen G. Leatham, the Court's written ruling in favor of plaintiffs, the
6 Findings of Fact and Conclusions of Law, and also heard argument from counsel for the parties.
7 Being fully advised in the premises, now, therefore,

8 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

9 1. A decree and judgment of specific performance is hereby entered in favor of
10 plaintiff 16 Street Investors, LLC and against defendant Joseph W. Morrison. This decree
11 requires defendant to close the real estate transaction described in the commercial and
12 investment real estate purchase and sale agreement that is attached to plaintiff's amended
13 complaint as Exhibit A and which is dated October 10, 2005.

14 2. A money judgment is hereby entered in favor of plaintiffs George Killian, Elaine
15 Killian, and Lance Killian, and against defendant Joseph W. Morrison in the principal amount of
16 \$100,689, plus prejudgment interest in the amount of \$13,473;

17 3. A money judgment is hereby entered in favor of plaintiff Bernhardt Associates,
18 Inc., dba Coldwell Banker Commercial Jenkins-Bernhardt Associates and against defendant
19 Joseph W. Morrison in the principal amount of \$17,400, plus prejudgment interest of \$3,495.25;

20 4. Plaintiff 16 Street Investors, LLC is awarded reasonable attorney fees in the
21 amount of \$51,350.00; and

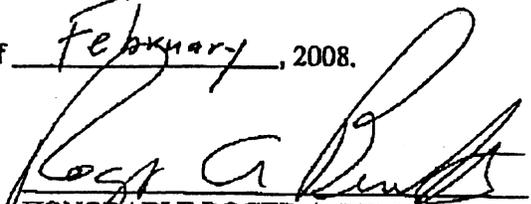
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1 5. Plaintiff 16 Street Investors, LLC is awarded taxable costs and disbursements in the
2 amount of \$3,215.96.

3 DONE IN OPEN COURT this 15 day of February, 2008.

4
5 
6 HONORABLE ROGER A. BENNETT

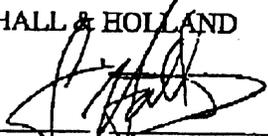
7 Presented by:

8 HEURLIN, POTTER, JAHN,
9 LEATHAM & HOLTMANN, P.S.

10 
11 Stephen G. Leatham, WSBA #15572
12 Of Attorneys for Plaintiffs

13 COPY RECEIVED; APPROVED AS TO FORM;
14 NOTICE OF PRESENTATION WAIVED:

15 HALL & HOLLAND

16 
17 James J. Holland, WSBA #33674
18 Of Attorneys for Defendant

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JUDGMENT - 4

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GREG CALL, P.C.

GREG J. CALL, Attorney
Sara Milliman, Legal Assistant

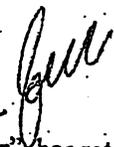
LEGAL COUNSEL

1917 MAIN STREET
VANCOUVER, WA. 98660
PHONE: 360.695.6790
FAX: 360.695.3899

MEMORANDUM

TO: Jim Justin
FR: GREG CALL
DT: October 19, 2005
RE: MORRISON TRANSACTION

Dear Jim:

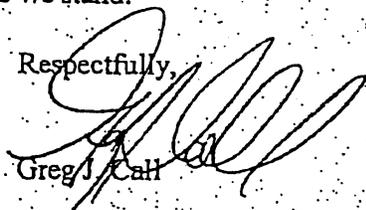
Seller 

Mr. Morrison, herein "Buyer", has retained me to consult with him in regard to the offer you tendered regarding the purchase of his property on "E" Street in Vancouver. He is agreeable to a purchase price of \$580,000 based upon \$20.00 per square foot, with refundable earnest money in the amount of \$50,000.00 in the form of a check paid into escrow within three (3) days of acceptance by both parties. The balance will be paid in cash at closing subject to instructions consistent with Mr. Morrison's plan to do a 1031 Exchange in this transaction.

As additional consideration, Mr. Morrison would like an option to purchase a condominium if Buyer, at Buyer's election, decides to include residential units in the construction and development of the property. The option would provide for the purchase of one (1) residential unit to be located on an upper level floor and on the south side or on the southwest corner of the building with the square footage of the unit to be the greater of the size of the largest residential unit included in the design or twice the size of the smallest unit planned for the design, but under no circumstances less than 1,600 square feet. The purchase price under the option would be based on Seller's cost per square foot for construction of the selected unit including inside walls, ceilings, windows, plumbing, wiring, ventilation and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings. Buyer and Seller shall agree on a location of electrical outlets, ventilation and plumbing.

The Buyer further agrees to take assignment and delegation of all rights and obligations as landlord and owner of the property upon closing and will indemnify and hold Seller harmless from liability for any claim and costs of defending any claim raised by any tenant, public agency or jurisdiction and any third party. Seller warrants that he has no knowledge or reason to know of any current claims relating to the condition of the property from any tenant, public agency or third party in connection with the condition of the property. Please review these terms with the Buyer or Buyer's agent and let us know where we stand.

Respectfully,


Greg J. Call

c.c.: Mr. Morrison

Handwritten signature and date: Greg Call 10/19/05

Exhibit C

Exhibit D



COLDWELL BANKER COMMERCIAL
BOB BERNHARDT ASSOCIATES
108 E. MILL PLAIN BLVD.
VANCOUVER, WA 98660
BUS. 360.699.4494
FAX 360.699.5136
info@cbnorthwest.com
www.cbnorthwest.com

COMMERCIAL AND INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT

*This has been prepared for submission to your attorney for review and approval prior to signing.
No representation is made by licensee as to its sufficiency or tax consequences.*

Date: October 10, 2005.

The undersigned Buyer, Coldwell Banker Commercial Bob Bernhardt Associates and/or assigns, agrees to buy and Seller agrees to sell, on the following terms, the commercial real estate and all improvements thereon (collectively, the "Property") commonly known as The Morrison Property, in the 500 Block of E. 15/16 Street in the City of Vancouver, Clark County, Washington, legally described on Exhibit A. (Buyer and Seller authorize the Listing Agent or Selling Licensee to insert and/or correct, over their signatures, the legal description of the Property.)

- PURCHASE PRICE.** The total purchase price is Twenty Dollars (\$20.00), per square foot for 29,000 square feet of land, Five Hundred Eighty Thousand & no/100 (\$580,000), including the earnest money, payable as follows (check only one):
 - All cash at closing, including the earnest money, with no financing contingency.
 - All cash at closing, including the earnest money, contingent on new financing under Section 4a below.
 - \$ / % of the purchase price in cash at closing, including the earnest money, with the balance of the purchase price paid as follows (check one or both, as applicable): Buyer's assumption of any underlying note and deed of trust, or real estate contract, under Section 4b below, Buyer's delivery at closing of a promissory note for the balance of the purchase price, secured by a deed of trust encumbering the Property, as described in Section 4c below.
 - Other:

- EARNEST MONEY.** Buyer agrees to deliver the earnest money \$50,000.00 in the form of Cash Personal check Promissory note Other:

If the earnest money is in the form of a promissory note, it shall be due no later than:

- Five days after mutual acceptance.
- Upon removal of the inspection contingencies in Section 5 below.
- Other:

The earnest money shall be held by Selling Licensee Closing Agent.

Buyer shall deliver the earnest money no later than:
after mutual acceptance.

- Upon removal of the inspection contingencies in Section 5 below.
- Other:

Selling Licensee may, however, transfer the earnest money to Closing Agent.

If the earnest money is to be held by Selling Licensee and is over \$10,000, it shall be deposited to: Selling Licensee's pooled trust account (with interest paid to the State Treasurer) A separate interest bearing trust account in Selling Licensee's name. The interest, if any, shall be credited at closing to Buyer whose Social Security or taxpayer ID Number is: If this sale fails to close, whoever is entitled to the earnest money is entitled to interest.

INITIALS: Buyer RS Buyer _____ Seller [Signature] Seller _____
Date 11-9-05 Date _____ Date _____ Date _____



Selling Licensee shall deposit any check to be held by Selling Licensee within 3 days after receipt or mutual acceptance, whichever occurs later. Buyer agrees to pay financing and purchase costs incurred by Buyer. If all or part of the earnest money is to be returned to Buyer and any such costs remain unpaid, Selling Licensee or Closing Agent may deduct and pay them therefrom. Unless otherwise provided in this Agreement, the earnest money shall be applicable to the purchase price and shall be non-refundable except where a condition to Buyer's obligation under this Agreement is not satisfied through no fault of Buyer.

3. EXHIBITS AND ADDENDA. The following Exhibits and Addenda are made a part of this Agreement

- Exhibit A - Legal Description
- Earnest Money Promissory Note
- Promissory Note
- Short Form Deed of Trust
- Deed of Trust Rider
- Utility Charges Addendum
- FIRPTA Certification
- Assignment and Assumption
- Addendum/Amendment
- Back-Up Addendum
- Vacant Land Addendum
- Other Exhibit *3 year RDB 11.9.05*
- None

4. FINANCING.

- a. **Application for New Financing.** If payment of the purchase price is contingent on Buyer obtaining new financing, then Buyer's obligation to close is conditioned upon Buyer accepting a written commitment for financing. Buyer will not reject those terms of a commitment which provide for a loan amount of at least _____ or _____ % of the purchase price, interest not to exceed _____ percent (_____ %) per annum, a payment schedule calling for monthly payments amortized over not less than _____ (_____) years, and total placement fees and points not more than _____ percent (_____ %) of the loan amount. Buyer shall make immediate application for said commitment, pay required costs and make a good faith effort to procure such financing. This Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives Seller written notice that this condition is satisfied or waived on or before _____ (_____) days (60 days, if not completed) following mutual acceptance of this Agreement.
- b. **Assumption of Existing Financing.** If payment of the purchase price includes Buyer's assumption of a note and mortgage or deed of trust, or a real estate contract, Seller shall promptly deliver to Buyer a copy of the underlying debt instrument(s) to be assumed, and Buyer shall be deemed to have approved all of the terms of the debt instrument(s) unless Buyer gives notice of disapproval within five (5) days after receiving such instrument(s). If any of the debt instrument(s) requires the consent of a third party to the assumption by Buyer, then Buyer shall apply for such consent within seven (7) days after receiving the debt instrument(s). Upon Buyer's request, Seller shall assist Buyer by requesting the third party's consent to the assumption on Buyer's behalf. This Agreement shall terminate and Buyer shall receive a refund of the earnest money unless Buyer gives Seller written notice within _____ (_____) days (30 days, if not completed) of receiving the debt instrument(s) stating that such consent is available. Buyer shall pay any assumption fees or other out-of-pocket expenses attributable to the assumption of the underlying indebtedness.
- c. **Seller Financing.** If Seller is financing a portion of the purchase price by promissory note and deed of trust, unless different forms are attached to this Agreement, Buyer shall execute and submit to the Closing Agent: (i) LPB Form No. 28A Promissory Note and the DUE ON SALE and COMMERCIAL PROPERTY optional clauses in that form shall apply; (ii) UCC-1 Financing Statement covering the personal property described in Section 14 below; (iii) LPB Form No. 20 Short Form Deed of Trust; and (iv) CBA Form No. DTR Deed of Trust Rider. The promissory note shall bear interest at the rate of _____ % per annum, and shall be payable as follows (choose one): monthly installments of interest only, monthly installments of \$ _____; equal monthly installments of principal and interest in an amount sufficient to fully amortize the outstanding principal balance at the stated interest rate over _____ years, other _____ Payments shall commence on the first day of the first month after closing and continuing on the same day of each succeeding month until (choose one): _____ months from the date of closing, other _____, on which date all outstanding principal and interest shall be due. The principal

INITIALS: Buyer *RB* Buyer _____ Seller *[Signature]* Seller _____
Date 11.9.05 Date _____ Date _____ Date _____

shall, at Sellers option, bear interest at the rate of _____ % per annum (18% or the maximum rate allowed by law, whichever is less, if not filled in) during any period of Buyer's default. If Seller receives any monthly payment more than _____ days (15 days if not filled in) after its due date, then a late payment charge of \$ _____ / _____ % of the delinquent amount (5% of the delinquent amount if not filled in) shall be added to the scheduled payment. Buyer shall have _____ days (5 days if not filled in) after written notice to cure a default before Seller may declare all outstanding sums to be immediately due and payable.
(Note to Buyer and Seller: If the Property is currently used primarily for agricultural purposes, then a nonjudicial foreclosure/forfeiture remedy is available to Seller only by using a real estate contract and is not available with a deed of trust.)

d. **Section 1031 Like-Kind Exchange.** If either Buyer or Seller intends for this transaction to be a part of a Section 1031 like-kind exchange, then the other party agrees to cooperate in the completion of the like-kind exchange so long as the cooperating party incurs no additional liability in doing so, and so long as any expenses (including attorneys fees and costs) incurred by the cooperating party that are related only to the exchange are paid or reimbursed to the cooperating party at or prior to closing.

5. **INSPECTION CONTINGENCY.** This Agreement shall terminate and Buyer shall receive a refund of the earnest money unless buyer gives written notice to Seller within _____ days (20 days if not filled in) of mutual acceptance of this Agreement stating that Buyer is satisfied, in Buyer's reasonable discretion, concerning all aspects of the Property, including without limitation, its physical condition; the presence of or absence of any hazardous substances; the contracts and leases affecting the property; the potential financial performance of the Property; the availability of government permits and approvals; and the feasibility of the Property for Buyer's intended purpose. If such notice is timely given, the inspection contingencies stated in this Section 5 shall be deemed to be satisfied.

a. **Books, Records, Leases, Agreements.** Seller shall make available for inspection by Buyer and its agents as soon as possible but no later than ten (10) days after mutual acceptance of this Agreement all documents available to Seller relating to the ownership, operation, renovation or development of the Property, including without limitation: statements for real estate taxes, assessments, and utilities; property management agreements, service contracts, and agreements with professionals or consultants entered into by the Seller or any predecessor in title to the Seller; leases of personal property or fixtures; leases or other agreements relating to occupancy of all or a portion of the Property and a schedule of tenants, rents, and deposits; plans, specifications, permits, applications, drawings, surveys, studies and maintenance records; and accounting records and audit reports. Buyer shall determine within the contingency period stated in the preceding introductory paragraph whether it wishes and is able to assume, as of closing, all of the foregoing leases, contracts, and agreements which have terms extending beyond closing. Buyer shall be solely responsible for obtaining any required consents to such assumption. Seller shall transfer the leases, contracts and agreements as provided in Section 17 of this Agreement.

b. **Access.** Seller shall permit Buyer and its agents, at Buyer's sole expense and risk to enter the Property at reasonable times after legal notice to tenants, to conduct inspections concerning the Property and improvements, including without limitation, the structural condition of improvements, hazardous materials (limited to a Phase I audit only), pest infestation, soils conditions, sensitive areas, wetlands, or other matters affecting the feasibility of the Property for Buyer's intended use. Buyer shall schedule any entry onto the Property with Seller in advance. Buyer shall not perform any invasive testing or contact the tenants without obtaining the Seller's prior written consent, which shall not be unreasonably withheld. Buyer shall restore the Property and improvements to the same condition they were in prior to inspection. Buyer agrees to indemnify and defend Seller from all liens, costs, claims, and expenses, including attorneys' and experts' fees, arising from or relating to entry onto or inspection of the Property by Buyer and its agents. This agreement to indemnify and defend Seller shall survive closing. Buyer may continue to enter the Property and interview tenants in accordance with the foregoing terms and conditions after removal or satisfaction of the inspection contingency only for the purpose of re-sale, leasing or to satisfy conditions of financing.

6. **TITLE INSURANCE.**

a. **Title Report.** Seller authorizes Lender and Listing Agent, Selling Licensee or Closing Agent, at Seller's expense, to apply for and deliver to Buyer a standard extended (standard, if not completed) coverage owner's policy of title insurance. If an extended coverage owner's policy is specified, Buyer shall pay the increased costs associated with that policy including the excess premium over that charged for a standard coverage policy, and the cost of any survey required by the title insurer. The title report shall be issued by Chicago Title - Kris Lobb (Pioneer Tower) - Portland Office.

INITIALS: Buyer

OB

Buyer

Seller

Law

Seller

books, records, leases, agreements and other items delivered to Buyer pursuant to this Agreement are accurate and complete; (c) The Property and the business conducted thereon comply with all applicable laws, regulations, codes and ordinances; (d) Seller has all certificates of occupancy, permits, and other governmental consents necessary to own and operate the Property for its current use; (e) There is no pending or threatened litigation which would adversely affect the Property or Buyer's ownership thereof after closing; (f) There are no covenants, conditions, restrictions, or contractual obligations of Seller which will adversely affect Buyer's ownership of the Property after closing or prevent Seller from performing its obligations under the Agreement, except as disclosed in the preliminary commitment for title insurance or as otherwise disclosed to Buyer in writing prior to the end of the inspecting contingency stated in Section 5 above; (g) There is no pending or threatened condemnation or similar proceedings affecting the Property, and except as otherwise disclosed in the preliminary commitment for title insurance as or otherwise disclosed to Buyer in writing prior to closing, the Property is not within the boundaries of any planned or authorized local improvement district; (h) Seller has paid (except to the extent prorated at closing) all local, state and federal taxes (other than real and personal property taxes and assessments described in Section 8 above) attributable to the period prior to closing which, if not paid, could constitute a lien on Property (including any personal property), or for which Buyer may be held liable after closing; and (i) Seller warrants that there are no pending or threatened notices of violation of building, zoning, or land use codes applicable to the Property; and (j) Seller is not aware of any concealed material defects in the Property except . . . Seller makes no representations or warranties regarding the Property other than those specified in this Agreement, Buyer otherwise takes the Property "AS IS," and Buyer shall otherwise rely on its own pre-closing inspections and investigations.

13. **HAZARDOUS SUBSTANCES.** Except as disclosed to or known by Buyer prior to the satisfaction or waiver of the inspection contingency stated in Section 5 above, Seller represents and warrants to Buyer that, to the best of its knowledge: (i) there are no Hazardous Substances (as defined below) currently located in, on, or under the Property in a manner or quantity that presently violates any Environmental Law (as defined below); (ii) there are no underground storage tanks located on the Property; and (iii) there is no pending or threatened investigation or remedial action by any governmental agency regarding the release of Hazardous Substances or the violation of Environmental Law at the Property. As used herein, the term "Hazardous Substances" shall mean any substance or material now or hereafter defined or regulated as a hazardous substance, hazardous waste, toxic substance, pollutant, or contaminant under any federal, state, or local law, regulation, or ordinance governing any substance that could cause actual or suspected harm to human health or the environment ("Environmental Law"). The term "Hazardous Substances" specifically includes, but is not limited to, petroleum, petroleum by-products, and asbestos.

14. **PERSONAL PROPERTY.**

a. This sale includes all right, title and interest of Seller to the following tangible personal property: None That portion of the personal property located on and used in connection with the Property, which Seller will itemize in an Addendum to be attached to this Agreement within ten (10) days of mutual acceptance (None, if not completed). The value assigned to the personal property shall be the amount agreed upon by the parties and, if they cannot agree, the County-assessed value if available, and if not available, the fair market value determined by an appraiser selected by the Listing Agent and Selling Licensee. Seller warrants title to, but not the condition of, the personal property and shall convey it by bill of sale. Buyer shall pay any sales or use tax arising from the transfer of the personal property.

b. In addition to the leases, contracts and agreements assumed by Buyer pursuant to Section 5A above, this sale includes all right, title and interest of Seller to the following intangible property now or hereafter existing with respect to the Property including without limitation: all rights-of-way, rights of ingress or egress or other interests in, on, or to, any land, highway, street, road or avenue, open or proposed, in, on, or across, in front of, abutting or adjoining the Property; all rights to utilities serving the Property; all drawings, plans, specifications and other architectural or engineering work product; all governmental permits, certificates, licenses, authorizations and approvals; all utility, security and other deposits and reserve accounts made as security for the fulfillment of any of Seller's obligations; any name of or telephone numbers for the Property and related trademarks, service marks or trade dress; and guaranties, warranties or other assurances of performance received.

15. **CONDEMNATION AND CASUALTY.** Buyer may terminate this Agreement and obtain a refund of the earnest money, less any costs advanced or committed for Buyer, if improvements on the Property are destroyed or materially damaged by casualty before closing, or if condemnation proceedings are commenced against all or a portion of the Property before closing.

INITIALS: Buyer

RSB

Buyer

Seller

[Handwritten Signature]

Seller

16. **FIRPTA - TAX WITHHOLDING AT CLOSING.** Closing Agent is instructed to prepare a certification (CBA or NWMLS Form 22E, or equivalent) that Seller is not a "foreign person" within the meaning of the Foreign Investment in Real Property Tax Act. Seller agrees to sign this certification. If Seller is a foreign person, and this transaction is not otherwise exempt from FIRPTA, Closing Agent is instructed to withhold and pay the required amount to the Internal Revenue Service.
17. **CONVEYANCE.** Title shall be conveyed by a Statutory Warranty Deed subject only to the Permitted Exceptions. If this Agreement is for conveyance of Seller's vendee's interest in a Real Estate Contract, the Statutory Warranty Deed shall include a contract vendee's assignment sufficient to convey after acquired title. At closing, Seller and Buyer shall execute and deliver to Closing Agent CBA Form No. PS-AS Assignment and Assumption Agreement transferring all leases, contracts and agreements assumed by Buyer pursuant to Section 5a and all intangible property transferred pursuant to Section 14b.
18. **NOTICES AND COMPUTATION OF TIME.** Unless otherwise specified, any notice required or permitted in, or related to, this Agreement (including revocations of offers and counteroffers) must be in writing. Notices to Seller must be signed by at least one Buyer and must be delivered to Seller and Listing Agent. A notice to Seller shall be deemed delivered only when received by Seller, Listing Agent, or the licensed office of Listing Agent. Notices to Buyer must be signed by at least one Seller and must be delivered to Buyer and Selling Licensee. A notice to Buyer shall be deemed delivered only when received by Buyer, Selling Licensee, or the licensed office of Selling Licensee. Selling Licensee and Listing Agent have no responsibility to advise of receipt of a notice beyond either phoning the party or causing a copy of the notice to be delivered to the party's address on this Agreement. Buyer and Seller must keep Selling Licensee and Listing Agent advised of their whereabouts to receive prompt notification of receipt of a notice. Unless otherwise specified in this Agreement, any period of time in this Agreement shall begin the day after the event starting the period and shall expire at 5:00 p.m. Pacific time of the last calendar day of the specified period of time, unless the last day is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, in which case the specified period of time shall expire on the next day that is not a Saturday, Sunday or legal holiday. Any specified period of five (5) days or less shall not include Saturdays, Sundays or legal holidays.
19. **AGENCY DISCLOSURE.** At the signing of this Agreement,

Selling Licensee Wally Hornberger

represented Buyer

and the Listing Agent Jim Justin

represented Seller

If Selling Licensee and Listing Agent are different salespersons affiliated with the same Broker, then Seller and Buyer confirm their consent to Broker acting as a dual agent. If Selling Licensee and Listing Agent are the same person representing both parties, then Seller and Buyer confirm their consent to that person and his/her Broker acting as dual agents. If Selling Licensee, Listing Agent, or their Broker are dual agents, then Seller and Buyer consent to Selling Licensee, Listing Agent and their Broker being compensated based on a percentage of the purchase price or as otherwise disclosed on an attached addendum. Buyer and Seller confirm receipt of the pamphlet entitled "The Law of Real Estate Agency."

20. **ASSIGNMENT.** Buyer may may not (may not, if not completed) assign this Agreement, or Buyer's rights hereunder, without Seller's prior written consent, unless provided otherwise herein.
21. **DEFAULT AND ATTORNEY'S FEE.** In the event Buyer fails, without legal excuse, to complete the purchase of the Property, then (check one):

INITIALS: Buyer

Rob

Buyer

Seller

[Signature]

Seller

that portion of the earnest money which does not exceed five percent (5%) of the purchase price shall be kept by Seller as liquidated damages (subject to Seller's obligation to pay certain costs or a commission, if any) as the sole and exclusive remedy available to Seller for such failure; or

Seller may, at its option, (a) keep as liquidated damages all of the earnest money (subject to Seller's obligation to pay certain costs or a commission, if any) as the sole and exclusive remedy available to Seller for such failure; (b) bring suit against Buyer for Seller's actual damages, (c) bring suit to specifically enforce this Agreement and recover any incidental damages, or (d) pursue any other rights or remedies available at law or equity.

If Buyer or Seller institutes suit concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses. In the event of trial, the amount of the attorney's fee shall be fixed by the court. The venue of any suit shall be the country in which the Property is located, and this Agreement shall be governed by the laws of the state where the Property is located.

22. MISCELLANEOUS PROVISIONS.

- a. **Complete Agreement.** The Agreement and addenda and any exhibits to it state the entire understanding of Buyer and Seller regarding the sale of the Property. There are no verbal or written agreements which modify or affect the Agreement.
- b. **No Merger.** The terms of the Agreement shall not merge in the deed or other conveyance instrument transferring the Property to Buyer at closing. The terms of this Agreement shall survive closing.
- c. **Counterpart Signatures.** The Agreement may be signed in counterpart, each signed counterpart shall be deemed an original, and all counterparts together shall constitute one and the same agreement.
- d. **Facsimile Transmission.** Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original. At the request of either party, or the Closing Agent, the parties will confirm facsimile transmitted signatures by signing an original document.

23. ACCEPTANCE; COUNTEROFFERS. Seller has until midnight of _____ (if not filled in, the third business day following the last Buyer signature date below) to accept this offer, unless sooner withdrawn. If this offer is not timely accepted, it shall lapse and the earnest money shall be refunded to Buyer. If either party makes a future counteroffer, the other party shall have until 5:00 p.m. on the _____ day (if not filled in, the second business day) following its receipt to accept the counteroffer, unless sooner withdrawn. If the counteroffer is not timely accepted or countered, this Agreement shall lapse and the earnest money shall be refunded to the Buyer. No acceptance, offer or counteroffer from the Buyer is effective until a signed copy is received by the Seller, the Listing Agent or the licensed office of the Listing Agent. No acceptance, offer or counteroffer from the Seller is effective until a signed copy is received by the Buyer, the Selling Licensee or the licensed office of the Selling Licensee.

24. INFORMATION TRANSFER. In the event this Agreement is terminated, Buyer agrees to deliver to Seller within ten (10) days of Seller's written request copies of all materials received from Seller and any plans, studies, reports, inspections, appraisals, surveys, drawings, permits, application or other development work product relating to the Property in Buyer's possession or control as of the date this Agreement is terminated.

25. CONFIDENTIALITY. Until and unless closing has been consummated, Buyer will treat all information obtained in connection with the negotiation and performance of this Agreement as confidential (except for any information that Buyer is required by law to disclose and then only after giving Seller written notice at least three (3) days prior to the disclosure) and will not use or knowingly permit the use of any confidential information in any manner detrimental to Seller.

26. SELLER'S ACCEPTANCE AND BROKERAGE AGREEMENT. Seller agrees to sell the Property on the terms and conditions herein, and further agrees to pay a commission in a total amount computed in accordance with the listing agreement. If there is no written listing agreement, Seller agrees to pay a commission of six (6%)% of the sales price or Buyer and Seller agree that they will share equally in paying the commission (3% by seller and 3% by buyer at closing). The commission shall be apportioned between Listing Agent and Selling Licensee as specified in the listing agreement or any co-brokerage agreement. Seller assigns to Listing Agent and Selling Licensee a portion of the sales proceeds equal to the commission. If the earnest money is retained as liquidated damages, any costs advanced or committed by Listing Agent or Selling Licensee for Buyer or Seller shall be reimbursed or paid therefrom, and the balance shall be paid one-half to Seller and one-half to Listing Agent and Selling Licensee according to the listing agreement and any co-brokerage agreement. In any action by Listing Agent or Selling Licensee to enforce this Section, the prevailing party is entitled to reasonable attorneys' fees and expenses. Neither Listing Agent nor Selling

Licensee are receiving compensation from more than one party to this transaction unless disclosed on an attached addendum, in which case Buyer and Seller consent to such compensation. The Property described in attached Exhibit A, is commercial real estate. Notwithstanding Section 26 above, the pages containing this section, the parties' signatures and an attachment describing the Property may be recorded.

27. OTHER: Buyer to be responsible from the Execution Date through Closing for all maintenance and repair required for City of Vancouver code compliance.

28. LISTING AGENT AND SELLING LICENSEE DISCLOSURE. EXCEPT AS OTHERWISE DISCLOSED IN WRITING TO BUYER OR SELLER, THE SELLING LICENSEE, LISTING AGENT, AND BROKERS HAVE NOT MADE ANY REPRESENTATIONS OR WARRANTIES CONCERNING THE LEGAL EFFECT OF THIS AGREEMENT, BUYER'S OR SELLER'S FINANCIAL STRENGTH, OR THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE PROPERTY'S ZONING, COMPLIANCE WITH APPLICABLE LAWS (INCLUDING LAWS REGARDING ACCESSIBILITY FOR DISABLED PERSONS), OR HAZARDOUS MATERIALS. SELLER AND BUYER ARE EACH ADVISED TO SEEK INDEPENDENT LEGAL AND TAX ADVICE ON THESE AND OTHER MATTERS RELATED TO THIS AGREEMENT.

For Coldwell Banker Commercial
Buyer Robert D Bernhardt Provier Date 11.9.05
Print Buyer's Name ROBERT D. BERNHARDT
Office Phone (360) 699-4494 Fax No. (360) 699-5136

Buyer's Address 108 E. Mill Plain Vancouver, WA 98660
Selling Office Coldwell Banker Commercial Bob Bernhardt Associates Office Ph 360-699-4494 Fax No 360-699-5136

By Wally Hornberger Print Name Wally Hornberger

Seller Jose L A Morrison Date 11/24/05
Seller _____ Date _____

Print Seller's Name JOSE L A MORRISON
Office Phone _____ Fax No. _____ Home Phone _____
Seller's Address _____

Listing Agent Jim Justin
Listing Office Coldwell Banker Commercial Bob Bernhardt Associates

Office Ph (360) 699-4494 Home Ph _____ Fax No. (360) 699-5136

28. BUYER'S RECEIPT. Buyer acknowledges receipt of a Seller signed copy of this Agreement on 11.9.05
BUYER Robert D Bernhardt BUYER _____

Handwritten initials and signatures at the bottom of the page.

EXHIBIT A
[Legal Description]

ATTACHED

REB

Seller  Seller



goTitle Reports - Find Target Property

Find Target Property

~~VIEW Morrison, James A & Michelle K, 3609 NE 113th St, Vancouver, WA 98686~~

~~Geo Level: 0, Good APN: 189999002~~

~~VIEW Morrison, James A & Michelle, 3613 NE 113th St, Vancouver, WA 98686~~

~~Geo Level: 0, Good APN: 189999004~~

~~VIEW Morrison, Jared A, 18013 NE Cole Witter Rd, Battle Ground, WA 98604~~

~~Geo Level: 0, Good APN: 233285000~~

~~VIEW Morrison, Jeffery M & Erin R, 1107 NW 23rd Ave, Battle Ground, WA 98604~~

~~Geo Level: 1, Good APN: 228573066~~

~~VIEW Morrison, Jeri D, 7705 NE 65th CT, Vancouver, WA 98661~~

~~Geo Level: 0, Good APN: 106511616~~

~~VIEW Morrison, Jim & Cecile, 503 Grand Blvd, Vancouver, WA 98661~~

~~Geo Level: 0, Good APN: 051064000~~

~~VIEW Morrison, Jim & Cecile, 3400 E Mill Plain Blvd, Vancouver, WA 98661~~

~~Geo Level: 0, Good APN: 037225000~~

~~VIEW Morrison, John & Mary, 5610 NE 40th St, Vancouver, WA 98661~~

~~Geo Level: 0, Good APN: 161007000~~

~~VIEW Morrison, John R & Mary A, 14303 NE 267th St, Battle Ground, WA 98604~~

~~Geo Level: 0, Good APN: 226124000~~

① VIEW Morrison, Joseph & Annalouise, 509 E 16th St, Vancouver, WA 98663

Geo Level: 0, Good APN: 040485000

② VIEW Morrison, Joseph & Annalouise, 0, Vancouver, WA 98660

Geo Level: 1, Good APN: 040495000

③ VIEW Morrison, Joseph & Annalouise, 505 E 16th St, Vancouver, WA 98663

Geo Level: 0, Good APN: 040510000

④ VIEW Morrison, Joseph W, 501 E 16th St, Vancouver, WA 98663

Geo Level: 0, Good APN: 040520000

⑤ VIEW Morrison, Joseph W, 500 E 15th St, Vancouver, WA 98663

Geo Level: 0, Good APN: 040530000

⑥ VIEW Morrison, Joseph W, 0, Vancouver, WA 98660

Geo Level: 1, Good APN: 040535000

⑦ VIEW Morrison, Joseph W, 504 E 15th St, Vancouver, WA 98663

Geo Level: 0, Good APN: 040540000

29,000 SF
.67 Acre



click will: Zoom + Zoom - Pan Label Report

MapsOnline

Map Groups

Land - Parcels

Maps

Parcels

ZONING

ComPlan

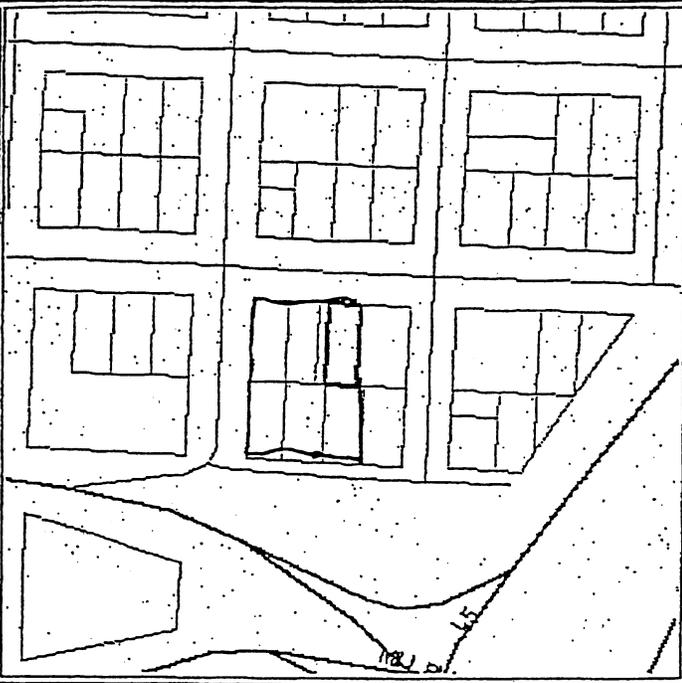
CWP 2004

Aerial Photos

Site Plan Review

Building Permits

HELP



Parcel Report

Account : 040485-
000

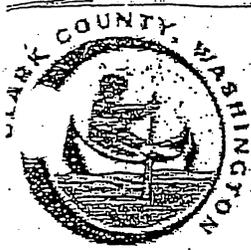
Owner : MORRISON JOSEPH &
ANNALOUISE

Address : 509 E 16TH ST
VANCOUVER, 98663

Legal : EAST VANCOUVER #2
LOT 2 BLK 71

[Battle Ground](#) · [Camas](#) · [La Center](#) · [Ridgefield](#) · [Vancouver](#) · [Washougal](#) · [Yacolt](#)
[Full County](#) · [Section](#) · [Atlas Page](#)

[County Homepage](#) | [GIS Homepage](#)



Clark County Property Information

Land & Building Details

1

Account No. 040485-000

Site Address
509 E 16TH ST, VANCOUVER, 98663

Abbreviated Legal Description
EAST VANCOUVER #2 LOT 2 BLK 71

Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |
New Search | Maps Online

Land Data

Lot Size 4000 sq ft
Subdivision Info... EAST VANCOUVER 27-2-1 (C-70)
Survey no data
Land Use Code Single family residence on commercial land
FEMA Flood Map 5300270007B
Miscellaneous Code DEV. HS #1

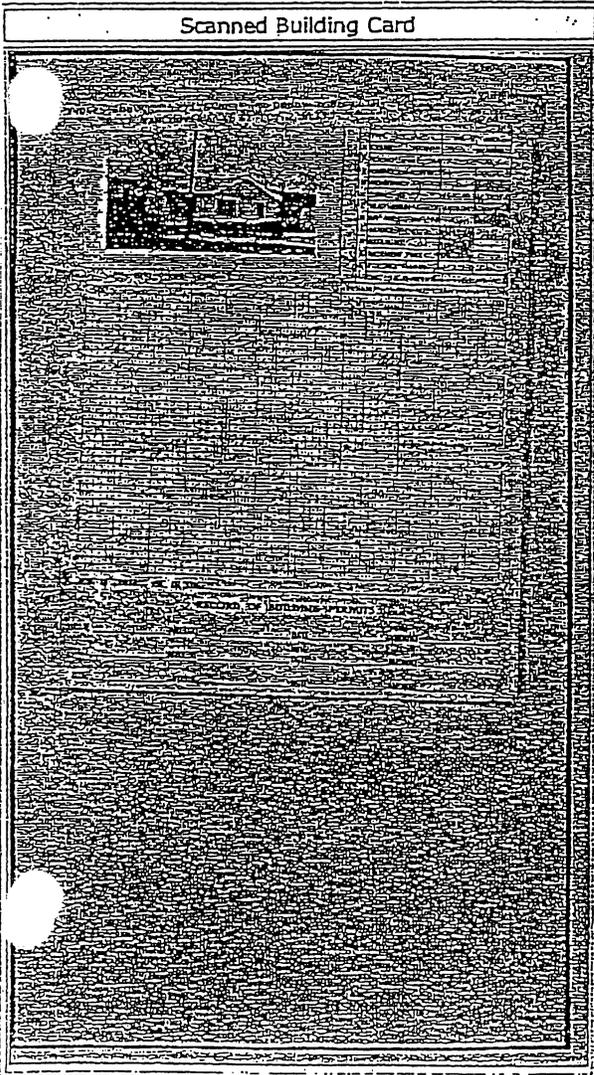
Building

Effective Year Built 1950
Actual Year Built 1950
Number of Bedrooms 3
Construction Quality Codes... LW
Building Style Codes... RANCH
Condition Codes... FR
Square Feet Main 1024
Square Feet Upper 0
Square Feet Basement 0
Square Feet Garage na
Heat Type Codes... BB
Central Air Conditioning N

Photo Date: 04/26/2004



Scanned Building Card





Clark County Property Information

Land & Building Details

2

Account No 040495-000

Site Address

VANCOUVER, 98663

Abbreviated Legal Description

EAST VANCOUVER #1 LOT 3 BLK 71

Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |

New Search | Maps Online

Land Data

Lot Size 1000 sq ft
Subdivision Info... EAST VANCOUVER
27-2-1 (C-70)
Survey no data
Land Use Code Unused or Vacant
Land - No
improvements
FEMA Flood Map 5300270007B
Miscellaneous Code no data

Building

Effective Year Built no data
Actual Year Built no data
Number of Bedrooms no data
Construction Quality Codes no data
Building Style Codes no data
Condition Codes no data
Square Feet Main no data
Square Feet Upper no data
Square Feet Basement no data
Square Feet Garage attached
Heat Type Codes no data
Central Air Conditioning no data

No photo available

to building cards or sketches available



Clark County Property Information

Land & Building Details

3

Account No 040510-000

Site Address
505 E 16TH ST, VANCOUVER, 98663

Abbreviated Legal Description
EAST VANCOUVER #2 LOT 3 BLK 71

Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |
New Search | Maps Online

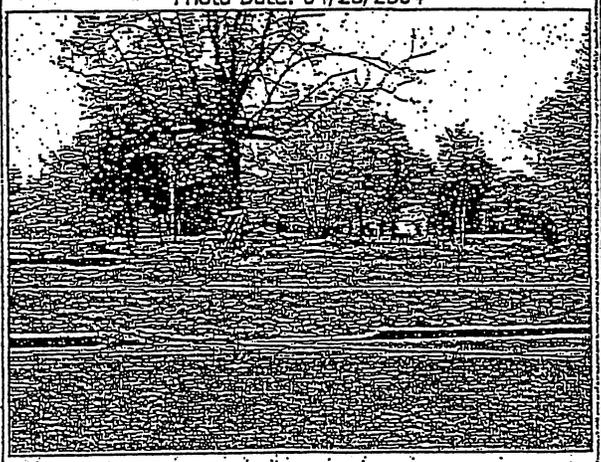
Land Data

Lot Size 4000 sq ft
Subdivision Info EAST VANCOUVER 27-2-1 (C-70)
Survey no data
Land Use Code Unused or Vacant Land - No improvements
FEMA Flood Map 5300270007B
Miscellaneous Code no data

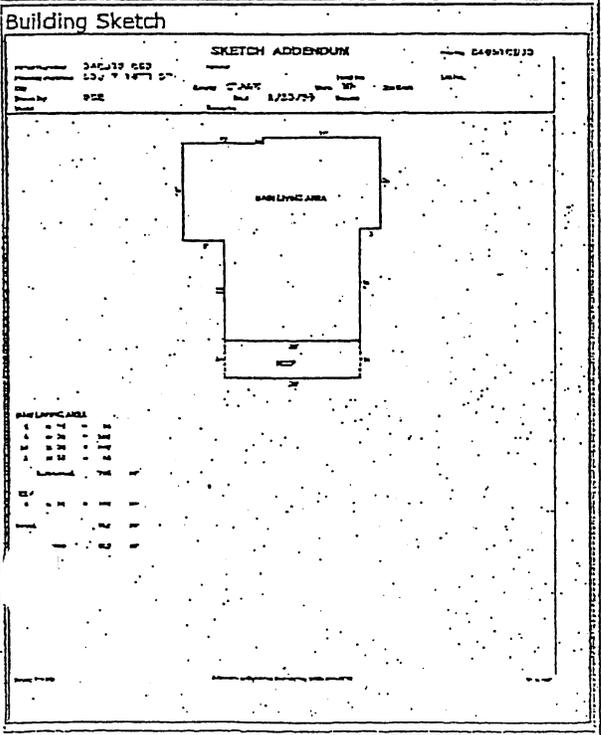
Building

Effective Year Built no data
Actual Year Built no data
Number of Bedrooms no data
Construction Quality Codes no data
Building Style Codes no data
Condition Codes no data
Square Feet Main no data
Square Feet Upper no data
Square Feet Basement no data
Square Feet Garage attached no data
Heat Type Codes no data
Central Air Conditioning no data

Photo Date: 04/26/2004



Building Sketch





Clark County Property Information

Land & Building Details

4

Account No: 040520-000

Site Address:
501 E 16TH ST, VANCOUVER, 98663

Abbreviated Legal Description:
EAST VANCOUVER LOT 4 BLK 71

Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |
New Search | Maps Online

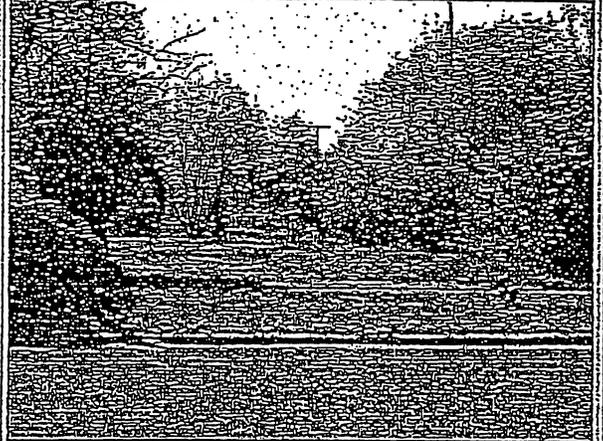
Land Data

Lot Size:	5000 sq ft
Subdivision Info:	EAST VANCOUVER 27-2-1 (C-70)
Survey:	no data
Land Use Code:	Single family residence on commercial land
FEMA Flood Map:	5300270007B
Miscellaneous Code:	no data

Building

Effective Year Built:	no data
Actual Year Built:	no data
Number of Bedrooms:	no data
Construction Quality Codes:	no data
Building Style Codes:	no data
Condition Codes:	no data
Square Feet Main:	no data
Square Feet Upper:	no data
Square Feet Basement:	no data
Square Feet Garage attached:	no data
Heat Type Codes:	no data
Central Air Conditioning:	no data

Photo Date: 04/26/2004



Scanned Building Card

see next page



Clark County Property Information

Land & Building Details

5

Account No: 040530-000

Site Address
500 E 15TH ST, VANCOUVER, 98663

Abbreviated Legal Description
EAST VANCOUVER LOT 5 BLK 71

Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |
New Search | Maps Online

Land Data

Lot Size	5000 sq. ft.
Subdivision Info	EAST VANCOUVER 27-2-1 (C-70)
Survey	no data
Land Use Code	Unused or Vacant Land - No improvements
FEMA Flood Map	5300270007B
Miscellaneous Code	no data

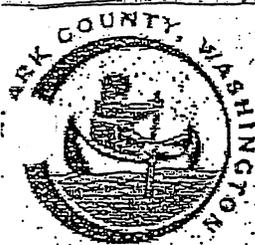
Building

Effective Year Built	no data
Actual Year Built	no data
Number of Bedrooms	no data
Construction Quality Codes	no data
Building Style Codes	no data
Condition Codes	no data
Square Feet Main	no data
Square Feet Upper	no data
Square Feet Basement	no data
Square Feet Garage attached	no data
Heat Type Codes	no data
Central Air Conditioning	no data

Photo Date: 04/26/2004



No building cards or sketches available



Clark County Property Information

Land & Building Details

16

Account No: 040535-000

Site Address
VANCOUVER, 98663

Abbreviated Legal Description
EAST VANCOUVER LOT 6 BLK 71

Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |
New Search | Maps Online

Land Data

Lot Size: 5000 sq ft
Subdivision Info: EAST VANCOUVER 27-2-1 (C-70)
Survey: no data
Land Use Code: Unused or Vacant Land - No Improvements
FEMA Flood Map: 5300270007B
Miscellaneous Code: no data

Building

Effective Year Built: no data
Actual Year Built: no data
Number of Bedrooms: no data
Construction Quality Codes: no data
Building Style Codes: no data
Condition Codes: no data
Square Feet Main: no data
Square Feet Upper: no data
Square Feet Basement: no data
Square Feet Garage attached: no data
Heat Type Codes: no data
Central Air Conditioning: no data

Photo Date: 04/26/2004



No building cards or sketches available.



Clark County Property Information

Land & Building Details

7

Account No 040540-000

Site Address
504 E 15TH ST, VANCOUVER, 98663

Abbreviated Legal Description
EAST VANCOUVER LOT 7 BLK 71

Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |
New Search | Maps-Online

Land Data

Lot Size 5000 sq ft
Subdivision Info... EAST VANCOUVER 27-2-1 (C-70)
Survey no data
Land Use Code Unused or Vacant Land - No Improvements
FEMA Flood Map 5300270007B
Miscellaneous Code no data

Building

Effective Year Built no data
Actual Year Built no data
Number of Bedrooms no data
Construction Quality Codes... no data
Building Style Codes... no data
Condition Codes... no data
Square Feet Main no data
Square Feet Upper no data
Square Feet Basement no data
Square Feet Garage attached no data
Heat Type Codes... no data
Central Air Conditioning no data

Photo Date: 04/26/2004



o building cards or sketches available

Exhibit B

(Condominium Purchase Agreement)

Attached memorandum from Sellers Attorney

007 5

[Handwritten signature]
10/10/05

GREG CALL, P.C.

GREG J. CALL, Attorney
Sara Milliman, Legal Assistant

LEGAL COUNSEL

1917 MAIN STREET
VANCOUVER, WA. 98660
PHONE: 360.695.6790
FAX: 360.695.3899

MEMORANDUM

TO: Jim Justin
FR: GREG CALL
DT: October 19, 2005
RE: MORRISON TRANSACTION

Dear Jim:

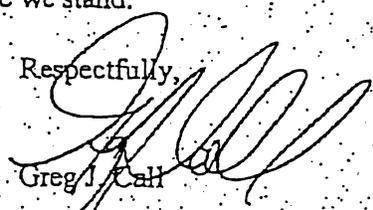
Seller 

Mr. Morrison, herein "Buyer", has retained me to consult with him in regard to the offer you tendered regarding the purchase of his property on "E" Street in Vancouver. He is agreeable to a purchase price of \$580,000 based upon \$20.00 per square foot, with refundable earnest money in the amount of \$50,000.00 in the form of a check paid into escrow within three (3) days of acceptance by both parties. The balance will be paid in cash at closing subject to instructions consistent with Mr. Morrison's plan to do a 1031 Exchange in this transaction.

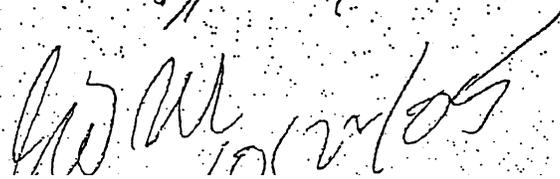
As additional consideration, Mr. Morrison would like an option to purchase a condominium if Buyer, at Buyer's election, decides to include residential units in the construction and development of the property. The option would provide for the purchase of one (1) residential unit to be located on an upper level floor and on the south side or on the southwest corner of the building with the square footage of the unit to be the greater of the size of the largest residential unit included in the design or twice the size of the smallest unit planned for the design, but under no circumstances less than 1,600 square feet. The purchase price under the option would be based on Seller's cost per square foot for construction of the selected unit including inside walls, ceilings, windows, plumbing, wiring, ventilation and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings. Buyer and Seller shall agree on a location of electrical outlets, ventilation and plumbing.

The Buyer further agrees to take assignment and delegation of all rights and obligations as landlord and owner of the property upon closing and will indemnify and hold Seller harmless from liability for any claim and costs of defending any claim raised by any tenant, public agency or jurisdiction and any third party. Seller warrants that he has no knowledge or reason to know of any current claims relating to the condition of the property from any tenant, public agency or third party in connection with the condition of the property. Please review these terms with the Buyer or Buyer's agent and let us know where we stand.

Respectfully,


Greg J. Call

c.c.: Mr. Morrison


10/19/05

Rob 905

Exhibit E

ASSIGNMENT AND ASSUMPTION OF AGREEMENT

THIS ASSIGNMENT AND ASSUMPTION OF AGREEMENT is made and entered into this 9th day of November, 2005, by and between COLDWELL BANKER COMMERCIAL BOB BERNHARDT ASSOCIATES and/or Assigns ("CB") and KILLIAN PACIFIC, LLC, a Washington limited liability company, and/or Assigns ("Killian").

WHEREAS, CB entered into that certain Commercial and Investment Real Estate Purchase and Sale Agreement dated October 10, 2005 (the "Agreement") with Joseph Morrison ("Seller") for the sale and purchase of the Morrison Property, in the 500 Block of E. 15/16-Street, Vancouver, Clark County, Washington (the "Property"); and

WHEREAS, CB entered into the Agreement as an agent for Killian as an undisclosed principal; and

WHEREAS, CB desires to assign to Killian and Killian desires to assume all liability pursuant to the Agreement; and

WHEREAS, neither CB nor Killian desire to disclose this Assignment to the Seller of the Property at this time;

NOW, THEREFORE, it is mutually agreed as follows:

1. Assignment. CB hereby assigns, transfers and sets over unto Killian all of CB's right, title and interest in and to the Agreement, a copy of which is attached hereto as Exhibit "A" and by this reference incorporated herein.

2. Assumption. Killian hereby accepts the foregoing Assignment and transfers and assumes as its own obligations to perform all of the covenants and duties of CB pursuant to the Agreement. Upon execution hereof, Killian has delivered to CB Killian's Promissory Note in the amount of \$50,000.00 thereby matching the Promissory Note CB issued in favor of the Seller. Killian agrees to redeem Killian's Promissory Note on the exact terms as set forth in the Agreement so that the CB's Promissory Note can be timely redeemed.

3. Confidentiality. CB and Killian agree to keep this Assignment confidential and, except as required by law, not to disclose the contents hereof to Seller prior to closing. At closing, this Assignment shall be disclosed and the conveyance of the Property shall be made directly from Seller to Killian.

4. General Provisions.

(a) This Assignment constitutes the entire agreement between the parties and cannot be changed or modified, other than by a written agreement executed by both parties.

000756

(b) The provisions of this Assignment shall extend to, bind and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors and assigns.

(c) This Assignment shall be governed and construed in accordance with the laws of the State of Washington.

(d) In case litigation is instituted arising directly or indirectly out of this Assignment, the losing party shall pay to the prevailing party its reasonable attorney's fees, together with all expenses, which may reasonably incur in taking such action. If an appeal is taken from any Judgment or Decree of the trial court, the losing party shall pay the prevailing party in the appeal its reasonable attorney's fees in such appeal. Said sums shall be in addition to all other sums provided by law.

(e) Failure by either party at any time to require performance by the other party of any of the provisions hereof shall in no way affect the party's rights hereunder to enforce the same nor shall any waiver by the party of any breach hereof be held to be a waiver of any succeeding breach or a waiver of this non-waiver clause.

(f) Time is of the essence of this Assignment.

IN WITNESS WHEREOF, the parties have executed this Assignment and Assumption of Agreement the day and year first above written.

COLDWELL BANKER COMMERCIAL
BOB BERNHARDT ASSOCIATES

KILLIAN PACIFIC, LLC

By: Bob Bernhardt

By: [Signature]

Title: Broker

Title: Manager

CB

KILLIAN

000757

EXHIBIT "A"

Purchase and Sale Agreement

000758

■ ■ ■ ■ ■
GREENE & MARKLEY, P.C.

ATTORNEYS

1515 SW FIFTH AVENUE, SUITE 600
PORTLAND, OREGON 97201-5492

TELEPHONE: (503) 295-2668

FACSIMILE: (503) 224-8434

E-MAIL: email@greenemarkley.com

E-MAIL: david.weiner@greenemarkley.com

Direct Line: (503) 546-1406

OF COUNSEL
DAVID P. WEINER, P.C.
Admitted to Practice
in Oregon and Washington

May 25, 2006

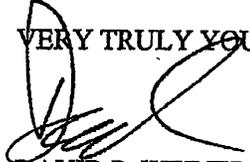
VIA E-MAIL: lykej@ctt.com
and VIA HAND DELIVERY
Ms. Jennifer Lyke
Chicago Title Insurance Company
Pioneer Tower
888 SW Fifth Ave., #930
Portland, OR 97204

Re: 16 Street Investors, LLC / Joseph W. Morrison
Escrow No. 50-418389-JL

Dear Jennifer:

Attached is an Acknowledgement that I have signed as Manager of 16 Street Investors, LLC in connection with the Morrison Option. Nothing in this Memorandum requires the recording of any document at this time. Please submit copies of this document to the Seller.

VERY TRULY YOURS,


DAVID P. WEINER

DPW/ko
encl.

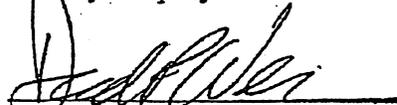
ACKNOWLEDGEMENT

16 STREET INVESTORS, LLC, having acquired the West 42 feet of Lot 2 in Blocks 3, 4, 5, 6 and 7, BLOCK 71, CITY OF VANCOUVER (commonly known as EAST VANCOUVER) according to the Plat thereof recorded in Volume "C" of Plats, Page 070, Records of Clark County, Washington, hereby acknowledge the provisions of that certain Memorandum attached hereto and by this reference incorporated herein. 16 Street Investors, LLC agrees that if it includes residential units in the construction and development of the aforementioned property, Joseph W. Morrison will be provided the option to acquire a unit as described in the attached Memorandum.

DATED this 25th day of May, 2006.

16 Street Investors, LLC, a Washington
limited liability company

By:


David P. Weiner, Manager

REAL ESTATE PURCHASE OPTION

*[*FIRST DRAFT PREPARED BY SELLER/OPTION GRANTEE'S ATTORNEY FOR REVIEW]*

In consideration of the rights and obligations of _____, as Option Grantor herein, and JOSEPH E. MORRISON, as Option Grantee herein, under that certain Real Estate Purchase and Sale Agreement between Option Grantor, as "Purchaser", and Option Grantee, as "Seller", Option Grantor, for itself and for its successors and assigns, does hereby grant to Option Grantor the right to acquire a residential unit constructed upon real property described below from Option Grantor under the following terms and conditions if Option Grantor or its successors or assigns elects to develop or redevelop the real property described below (herein after, "the property") under any plan that includes residential housing:

1. Real Property Description:

Tax Parcel No.:
Abbreviated Legal:
Legal Description: See Exhibit "A" hereto.

2. Grantee's Right to Purchase:

Pursuant to this instrument, Option Grantor grants to Option Grantee the option to purchase one (1) residential unit located on the above described property to be located on an upper level floor and on the south side or on the southwest corner of the building with the square footage of said residential unit to be the greater of the size of the largest residential unit included in the development plan, twice the size of the smallest unit in the development plan, or 1,600 square feet. The purchase price under this option shall be based on Option Grantor's cost per square foot for construction of the selected unit including inside walls, ceilings, windows, plumbing, wiring, ventilation and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings. Option Grantor and Option Grantee shall agree on a location of electrical outlets, ventilation and plumbing. In the event residential units subject to this option shall be built for rent

and not for sale, this Option shall entitle Option Grantee shall to acquire a pro rata equitable interest in the property conveyed to Option Grantor under the above referenced Real Estate Purchase and Sale Agreement based upon the square footage of the unit that Option Grantee could have acquired under this Option were it available for purchase rather than for rent in consideration of paying the amount that Option Grantee would have paid to acquire such unit under the formula described above.

3. This Option shall run with the land and shall be fully enforceable by Option Grantee and his successors and assignees against Option Grantor and its successors and assignees.

4. Notice of Intent to Develop. Option Grantor shall have a duty to send Option Grantee ninety (90) days written notice of its intent to seek development plan approval from the City of Vancouver or other jurisdiction, if any, having legal authority to approve plans for construction of any building or improvement upon the property described above, whether or not such plan includes the construction of any residential unit or units. Said notice shall include a preliminary drawing of the proposed construction. Upon receipt of Option Grantor's intent to build any building or improvement which includes the construction of any residential units, Option Grantee shall have thirty (30) days to provide Option Grantor with written notice of Option Grantee's intent to exercise its option under this instrument.

5. Negotiation and Identification of Residential Unit. Upon Option Grantor's receipt of Option Grantee's notice of intent to exercise its rights under this Option, the parties shall exercise good faith and due diligence to reach an agreement for Option Grantee's purchase of a residential unit from Option Grantor according to the terms of this Option prior to Option Grantor filing its final plan for construction on the above described real property.

6. Arbitration. In the event that a dispute develops between the parties under this instrument, the parties agree to submit such dispute to arbitration by qualified arbitrator to be mutually selected by the parties with arbitration to proceed according to the guidelines for arbitration established by the American Institute of Architecture. If the parties cannot agree on a qualified arbitrator, then the parties shall Petition a court of competent jurisdiction to appoint a qualified arbitrator. The arbitrator's decision shall be final and binding upon all parties and the prevailing party shall be entitled to reasonable fees and costs relating such proceeding from the non-prevailing party.

7. This Option shall be deemed to be incorporated into the above referenced Real Estate Purchase and Sale Agreement as an integral part thereof.

8. This Option may be assigned by the Option Grantee and, in the event Option Grantee shall die prior to termination of its rights herein, this Option shall enure for the benefit of Option Grantee's estate.

9. Termination. This Option shall terminate and expire twenty (20) years following the date on which title to property subject to this Option is conveyed to Option Grantor as Purchaser under the above referenced Real Estate Purchase and Sale Agreement.

Option Grantor

Date

Option Grantee:

Date

State of Washington)
County of Clark :
)

On this _____ day of _____, 2006,
_____, known personally to me, appeared before me and executed the
foregoing as his free and voluntary act for the uses and purposes therein mentioned.

Notary for Washington, residing at: _____.
My appointment expires _____.

State of Washington)
County of Clark :
)

On this _____ day of _____, 2006,
_____, known personally to me, appeared before me and executed the
foregoing as his free and voluntary act for the uses and purposes therein mentioned.

Notary for Washington, residing at: _____.
My appointment expires _____.]

Exhibit H

and on by it
if a residential condominium project is developed on the real property described below

REAL ESTATE PURCHASE OPTION

[*FIRST DRAFT PREPARED BY SELLER/OPTION GRANTEE'S ATTORNEY FOR REVIEW]

In consideration of the rights and obligations of 16 Street Investors, LLC, as Option Grantor herein, and JOSEPH E. MORRISON, as Option Grantee herein, under that certain Real Estate Purchase and Sale Agreement between Option Grantor, as "Purchaser", and Option Grantee, as "Seller", Option Grantor, for itself and for its successors and assigns, does hereby grant to Option Grantee the right to acquire a residential unit constructed upon real property described below from Option Grantor under the following terms and conditions if Option Grantor or its successors or assigns elects to develop ~~and develop~~ the real property described below (herein after, "the property") under any plan that includes residential housing:

Grantee

initially

1. Real Property Description:

Tax Parcel No.:
Abbreviated Legal:
Legal Description: See Exhibit "A" hereto.

condominium
condominium units.

2. Grantee's Right to Purchase:

Pursuant to this instrument, Option Grantor grants to Option Grantee the option to purchase one (1) residential unit located on the above described property to be located on an upper level floor and on the south side or on the southwest corner of the building with the square footage of said residential unit to be the greater of the size of the largest residential unit included in the development plan, twice the size of the smallest unit in the development plan, or 1,600 square feet. The purchase price under this option shall be based on Option Grantor's cost per square foot for construction of the selected unit including inside walls, ceilings, windows, plumbing, wiring, ventilation and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings. Option Grantor and Option Grantee shall agree on a location of electrical outlets, ventilation and plumbing. ~~Initial residential units subject to this option shall be both for rent~~

condominium

condominium

(ii)

residential condominium

(iii)

REAL ESTATE PURCHASE OPTION (DRAFT FOR REVIEW ONLY)- I

residential condominium unit

other than condominium units

~~and not for sale, this Option shall entitle Option Grantee shall to acquire a pro rata equitable interest in the property conveyed to Option Grantor under the above referenced Real Estate Purchase and Sale Agreement based upon the square footage of the unit that Option Grantee could have acquired under this Option were it available for purchase rather than for rent in consideration of paying the amount that Option Grantee would have paid to acquire such unit under the formula described above.~~

Run with the land.

3. This Option shall run with the land and shall be fully enforceable by Option Grantee and his successors and assignees against Option Grantor and its successors and assignees.

4. Notice of Intent to Develop. Option Grantor shall have a duty to send Option Grantee ninety (90) days written notice of its intent to seek development plan approval from the City of Vancouver or other jurisdiction, if any, having legal authority to approve plans for construction of any building or improvement upon the property described above, whether or not such plan includes the construction of any residential ^{condominium} units. Said notice shall include a preliminary drawing of the proposed construction. Upon receipt of Option Grantor's intent to build any building or improvement which includes the construction of any residential units, Option Grantee shall have thirty (30) days to provide Option Grantor with written notice of Option Grantee's intent to exercise its option under this instrument. *If Option Grantee does not exercise the option within said 30 day period or if the development plan does not include any*

5. Negotiation and Identification of Residential Unit. Upon Option Grantor's receipt of Option Grantee's notice of intent to exercise its rights under this Option, the parties shall exercise good faith and due diligence to reach an agreement for ~~Option Grantee's purchase of a residential unit from Option Grantor~~ according to the terms of this Option prior to Option Grantor filing its final plan for construction on the ~~above described real property.~~

residential condominium units - this

6. Arbitration. In the event that a dispute develops between the parties under this instrument, the parties agree to submit such dispute to arbitration by qualified arbitrator to be mutually selected by the parties with arbitration to proceed according to the guidelines for arbitration established by the ~~American Institute of Architecture.~~ *Arbitration Service of Portland Oregon.* If the parties cannot agree on a qualified arbitrator, then the parties shall Petition a court of competent jurisdiction to appoint a qualified arbitrator. The arbitrator's decision shall be final and binding upon all parties and the prevailing party shall be entitled to reasonable fees and costs relating such proceeding from the non-prevailing party.

Option shall automatically expire and be of no force and effect except that

7. ~~This Option shall be deemed to be incorporated into the above referenced Real Estate Purchase and Sale Agreement as an integral part thereof.~~

Option Grantee shall be obligated to execute and deliver to Option Grantor

8. This Option may be assigned by the Option Grantee and, in the event Option Grantee shall die prior to termination of its rights herein, this Option shall enure for the benefit of Option Grantee's estate.

a revocable instrument removing the Option from as an encumbrance on the Property.

Subject to the provisions of Paragraph 4 above

9. Termination. This Option shall terminate and expire twenty (20) years following the date ~~on which title to property subject to this Option is conveyed to Option Grantor as Purchaser under the above referenced Real Estate Purchase and Sale Agreement.~~ ^{on}

June 1, 2026

16 Street Investors, LLC

by _____
Option Grantor Manager

June _____ 2006
Date

Option Grantee:

Date

State of Washington)
County of Clark :
m)

On this _____ day of June, 2006,
DPW known personally to me, appeared before me and executed the foregoing as his free and voluntary act for the uses and purposes therein mentioned.

as a manager of 16 Street Investors, LLC

Crean Notary for Washington, residing at: _____
My appointment expires _____

State of Washington)
County of Clark :
)

On this _____ day of _____, 2006,
_____, known personally to me, appeared before me and executed the foregoing as his free and voluntary act for the uses and purposes therein mentioned.

Notary for Washington, residing at: _____
My appointment expires _____

AFTER RECORDING
RETURN TO:
David P. Weiner, Esq.
1515 S.W. Fifth Avenue, Suite 600
Portland, OR 97201

REAL ESTATE PURCHASE OPTION

*~~[*FIRST DRAFT PREPARED BY SELLER/OPTION
GRANTEE'S ATTORNEY FOR REVIEW]~~*

In consideration of the rights and obligations of _____, 16
STREET INVESTORS, L.L.C., as Option Grantor herein, and JOSEPH E. MORRISON,
as Option Grantee herein, under that certain Real Estate Purchase and Sale Agreement
between Option Grantor, as "Purchaser", and Option Grantee, as "Seller", if and only if a
residential condominium project is developed on the real property described below,
Option Grantor, for itself and for its successors and assigns, does hereby grant to Option
~~Grantor~~ Grantee the right to acquire a residential condominium unit constructed upon real
property described below from Option Grantor under the following terms and conditions
if Option Grantor, or its successors or assigns, initially elects to develop ~~or redevelop~~ the
real property described below (herein after, "~~the property~~") the "Property") under any
plan that includes residential housing condominium units:

1. Real Property Description:

_____ Tax Parcel No.: 040485-000,
040495-000, 040510-000, 040520-000,
040530-000, 040535-000, 040540-000
Abbreviated Legal: Lot: PTN2 and 3, 4, 5, 6, 7 Block 71
Subdivision: CITY OF VANCOUVER
Volume: C Page: 070
Legal Description: See Exhibit "A" hereto.

2. Grantee's Right to Purchase:

Pursuant to this instrument, Option Grantor grants to Option Grantee the option to purchase one (1) residential condominium unit located on the above-described ~~property~~Property to be located on an upper level floor and on the south side or on the southwest corner of ~~the~~a building with the square footage of said residential condominium unit to be the greater of (i) the size of the largest condominium residential unit included in the development plan, (ii) twice the size of the smallest residential condominium unit in the development plan, or (iii) 1,600 square feet. The purchase price under this option shall be based on Option Grantor's cost per square foot for construction of the selected residential condominium unit including inside walls, ceilings, windows, plumbing, wiring, ventilation and flooring but not fixtures, appliances, molding, paint, wall paper, cabinets and floor coverings. Option Grantor and Option Grantee shall agree on a location of electrical outlets, ventilation and plumbing. ~~In the event residential units subject to this option shall be built for rent and not for sale, this Option shall entitle Option Grantee shall to acquire a pro rata equitable interest in the property conveyed to Option Grantor under the above referenced Real Estate Purchase and Sale Agreement based upon the square footage of the unit that Option Grantee could have acquired under this Option were it available for purchase rather than for rent in consideration of paying the amount that Option Grantee would have paid to acquire such unit under the formula described above.~~

3. Run with the Land. This Option shall run with the land and shall be fully enforceable by Option Grantee and his successors and assignees against Option Grantor and its successors and assignees.

4. Notice of Intent to Develop. Option Grantor shall have a duty to send Option Grantee ninety (90) days written notice of its intent to seek development plan approval from the City of Vancouver or other jurisdiction, if any, having legal authority to approve plans for construction of any building or improvement upon the ~~property described above~~Property, whether or not such plan includes the construction of any residential ~~unit~~ or condominium units. Said notice shall include a preliminary drawing of the proposed construction. Upon receipt of Option Grantor's intent to build any building or improvement which includes the construction of any residential condominium units, Option Grantee shall have thirty (30) days to provide Option Grantor with written notice of Option Grantee's intent to exercise its ~~option~~Option under this instrument. If Option Grantee does not exercise the Option within said thirty (30) day period or if the development plan does not include any residential condominium units, this Option shall automatically expire and be of no further force and effect except that Option Grantee shall be obligated to execute and deliver to Option Grantor a recordable instrument removing this Option as an encumbrance on the Property.

5. Negotiation and Identification of Residential Unit. Upon Option Grantor's receipt of Option Grantee's notice of intent to exercise its rights under this Option, the parties shall exercise good faith and due diligence to reach an agreement ~~for Option Grantee's purchase of a residential unit from Option Grantor according to the terms of~~

this Option prior to Option Grantor -filing its final plan for construction on the above described real property.Property.

6. Arbitration. In the event that a dispute develops between the parties under this instrument, the parties agree to submit such dispute to arbitration by qualified arbitrator to be mutually selected by the parties with arbitration to proceed according to the guidelines for arbitration established by the ~~American Institute of Architecture~~Arbitration Service of Portland, Oregon. If the parties cannot agree on a qualified arbitrator, then the parties shall Petition a court of competent jurisdiction to appoint a qualified arbitrator. The arbitrator's decision shall be final and binding upon all parties and the prevailing party shall be entitled to reasonable fees and costs relating such proceeding from the non-prevailing party.

7. ~~This Option shall be deemed to be incorporated into the above referenced Real Estate Purchase and Sale Agreement as an integral part thereof.~~

~~8. This Option may be assigned by the Option Grantee and, in the event Option Grantee shall die prior to termination of its rights herein, this Option shall enure for the benefit of Option Grantee's estate.~~

~~9. Termination. This Option shall terminate and expire twenty (20) years following the date on which title to property subject to this Option is conveyed to Option Grantor as Purchaser under the above referenced Real Estate Purchase and Sale Agreement. Subject to the provisions of paragraph 4 above, this Option shall terminate and expire on June 1, 2026.~~

Option Grantor _____ Date

Option Grantee:

Date

16 Street Investors, L.L.C

By: _____

Manager Date
OPTION GRANTOR

DECLARATION OF SERVICE

On said day below I deposited in the U. S. Mail a true and accurate copy of the Opening Brief of Appellant, in Court of Appeals Cause No. 37451-0-II, to the following:

Steven G. Leatham
Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, PS
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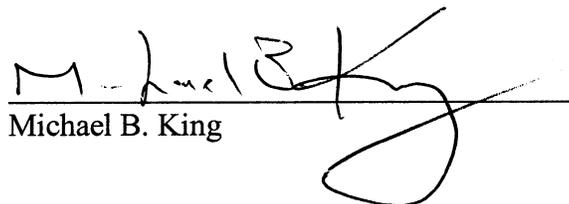
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DIVISION II
08 AUG 26 AM 11:10
STATE OF WASHINGTON
BY _____
DEPUTY

Original sent same day by U.S mail for filing with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

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

DATED: August 25th, 2008, at Tukwila, Washington.



Michael B. King