

NO. 37451-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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,

vs.

JOSEPH W. MORRISON,

Appellant.

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STATE OF WASHINGTON
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. SUMMARY OF REPLY	1
II. ARGUMENT IN REPLY	6
A. The Legal Fiction of Principal and Agency Law, Under Which an Undisclosed Principal is Deemed to be a Party to a Contract Entered into by that Principal’s Agent, Should Not be Extended so as to Allow that Principal’s Undisclosed Reading of the Contract to Control the Interpretation of the Contract’s Terms.....	6
B. The Objective Manifestations of the Parties Disclosed During the Process of Forming the Purchase and Sale Agreement Contract, As Well as the Parties’ Course of Conduct Under that Contract, Conclusively Establish that the PSA Contract was a Mere “Agreement to Agree” That Gave Rise to No Obligation on Morrison’s Part to Effect a Transfer of Title to the Killians.....	12
C. Morrison Preserved His Claims of Error	22
III. CONCLUSION.....	24

TABLE OF AUTHORITIES

Federal Cases	<u>Page</u>
<i>Ford v. Williams</i> , 62 U.S. 287 (1858).....	8, 12
 State Cases 	
<i>Columbia Security Co. v. Aetna Accident & Liability Co.</i> , 108 Wash. 116, 183 P. 137 (1919).....	7, 8
<i>Dana v. Boren</i> , 133 Wn. App. 307, 135 P.3d 963 (Div. II 2006)	7, 8, 11
<i>Keystone Land & Development Co. v. Xerox Corp.</i> , 152 Wn. 2d 171, 94 P.3d 945 (2004).....	13, 14, 16, 20
<i>King v. Rice</i> , 146 Wn. App. 662, 191 P.3d 946 (2008).....	18
<i>Martinez v. Miller Industries, Inc.</i> , 94 Wn. App. 935, 974 P.2d 1261 (1999).....	15
<i>In re Mayer's Estate</i> , 43 Wn. 2d 258, 260 P.2d 888 (1953).....	13
<i>Miller v. Jarman</i> , 2 Wn. App. 994, 998, 471 P.2d 704, <i>rev. denied</i> , 78 Wn.2d 995 (1970).....	13
<i>Ross v. Harding</i> , 64 Wn. 2d 231, 391 P.2d 526 (1964).....	21
<i>Sandeman v. Sayres</i> , 50 Wn.2d 539, 314 P.2d 428 (1957).....	13
<i>Valley Garage, Inc. v. Nyseth</i> , 4 Wn. App. 316, 481 P.2d 17 (1971).....	17

Page

Wm. Dickson Co. v. Pierce County,
128 Wn. App. 488, 116 P.3d 409 (2005).....15

Other Authorities

Michael A. Wolf, "*Looking Backward: Richard Epstein Ponders
the 'Progressive' Peril*," 105 Mich. L. Rev. 1233 (2007).....11

Randy E. Barnett, "*Squaring Undisclosed Agency Law With
Contract Theory*," 75 Cal. L. Rev. 1969 (1987)9, 10

Constitutional Provisions, Statutes and Court Rules

RAP 1.2(a)24
RAP 10.3(a)(4).....23, 24

I. SUMMARY OF REPLY

Was the Purchase and Sale Agreement contract an “agreement to agree”? If it was then Morrison had no duty to effect a transfer of title, and the trial court should have denied the Killians’ plea for a decree of specific performance.

The Killians correctly assert that, to resolve this issue, the Court should focus on the objective manifestations of the intent of the parties to the PSA contract. But the Killians have misread those manifestations. The terms of the Call Memorandum and its incorporation into the PSA contract, as well as the universal understanding of everyone (Morrison and the three members of the Bernhardt firm) who openly participated in the formation of that contract, establish that (1) the final form of the option addressed in the Call Memorandum was left unresolved by the PSA contract, and (2) absent a subsequent agreement on that form there would be no legally binding obligation to close the deal for the sale of Morrison’s property.

The Killians have attempted to finesse this issue through the legal fiction of principal and agency law which declares undisclosed principals to be parties to contracts entered into by their agents. Yet nothing in the law setting forth that legal fiction under which the Killians are deemed to be parties to the PSA contract -- neither the case law that has applied it nor the treatises that have declared it nor even law review articles that have explored the possible reasons for it -- endorses allowing undisclosed

principals to enforce their equally undisclosed interpretation of contract terms, as the trial court allowed the Killians to do in this case. Because they chose to stay “off the contract” -- perhaps more precisely, because they chose to *stay out of the process* that generated the objective manifestations of intent -- in order to reap the presumed benefit of anonymity (paying a lower price than they might otherwise have had to pay), the Killians have no right to have their own, undisclosed and therefore purely subjective understanding of the nature of the PSA contract be given any weight in the interpretation of the terms of that contract.

Yet without the benefit of that understanding, the Killians must lose. The Call Memorandum stated what Morrison “would like” to see in a contract for the purchase and sale of his property -- to wit, an option for a residential unit. By making that document part of the PSA contract, the parties reduced what would otherwise have been an enforceable contract for the purchase and sale of Morrison’s property into an agreement to agree, under which Morrison would have no obligation to effect the transfer of the title to his property unless the parties subsequently agreed on the final form of the option outlined in the Call Memorandum. *Everyone* who participated openly in the process that led to the formation of that contract agreed that the Call Memorandum was not intended to constitute the final statement of the option sought by Morrison. And *nothing* in the balance of the PSA contract document refutes this

understanding -- certainly not the presence of an integrated agreement clause, which merely evidences that the agreement itself is a complete expression of the intent of the parties and which can shed no light on what the parties intended when they made the Call Memorandum *a part of that complete expression*.

Moreover, the parties' course of dealing under the PSA contract confirms Morrison's and not the Killians' interpretation of the Call Memorandum's option language. The Killians claim that the memorandum constituted the final statement of Morrison's option rights, and further claim that the memorandum by its terms limited Morrison's option to the purchase of a condominium. But when the parties approached the agreed closing date in May of 2006, and Morrison objected to the absence of a recordable form of his option in the proposed closing documents circulated by the escrow agent, the Killians -- speaking through Mr. Weiner, the Killians' counsel as well as the managing agent for 16th Street Investors -- acknowledged that Morrison was entitled to an option to acquire a *residential unit*:

16 STREET INVESTORS, LLC...hereby acknowledge [sic] the provisions of that certain Memorandum [i.e., the Call 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...property, Joseph W. Morrison will be provided the option to acquire a unit as described in the attached Memorandum.

Trial Exhibit (“Ex.”) 20 (copy of May 25, 2006 “Acknowledgement”) (emphasis added) (copy attached as Ex. F of the Appendix to Morrison’s Opening Brief, and as Ex. App. 1 of the Appendix to this Reply Brief).

In short, when called upon to provide writing confirmatory of Morrison’s option rights, the Killians responded with a document reflecting that the parties to the PSA contract intended Morrison to receive an option to a residential unit and not just to a condominium (a specific kind of residential unit). Moreover, that the Killians recognized the distinction’s materiality is confirmed by the ensuing imbroglio over the recordable form of that option. For after withdrawing their initial contention that nothing in the Call Memorandum required the recording of an option document as a condition to closing, the Killians suddenly insisted that the recordable form of the option had to be limited to one for a condominium.

What Morrison could not know then, but which the litigation of this case has subsequently brought to light, is that the Killians *had no intention of including condominiums in their development of the property*. Had Morrison acceded to the Killians’ proposed change in the option’s scope, he would have received an option that he could never have exercised. In the event, Morrison refused to accede to the Killians’ eleventh-hour demand for a change in the scope of his option rights. And instead of then backing down and closing based on the originally agreed-to scope of that option, the Killians sued for (1) a decree of specific

performance under which Morrison would receive an option for a condominium that would never be built, *and* (2) an award of damages for the value of a 1031 property exchange that was snafued only because the Killians tried to force a last-minute change in the agreed scope of Morrison's option rights.

The trial court at some level seemed to recognize the potential vulnerability of its insistence that the Killians' reading of the scope of Morrison's option rights should control the resolution of the case. Hence the court's employment of the homey image (seized upon by the Killians in this proceeding) of a customer who tells a waiter that he "would like" a steak, as somehow proving that the Killians were right to read the Call Memorandum as embodying the final expression of an option under which Morrison would be limited to a condominium. The problem, of course, is that in the "restaurant" that is this real estate transaction *the "waiter" (the Killians) did not bring the "customer" (Morrison) the steak that the customer ordered and instead tried to force the customer to accept hamburger* (the Killians tried to force Morrison to accept an option limited to a condominium). Moreover, while the Killians were insisting that Morrison accept hamburger instead of steak, the Killians knew -- but did not tell Morrison -- that they were not even going to serve up hamburger but only a tofu look-alike (an option for a condominium that would never come to pass, because the Killians did not plan to develop the property with condominiums).

When a waiter in a restaurant refuses to serve the customer what the customer asks for, and instead plops down something the customer does not want to eat, the customer is entitled to stand up and walk out without paying the bill. Should the restaurant owner then have the gall to sue the customer for not paying, the suit would be tossed out of court. Here, the Killians refused to agree to the option that Morrison wanted, Morrison refused to go forward with the sale of his property, and the Killians then sued to compel that sale. The trial court failed to toss the Killians' suit out of court. This Court should correct that error, and award Morrison the attorney's fees and costs he has incurred in having to defend against the Killians' meritless claims.

II. ARGUMENT IN REPLY

A. **The Legal Fiction of Principal and Agency Law, Under Which an Undisclosed Principal is Deemed to be a Party to a Contract Entered into by that Principal's Agent, Should Not be Extended so as to Allow that Principal's Undisclosed Reading of the Contract to Control the Interpretation of the Contract's Terms.**

The Killians do not dispute that they are not parties to the PSA contract under basic principles of contract law. Nor could they credibly do so, since the PSA contract document is executed by Morrison as the seller and by Bernhardt as the buyer. Instead, the Killians claim the status of party to the PSA contract under a long-standing rule of principal and agency law, under which an undisclosed principal is deemed by operation of law to be a party to a contract entered into on behalf of the undisclosed principal by that principal's agent. *See, e.g.*, Killians' Brief at 17-19.

This Court recently summarized Washington's form of the rule, as follows:

It has long been the law that an undisclosed principal may *enforce a contract* made through an agent on his behalf. This rule is set forth in *Columbia Security Co. v. Aetna Accident & Liability Co.*, 108 Wash. 116, 126-27, 183 P. 137 (1919):

[I]t is a well established general rule that, where an agent on behalf of his principal enters into a simple contract as though made for himself and the existence of the principal is not disclosed, the contract inures to the benefit of the principal who may appear and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, *it thereby becomes his own* to the same extent as if his name had originally appeared as a contracting party, and the fact that the agent has made the contract in his own name does not preclude the principal from suing thereon as the real party in interest.

(Quoting 2 C.J. 873.)

Dana v. Boren, 133 Wn. App. 307, 311, 135 P.3d 963 (Div. II 2006) (emphasis added).

The Killians cite to this decision, and even go so far as to quote a substantial portion of the language that Morrison has just quoted. *See* Killians' Brief at 17. But the Killians fail to apprehend the distinction between the rule as stated by this Court in *Dana*, and the rule as the Killians must have it in order to prevail in this case. As this Court's statement of the rule shows, the rule gives to the undisclosed principal the right to "enforce" a contract made by the principal's agent. It is to that extent -- and to that extent *only* -- that the undisclosed principal is made a

party to the contract: “By appearing and claiming the benefit of the contract, it thereby becomes...[the principal’s] own[.]” *Dana*, 133 Wn. App. at 311 (quoting the Supreme Court’s decision in *Columbia Security Co.*, *supra*). Thus, to apply the rule to the facts of this case, the PSA contract became the Killians’ contract when they appeared and claimed its benefits. The Killians, however, did not appear and claim the benefits of the PSA contract until shortly before closing. How then could they be entitled to have their secret reading of the contract -- specifically, their interpretation of the Call Memorandum’s option language -- enforced against Morrison, when that reading arose well prior to their stepping out of the shadows to claim the contract’s benefits?¹

In fact, nothing either in this Court’s decision in *Dana*, or in the Supreme Court’s earlier decision in *Columbia Security* applied by this Court in *Dana*, in any way supports applying the rule in the fashion urged by the Killians. Nor does anything in the Killians’ other authorities support such an application of the rule.²

¹ At the time the Killians’ economic interest in the transaction became known, the buyer’s rights under the contract had gone through a series of assignments and had ended up in the hands of 16th Street Investors, an entity specifically created shortly before the scheduled closing to take title to the property at closing. While the Killians undoubtedly exercised ultimate control over these entities, and while there is no dispute that Bernhardt principals Messrs. Bernhardt and Hornberger understood they were acting for the ultimate benefit of the Killians, the Killians never formally assumed the status of party to the PSA contract, even by an assignment of rights.

² Given that this rule forms the legal linchpin of the Killians’ case, it is remarkable just how few authorities the Killians offer in support of their proposed application of it. Besides this Court’s decision in *Dana*, the Killians quote a general statement of the rule from the 1858 decision of the United States Supreme Court in *Ford v. Williams*, 62 U.S. (Footnote continued on next page.)

The Killians rely most heavily on a 1987 law review article entitled “Squaring Undisclosed Agency Law With Contract Theory” (which appeared in Volume 75 of the California Law Review, at pages 1969 through 2003). This article is the -- sole -- authority that the Killians offer to buttress their claim that “[c]ommentators have recognized the important economic basis for th[e] ‘undisclosed principal’ rule.” See Killians’ Brief at 18. As set forth in the article in language quoted with evident enthusiasm by the Killians, the supposed “important economic basis” amounts to enabling parties in the position of developers such as the Killians to avoid paying a premium price they might otherwise have to pay, if the targeted property owner should tumble to the fact that the developer must acquire their property in order for a planned development to go forward.

Of course, that is not *precisely* how Professor Randy Barnett, the author of the article, put the matter. Writing over twenty years ago, when our national enthusiasm for all things “marketist” was still gathering steam and the consequences of re-unleashed laissez faire the concern of but a handful of socio-economic Cassandras, Professor Barnett waxed enthusiastic about what he proclaimed an economic “efficiency” rationale for the undisclosed principal rule. As Professor Barnett saw it, the “problem” to be overcome was a group of the property owners who could

287 (1858), Section 6.03 of the Restatement (Third) of Agency, and an article entitled “Squaring Undisclosed Agency Law with Contract Theory” which appeared in Volume 75 of the California Law Review in 1987. See Killians’ Brief at 17-19.

hold out for more if they became aware of a would-be developer's "deep pocket"; in the professor's view, principals should be allowed to "conceal their existence" in order to "overcome" such "strategic behavior," which could otherwise "impair" what he proclaimed to be "the formation of *mutually beneficial* contracts." See "Squaring...", 75 Cal. L. Rev. at 1976-77 (emphasis added).

It perhaps should come as no surprise that the Killians, whom the record shows to be developers of the first rank in the Vancouver, Washington market, should embrace a theory like Professor Barnett's. After all, it sanctions a practice under which they avoid paying *true market value* to the owner of the last piece of property needed so a project can go forward.³ Yet (and with all due respect to Professor Barnett) it is far from self-evident how a contract in which one party manages to get their hands on another's property for a lower price, by concealing the true purpose for the purchase, can accurately be described as a "*mutually beneficial*" contract. Moreover, many years have passed since Professor Barnett penned his encomium to this kind of "hide the ball" tactic. Even as Morrison submits this Reply Brief, the bill our country will have to pay, for having allowed practices that made markets less transparent run unchecked in recent years, grows ever larger. Morrison respectfully

³ That this is in fact a practice assiduously adhered to by developers generally is suggested by the webpage extracts attached to the Killians' brief, which at least leave no doubt that *some* developers and their brokers are well aware of the economic benefit to be reaped by keeping the true facts surrounding a proposed acquisition from a target property owner who holds title to the last key piece needed for a development.

submits that just about the *last* thing the country needs today are common law courts proclaiming the benefits of such conduct. Yet that is precisely what the Killians would have this Court do, by adopting Professor Barnett's rationale for letting principals (in his words) "conceal their existence[.]"⁴

Morrison is not suggesting that this Court presume to repudiate the rule under which an undisclosed principal (in the words of this Court in *Dana*) "may enforce a contract made through an agent on his behalf." The rule may very well serve a salutary purpose (by allowing undisclosed principals to enforce a contract when the other party is trying to use the fact the principal was undisclosed as an excuse to withdraw from a contract they should otherwise be expected to perform), and any change in the status of the rule in any event must come from our state Supreme Court. This Court is under no obligation, however, to extend the rule so that undisclosed principals will now be free to impose their undisclosed reading of the contract on the opposing party. The rule is already at odds

⁴ If a curriculum vitae is any indication, Professor Barnett likely has not yet been persuaded of any problem either with his specific endorsement of "hide the ball" tactics in the field of real estate development, or with the preceding years of enthusiasm for laissez faire which has recently come into such disrepute in the wake of this year's financial crisis. See www.randybarnett.com, "Books" link, listing books and other publications (as of Dec. 19, 2008). For a critique of the jurisprudence of contemporary laissez faire enthusiasts (including Professor Barnett), see Michael A. Wolf, "Looking Backward: Richard Epstein Ponders the 'Progressive' Peril," 105 Mich. L. Rev. 1233 (2007).

with the goal of *transparency* in market transactions,⁵ and there is no good reason to compound that tension by also allowing the undisclosed principal the benefit of undisclosed contract interpretations -- something that the law of *contract* indisputably would *not* allow. And the fact that the Killians have not offered a single authority -- not one case, treatise, or law review⁶ -- supporting such an extension of the undisclosed principal rule should reassure this Court that rejection is the correct common law course to take.

B. The Objective Manifestations of the Parties Disclosed During the Process of Forming the Purchase and Sale Agreement Contract, As Well as the Parties' Course of Conduct Under that Contract, Conclusively Establish that the PSA Contract was a Mere "Agreement to Agree" That Gave Rise to No Obligation on Morrison's Part to Effect a Transfer of Title to the Killians.

Having disposed of the notion that the trial court was entitled to give controlling weight to the Killians' undisclosed secret interpretation of

⁵ It is not at all clear that Washington's form of the rule even now obligates a court to enforce a contract where it can be proven that the undisclosed principal insisted on anonymity in order to deprive the target seller of the price that party might otherwise have extracted for their property, *and in fact the seller suffered such a loss as a consequence*. This Court need not reach that issue here, however, since the only evidence introduced on the point by the Killians showed a general desire to avoid paying any such premium and failed to establish that in fact such a premium would likely have been demanded had Morrison learned of the Killians' identity prior to formation of the PSA contract.

⁶ Neither the United States Supreme Court's decision in *Ford* nor Section 6.03 of the Restatement (Third) of Agency provide any support for the Killians' proposed application of the rule. Not even Professor Barnett in any way suggests he would take his enthusiasm for "conceal[ment]" so far as to allow a principal the benefit of an undisclosed interpretation of a contract to which it was unwilling to enter openly.

the Call Memorandum,⁷ Morrison now turns to the Killians' attempt to salvage the trial court's judgment based on the objective manifestations of the parties disclosed during the process of forming the PSA contract. The issue is whether the parties intended the PSA contract to be a final and enforceable agreement, or whether the parties understood that agreement still needed to be reached on the final form of Morrison's option in order to transform the PSA contract into an enforceable agreement.

In other words: Was the PSA contract an "agreement to agree"? As the Washington Supreme Court reiterated in *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004), "[a]n 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.'" See 152 Wn.2d at 175-76 (citing and quoting *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957)). And as the Supreme Court also underscored in *Keystone*, it is our state's "long standing jurisprudence that agreements to agree are unenforceable." See

⁷ The Killians valiantly try to rewrite history, claiming that the trial court really didn't mean that it was giving controlling effect to the Killians' undisclosed reading of the Call Memorandum at the time of the formation of the PSA contract, only that it was going to be guided by the objective manifestations of the parties. See Killians' Brief at 29-30. But their effort at rehabilitation rests on the trial court's *memorandum decision*, when the problem lies with the court's ultimate (and legally controlling) *findings and conclusions*. See, e.g., COL No. 5 (CP 932) ("16 [sic] 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.*" (emphasis added)); see generally *In re Mayer's Estate*, 43 Wn.2d 258, 266, 260 P.2d 888 (1953) (citation omitted) ("Where there is a discrepancy between a memorandum decision and the findings of fact, the latter control"); *Miller v. Jarman*, 2 Wn. App. 994, 998, 471 P.2d 704, *rev. denied*, 78 Wn.2d 995 (1970) (op. per Utter, J.) (adhering to the holding in *Mayer's Estate*).

152 Wn.2d at 180 (citations omitted). Hence, if the PSA contract was only an “agreement to agree,” Morrison had no duty to close the sale and surrender title to his property, and the Killians’ plea for specific performance should have been dismissed with prejudice.

To determine whether the PSA contract was merely an agreement to agree under the test reiterated in *Keystone*,⁸ one looks first to the objective manifestations of the parties generated by the formation of the contract and then to the course of conduct of the parties under that contract. The Killians have misread those manifestations, and ignored the parties’ course of conduct. Both are fatal to the trial court’s decree.

- Manifestations. Logically, this analysis begins with the Call Memorandum. In turn, the analysis of the memorandum logically begins with the opening phrase of the paragraph addressing the option, which states that “[a]s additional consideration, Mr. Morrison *would like* an option[.]” See Call Memorandum (Ex. 4) (emphasis added) (copy attached as Ex. C to Morrison’s Opening Brief and as Ex. App. 2 of the Appendix to this Reply Brief). A common meaning of “would” is to

⁸ The Killians chide Morrison for citing to *Keystone*, asserting the case is irrelevant because some other court in the underlying dispute had already decided that the parties did not have an enforceable contract. See Killians’ Brief at 32. While the Killians are correct that another court (specifically, the Ninth Circuit) had already affirmed a prior trial court determination that *Keystone* and Xerox did not have a binding agreement, the Killians miss the salient point -- that *Keystone* sets forth the test for determining whether a contract is only an agreement to agree, and that the facts of the case are instructive because they illustrate what kinds of agreements fall within the category of contracts that will be held to be nothing more than agreements to agree, and therefore unenforceable.

express a desire or preference, while a common meaning of “like” is “a wish to have” that (as dictionaries point out) is “often used with a conditional auxiliary” such as would (i.e., “would like X”). *See, e.g., Webster’s Third New International Dictionary of the English Language Unabridged* at 1310 (fourth definition of first listing of “like”) & 2637-38 (second definition of “would”) (2002 ed.). Thus, using ordinary meanings of these words,⁹ one derives that Mr. Morrison was expressing his “wish to have” (his “desire” or “preference” for) an option, which the memorandum goes on to state “would provide for the purchase of one (1) residential unit” of a specified minimum size, building location, and cost. *See Ex. 4* (Call Memorandum, second sentence of paragraph two).

It would seem rather difficult to square this expressed “wish to have” an option that Morrison “prefer[red]” take the form of a residential unit of a minimum size, building location, and price, with the idea that -- as the Killians asserted and the trial court concluded -- the Call memorandum’s second paragraph was *itself* the option that Morrison “wish[ed] to” receive, *and* limited Morrison to an option for a condominium only. And in fact, the trial court’s own effort at such a

⁹ Although the Killians do not address this point, given their enthusiasm for the concept of objective manifestations they would be hard pressed to quarrel persuasively with the application of the well-established rule that words in contracts are presumptively to be given their ordinary meaning which is typically derived from widely used dictionaries of the English language. *See, e.g., Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005); *Martinez v. Miller Industries, Inc.*, 94 Wn. App. 935, 944-945, 974 P.2d 1261 (1999) (both determining ordinary meaning by the use of English language dictionaries).

“squaring” (embraced by the Killians in this appeal) actually proves the implausibility of the Killians’ -- and the court’s -- reading of the Call Memorandum.

In his memorandum decision, Judge Bennett compared the Call Memorandum’s statement that Morrison “would like an option” to someone going into a restaurant and ordering a steak:

[I]f Mr. Morrison went to a restaurant and said to the waiter: “I would like to order a steak,” that language imparts a current, present desire to order a steak, not an intention to order one sometime in the future.

Memorandum Decision (“Ruling”) at 6 (CP 873). Yet this is exactly Morrison’s point. In the real estate transaction that is the “restaurant” of this case, Morrison said to the “waiter” (here, Bernhardt acting on behalf of the -- anonymous -- restaurant owners, the Killians) that he would like a steak (here, an option to purchase a residential unit of certain minimum specified characteristics). If the Killians then failed to bring him a steak, Morrison would be entitled to walk out of the restaurant and not pay (here, if the Killians failed to provide Morrison with a form of option satisfactory to him, Morrison would be under no obligation to close the sale and transfer title to his property to the Killians). Or, to put matters in the language of the definition of “agreements to agree” reiterated in *Keystone*, the Killians agreed to provide a form of option upon which there could be a meeting of the minds with Morrison, and without which the PSA contract would not be complete (and therefore enforceable against Morrison).

In the event, the Killians brought Morrison hamburger instead of steak (an option for a condominium only). Moreover, unknown to Morrison but well known to the Killians, the hamburger was not even beef but a tofu substitute said to be hamburger (the Killians knew but did not disclose that they did not plan to build the development with condominiums, which would render Morrison's option unexercisable and therefore worthless). Morrison therefore was entirely within his rights to walk out of the restaurant without paying for the hamburger (Morrison was entitled to refuse to close the deal and retain title to his property).¹⁰

To avoid this conclusion, the Killians are forced to fall back on the claim that one must look beyond the language of the Call Memorandum to the terms of the PSA contract taken as a whole. According to the Killians, there are provisions found elsewhere in the PSA contract document which establish that the Call Memorandum's option discussion was intended by the parties to be the final statement of Morrison's option rights. But the only *specific* provision that the Killians can point to is the integrated agreement clause set forth in the Bernhardt firm's boilerplate form. *See* Killians' Brief at 25-26.¹¹ While the Killians are correct that the trial court

¹⁰ This basic fact also renders inapposite the Killians' various "option" cases, such as *Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 481 P.2d 17 (1971). *See* Killians' Brief at 23-25. Here, the problem was not a question of area, location or price, but the circumstances that would trigger Morrison's option right. This is the nub of the "steak v. hamburger" issue, and it is fatal to the Killians' case.

¹¹ The clause in question appears at page 7 of the Bernhardt form, as part of a paragraph entitled "Miscellaneous Provisions." *See* Ex. 3 (PSA contract) (copy attached as Ex. D of *Footnote continued on next page.*)

highlighted this clause in its findings and conclusions, *see* COL No. 3 (CP 931) (“16 [sic.] Street was entitled to rely upon section...22(a)...an integration clause...”), both the Killians and the trial court misapprehend the basic import of such a clause.

To be sure, an integration clause is evidence that the parties intend their written agreement to constitute the complete expression of their contractual obligations. *See, e.g., King v. Rice*, 146 Wn. App. 662, 670, n.17, 191 P.3d 946 (2008) (“While boilerplate integration clauses are strong evidence of integration, they are not operative if they are factually incorrect” (citation omitted)). And if the Call memorandum had not been incorporated into the PSA contract, and Morrison was trying to use it to establish that the parties intended the enforceability of the PSA contract to be subject to a subsequent agreement on a form of the option referenced in the memorandum, the Killians -- and the trial court -- would have a point. But instead the Call Memorandum *was made a part of the parties’ written agreement*. The integrated agreement clause therefore can tell us absolutely nothing about what the parties intended when they incorporated the Call Memorandum, with its “would like an option” language, into the PSA contract. Yet the integrated agreement clause is the *only* specific provision of the balance of the PSA contract which the Killians offer up as (somehow) proving that the parties did not intend that the Call

the Appendix to Morrison’s Opening Brief, and as Ex. 3 of the Appendix to this Reply Brief).

Memorandum mean what the ordinary meaning of the language of the option paragraph would indicate they understood it to mean.¹²

- Course of Conduct. In sum, both the language of the Call Memorandum, as well as its incorporation into the PSA contract, establish that the PSA contract was only an agreement to agree, and that formation of an enforceable contract was contingent on the parties agreeing on the form of Mr. Morrison's option. Moreover, the course of conduct of the parties pursuant to that contract establishes that the parties understood that Morrison was to be provided an option for a residential unit, rather than an option limited to a condominium. Incredibly, the Killians do not even attempt to explain away why, if the parties' intentions to the PSA contract were as they claim, their own lawyer (Mr. Weiner) provided Morrison a written acknowledgment of the scope of his option rights stating unequivocally that Morrison was entitled to an option *for a residential unit rather than an option limited to a condominium*:

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 [i.e., the Call Memorandum].

¹² The trial court (although apparently not the Killians on appeal) also seemed to think that another boilerplate clause, concerning how the PSA agreement would not merge into the deed upon the closing of any sale, somehow proved that the parties intended the language of the Call Memorandum to be the actual option. *See* COL No. 3 (CP 931) (referring to Paragraph 22(b) of the PSA Contract). This clause, however, would only at best raise a question about whether the Killians were bound to provide a *recordable* form of an option, and the record reflects that, after initial resistance, the Killians agreed that Morrison should receive a recordable option at the time of closing.

Ex. 20 (May 25, 2006 “Acknowledgment”) (emphasis added).

Of course, when Morrison refused to accept an *unrecorded* option, and the parties then got down to working out the terms of an option that could also be recorded, the Killians effectively repudiated this acknowledgment and demanded that Morrison accept an option only for a condominium. Compare Ex. 23 (Greg Call draft of form of option) (providing for option for residential unit) with Ex. 26 (Weiner red-line revision to Call draft, striking all references to an option for simply a “residential unit” and substituting or inserting “condominium”).¹³ Even then, Morrison was still prepared to close -- but only if the Killians lived up to their end of the PSA contract and provided an option for a residential unit. But while Morrison was *willing* to close, as a matter of law he was under no *obligation* to close, because the Killians had never fulfilled -- indeed, had refused to fulfill -- their obligation to provide a satisfactory form of option. And without (in the words of *Keystone*) a “meeting of the minds” on the form of that option, the parties had nothing but a purchase

¹³ The Killians also attempted to further condition whatever option Morrison did receive by making it operative only if the property were “initially” developed with residential (condominium) units. See Ex. 26 (page 1 of Weiner’s red-line version, reflecting his insertion of the term). The Killians thereby would have preserved for themselves the ability to develop the property with condominiums at a later date (presumably, as part of some sort of “second phase” development), or initially with apartments (to be converted to condominiums, again as part of a “second phase” development), and in either event claim they had no obligation to offer a unit to Morrison because the condominiums had not been part of the Killians’ “initial...” development of the property. And if Morrison had been persuaded to accept this form of option, the Killians presumably would have claimed in any subsequent lawsuit brought by Morrison for damages for fraudulent inducement that Morrison was put on notice by this term of the possibility that the project would not initially be developed with condominiums.

and sale contract that constituted (under long established Washington law) an unenforceable agreement to agree.

Moreover, *even if* the PSA contract is deemed to be an enforceable contract, this only changes the precise nature of the legal problem confronting the Killians. They merely go from having nothing but an agreement to agree to having a purchase and sale contract subject to a condition precedent -- specifically, that Morrison provide a form of option prior to closing consistent with the description set forth in the Call Memorandum. And as that condition was not satisfied because the Killians refused to provide what they had agreed to provide, the Killians still end up with no right to a decree for specific performance because their breach relieved Morrison of any duty to perform. *See, e.g., Ross v. Harding*, 64 Wn.2d 231, 391 P.2d 526 (1964).

In sum, the Killians failed to establish their right to specific performance. This Court therefore should reverse the trial court's judgment, direct the dismissal of the Killians' complaint with prejudice (along with the Bernhardt's firm's claim for a broker's commission for a sale that Morrison had no obligation to close), and award Morrison his attorney's fees and costs incurred before the trial court and on appeal defending against the Killians' (and Bernhardt's) meritless claims.

C. Morrison Preserved His Claims of Error.

Having disposed of the Killians' substantive defense of the trial court's judgment, there remains the Killians' procedural defenses against the reversal that must otherwise ensue.

First, the Killians assert that Morrison did not preserve his theory for appellate relief before the trial court, supposedly because Morrison conceded before the trial court that the Killians were parties to the PSA contract. *See* Killians' Brief at 4-6. The Killians fail to acknowledge, however, that Morrison's opposition to the Killians' pre-trial motion for summary judgment was based on the same theory now being advanced on appeal, *and* that the trial court fully grasped the import of Morrison's argument (indeed, the court expressly rested its denial of summary judgment on the very point of law and fact that is now the central issue of this appeal). *See* Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, § B, "The Purchase and Sale Agreement is Unenforceable," at 20-33 (CP 282-295); VRP (May 29, 2007) 28:4-7 (court's ruling denying summary judgment) ("Mr. [C]all's memorandum of October 19th, 2005 is not intended to be a final declaration of the option rights available to the Defendant/seller...because it was not intended to be the option agreement itself").

Nor did Morrison abandon this theory at trial, as his trial brief confirms. *See* Defendant's Trial Brief at 22-28 (CP 511-517). The record reflects that Morrison did attempt to establish at trial that Mr. Justin was the Killians' agent, and in that context argued that the Killians were bound

by the dealings between Morrison and Justin under the law of principal and agent. The trial court rejected that claim because it found that Justin was Morrison's agent and Morrison is not challenging that finding on appeal. Instead, Morrison has returned to the issue that has always formed the heart of his defense to the Killians' suit -- that the Call Memorandum's discussion of an option was not intended to be the actual option itself and that the Killians have only themselves to blame for the failure of the parties to arrive at a binding sales agreement, because they tried to get out of what they knew was their obligation to provide Morrison with an option for a residential unit. The trial court had a full and fair opportunity to come to grips with this issue and in the end simply failed to get it right. Hence, the need for this appeal.

Second, the Killians appear to quarrel with the adequacy of Morrison's compliance with the requirements of RAP 10.3(a)(4), which calls for "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." *See* Killians' Brief at 6-7. (The Killians don't actually *cite* to this rule, but Morrison assumes that this provision of the Rules of Appellate Procedure must be the source of their complaint, given the content of their argument.) Morrison surmises that the Killians are objecting to the fact that Morrison's two stated issues each cross-reference all 23 of Morrison's assignments of error. While Morrison is prepared to concede that this kind of cross-reference does lack a certain quality of

particularity, it must also be conceded that the nature of the issues in this appeal cut across the *entirety* of Morrison's assignments of error and therefore render it presumptively difficult to offer any more specificity than Morrison has in fact set forth in his opening brief. Moreover, after carping about the precision of Morrison's cross-references, the Killians appear to concede that, in fact, their ability to come to grips with Morrison's issues has not *actually* been compromised by the formal statement of Morrison's assignments of error, statement of issues, *or* cross-references between the two. Especially given the mandate of RAP 1.2(a), that appeals shall not be decided on a (supposed) failure to comply with procedural requirements of the rules absent *compelling circumstances*, this Court should not deny Morrison the relief to which he is otherwise entitled on the merits based on this quarrel with what can at best be described as an objection to the *degree* of a party's compliance with RAP 10.3(a)(4).

III. CONCLUSION

The PSA contract, to which the Killians are deemed a party solely by operation of the rules of principal and agent law, was merely an agreement to agree. To be entitled to a decree of specific performance compelling Morrison to transfer title to his property, the Killians needed to provide Morrison a satisfactory form of option for a residential unit in any development including residences -- of whatever type -- which the Killians, or any subsequent purchaser, decided to build on the property.

The Killians refused to provide such an option, and Morrison therefore refused to close. Morrison was entirely within his rights to do so, and the trial court erred when it concluded otherwise and ordered Morrison to transfer title to his property to the Killians. This Court should reverse the trial court's judgment, dismiss the Killians' complaint with prejudice, and order the Killians to pay Morrison the attorney's fees and costs he has incurred before the trial court and on appeal having to defend against this meritless suit.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
MICHAEL B. KING
WSBA No. 14405
Of Attorneys for Appellant

REPLY BRIEF APPENDIX

INDEX TO REPLY BRIEF APPENDIX
Case No. 37451-0-II

Exhibit No.	Description
Ex. App. 1	May 25, 2006 "Acknowledgement" – Trial Ex. 20
Ex. App. 2	Call Memorandum – Trial Ex. 4
Ex. App. 3	PSA Contract – Trial Ex. 3

Ex. App. 1

■ ■ ■ ■ ■
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

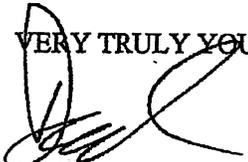
VIA E-MAIL: lykej@ctt.com
and VIA HAND DELIVERY
Ms. Jennifer Lyke
Chicago Title Insurance Company
Pioneer Tower
888 SW Fifth Ave., #930
Portland, OR 97204

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.

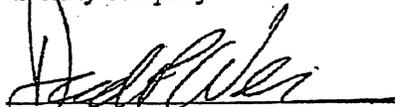
ACKNOWLEDGEMENT

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

Ex. App. 2

GREG CALL, P.C.

GREG J. CALL, Attorney
Sara Milliman, Legal Assistant

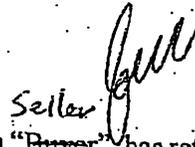
LEGAL COUNSEL

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:

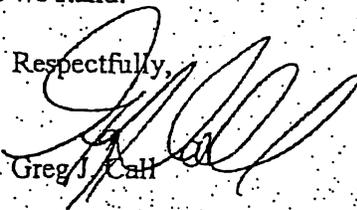
Seller 

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.

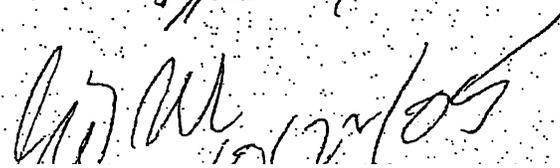
As additional consideration, Mr. Morrison would like an option to purchase a condominium if Buyer, at Buyer's election, decides to include residential units in the construction and development of the property. The option would provide for the purchase of one (1) residential unit to be located on an upper 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



208 a05

Ex. App. 3



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.)

1. 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:

2. 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

RSB

Buyer

Date

11-9-05

Seller

Date

[Signature]

Seller

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 *Buyer 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 *RDB* 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

ASB

Buyer

Seller

[Signature]

Seller

Date: _____ Date: _____

b. **Permitted Exceptions.** Buyer shall notify Seller of any objectionable matters in the title commitment or any supplemental report within ten (10) days after receipt of such commitment or supplement. This Agreement shall terminate and Buyer shall receive a refund of the earnest money, less any costs advanced or committed for Buyer, unless (a) within ten (10) days of Buyer's notice of such objections, Seller agrees to remove all objectionable provisions, or (b) within fifteen (15) days after Buyer's notice of such objections, Buyer notifies Seller in writing that it waives any objections which Seller does not agree to remove. The closing date shall be extended to the extent necessary to permit time for these notices. Those provisions not objected to or for which Buyer waived its objections shall be referred to collectively as the "Permitted Exceptions." The title policy shall contain no exceptions other than the General Exclusions and Exceptions common to such form of policy and the Permitted Exceptions.

7. **CLOSING OF SALE.** This sale shall be closed on or before, at Seller's election with 45 days advance written notice to Buyer, not to exceed 180 days after Due Diligence Period (of 45 days), ("closing") by Kris Lobb ("Closing Agent"). Buyer and Seller will, immediately on demand, deposit with Closing Agent all instruments and monies required to complete the purchase in accordance with this Agreement. "Closing" shall be deemed to have occurred when all documents are recorded and the sale proceeds are available to Seller. Time is of the essence in the performance of this Agreement.

8. **CLOSING COSTS.** Seller shall pay the excise tax and premium for the owner's standard coverage title policy. Seller and Buyer shall each pay one-half of the escrow fees. Real and personal property taxes and assessments payable in the year of closing; rents on any existing tenancies; interest; mortgage reserves; utilities; and other operating expenses shall be pro-rated as of closing. Buyer shall pay all costs of financing including the premium for the lender's title policy. Security, cleaning, and any other unearned deposits on tenancies, and remaining mortgage or other reserves shall be assigned to Buyer at closing. The real estate commission is due on closing or upon Seller's default under this Agreement, whichever occurs first, and neither the amount nor due date thereof can be changed without Listing Agent's written consent.

a. **Unpaid Utility Charges.** Buyer and Seller WAIVE DO NOT WAIVE the right to have the Closing Agent disburse closing funds necessary to satisfy unpaid utility charges affecting the Property pursuant to RCW60.80. If "do not waive" is checked, then attach CBA Form UA ("Utility Charges" Addendum). If neither box is checked, then the "do not waive" option applies.

9. **POST-CLOSING ADJUSTMENTS, COLLECTIONS, AND PAYMENTS.** After closing, Buyer and Seller shall reconcile the actual amount of revenues or liabilities upon receipt or payment thereof to the extent those items were prorated or credited at closing based upon estimates. Any bills or invoices received by Buyer after closing which relate to services rendered or goods delivered to the Seller or the Property prior to closing shall be paid by Seller upon presentation of such bill or invoice. At Buyer's option, Buyer may pay such bill or invoice and be reimbursed the amount paid plus interest at the rate of 12% per annum beginning fifteen (15) days from the date of Buyer's written demand to Seller for reimbursement until such reimbursement is made. Rents collected from each tenant after closing shall be applied first to rentals due most recently from such tenant for the period after closing, and the balance shall be applied for the benefit of Seller for delinquent rentals owed for a period prior to closing. The amounts applied for the benefit of Seller shall be turned over by Buyer to Seller promptly after receipt.

10. **OPERATIONS PRIOR TO CLOSING.** Prior to closing, Seller shall continue to operate the Property in the ordinary course of its business and maintain the Property in the same or better condition than as existing on the date of mutual acceptance of this Agreement, but shall not be required to repair material damage from casualty except as otherwise provided in this Agreement. Seller shall not enter into or modify existing rental agreements or leases (except that Seller may modify or terminate residential rental agreements or leases in the ordinary course of its business), service contracts, or other agreements affecting the Property which have terms extending beyond closing without first obtaining Buyer's consent, which shall not be unreasonably withheld.

11. **POSSESSION.** Buyer shall be entitled to possession, subject to existing tenancies (if any), on closing _____ (on closing, if not completed).

12. **SELLER'S REPRESENTATIONS AND WARRANTIES.** Seller represents and warrants to Buyer that, to the best of Seller's knowledge, each of the following is true as of the date hereof and shall be true as of closing: (a) Seller is authorized to enter into the Agreement, to sell the Property, and to perform its obligations under the Agreement; (b) All

INITIALS: Buyer dlg ds
Date 5/21/06

Buyer
Date

Seller [Signature]
Date 5/21/06

Seller
Date

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

ROB

Buyer

Seller

[Signature]

Seller

Date

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

Bob

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

INITIALS: Buyer RDG Buyer _____ Seller [Signature] Seller _____

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 Joseph K. A. Morrison Date 01/27/05
Seller _____ Date _____
Print Seller's Name JOSEPH K. 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 _____
INITIALS: Buyer DBB Buyer _____ ASeller [Signature] Seller _____

EXHIBIT A

[Legal Description]

ATTACHED

INITIALS: Buyer

REB

Buyer

Seller

[Handwritten Signature]

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 & Annalouisa, 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

Com Plan

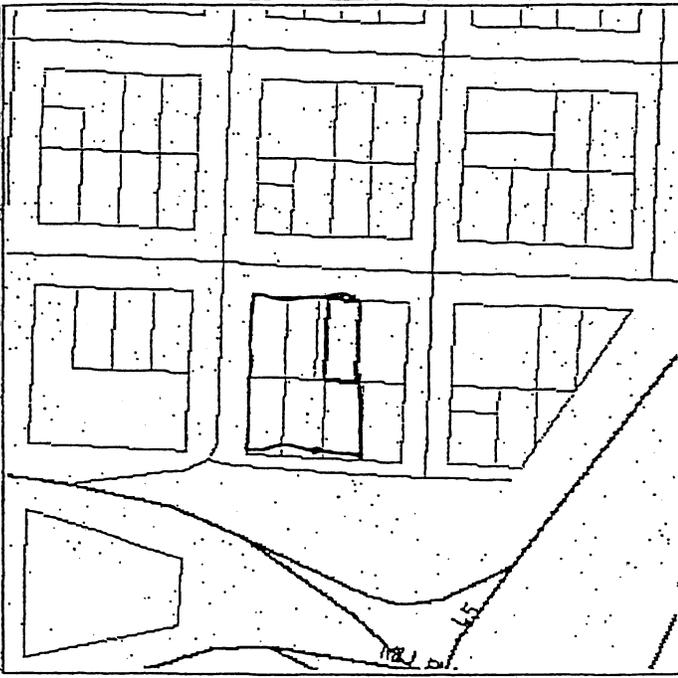
CWP 2004

Aerial Photos

Site Plan Review

Building Permits

HELP



Parcel Report

Account : 049485-
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

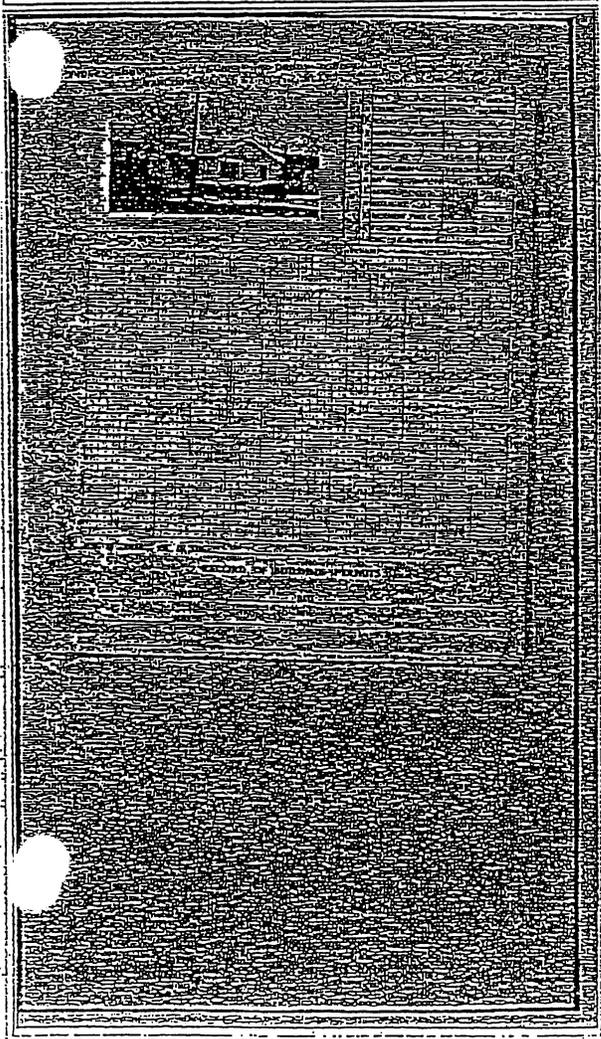
Building

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		Building		No photo available
Lot Size	1000 sq ft	Effective Year Built	no data	
Subdivision Info...	EAST VANCOUVER 27-2-1 (C-70)	Actual Year Built	no data	
Survey	no data	Number of Bedrooms	no data	
Land Use Code	Unused or Vacant Land - No improvements	Construction Quality Codes	no data	
FEMA Flood Map	5300270007B	Building Style Codes...	no data	
Miscellaneous Code	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	

No 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
 Account | Land-Building | Taxes | Documents | Permits | Splits/Merges |
 New Search | Maps Online

Abbreviated Legal Description
 EAST VANCOUVER #2 LOT 3 BLK 71

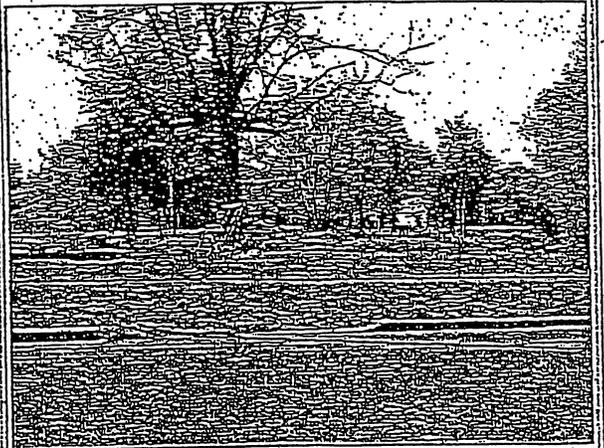
Photo Date: 04/26/2004

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 no data
 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



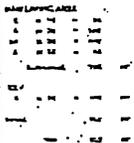
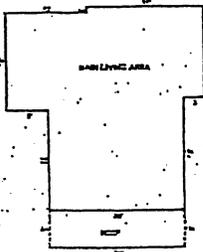
Building Sketch

Building Sketch

SKETCH ADDENDUM

04/26/04

345319 003
 137' x 147' 0"
 932
 1/23/04





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

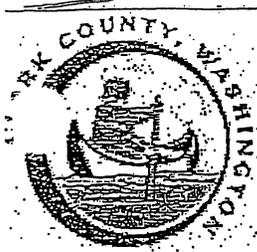
Central Air Conditioning: no data

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

6

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: no data
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

09/17/05

[Handwritten signature]
10/22/05

GREG CALL, P.C.

GREG J. CALL, Attorney
Sara Milliman, Legal Assistant

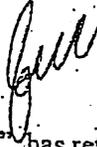
LEGAL COUNSEL

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:

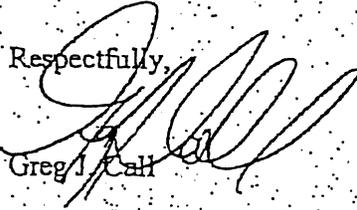
Seller 

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.

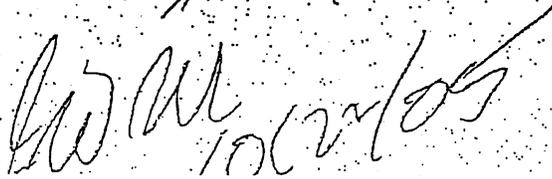
The Buyer further agrees to take assignment and delegation of all rights and obligations as landlord and owner of the property upon closing and will indemnify and hold Seller harmless from liability for any claim and costs of defending any claim raised by any tenant, public agency or jurisdiction and 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

*Rob
11-9-05*



NO. 37451-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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,

vs.

JOSEPH W. MORRISON,

Appellant.

CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
08 DEC 23 AM 10:13
STATE OF WASHINGTON
BY _____
DEPUTY

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On December 19, 2008, I served by US Mail, one copy of the following documents on:

CERTIFICATE OF SERVICE -1-

James J. Holland
Hall & Holland
1109 Broadway
Vancouver WA 98660

Stephen G. Leatham
Heurlin, Potter, John, Leatham, Holtmann & Stoker PS
211 E. McLoughlin Blvd. Suite 100
Vancouver WA 98663

James T. McDermott
Aaron D. Goldstein
Ball Janik LLP
101 SW Main Street Suite 1100
Portland OR 97204

entitled exactly:

REPLY BRIEF

DATED: December 19, 2008



Lily T. Laemmle

CERTIFICATE OF SERVICE -2-