

FILED

MAY 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 296831

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

PATRICK H. KOFMEHL,

Plaintiff/Respondent,

vs.

BASELINE LAKE, LLC,

Defendant/Appellant.

BRIEF OF APPELLANT

George M. Ahrend
WSBA No. 25160

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Attorneys for Appellant

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INTRODUCTION

When real estate developer Patrick H. Kofmehl (Kofmehl) became concerned about the economic viability of one of his proposed developments, he sought to obtain more than he bargained for under the terms of a commercial real estate purchase and sale agreement with Baseline Lake, LLC (Baseline). When it became apparent that his own broker could not support him and that he would not improve upon his bargain by means of litigation, he successfully avoided the bargain altogether on grounds that the description of the property conveyed by the agreement did not comply with the statute of frauds.

Baseline does not seek to enforce the agreement on appeal. Instead, it seeks reversal of the superior court decisions leading to an award of rescission and restitution in favor of Kofmehl following his avoidance of the deal. This case presents the question of whether, and under what circumstances, a buyer who avoids a real estate contract under the statute of frauds is entitled to rescission and restitution when the seller is ready, willing and able to perform as agreed.

ASSIGNMENTS OF ERROR

1. The superior court erred by granting Kofmehl's motion for summary judgment regarding rescission and restitution. CP 804-08 (Order Granting Plaintiff's Motion for Summary Judgment Re: (1) Rescission and

(2) Restitution & Denying Defendant's (Renewed) Motion for Summary Judgment, Oct. 22, 2010).

2. The superior court erred by denying Baseline's cross motion for summary judgment regarding rescission and restitution. *Id.*

3. The superior court erred by ordering restitution in favor of Kofmehl. CP 850-52 (Order Granting Restitution Award, Jan. 11, 2011).

4. The superior court erred by awarding attorney fees and costs to Kofmehl. CP 880-881 (Order Granting Award of Attorney Fees & Costs, Feb. 17, 2011).

5. The superior court erred in entering final judgment based on the foregoing orders. CP 882-84 (Judgment, Feb. 17, 2011).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a buyer of real estate avoids a purchase and sale agreement on grounds of the statute of frauds, can the buyer obtain rescission and restitution when the seller remains ready, willing and able to perform as agreed?

2. If the buyer is not entitled to rescission and restitution under these circumstances, who has the burden of proving whether the seller is ready, willing and able to perform?

3. What is the degree of certainty required to meet the burden of proof: clear and convincing evidence or a preponderance of the evidence?

4. Is there a genuine disputed issue of material fact regarding Baseline's readiness, willingness and ability to perform under its real estate purchase and sale agreement with Kofmehl?

5. Is either party entitled to recover attorney fees and costs?

STATEMENT OF THE CASE

A. Background To Agreement.

In January 2007, an Internal Revenue Code § 1031 tax exchange facilitator known as Exchange 1031 Services IV, LLC (Exchange 1031 Services), acquired a parcel of real property near Quincy, Washington, on behalf of Baseline. The property consists of approximately 43 acres, and, at the time of acquisition, was legally described as Farm Unit (FU) 182, Block 73, in Grant County, Washington. Ultimately, Baseline did not participate in a § 1031 tax exchange and title to the property was later conveyed from Exchange 1031 Services to Baseline.¹

Baseline had the property surveyed and divided into three lots, which are described as Lots 1, 2 and 3 on the plat. Lot 1, consisting of

¹ CP 68-69 (Declaration of Warren R. Morgan in Opposition to Plaintiff's Motion for Summary Judgment, Mar. 24, 2009, at 1:25-2:8 [hereafter "Morgan Decl., Mar. 24, 2009"]); CP 83 (Baseline deed); CP 88-89 (Exchange 1031 Services deed).

approximately 30.12 acres, comprises the middle of the property. Lot 2, consisting of approximately 3.93 acres, comprises one corner of the property. Lot 3, consisting of approximately 9.04 acres, comprises the southern part of the property.²

Baseline intended to sell Lot 1 for development, and to build a private school on Lot 2. It had no immediate plans for Lot 3, which was subject to an easement for an irrigation canal. CP 69 (Morgan Decl., Mar. 24, 2009, at 2:16-19).

Baseline listed Lot 1 (not Lots 2 or 3) for sale with a real estate broker. The original listing price was \$1.6 million. However, given market conditions at that time, and competing offers from two buyers, the listing agreement was amended to reflect a price of \$1.65 million for the same property.³

Kofmehl sought to buy the property for a residential development. After exchanging several offers and counteroffers, Kofmehl and Baseline

² CP 69 (Morgan Decl., Mar. 24, 2009, at 2:8-15); CP 74 & 327 (survey map); CP 91 & 353 (preliminary short plat); CP 98 & 377 (recorded short plat). On the survey map, the 30.12 acres of Lot 1 was further subdivided into a 12.72-acre parcel and a 17.40-acre parcel—the maximum number of lots that could be short-platted, *see* RCW 58.17.060—in order to facilitate sale. CP 69 (Morgan Decl., Mar. 24, 2009, at 2:20-25). Because the sale between the parties involved all 30.12 acres of Lot 1, the further subdivision is not reflected on the preliminary plat, nor on the recorded plat. *Id.* The survey and plat maps are reproduced in the Appendix to this brief.

³ CP 70 (Morgan Decl., Mar. 24, 2009, at 3:2-6); CP 97 (original listing agreement); CP 99 (amended listing agreement); CP 451 (Deposition of Warren R. Morgan, Dec. 17, 2008, at 65:5-12 [hereafter “Morgan Depo.”]); CP 457-58 (Deposition of Curt Morris, Mar. 5, 2009, at 52:14-53:5 [hereafter “Morris Depo.”]).

entered into a commercial real estate purchase and sale agreement (PSA) on April 17, 2007. Kofmehl offered to purchase the 30.12-acre Lot 1 for the listing price of \$1.65 million. Baseline accepted Kofmehl's offer in lieu of a competing offer for the same property in the amount of \$1.625 million.⁴

B. Property Description.

The PSA described the property as follows:

This Agreement covers the following described real estate in the City of Quincy, County of Grant, Washington, commonly known as Approximately 30.12 acres of vacant land situated between 10th Avenue and 13th and legally described as follows: All included inside of FU 182, Block 73, Columbia Basin Project, Grant CO Tax Parcel # 20-0838-000.

CP 75 (parentheticals omitted). The property description was drafted by Kofmehl's broker.⁵ He based the property description on Baseline's listing agreement and the survey map. CP 464-65 (Nicholson Depo., at 48:11-49:23). He intended to include the 30.12 acres corresponding to Lot 1 in the property description. *Id.* He knew that the property corresponding to Lots 2 and 3 was not for sale, and he intended to exclude that property

⁴ CP 70 (Morgan Decl., Mar. 24, 2009, at 3:7-17); CP 75-77 (PSA); CP 93-96 (competing offer). Although the first page of the PSA is dated April 13, 2007, the last signature was obtained on April 17, 2007. CP 75 & 77. The PSA is reproduced in the Appendix to this brief.

⁵ CP 464 (Deposition of Michael Nicholson, Mar. 18, 2009, at 48:1-7 [hereafter "Nicholson Depo."]); CP 70 (Morgan Decl., Mar. 24, 2009, at 3:17-23).

from the description. CP 460 & 464-65 (Nicholson Depo., at 21:8-15 & 48:11-49:23).

Kofmehl's broker highlighted his copy of the survey map to show the property described in the PSA. CP 465 (Nicholson Depo., at 49:3-14); CP 371 (map). Initially, he highlighted the map incorrectly. The initial highlighting did not accurately reflect the southern boundary between Lots 1 and 3. However, it did accurately reflect the boundary between Lots 1 and 2, and it clearly showed that the 3.93-acre Lot 2 was "excluded," in all capital letters with underlining. CP 468-70 (Nicholson Depo., at 63:18-65:22); CP 372 (incorrectly highlighted map).

Kofmehl's broker discovered his error "almost immediately," and corrected the highlighted survey map "within hours" on the same day. CP 470 (Nicholson Depo., at 65:10-22). The corrected map accurately reflects all boundaries of Lot 1. As with the previous, incorrectly highlighted map, the correct map also clearly shows that the 3.93-acre Lot 2 was "excluded," again in all capital letters with underlining. CP 371 (correctly highlighted map).⁶

Kofmehl's broker told Kofmehl exactly what property he was offering to purchase under the PSA. CP 465 (Nicholson Depo., at 49:15-23). Kofmehl's broker also gave copies of the listing agreement, the

⁶ Both maps highlighted by Kofmehl's broker are reproduced in the Appendix to this brief.

correctly highlighted survey map, and the PSA to Kofmehl. Kofmehl admits receiving a copy of the listing agreement, although he claims “[i]t was not something that I actually paid a lot of attention to.”⁷ Kofmehl admits receiving a copy of the map, and being aware that the 3.93-acre Lot 2 was excluded. CP 439 (Kofmehl Depo., at 19:10-19). Kofmehl also signed the PSA twice, once on April 13, 2007, when he made an offer, and again on April 17, 2007, when he accepted Baseline’s counter offer. CP 75-77.

C. Other Terms And Conditions.

In addition to the property description, Kofmehl’s broker and Kofmehl himself added the following terms and conditions to the PSA:

\$50,000.00 Earnest money as shown above in the form of a check to be deposited with [Baseline’s broker] Trust Account upon mutual acceptance of this agreement. Said Earnest money to become non-refundable upon Final annexation of this property into the City of Quincy, Washington and is to be released to the seller at that time.

\$1,600,000.00 Additional cash at closing.

Offer to purchase subject to the following terms and conditions:

1. Purchaser receiving preliminary plat approval from the City of Quincy.

⁷ CP 440-42 (Deposition of Patrick H. Kofmehl, Dec. 17, 2008, at 20:3-22:4 [hereafter “Kofmehl Depo.”]).

2. Purchaser closing this sale within five business days after preliminary plat approval from the City of Quincy.
3. Both purchaser & seller may participate in a 1031 exchange at no cost to the non[-]participating party.
4. Accessibility of city sewer.

CP 75. All of these terms and conditions, with the exception of paragraph 4, referring to accessibility of city sewer, were typed in to the PSA by Kofmehl's broker. CP 464 (Nicholson Depo., at 48:4-5.) Kofmehl himself hand-wrote paragraph 4 on the agreement. CP 466 (Nicholson Depo., at 52:22-24).

Before closing, Baseline fulfilled all applicable terms and conditions. Baseline obtained annexation and preliminary plat approval within less than a month after the PSA was signed. CP 391-429 (platting documents) On May 8, 2007, Baseline's broker faxed confirmation of annexation and preliminary plat approval to Kofmehl's broker. CP 352-53. The fax attached a copy of the preliminary plat map, clearly showing the metes, bounds, acreages and configurations of Lot 1, which was being sold to Kofmehl, and Lots 2 and 3, which were not being sold. *Id.* The fax stated that the earnest money would be released to Baseline the next day in accordance with the PSA. *Id.* Kofmehl did not object to the preliminary plat or the release of funds.

Annexation was necessary to access city sewer, and, shortly after annexation occurred, accessibility of city sewer was confirmed by the Mayor of Quincy. CP 334. Later, the Quincy City Administrator also confirmed accessibility of city sewer by means of pre-existing easements. CP 335-36. He plotted out the course of the existing sewer line and easements for the parties, and referred the parties to the relevant easement documents. *Id.*; *see also* CP 387 (easement document).

With respect to the closing date, the parties entered into two addenda that extended the closing date until July 1, 2008. CP 331-32. The addenda did not change any provisions of the PSA other than the closing date, but rather expressly affirmed that all other provisions of the PSA remain unchanged. *Id.*

D. Post-Agreement Negotiations.

Sometime after signing the PSA, Kofmehl apparently wanted to acquire the 3.93-acre Lot 2 for his development, in addition to the 30.12-acre Lot 1. He initially claimed that he thought Lot 2 was, in fact, included within the description of the property subject to the PSA, giving him a total of approximately 34 acres, notwithstanding the discrepancy with the PSA, the listing agreement and the survey map circulated among the parties. CP 349. Kofmehl made this claim for the first time on September

5, 2007. *Id.* “Months and months and months later he brought it up,” according to his broker. CP 470 (Nicholson Depo., at 65:7).

Thereafter, Kofmehl proceeded to engage in negotiations with Baseline for the purchase of the 3.93-acre Lot 2. CP 71-72 (Morgan Decl., Mar. 24, 2009, at 4:19-5:12).⁸ Before signing the PSA, Kofmehl and his broker prepared profit projections for the development. These projections were based on the terms of the PSA. That is, they were based on the development of 30.12 acres, corresponding to Lot 1, at the purchase price of \$1.65 million. CP 380-81 (pre-PSA projections); CP 475-78 (Nicholson Depo., at 95:11-98:6).

During negotiations for the purchase of Lot 2, which occurred after the signing of the PSA, there was no suggestion that Kofmehl had already purchased Lot 2, nor that he proposed to sell it back to Baseline. Instead, Kofmehl offered to pay Baseline additional consideration in order to purchase Lot 2. CP 71-72 (Morgan Decl., Mar. 24, 2009, at 4:19-5:12).

Kofmehl’s broker also prepared new profit projections for the development at Kofmehl’s request. These post-PSA profit projections were based on the development of 34.3 acres at the purchase price of \$1,849,500. The acreage used in these profit projections represents the

⁸ *See also* CP 331 (PSA addendum extending closing date so the parties “can complete the negotiations regarding sewer & water cost sharing and any other negotiations regarding the 3.93 acres that seller wants to build a school on”).

combination of Lots 1 and 2. The price used in these profit projections represents the additional sum that Kofmehl expected to have to pay Baseline in order to purchase Lot 2. CP 378 (post-PSA projections); CP 473-75 (Nicholson Depo., at 93:9-95:10). However, no agreement for the purchase of Lot 2 was ever reached. CP 447 (Kofmehl Depo., at 61:1-5).

Kofmehl and Baseline also engaged in negotiations regarding sharing the cost of bringing sewer and water to Kofmehl's development and the school that Baseline intended to build on Lot 2. These negotiations were premised on the assumption that Baseline retained Lot 2. Otherwise, there would be no reason for Baseline to share the cost. In any event, no agreement regarding cost-sharing for sewer and water was ever reached. CP 71-72 (Morgan Decl., Mar. 24, 2009, at 4:19-5:12); CP 331 (PSA addendum).

E. Failure To Close.

By the time of closing, Kofmehl was concerned about the financial prospects of his development. Kofmehl's broker wrote to Kofmehl, "I have had the feeling for some time now that you didn't want to do this development[.]" CP 374. Kofmehl's broker also wrote to a representative of the Grant County Economic Development Council (EDC) that Komfehl "has become apprehensive about future demand for affordable homes."

CP 382; *see also* CP 383 (email indicating EDC response undercut “optimism” regarding need for housing).

Ultimately, according to his broker, Kofmehl refused to close because of issues related to water and sewer. CP 461-63 (Nicholson Depo., at 26:15-27:6 & 46:14-18). Accessibility of water was not a term or condition of the PSA. CP 77-75 (PSA); CP 462 (Nicholson Depo., at 27:14-23). With respect to accessibility of city sewer, Kofmehl refused to close because, in his view, the existing “easements were not new, fresh and recorded and exact.” CP 463 (Nicholson Depo. at 46:14-18.) Kofmehl told his broker that was the reason. *Id.* Kofmehl did not refuse to close because of any issues related to the purchase of Lot 2. CP 462 (Nicholson Depo., at 27:2-3). Baseline fully tendered its performance at closing, and executed all documents prepared by the title company at the request of Kofmehl’s broker.⁹

F. Procedural History.

Both parties subsequently sought to enforce the PSA, albeit on different terms. Kofmehl filed suit alleging three principal claims against Baseline, for breach of contract, misrepresentation and promissory estoppel. CP 4-14 (complaint). These claims all sought to compel Baseline

⁹ CP 72 (Morgan Decl., Mar. 24, 2009, at 5:18-20); CP 760 (instructions from Kofmehl’s broker to title company); CP 764, 766, 768, 770, 772, 774 (closing documents executed by Baseline).

to sell Lot 2 in addition to Lot 1, and to bring sewer and water service to the property line. Kofmehl also alleged four self-described “alternative claims,” for unilateral mistake, mutual mistake, rescission and quantum meruit. These claims all sought to avoid the PSA on grounds that Baseline had not sold Lot 2 together with Lot 1, and/or had not brought sewer and water service to the property line. For its part, Baseline brought suit against Kofmehl for specific performance of the PSA, which was consolidated with Kofmehl’s suit, and denominated as a counterclaim. CP 21-23 (counterclaim).

After the completion of a substantial amount of discovery and the filing of a motion for summary judgment, Kofmehl amended his answer to Baseline’s counterclaim to allege, for the first time, that the property description in the PSA did not satisfy the statute of frauds. CP 62. He amended the pending motion for summary judgment to include argument on the statute of frauds. CP 65-66. In granting summary judgment based on the statute of frauds, the superior court recognized that Baseline’s understanding of the PSA appeared to be correct. CP 286-87 (VRP, Apr. 2, 2009, at 56:21-57:9). Nonetheless, the court decided that the statute of frauds trumped the merits of the disputed issues of contract interpretation. CP 303-05 (summary judgment order).

Thereafter, the parties filed cross motions for summary judgment on Kofmehl's claims for rescission and restitution. CP 752-54 (Kofmehl's motion); CP 755-56 (Baseline's motion). The superior court granted Kofmehl's motion for summary judgment, denied Baseline's motion for summary judgment, and then ordered restitution and attorney fees and costs in favor of Kofmehl. CP 804-08 (summary judgment order); CP 850-52 (restitution order); CP 880-81 (fees and costs); CP 882-84 (judgment). Baseline timely appealed to this Court. CP 853-77 (notice of appeal).

SUMMARY OF ARGUMENT

A buyer who avoids a real estate contract on grounds of the statute of frauds is not entitled to rescission or restitution unless the buyer proves by clear and convincing evidence that the seller was not ready, willing and able to perform as agreed. In this case, rescission and restitution are unavailable to Kofmehl as a matter of law because he failed to offer any competent evidence to satisfy his burden of proof. The overwhelming undisputed evidence establishes that Baseline was, in fact, ready, willing and able to perform. The superior court erred in refusing to consider this issue, and in denying Baseline's motion for summary judgment.

STANDARD OF REVIEW

This case comes before the Court on cross motions for summary judgment. Review of summary judgment orders is de novo, and the Court

performs the same inquiry as the superior court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The decision of the superior court is entitled to no deference. *Id.*

Summary judgment is warranted when there are no genuine issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. CR 56(c). The evidence must be viewed in the light most favorable to the non-moving party, and the non-moving party must be given the benefit of all reasonable inferences from the evidence. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). Since summary judgment was granted in favor of Kofmehl, he must be deemed the moving party and the evidence must be viewed in the light most favorable to Baseline. However, since Baseline also assigns error to the denial of its cross motion for summary judgment, the evidence is analyzed in the light most favorable to Kofmehl in part C, *infra*.

Regardless of who is the moving party, summary judgment review must account for the burden of proof in two respects. First, the party having the burden of proof is obligated to produce evidence supporting every element of that party's claim in order to avoid summary judgment. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (adopting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), standard for summary judgment). The party not having the burden of proof may

simply point to the absence of evidence supporting one or more elements of the opposing party's claim. *Id.* In this case, Kofmehl has the burden of proving that Baseline was not ready, willing and able to perform as agreed. *See* part A, *infra*. He is obligated to produce competent evidence to support his claim in order to avoid summary judgment, while Baseline may simply point to the absence of competent evidence to support his claim.

Second, summary judgment review must account for the degree of certainty required to satisfy the burden of proof. *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 767-68, 776 P.2d 98 (1989) (adopting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and applying "clear and convincing" standard to summary judgment on defamation claim). The court "must view the evidence presented through the prism of the substantive evidentiary burden." *Sedwick v. Gwinn*, 73 Wn.App. 879, 885, 873 P.2d 528 (1994) (quotation omitted; applying "clear and convincing" standard to summary judgment on Uniform Fraudulent Transfer Act claim). Here, Kofmehl's burden of proof is clear and convincing evidence. *See* part A, *infra*. He is obligated to produce competent evidence that could satisfy this degree of certainty in order to avoid summary judgment.

ARGUMENT

A. To Obtain Rescission And Restitution, Kofmehl Was Obligated To Prove That Baseline Was Not Ready, Willing And Able To Perform As Agreed.

If a contract for the sale of real estate is unenforceable because it does not satisfy the statute of frauds, the buyer cannot obtain rescission or restitution when the seller is ready, willing and able to perform as agreed. *Schweiter v. Halsey*, 146 Wn.2d 707, 710-11, 359 P.2d 821 (1961); *Dubke v. Kassa*, 29 Wn.2d 486, 487, 187 P.2d 611 (1947); *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn.App. 231, 240, 189 P.3d 253 (2008); *see also Browne v. Anderson*, 36 Wn.2d 321, 324, 217 P.2d 787 (1950) (applying rule to real estate lease). This is the general rule followed by a great majority of other jurisdictions. *Home Realty*, 146 Wn.App. at 240 (citing R.J. Fox, Annot., *Vendor's Willingness And Ability To Perform Contract Which Does Not Satisfy Statute Of Frauds As Precluding Purchaser's Recovery Back Of Payments Made Thereon*, 169 A.L.R. 187 (1947 & Cum. Supp.) [hereafter "Fox"]).

In Washington, the rule can be traced to the decision in *Johnson v. Puget Mill Co.*, 28 Wash. 515, 520-21, 68 Pac. 867 (1902). *See Schweiter*, 57 Wn.2d at 711-12 (quoting *Johnson*); *Browne*, 36 Wn.2d at 324 (same);

Dubke, 29 Wn.2d at 487 (citing *Johnson*).¹⁰ It is the same rule applied whenever a buyer seeks rescission and restitution after failing to perform his or her obligations under a real estate contract. See *Gillmore v. Green*, 39 Wn.2d 431, 437-38, 235 P.2d 998 (1951).¹¹

There are two distinct rationales for this rule. The first is a matter of mutuality and fairness between the parties. As stated in the seminal *Johnson* case:

It may be asserted with confidence that a party who has advanced money or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done. The plaintiffs are seeking to recover the money advanced on a contract every part of which the defendant has performed as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus have themselves rescinded the contract.

It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it,

¹⁰ There is one federal case that appears to be contrary to *Johnson*, allowing a buyer to raise the statute of frauds as a defense and also to recover sums paid on a real estate contract notwithstanding the seller's readiness to convey the real estate. See *Hooper v. First Exch. Nat'l Bank*, 53 F.2d 593, 598 (9th Cir. 1931). The federal court's determination of Washington law in *Hooper* is not binding on this Court. The decision is incorrect to the extent that it does not correctly apply the law as stated in *Johnson* before *Hooper* was decided. (*Hooper* does not even cite *Johnson*.) Moreover, *Hooper* has been superseded by the Washington Supreme Court's later decisions in *Schweiter* and *Dubke*.

¹¹ See generally 18 William B. Stoebuck & John W. Weaver, Wash. Prac., *Real Estate: Transactions* § 16.9 (2d ed. 2010).

would have the same right to recover it back that the plaintiffs have.

Johnson, 28 Wash. at 520 (quotation omitted). This rationale has been carried forward verbatim and approved in *Schweiter*, at 711-12, and *Browne*, at 324. See also *Home Realty*, at 240 (stating “[t]he rationale is that ‘a purchaser should not be allowed to use his own breach to escape his contractual obligations—in effect, to have an election not to perform what he has agreed to do’”; quoting 18 Stoeck & Weaver, *supra* § 16.9); 18 Stoeck & Weaver, *supra* § 16.9 (stating “[t]his is only common sense, because if the purchaser could have rescission without being willing to perform, he could terminate the contract by simply refusing to perform”).

The second rationale is based on the purpose of the statute of frauds:

It has been said that the purpose of the statute, so far as it relates to the sale of land, is to protect the vendor only, and that the vendee, seeking to recover purchase money, cannot set up the statute against a vendor who is ready and willing to perform, and the contract cannot be considered void so long as the vendor, for the protection of whose rights the statute exists, is willing to treat and consider the contract good.

Home Realty, 146 Wn.App. at 240 (quoting 73 Am. Jr. 2d, *Statute of Frauds* § 450 (2008)); accord *Fox*, *supra* § II.b.2. (collecting cases).

Related to, and perhaps underlying, both of these rationales is an element of unclean hands on the part of a buyer who asserts the statute of frauds as

a defense to his or her obligations under a real estate contract, and then seeks rescission and restitution from the seller. *See* 18 Stoebeuck & Weaver, *supra* § 16.9 (stating “since a contract within the statute is only voidable on the motion of a party, it would violate the equitable principle of clean hands to allow a purchaser who seeks equitable restitution to assert the statute against his own contract”).

In order to obtain rescission and restitution, the buyer has the burden of proving that the seller was *not* ready, willing and able to perform. In the specific context of rescission and restitution based on the statute of frauds, placing the burden of proof on the buyer is implicit in *Johnson*, 28 Wash. at 521, where the Court denied recovery of down payments under a real estate contract that did not satisfy the statute of frauds because “[t]here is no proof whatever that the respondent [seller] was not at all times, during the period covered by the terms of the contract, able, ready, and willing to fully perform its part thereof[.]” The Court did not reference any affirmative proof that the seller *was* ready, willing and able to perform, but in the absence of any contrary evidence, the Court ruled in the seller’s favor. The only reasonable conclusion from this result is that the buyer failed to meet its burden of proof.

Placement of the burden of proof on the buyer is also implicit in *Browne*, 36 Wn.2d at 323-24, where the Court denied recovery of earnest

money under a real estate lease that did not satisfy the statute of frauds. While the superior court denied recovery of the earnest money and found that the lessors were “without fault,” it did not make any express finding that the lessors were ready, willing and able to perform. *See id.* at 322-24 (reproducing and discussing findings). On appeal, the Court interpreted the result in the absence of such a finding as “inferentially recognizing that the building was ready for occupancy, and that the leases were tendered within a reasonable time.” *Id.* at 323-24.

The result in *Browne* can best be explained by the rule that the absence of a finding is deemed as a negative finding against the party having the burden of proof. *See In re Welfare of A.B.*, 168 Wn.2d 908, 926 & n.42, 232 P.3d 1104 (2010) (stating rule “that lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof”; collecting cases). Since the Court construed the absence of a finding against the buyer in *Browne*, it stands to reason that the buyer has the burden of proof.

The remaining statute of frauds cases (*Schweiter*, *Dubke* and *Home Realty*) do not appear to address placement of the burden of proof. Nonetheless, placing the burden of proof on the buyer seeking rescission and restitution in the statute of frauds context is entirely consistent with and supported by the rescission and restitution cases in other contexts. *See*

Gillmore, 39 Wn.2d at 437 (stating “[t]he burden is upon plaintiff (vendee) to allege and prove that the vendor cannot perform when the time for performance arrives”). It is also consistent with and supported by the rationales for the rule barring rescission and restitution when the seller is ready, willing and able to perform, as discussed above.

Language seemingly to the contrary in *Home Realty* should not alter this placement of the burden of proof. In *Home Realty*, 146 Wn.App. at 239-40, the sellers raised their readiness to perform as an alternate ground to affirm a superior court decision allowing them to retain \$50,000 earnest money under a real estate contract that was determined on appeal to violate the statute of frauds. In response, the buyers attempted to distinguish *Schweiter* on grounds that the record in those cases “conclusively established that the sellers remained ready, willing and able to perform,” whereas the record in *Home Realty* apparently contained no such evidence. *See id.* at 241. The court then stated “[t]he record before us is devoid of conclusive evidence that the [sellers] remained ready, willing and able to perform [t]herefore, we decline to consider this alternate ground and remand to the trial court for further proceedings.” *Id.* at 241-42. Although the phrasing of the court’s language implies that the burden of proof is on the sellers, the court does not cite any authority or provide any rationale.

The result in *Home Realty* can best be understood as an application of the *Rule of Appellate Procedure* that the Court will not consider an alternate ground to affirm the trial court unless “the record has been sufficiently developed to fairly consider the ground.” See RAP 2.5(a). The case does not militate against placing the burden of proof on the buyer seeking restitution, especially in light of the Supreme Court’s decisions in *Schweiter* and *Browne*, and the rule applied in similar contexts, e.g., *Gillmore*.

Home Realty’s reference to “conclusive evidence” may be indicative of the degree of certainty required to satisfy the burden of proof, rather than the placement of the burden of proof. Neither *Schweiter* nor *Dubke* describe the evidence before them as “conclusive,” and none of the rescission cases involving the statute of frauds appear to address the degree of certainty required to satisfy the burden of proof apart from the “conclusive” language of *Home Realty*. However, consistent with the rationales for the rule barring rescission and restitution when the seller is ready, willing and able to perform, the buyer should be required to satisfy the burden of proof with a higher degree of certainty than the preponderance of the evidence standard.

The clear and convincing standard of proof is imposed on parties who seek to enforce a real estate contract that does not comply with the

statute of frauds. *See Golden v. Mount*, 32 Wn.2d 653, 670-71, 203 P.2d 667 (1949) (part performance doctrine). Considerations of mutuality and fairness would suggest that it should also apply to those who seek rescission and restitution for a contract that does not comply with the statute of frauds.

Moreover, the purpose of the statute of frauds is to prevent fraud arising from uncertainty inherent in oral contractual undertakings. *See Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971). A clear and convincing standard is consistent with this purpose, and would minimize the likelihood that a buyer seeking rescission and restitution could capitalize on that uncertainty, using the statute of frauds to perpetrate, rather than prevent, a fraud.

With this understanding of the burden of proof applicable to Kofmehl's claims for rescission and restitution, it is possible to assess whether the superior court properly granted Kofmehl's motion for summary judgment and denied Baseline's cross motion for summary judgment.

B. The Superior Court Erred By Granting Rescission And Restitution To Kofmehl On Summary Judgment, Without Requiring Him To Meet His Burden of Proof.

In addressing the parties' cross motions for summary judgment, the superior court specifically declined to resolve the question of whether

Baseline was ready, willing and able to perform as agreed. The superior court judge stated, in his oral decision:

It seems to me that both parties share responsibility for attempting to enter a contract and doing it in a way that rendered their attempt void. And that no matter how I turn from side to side or top to bottom the defendant's present argument, Baseline's present argument, it always seems to me to return to an issue of asking the court to decide which of them was right and which of them was wrong. And I believe the court has already made it clear that *under this factual scenario, the court cannot determine who was right and who was wrong in regard to the contract that they attempted to form.*

VRP, Oct. 12, 2010, at 26:14-25 (emphasis added). If the superior court could not determine who was right and who was wrong because of genuine issues of material fact, then it was obligated to conduct a trial rather than granting summary judgment. If the superior court could not determine who was right and who was wrong because of a failure of proof by Kofmehl, then it was obligated to grant summary judgment against him, not in his favor. In either case, it was error for the superior court to grant rescission and restitution to Kofmehl as a matter of law, without resolving the essential question of whether Baseline was ready, willing and able to perform as agreed. This error infects the subsequent superior court orders awarding restitution and attorney fees and costs to Kofmehl, and the final judgment rendered in his favor.

C. The Trial Court Erred By Denying Baseline’s Cross Motion For Summary Judgment Because There Is A Complete Lack Of Competent Evidence That It Was Not Ready, Willing And Able To Perform.

Although the superior court below declined to address the question presented by this appeal, Kofmehl did not disagree with the rule stated in *Schweiter, Dubke* and *Home Realty*. Instead, Kofmehl argued that Baseline was not ready, willing and able to perform as agreed, emphasizing “as agreed.” The focus of the dispute between the parties is whether Baseline tendered its performance in accordance with the agreement between the parties regarding the extent of property conveyed under the PSA and the accessibility of city sewer.

With respect to the extent of property conveyed, the admissions of Kofmehl’s agent and the overwhelming undisputed evidence in the record conclusively establish that Baseline did not agree to convey the 3.93-acre Lot 2 to Kofmehl in addition to the 30.12-acre Lot 1. With respect to the accessibility of city sewer, annexation of the property by the City of Quincy and the existing easements satisfy this condition of the PSA as a matter of fact, and in light of the controlling decision in *Goedecke v. Viking Invest. Corp.*, 70 Wn.2d 504, 424 P.2d 307 (1967). Kofmehl’s self-serving post-hoc statements of his subjective and unexpressed intent and his broker’s sham declaration contradicting his deposition testimony are

irrelevant, inadmissible, and insufficient to avoid summary judgment in Baseline's favor.

1. The Admissions Of Kofmehl's Broker Conclusively Establish That Baseline Was Not Obligated To Convey The 3.93-Acre Lot 2 In Addition To The 30.12-Acre Lot 1 Under The PSA.

As noted above, Kofmehl's broker clearly indicated that he intended and knew that the property subject to conveyance under the PSA excluded (or, phrased another way, did not include) Lot 2. CP 466 (Nicholson Depo., at 52:19-21). He drafted the property description in the PSA to accomplish precisely this result.¹² The knowledge and actions of Kofmehl's broker are imputed to, and binding upon, Kofmehl himself under the rules of evidence, *see* ER 801(d)(2), and settled law of agency, *see Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 665-66, 63 P.3d 125 (2003) (knowledge of architect regarding square footage imputed to owner); *Coast Trading Co. v. Parmac, Inc.*, 21 Wn.App. 896, 908, 587 P.2d 1071 (1978) (citing Restatement (Second) of Agency § 272 (1958) with approval for the proposition that “[t]he knowledge of the

¹² To the extent that the property description is susceptible of a different interpretation, it would have to be construed against Kofmehl under the principle of *contra proferentem* because it was drafted by his broker. *See Clise Invest. Co. v. Stone*, 168 Wash. 617, 620-21, 13 P.2d 3 (1932) (applying rule to real estate lease); *see also* Restatement (Second) of Contracts § 206 (1981) (stating “[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds”); *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990) (citing Restatement § 206 with approval).

agent acting within the scope of his authority is imputed to his principal”); *see generally* Restatement (Second) of Agency §§ 272 & 286. The broker’s admissions are therefore dispositive on the question of whether Baseline tendered the agreed performance, at least with respect to the extent of the property conveyed.

2. The Overwhelming Undisputed Evidence In The Record Confirms The Admissions Of Kofmehl’s Broker Regarding The Extent Of Property Conveyed Under The PSA.

Even without the admissions of Kofmehl’s broker, the undisputed evidence confirming the extent of the property conveyed under the PSA, and the fact that Baseline did not agree to convey the 3.92-acre Lot 2 in addition to the 30.12-acre Lot 1, is extensive, and includes the following:

- The survey (CP 74), the preliminary plat (CP 91), and the recorded plat (CP 98), all of which showed the metes, bounds, acreages and configuration of lots on the property. Kofmehl’s broker based the description of property in the PSA, in part, on the survey map. CP 464-65.
- The original (CP 97) and amended (CP 99) listing agreements, indicating the property subject to sale. Kofmehl’s broker also based the description of property in the PSA, in part, on the listing agreement. CP 464-65. Kofmehl personally received a copy of the listing agreement. CP 440-42.

- The survey map highlighted by Kofmehl's broker to indicate the property described in the PSA, first incorrectly (CP 372), but then immediately corrected (CP 371). The fact that the highlighting had to be corrected only served to draw Kofmehl's attention to the exact boundaries of the property subject to the PSA. Kofmehl personally received a copy of the highlighted map. CP 493.

- The PSA itself (CP 75-77), which describes the property as approximately 30.12 acres, corresponding to Lot 1 on the survey and plat maps (CP 74, 91 & 98). Kofmehl personally signed the PSA twice. CP 77.

- Kofmehl's profit projections prepared *before* the PSA was signed, corresponding exactly to the acreage and the price stated on the PSA. CP 380-81. These projections were prepared with Kofmehl's input. CP 478 (Nicholson Depo., at 98:1-6).

- Kofmehl's profit projections prepared *after* the PSA was signed, reflecting the proposed addition of the 3.93-acre Lot 2 to the property conveyed under the PSA, and additional consideration that would be required to purchase Lot 2. CP 378. These projections were prepared at Kofmehl's request. CP 473 (Nicholson Depo., at 93:23-24).

- The addendum to the PSA, which extended the closing date so that Kofmehl could negotiate for the purchase of Lot 2 in addition to Lot 1, or in the alternative, for sharing of the cost of bringing water and

sewer to the property to serve the school built by Baseline on Lot 2 and the development of Kofmehl on Lot 1. CP 331. These negotiations were premised on the fact that Baseline had not sold, and Kofmehl had not purchased, Lot 2. CP 72. (They were also premised on the fact that Baseline had not agreed to install sewer and water to the property line.)

- The closing documents prepared by the title company at Kofmehl's request and executed by Baseline. CP 72 (Morgan Decl., Mar. 24, 2009, at 5:18-20); CP 760 (instructions from Kofmehl's broker to title company); CP 764, 766, 768, 770, 772, 774 (closing documents executed by Baseline).

- The testimony of Baseline's broker and principal. CP 68-102 (Morgan Decl., Mar. 24, 2009); CP 214-227 (Declaration of Curt Morris, Apr. 2, 2009).

3. The Accessibility Of City Sewer Is Conclusively Established By The Existing Easements And The Authority Of *Goedecke v. Viking Invest. Corp.*

As noted above, the PSA was subject to "accessibility of city sewer."¹³ In order to satisfy this provision, Baseline obtained annexation of the property into the City of Quincy, which was a necessary prerequisite for hooking up to the city sewer system. City sewer was

¹³ As with the property description, to the extent there is any ambiguity in this condition, it must be construed against Kofmehl under the principle of *contra proferentem* because it was drafted by him. *See supra* n.12.

accessible by means of an easement between the property and the existing city sewer line. CP 387 (easement). The accessibility of city sewer via the easement was confirmed by the mayor and city administrator of Quincy. CP 334; (mayor); 335-36 (city administrator). The city administrator even plotted out the course of the existing sewer line and easements for the parties. CP 335-36. These undisputed facts establish the accessibility of city sewer as a matter of law.

While the phrase “accessibility of city sewer” is not separately defined in the PSA, its meaning can be discerned from standard English dictionaries. *See Panorama Village Condo. Owners Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 139, 26 P.3d 910 (2001). There is no dispute in this case about the meaning of “city sewer,” only “accessibility.”

Accessible means “capable of being reached.” *E.g.*, *Merriam-Webster OnLine*, s.v. “accessible” (viewed May 1, 2011). In this case, city sewer is capable of being reached from the property in question, now that the property has been annexed into the City of Quincy, via the easement that connects the property with the existing city sewer line.

This understanding of accessibility is confirmed by *Goedecke v. Viking Invest. Corp.*, 70 Wn.2d 504, 505, 424 P.2d 307 (1967), where the Court held that a right-of-way to connect with sewer lines satisfied a condition in a real estate contract “that public sewers are available to the

property.” Since a right-of-way was sufficient to satisfy this condition, an easement should be sufficient to satisfy the similar condition in the PSA between Kofmehl and Baseline.

In fact, the condition in *Goedecke* is more exacting than the condition in the Kofmehl-Baseline PSA. While the word “available” can be synonymous with “accessible,” it connotes a sense of temporal and spatial immediacy that is lacking for the word “accessible.” *See Merriam-Webster OnLine*, s.v. “available” (viewed May 1, 2011).

Furthermore, the *Goedecke* condition contained the preposition “to” and the reference to “property.” These words emphasize and reinforce a sense of spatial proximity. Since similar words are lacking in the Kofmehl-Baseline PSA, there is even less room to dispute satisfaction of the condition in this case than there was in *Goedecke*.

Kofmehl’s ostensible grounds for refusing to close—that the existing sewer “easements were not new, fresh and recorded and exact,” *see* CP 463 (Nicholson Depo. at 46:14-18)—does not change the fact that sewer was accessible by means of those easements, as confirmed by the City of Quincy. Accordingly, Baseline tendered its performance with respect to accessibility of city sewer as agreed under the PSA.

4. There Is No Competent Evidence To The Contrary In The Record.

Evidence offered in connection with summary judgment practice must be admissible to establish a genuine issue of material fact. CR 56(e). In this case, the evidence submitted in opposition to Baseline's motion for summary judgment is not admissible and does not create any genuine issues of material fact.

a. Kofmehl's Declaration Is Immaterial In Light Of His Broker's Admissions, And His Post-Hoc Statements Of Subjective Intent Are Inadmissible In Any Event.

In opposition to Baseline's motion for summary judgment, Kofmehl submitted his own declaration. Given the admissions of his broker, this declaration is immaterial. However, even if the broker's admissions were not imputed to and binding upon Kofmehl, there is nothing in Kofmehl's declaration that denies or contradicts the broker's admissions or that otherwise creates a genuine issue of material fact.

Kofmehl's declaration is significant principally for what it *omits*. It does not contain any contemporaneous evidence of Kofmehl's intent or his understanding of the PSA. The declaration simply states "[t]he 3.93 acres [i.e., Lot 2] was included."¹⁴ Aside from the fact that this acreage was not

¹⁴ CP 605 (Declaration of Patrick H. Kofmehl in Opposition to Defendant's Motion for Summary Judgment, Sept. 14, 2009, at 2:5 [hereafter "Kofmehl Decl., Sept. 14, 2009"]). This careful phrasing avoids the inconsistency resulting from Kofmehl's earlier

reflected in the property description drafted by his broker, Kofmehl's statement appears to be argument, not evidence, albeit in the form of a declaration.

To the extent that the statement is deemed to be reflective of his intent, Kofmehl's self-serving, post-hoc assertion of his subjective, unilateral and unexpressed intent are inadmissible. Only contemporaneous and objective manifestations of intent are admissible. *See Hearst Comm., Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (“Washington continues to follow the objective manifestation theory of contracts”); *Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981) (The court imputes “an intention corresponding to the reasonable meaning of a person's words and acts”); *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982) (unilateral, self-serving, post-hoc expressions of subjective intent are irrelevant).

Next, Kofmehl states that he hired an engineering company to plat the 3.93-acre Lot 2 sometime “[a]fter executing the April 2007 PSA.” CP 605 (Kofmehl Decl., Sept. 14, 2009, at 2:10-13). This is not evidence

litigation position that he purchased “all land inside Farm Unit 182, Block 73.” CP 39 (Declaration of Patrick H. Kofmehl, Feb. 3, 2009, at 1:20-24); *accord* CP 7 (complaint, stating “[t]he April 2007 offer was for all FU 182, Block 73”). Kofmehl himself admitted that he could not have purchased *all* of FU 182, Block 73, because he did not purchase Lot 3, which was subject to an easement for an irrigation canal. CP 439-40 (Kofmehl Depo., at 19:17-20:2).

of what the PSA included or excluded in the understanding of Kofmehl's broker or Kofmehl himself. The unspecified period of time represented by the adverb "after" does not establish that this was a contemporaneous action, and it is suggestive of the fact that it was not, in fact, contemporaneous.¹⁵ Of course, after signing the PSA, Kofmehl did try to purchase Lot 2 from Baseline in addition to Lot 1, which may explain why he platted Lot 2.¹⁶

Finally, Kofmehl states that he was "concerned" with what he described as Baseline's "unilateral replatting of the subject property." CP 606 (Kofmehl Decl., Sept. 14, 2009, at 3:5-8). This unspecified "concern" was not expressed until June 26, 2008, only four days before closing, and more than a year after the PSA was signed. *Id.* Aside from the question of whether this ostensible concern has anything to do with the terms of the parties' agreement, it is completely without merit. The PSA itself was subject to a condition of "[p]urchaser receiving preliminary plat approval from the City of Quincy." CP 75. In this sense, there was nothing "unilateral" about platting the property.

¹⁵ An earlier declaration filed by Kofmehl is similarly opaque with regard to timeframe. CP 598 (Declaration of Patrick H. Kofmehl, Aug. 28, 2009, at 1:24-25, referring to "following the execution of the April 2007 PSA").

¹⁶ Kofmehl also states that "Baseline did not object" to his platting of the 3.93 acre Lot 2. CP 605 (Kofmehl Decl., Sept. 14, 2009, at 2:12-14). There is no evidence in the record that Baseline even knew about it.

Then, on May 8, 2007, within less than a month after the PSA was signed, Baseline's broker faxed confirmation of annexation and preliminary plat approval to Kofmehl's broker, and notified him that the \$50,000 earnest money would be released to Baseline. CP 352-53. The fax attached a copy of the preliminary plat map. CP 353. The configuration and acreage of the preliminary plat map corresponds to the survey (CP 74), the maps highlighted by Kofmehl's broker (CP 371-72), and the recorded plat (CP 98). The acreage of the preliminary plat conforms with the acreage of the PSA (CP 75) and the profit projections prepared by Kofmehl and his broker (CP 380-81). In this sense, the plat conforms exactly to the parties' agreement. In sum, Kofmehl's declaration does not establish that Baseline failed to tender the agreed performance.

b. The Declaration Of Kofmehl's Broker Contradicts His Own Deposition Testimony And Must Be Disregarded.

In opposition to summary judgment, Kofmehl also procured a declaration from his broker purporting to "clarify" the broker's deposition testimony. In his deposition, the broker testified as follows:

Q. (By Mr. Ahrend:) Mr. Nicholson, you've been handed what has been marked as Exhibit 23.¹⁷ Can you identify that document?

¹⁷ Exhibit 23 is the survey map, showing boundaries highlighted by Kofmehl's broker. CP 371.

A. (By Mr. Nicholson:) Yes. That's a map that I darkened the boundaries on to outline the two parcels that were for sale.

Q. Was it you who actually darkened the boundaries or could it have been somebody else, do you know?

A. I'm sure it's me.

Q. When did you receive this map?

A. Well, let me look at my copy. I don't know. There's no fax identification on it.

Q. Did you have that map before you submitted any offers on this property on behalf of Mr. Kofmehl?

A. I don't know.

Q. Is the property that is -- or, the boundary that's outlined on Exhibit 23, does that represent the property that you understood Baseline Lake was willing to sell?

A. Yes.

Q. Is that the property that you understood Curt Morris had authority, as agent for Baseline Lake, to sell?

A. Yes.

CP 627 (Nicholson Depo., at 20:19-21:15).

Q. (By Mr. Ahrend:) I'd have you turn to tab 2, please.

A. 2?

Q. 2. Tab 2.¹⁸

A. (Witness holds up two fingers.)

¹⁸ Tab 2 is the PSA. CP 75-77.

- Q. Yes.
- A. Okay.
- Q. This is a three-page document. Can you identify that document for the record?
- A. This is the April -- I can't read that -- 12th or 13th Purchase and Sale Agreement for 1,650,000 dollars.
- Q. Who drafted the agreement?
- A. I did anything that was typed.
- Q. The legal description, you typed that?
- A. Yes.
- Q. Did you copy that from prior offers that had been exchanged between the parties?
- A. No.
- Q. Where did you get the legal description?
- A. I remember having to create this legal description from the Listing Agreement. There was no exact legal description other than the parcel number that you'll see on here. I was trying to define what it was that -- to coordinate with these two pieces on the Listing Agreement. I added the two separate parcels, 1 and 2, price up -- to come up with the price -- and I added the -- well, this proves that I had this somewhere along the line. I added that's 17.4 and 12.72 descriptions on this map to come up with the 30.12 acres.
- Q. And so you were looking at the map that we've marked as Exhibit Number?
- A. 23.
- Q. 23?

A. 23.

Q. Okay. And you intended by this legal description to include all of the property that was outlined on this map?

A. That's why I outlined it, yes.

Q. And you intended the legal description to exclude the 3.93 acres in the corner of this property?

A. Yes.

Q. And you intended the legal description to exclude the -- well, it's the south portion of the property that's covered with irrigation -- or, canal easements?

A. Yes.

Q. And you communicated that property this legal description covered to Pat Kofmehl?

A. Say again.

Q. You told Pat Kofmehl what property he was buying, or offering to buy?

MR. TUCKER: Object to form.

Q. Did you tell Pat Komfehl what property he was offering to buy?

A. Yes. Yes.

CP 630 (Nicholson Depo., at 47:18-49:23).

Q. (By Mr. Ahrend:) When Exhibit Number 2 was signed by Kofmehl and Baseline the 3.93 acres was excluded, correct?

A. (By Mr. Nicholson:) Yes.

CP 631 (Nicholson Depo., at 52:19-21). Kofmehl's broker never corrected or clarified this deposition testimony in accordance with CR 30(e).¹⁹ The broker, Kofmehl and Kofmehl's counsel had the opportunity to clarify or inquire about the time frame during the deposition, or within the correction period, but they did not to do so.

Six months after the deposition, Kofmehl's broker claimed for the first time that his prior testimony relates solely to an earlier March 9, 2007, offer that was never accepted.²⁰ This is a sham affidavit, which should be disregarded on summary judgment, and which cannot create a genuine issue of material fact. *See Marshall v. AC&S, Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989).

Specifically, Kofmehl's broker now states: "My testimony as it relates to the exclusion of 3.93 acres on page 47, line 24 - page 52, line 21 applies to the March 9, 2007 offer." CP 621 (Nicholson Decl., Sept. 14, 2009, at 4:6-8.) In context, it is apparent that the "clarification" of the testimony quoted above is patently and demonstrably false. First, in the question and answer at 47:24-48:3, the broker is obviously identifying the PSA, which was sitting in front of him, on the table, during the entire

¹⁹ The only correction in the relevant page range was at 49:14. CP 633. The fact that Kofmehl's broker reviewed and corrected these pages confirms that he originally understood and intended the uncorrected portions of original deposition to stand.

²⁰ CP 621 (Declaration of Michael L. Nicholson Clarifying Deposition Testimony, Sept. 14, 2009, at 4:1-5 [hereafter "Nicholson Decl., Sept. 14, 2009"].)

course of questioning quoted above. All of the questions and answers relate to the PSA, not some prior offer. For example, the broker testified that he was the person who drafted the PSA, including the property description, at 48:1-7; that he did not copy the property description in the PSA from prior offers at 48:8-10; that he intended the property description in the PSA to correspond to the survey map at 48:11-49:9, and that he told Kofmehl what property he was offering to buy under the PSA at 49:21-23.

Second, in his deposition, Kofmehl's broker testified that he based the property description for the PSA on the listing agreement for the property at 21:13-15 & 48:11-22. However, the listing agreement was not received until March 16, 2007. CP 627 (Nicholson Depo., at 19:24-20:14.) As a result, it is temporally impossible for the foregoing testimony to relate to an offer exchanged beforehand on March 9, 2007.

What is most important about the broker's clarifying declaration is what it does *not* say. It *never* states that the PSA included the 3.93-acre Lot 2. The broker cannot make this statement because his deposition is replete with testimony that the PSA did not, in fact, include the parcel. For example, in testimony that has neither been changed in accordance with CR 30(e) nor "clarified" in his declaration, the broker testified:

Q. You understood that Baseline had not agreed, under the Purchase and Sale Agreement, to deed that 3.93 acres over to Pat [Kofmehl] previously?

MR. TUCKER: Object to form.

Q. Is that correct?

A. Previous to this, yes.²¹

CP 161 (Nicholson Depo., at 72:5-10).

A. (By Mr. Nicholson:) Well, in reality, the legal, even with my definition to try to explain it, was FU 182, Block 73. And the 30.12 acres was included within that parcel number, and I had no other way to define it. This clarifies that Lot 3 is worthless, Lot 1 is 30.13 acres, and Lot 2 is 3.93 acres. That was a technicality. In reality, we should have just had an addendum to change the legal description to Lot 1.

CP 472 (Nicholson Depo., at 92:5-12.)²² Regardless of the reason for changing his testimony, and whether it is material, the change in testimony by Kofmehl's broker is improper, and it should not allow Kofmehl to avoid summary judgment.²³

²¹ In context, "previous to this" is the date of Exhibit 26, May 21, 2008. CP 160-61 (Nicholson Depo., at 69:24-70:2).

²² In any event, the proffered "clarification" is immaterial because both the PSA and the March 9, 2007, excluded the 3.93-acre Lot 2. CP 621 (Nicholson Decl., Sept. 14, 2009, at 4:9-12).

²³ The proposed changes to the testimony of Kofmehl's broker may be explained by his relationship with Kofmehl and/or the fact that he was facing the threat of a malpractice claim by Kofmehl. With respect to his relationship to Kofmehl, *see* CP 374 (email from broker to Kofmehl stating, "I am willing to tell Curt that you believed that the 3.93 acres were included in the final price as well as Warren brining the sewer and water to the property line. If Warren is not willing to include both those items then the deal is off and you will expect Warren to reimburse you for all the engineering costs and the \$50,000 earnest money. Even though this project is important to me, a well, I am working for you and am willing to do whatever you need me to do. You are my friend and I would never do anything to jeopardize that.")). With respect to the prospect of a malpractice claim, *see* CP 721-22 (Declaration of Warren R. Morgan, Sept. 21, 2009).

D. Baseline Should Be Awarded Attorney Fees And Costs As A Prevailing Party.

Based on its award of rescission and restitution to Kofmehl, the superior court also awarded him attorney fees and costs under the PSA. CP 880-81. If this court reverses the superior court's decision on rescission and restitution, the court should also reverse the award of attorney fees and costs to Kofmehl, and instead award fees to Baseline pursuant to the PSA and RAP 18.1(b). CP 77 (PSA).

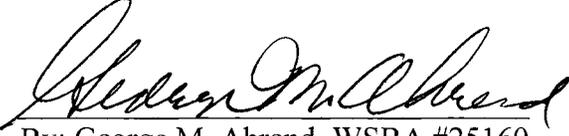
CONCLUSION

Based on the foregoing argument and authorities, Baseline asks the Court for the following relief:

1. Reverse the decision of the superior court;
2. Vacate the superior court orders granting summary judgment to Kofmehl, awarding him restitution and attorney fees and costs, and the judgment in his favor;
3. Enter or direct entry of summary judgment in favor of Baseline, dismissing Kofmehl's claims for rescission and restitution; and
4. Award attorney fees and costs to Baseline pursuant to RAP 18.1 and contract as the prevailing party.

Submitted this 3rd day of May, 2011.

AHREND LAW FIRM PLLC



By: George M. Ahrend, WSBA #25160

Attorneys for Baseline Lake, LLC

CERTIFICATE OF SERVICE

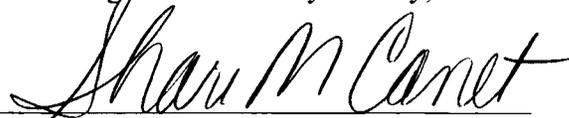
The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On May 3, 2011, I served the Respondent with the document to which this is annexed as follows:

By facsimile transmission to (509) 455-8734, email to mtucker@dunnandblack.com, Fed Ex, Priority Overnight, and/or hand delivery, to:

Michael R. Tucker
Dunn & Black, P.S.
N. 111 Post, Ste. 300
Spokane, WA 99201

Signed at Moses Lake, Washington this 3rd day of May, 2011.



Abend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000
(509) 464-6290 Facsimile

APPENDIX

Survey Map (CP 74) A-2

Preliminary Short Plat (CP 91) A-4

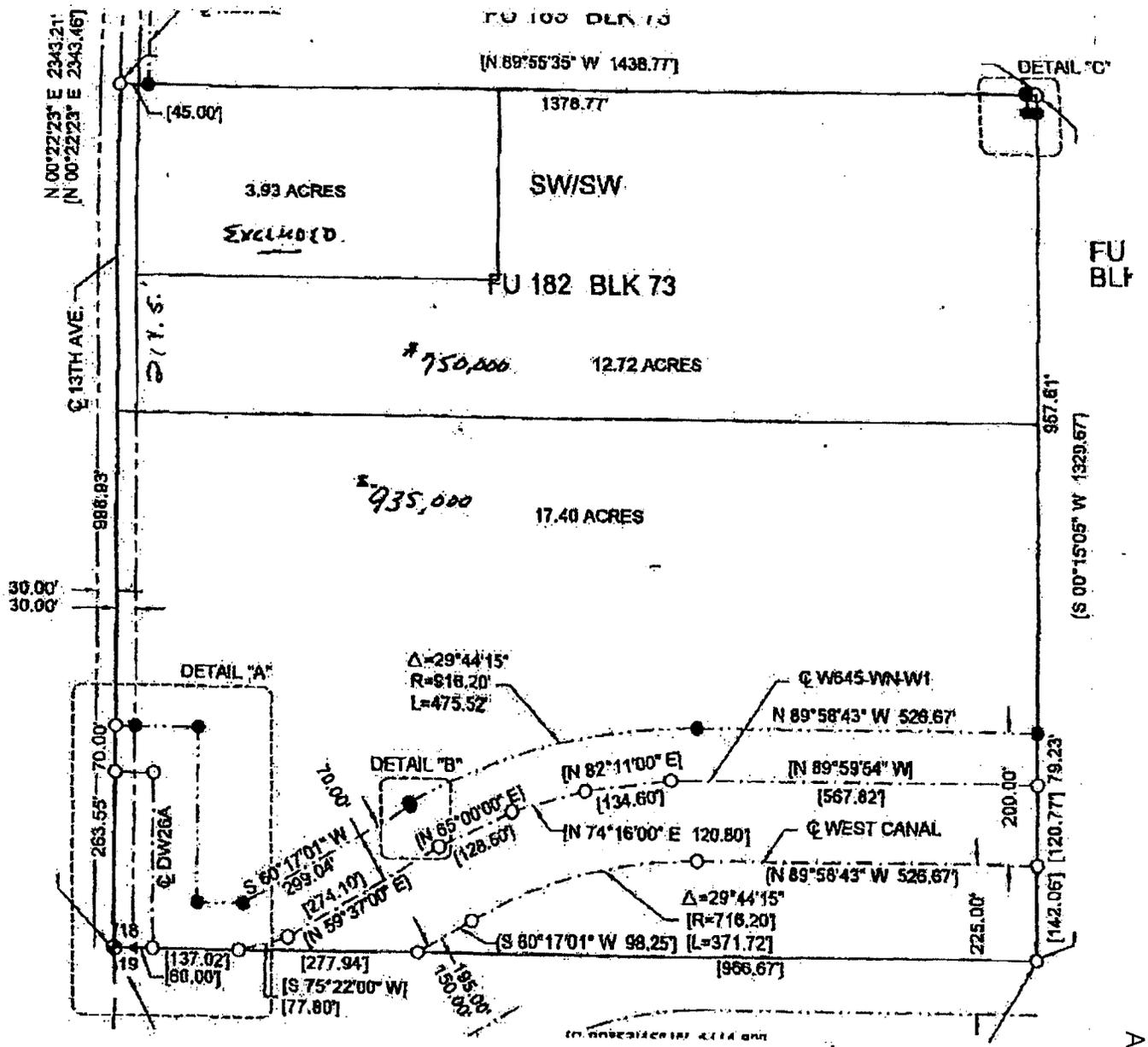
Recorded Short Plat (CP 98) A-6

Purchase & Sale Agreement (CP 75-77) A-8

Survey Map Incorrectly Highlighted By Kofmehl's Broker (CP 372) A-12

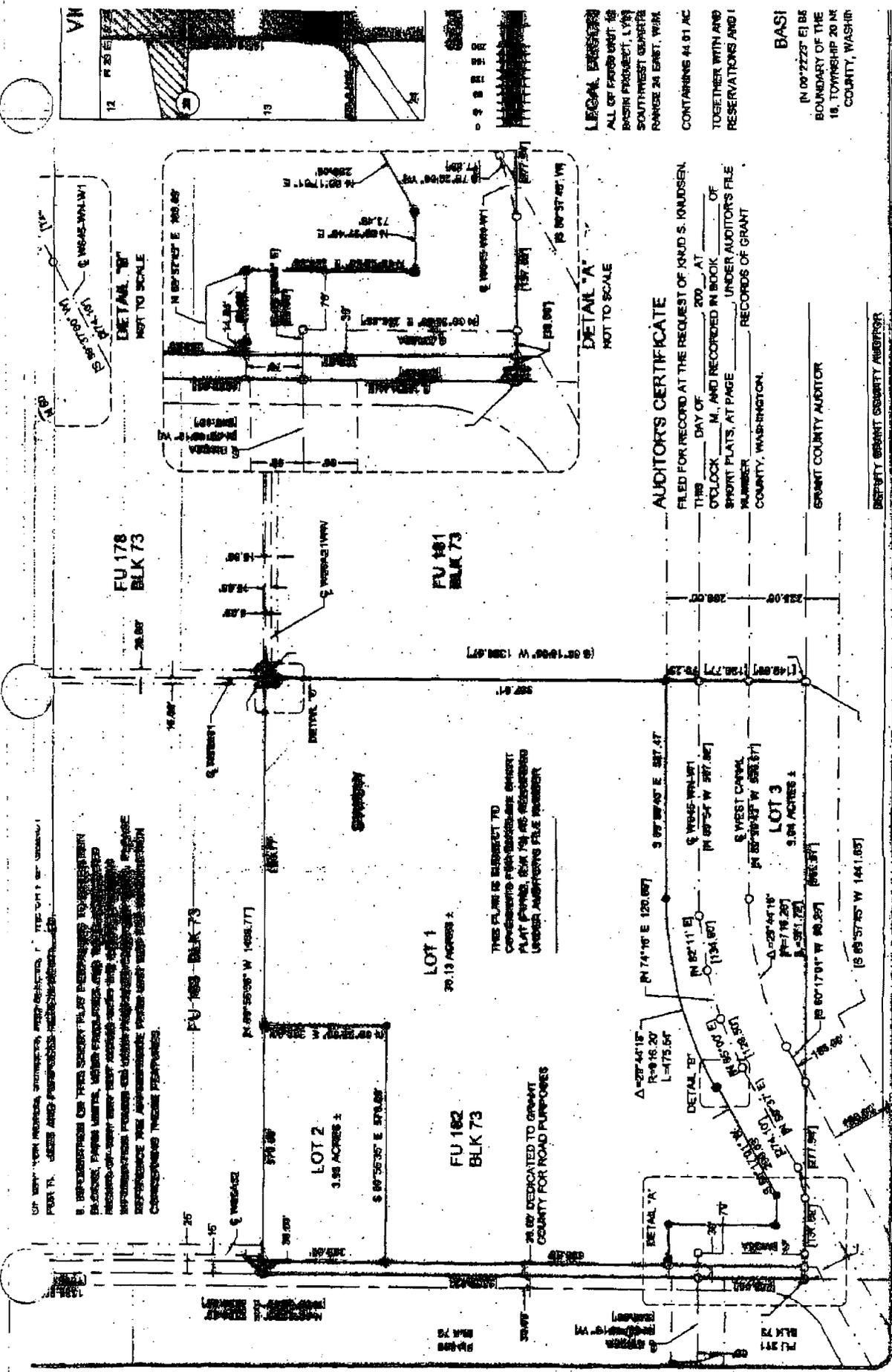
Survey Map Correctly Highlighted By Kofmehl's Broker (CP 371) .. A-14

SURVEY MAP
(CP 74)



BASE-00429

PRELIMINARY SHORT PLAT
(CP 91)



UP WITH YOUR INSTRUMENTS, AND BEING SURE THAT THE CHAIN IS STRAIGHT
 FROM THE CENTER AND PERPENDICULAR TO THE CENTER LINE.

B. INFORMATION ON THIS SURVEY PLAT REFERENCED TO THE SURVEY
 PLAT BOOK, PAGES 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

LEGAL RESERVATION
 ALL OF PARCELS 18
 BASTIN PROJECT, LYNN
 SOUTHWEST QUARTER
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 CONTAINING 41.61 AC
 TOGETHER WITH AND
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 18, TOWNSHIP 20 N
 COUNTY, WASHIR

AUDITORS CERTIFICATE
 FILED FOR RECORD AT THE REQUEST OF KNUD S. JONSDEN
 THIS DAY OF 200 AT
 O'CLOCK M., AND RECORDED IN BOOK OF
 SHORT PLATS, AT PAGE UNDER AUDITORS FILE
 NUMBER RECORDS OF GRANT
 COUNTY, WASHINGTON.
 GRANT COUNTY AUDITOR
 SECURITY GRANT SECURITY AUDITOR

RECORDED SHORT PLAT
(CP 98)

PURCHASE & SALE AGREEMENT
(CP 75-77)

REAL ESTATE PURCHASE & SALE AGREEMENT (With EARNEST MONEY PROVISION) COMMERCIAL FORM



THIS CONTRACT CONTROLS THE TERMS OF SALE OF REAL PROPERTY. READ CAREFULLY BEFORE SIGNING.

RECEIVED FROM: Patrick M. Kobashi, and or assigns in an LLC to be formed Quincy, Washington, April 11, 2007. FIFTY Thousand DOLLARS (\$ 50,000.00) in the form of a check for \$ 50,000.00, cash for \$ with rate due which has been deposited with the Selling Broker as earnest money ("Earnest Money") to be credited to Purchaser at closing...

(If the legal description of the Property is unclear, incomplete or inaccurate at the time of signing, the Agreement shall not be invalidated and Selling or Listing Broker is authorized to insert or attach the correct legal description.)

THE TOTAL PURCHASE PRICE IS One Million Six Hundred Fifty Thousand DOLLARS (\$ 1,650,000.00) (the "Purchase Price"), payable as follows: \$ 50,000.00 Earnest money as shown above in the form of a check to be deposited with Martin Morris Agency Trust Account upon mutual acceptance of this agreement...

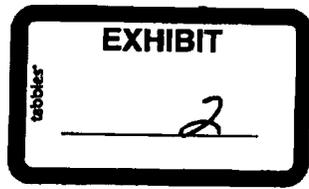
- Offer to purchase subject to the following terms and conditions: 1. Purchaser receiving preliminary plat approval from the City of Quincy. 2. Purchaser closing this sale within five business days after preliminary plat approval from the City of Quincy. 3. Both purchaser & seller may participate in a 1031 exchange at no cost to the non participating party.

4. Accessibility of City sewer.

Handwritten initials WRM and a circled signature.

Purchaser agrees to hire Western Pacific Engineering within five business days, from the closing of this property into the City of Quincy. Seller shall be responsible for up to \$30,000 for engineering cost if annexation is not completed. For this consideration buyer agrees to begin engineering with Western Pacific within 5 days after acceptance. WRM

Purchaser's Initials: [Signature] Seller's Initials: [Signature] Copyright © Spokane Association of REALTORS® All Rights Reserved. Spokane Association of REALTORS® 2002 Form SCI-4115 Rev. 1/00 Page 1 of 3



Address: Approximately 30.12 acres of vacant land

A-10

1. ADDENDUMS: Additional provisions, if any, are attached by Addendum ("Addendum"). If Addendum(s) are included, check here and identify Addendum(s)

2. TITLE: Seller's title to the Property shall be marketable at closing, with the following exceptions: ESSEMENTS and RESTRICTIONS OF RECORD

Rights reserved in federal patents, state deeds, building and use restrictions general to the area, existing easements not inconsistent with Purchaser's intended use, building and zoning regulations and references made in order to comply with Truth in Lending Legislation shall not be considered to render Seller's title unmarketable.

3. MONETARY ENCUMBRANCES: Monetary encumbrances to be discharged by Seller shall be paid no later than closing. Monetary encumbrances which are not to be paid at closing shall be current at closing and not in default. Balance(s) on monetary encumbrance(s) not paid at closing which differ from estimated balance(s) to be assumed or taken "subject to" at closing shall cause any new financing balance to be paid to Seller following closing to be adjusted accordingly, or, if none, then an appropriate adjustment shall be made at closing in cash.

4. TITLE INSURANCE: Seller shall furnish to Purchaser a standard form owner's or purchaser's policy of title insurance and copies of all existing monetary encumbrances which are not to be fully paid at closing, taxes, easements, covenants, restrictions and other written documents affecting the Property, and as soon as practical prior to closing a preliminary commitment letter issued by Chicago Title (Spokane, WA.) TITLE INSURANCE COMPANY, and Seller authorizes Selling Broker to apply at once for such title insurance. The title policy shall contain no exceptions other than those provided in said standard form and those not inconsistent with this Agreement. Delivery of such policy or the report to Closing Agent named herein shall constitute delivery to Purchaser. If title is not so insurable and cannot be made so insurable by Termination Date set forth in Paragraph 5, the Earnest Money shall be returned and all rights of purchase terminated, provided that Purchaser may waive defects and elect to purchase. Neither Broker nor their Agents shall be responsible for delivery of title.

5. INCLUDED ITEMS: This sale includes, at no additional cost to Purchaser, not only those items which the law of the State of Washington provides are part of the Property, but also includes the following items, if any, owned by Seller and presently located on the Property: attached floor coverings; screen and storm windows and doors; built-in appliances and "drop-in ranges"; window treatments; plumbing, lighting, heating, ventilating and cooling systems, apparatus and fixtures (including light bulbs and filters); landscaping and attached irrigation equipment; and air lines and conduits.

FINANCING: Purchaser represents that it is not relying on any contingent source of funds for this purchase except as expressly stated in this Agreement. If financing is failed, Purchaser agrees to make formal or written application for the same within 5 business days after the date of delivery to Purchaser of this accepted Agreement. Purchaser further agrees to sign necessary papers, pay required costs and exert best efforts to procure such financing.

7. CONVEYANCE: a) If this Agreement provides for conveying fee title, title shall be conveyed by statutory warranty deed free of encumbrances and defects except those permitted under this Agreement. b) If this Agreement provides for a sale by a real estate contract, Seller and Purchaser ("the Parties") agree to execute a real estate contract on Real Estate Contract Form LPS-16. Said contract shall provide that title be conveyed by statutory warranty deed free of encumbrances and defects except those permitted under this Agreement. c) If the Property is subject to an existing contract, mortgage, deed of trust or other encumbrance which either Party is to continue to pay, then the obligated Party agrees to pay the same in accordance with its terms and conditions and upon default, the other Party shall have the right to make any payments necessary to cure said default, and the payments so made, together with interest at the legal rate, shall be immediately due and owing the Party making the same. d) If this Agreement provides for the sale and transfer of vendee's interest under an existing real estate contract, Seller agrees to execute Form LPS-14. e) If a portion of the Purchase Price is to be evidenced by a note and secured by a deed of trust, Purchaser agrees to execute a deed of trust on Master Promissory Note of Trust recorded on July 25, 1999, in the official records of Spokane County, Washington under Auditor's File No. 376297C, and a promissory note on LPS Form 26. The terms of said forms named in this paragraph are herein incorporated by reference and copies may be obtained from Closing Agent.

8. CLOSING: The sale shall be closed in the office of Chicago Title Escrow (Spokane) ("Closing Agent"). Closing shall occur within 10 days after the last to occur of: (a) delivery of a title insurance commitment meeting the requirements of Paragraph 4; (b) removal of contingencies; and (c) obtaining financing, if required. In any event, closing shall occur no later than Sept 15, 2008 ("Termination Date"). The Parties shall each pay one-half of the Closing Agent's Fee. Seller agrees to pay the real estate excise tax and other customary selling costs. Purchaser agrees to pay customary purchasing costs. Property taxes for the current year, rent, interest, mortgage reserves, water and other utilities constituting liens shall be prorated as of the date of closing. Security and/or damage deposits, if any, shall be delivered to Purchaser at closing. The Parties will, on demand, deposit in escrow with Closing Agent all instruments and monies necessary to complete the purchase in accordance with this Agreement. If the documents are to be escrowed, the escrow shall be placed with with fees shared equally. Closing Agent will prepare and file L.R.E. Forms 1099B and W-9. If filing is required by I.R.S. regulation.

9. SELLER'S WARRANTIES: Seller hereby covenants, warrants and represents as hereinafter set forth: (a) Seller, including the person(s) signing on behalf of Seller, owns, is buying, and/or has the full right and authority to sell, transfer or convey the Property, and to carry out Seller's obligations according to this Agreement. (b) This sale will not result in an acceleration or default under any monetary encumbrance which is not to be fully paid at closing. (c) Subject to Paragraph 14 (f), until closing, Seller shall use its best efforts to maintain the Property in its present condition, ordinary wear and tear excepted. (d) Seller has no knowledge of any order or directive of the applicable department of building and safety, health department or any other city, county, state or federal authority that requires that any work of repair, maintenance or improvement be performed on the Property. (e) All of the documents, information and records provided in accordance with Paragraph 4 shall contain true, accurate and complete information except as otherwise noted to Purchaser in writing. No party to any document is in breach or has left uncured any breach of any term therein. (f) There are no hazardous wastes, toxic substances or related materials, including, but not limited to, substances defined as "hazardous substances" or "toxic substances" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. section 9601, et seq., Hazardous Material Transportation Act, 49 U.S.C. section 1602, et seq., and Resource Conservation Recovery Act, 42 U.S.C. section 6901, et seq., and those substances defined as "extremely hazardous wastes" and "dangerous wastes" or "hazardous wastes" in the Hazardous Waste Disposal Act, RCW 70.105 and in the regulations adopted in publications promulgated pursuant to such laws, contained in the soil or ground water of the Property, and Seller has received no notice and has no knowledge of any violation or inspection relating to, and there is no violation by Seller under, any such governmental requirement. The Property, including improvements, soil and ground water, complies with all federal, state and local laws, regulations and ordinances regulating the environment or hazardous materials or wastes, toxic substances, asbestos or urea formaldehyde, insulation or other pollutants.

Purchaser's Initials: [Signature]

Seller's Initials: WRM, CW

REAL ESTATE PURCHASE & SALE AGREEMENT (WITH EARNEST MONEY PROVISION)
COMMERCIAL FORM

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Spokane Association of REALTORS® 2002 Form SCA-4115 Rev. 11/99

Printed with the Form by RE Formator 11-C 10796 Gates Hill Street, Union, WA 99084

Page 2 of 3

EXHIBIT 2
PAGE 2 OF 3

KOFMEHL 00026

Address: approximately 30.12 acres of vacant land

10. AGENCY DISCLOSURE: The Parties consent to the following representation: Michael L. Nicholson (Selling Agent), who is affiliated with Nicholson-Wood, Inc. (Selling Broker), represented (check one) Seller Purchaser dual agent neither Seller or Purchaser. (Listing Agent) was a witness with Martin Morza (Listing Broker).

represented (check one) Seller dual agent. If Selling and Listing Agents are affiliated with Listing Broker, and both Parties are being represented (including by dual agents) then Listing Broker is a dual agent. Each Party confirms that prior oral and/or written disclosure of agency was provided to them in this transaction and that each has received a copy of a pamphlet entitled "The Law of Real Estate Agency."

11. RESPONSIBILITY FOR INFORMATION: The Parties agree and warrant that subject to Paragraphs 9. (a) and 14. (i), Purchaser is purchasing the Property in its present condition. "As-Is". All representations and information regarding the Property, including any information regarding size and boundaries of the Property and improvements provided in marketing the Property, and other representations to be independently verified by Purchaser or are made solely by Seller, and not by any of the Broker, Agents or employees. Seller shall indemnify and hold all Brokers and Agents harmless in the event any of Seller's statements or representations are false. No Broker or Agent is responsible for attesting that either Purchaser or Seller performs their obligations under this Agreement. No Broker or Agent has agreed to independently investigate or confirm any matter of fact related to the Property or this transaction except as specifically stated in this Agreement, or in a separate writing signed by such Broker or Agent. Purchaser shall have 5 working days from the date of delivery to Purchaser of this accepted Agreement, with all utility services on and reasonable access to the Property, to inspect the conditions, to the extent applicable and present at the Property, of the plumbing, heating, ventilating, air conditioning, and electrical systems; included appliances; the structural integrity of the building(s) and improvements; roof and/or sprinkler system. If Purchaser provides written notice to Seller within said time period detailing those items which Purchaser has determined, in Purchaser's sole discretion, are not in good working order, or acceptable condition, then Seller shall have the option of correcting such conditions or terminating this Agreement. If Seller or Selling Broker or Agent do not receive any written notice within such time period, the inspection or absence of inspection shall be conclusively deemed to have been satisfactory, and Purchaser shall have waived any right to further inspection and agrees that Purchaser shall accept the Property in its "as-is" condition as of the date of delivery to Purchaser of this accepted Agreement.

12. TIME FOR ACCEPTANCE: Seller shall have until midnight April 16, 2007, to accept Purchaser's offer, in consideration of Selling Broker submitting the offer to Seller. Purchaser will not withdraw this offer during said time period, unless notice of Seller's rejection is received earlier. Purchaser agrees that written notice of acceptance given to Selling Broker by Seller shall be notice to Purchaser. If Seller does not accept this Agreement within the time specified, Selling Broker shall refund the Earned Money upon demand.

13. DEFAULT: If either Party defaults hereunder, the other Party may seek specific performance of this Agreement, damages or rescission. If Purchaser defaults, Seller shall have the right to elect to receive the Earned Money and return it as liquidated damages, thereby terminating this Agreement. In the event the Earned Money is forfeited, Seller shall retain (keep) for all expenditures made in this proposed transaction, and any remaining Earned Money shall be apportioned equally to Seller and Broker(s), provided the forfeited Earned Money remains in Broker(s) than for escrow or multiple transactions.

14. GENERAL PROVISIONS: (a) FAXES AND COUNTERPARTS: Facsimile transmission of any signed original document, and retention of any signed facsimile transmission shall be the same as delivery of an original. At the request of either party, or Closing Agent, the Parties will confirm facsimile transmissions by signing an original document. This Agreement may be signed in counterparts. (b) INTEGRATION: This Agreement supersedes all prior understandings, negotiations and agreements of the Parties and there are no verbal agreements or understandings which modify this Agreement. This Agreement constitutes the full understanding between the Parties. (c) PARTIAL INVALIDITY: If any provision in this Agreement is invalid, the remainder of this Agreement shall remain in effect unless an essential purpose for which this Agreement has been entered would be defeated. (d) TIME IS OF THE ESSENCE: Time is of the essence as to all terms and conditions of this Agreement. (e) BACKUP OFFERS: Regardless of agency representation, Listing Broker and its agents may continue to market the Property and Seller may continue to accept backup offers. (f) ATTORNEYS' FEES: If Purchaser, Seller, or any Agent or Broker involved in this transaction is involved in any dispute relating to any aspect of this transaction, any prevailing party shall recover their reasonable attorneys' fees and costs. (g) RECEIPT: The Parties each acknowledge receipt of a copy of this Agreement. (h) POSSESSION: Purchaser shall be entitled to possession of the Property following closing. (i) RISK OF LOSS: The risk of loss prior to closing shall remain in Seller and prior to date of closing, improvements on the Property shall be destroyed or materially damaged by fire or other casualty, this Agreement, at the option of Purchaser, shall become null and void. (j) ACCURACY AND SURVIVAL OF PROVISIONS: All statements, warranties and representations in this Agreement, including those in Paragraph 9, shall be true and correct as of closing; and all obligations and provisions which may apply following closing, including those in Paragraph 7, (a) and (b), shall merge into any deed and shall survive closing and continue in full force and effect.

SELLING BROKER: Michael L. Nicholson, Inc. Phone (509) 730-8200 PURCHASER: Patrick R. Kozmehl

By Michael L. Nicholson Fax (509) 435-8692 PURCHASER and or assigns to B/LLC to be

Purchaser's Phone: Cell Res (509) 924-4560 Fax Mobile

PURCHASER'S ADDRESS 4221 North Center Road, Spokane Valley, WA 99212

The undersigned Seller, on this 15th day of April, 2007, hereby accepts and approves the above Agreement and agrees to carry out all of its terms. Seller further agrees to pay forthwith to CHEE MORZA and Nicholson-Wood, Inc. as Listing and Selling Broker, a commission in the amount stated in the last agreement to pay a commission to the Listing Broker or in the absence of any agreement, \$ 82,500.00. Seller hereby authorizes and directs Closing Agent to pay Listing and Selling Broker said commission from the sale proceeds. Upon closing or specific performance of this transaction, Seller immediately assigns a portion of Seller's proceeds in the Broker(s), including the Earned Money sufficient to satisfy the commission obligation. This commission shall be apportioned 50,000.00 to Selling Broker and the remainder to Listing Broker.

Seller's counter offer (Counter Offer) made herein or attached hereto, is made a part of this Agreement by reference. Purchaser shall have until midnight on to accept same. If Counter Offer is not accepted by that time, the Earned Money will be refunded to Purchaser. Seller agrees that written notice of acceptance given to Listing Broker by Purchaser shall be notice to Seller.

SELLER'S ADDRESS SELLER: William R. Morgan Authorized S

Phone Fax Mobile SELLER: William R. Morgan Authorized S

Purchaser acknowledges receipt of a copy of the foregoing Agreement bearing its JUDICIAL AND that of Seller. The date of delivery to Purchaser of the accepted Agreement.

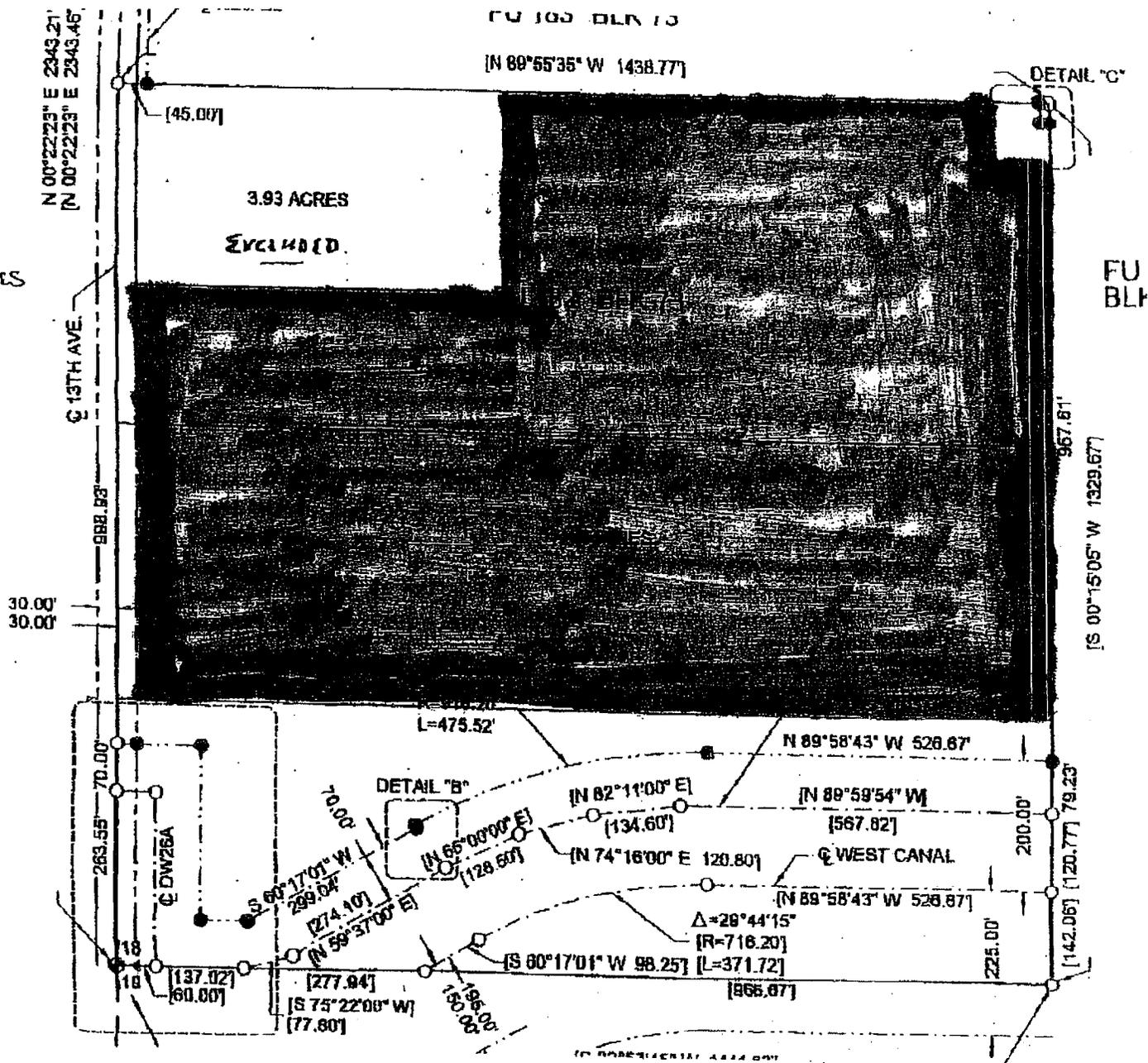
Date April 27, 2007 PURCHASER: Patrick R. Kozmehl

THIS AGREEMENT HAS BEEN PREPARED FOR SUBMISSION TO YOUR ATTORNEY AND/OR TAX COUNSEL FOR THEIR APPROVAL. NO REPRESENTATION OR RECOMMENDATION IS MADE BY ANY BROKER, AGENT OR EMPLOYEE AS TO THE LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS AGREEMENT OR THE TRANSACTION RELATING HERETO. IF YOU DO NOT UNDERSTAND THE EFFECT OF ANY PART OF THIS AGREEMENT, CONSULT YOUR ATTORNEY OR/TAX COUNSEL. NO BROKER, AGENT OR EMPLOYEE CAN GIVE YOU LEGAL ADVICE.]

EXHIBIT 2 PAGE 3 OF 3

**SURVEY MAP INCORRECTLY HIGHLIGHTED
BY KOFMEHL'S BROKER
(CP 372)**

BLUE (DARK)
= 30.12 ACRES



EXH 25 DATE 3-18-09
 WITNESS *N. Nicholas*
 NOREEN NYSTROM
Charleston Reporting

SURVEY MAP CORRECTLY HIGHLIGHTED
BY KOFMEHL'S BROKER
(CP 371)

