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No. 68034-0-I

**IN THE COURT OF APPEALS  
OF  
THE STATE OF WASHINGTON  
DIVISION I**

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KARNAIL JOHAL, YEVGENI OSTROVSKI  
AND GRIGORY YELKIN,

*Appellants,*

vs.

THE CITY OF SEATTLE,

*Respondent,*

vs.

STATE OF WASHINGTON  
DEPARTMENT OF TRANSPORTATION

*Third Party Defendant.*

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**THE CITY OF SEATTLE'S RESPONSE BRIEF**

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18 William B. Stoebuck and John W. Weaver, Washington Practice Real  
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## **I. INTRODUCTION**

In 2005, Appellants agreed to buy property that was a former city street by quitclaim deed on an installment contract for \$25,000 from the State of Washington Department of Transportation (“WSDOT”). WSDOT failed to disclose to Appellants that the former street contained City of Seattle utilities that the City had replaced and relocated in the mid-1980s under agreements with WSDOT related to the widening of Interstate 90. These agreements required WSDOT to provide permanent easements to the City for its utilities. WSDOT also provided the City with an interim permit that allowed the City to install, maintain, and operate its utilities until the permanent easement was provided by WSDOT.

After agreeing to take the property under the purchase contract “as-is” and subject to all existing encumbrances, Appellants discovered the City’s utilities. WSDOT then informed Appellants of the City’s right to have the utilities on the property, thereby acknowledging its non-disclosure.

Despite this, Appellants have ignored their opportunities to hold WSDOT responsible, and have instead sought to leverage WSDOT’s omissions into an inverse condemnation case against the City and seek money damages beyond those that would be available in a breach of contract claim against WSDOT. The trial court rejected that misguided attempt. That ruling should be affirmed.

## **II. QUESTION PRESENTED**

**Did the trial court correctly rule that Appellants' interest in property purchased from WSDOT is subject to the City's utility easement where: 1) the City utilities have existed undisturbed in their present location on the property since at least 1987, as required by contract with, and permitted by, WSDOT; 2) Appellants' 2005 real estate installment contract with WSDOT provided that the property would be taken "as-is" and subject to all existing encumbrances; and 3) there has been no act by the City, or damage caused by the City, since Appellants acquired their interest in the property?**

## **III. STATEMENT OF THE CASE**

Because Appellants' Statement of the Case omitted important facts regarding the history of the property, the WSDOT-City agreements relating to the City's utilities on the property, and the 2005 real estate contract between WSDOT and Appellants, the City is compelled to provide the following counterstatement to the case.

1. The City has an underground power line, an underground sewer, and underground storm water drain line (the "City Utilities") that have existed undisturbed and fully operational since at least 1987 in their present locations on property that was formerly part of a city street ("the Property"). (CP 34 – FF 1) In the mid-1980s WSDOT required the City to relocate and reconstruct the City Utilities on the Property to accommodate WSDOT's I-90 highway improvement project. (CP 34 – FF 2)

2. The City fully performed the utility relocation and reconstruction pursuant to the requirements of a Master Agreement and Task Orders issued by WSDOT to the City that provided that WSDOT and the City would “enter into a separate easement agreement to perpetuate existing or replacement property rights of the City, and to define the locations and conditions of said easement.” (CP 34 – FF 3, 4, 5 and 6)

3. WSDOT issued a permit to the City to enter WSDOT property for the utility relocation work to be performed pursuant to the Master Agreement and Task Orders (the “Permit”). (CP 34 – FF 7) The Permit provided that “it shall be in full force until the contemplated easement has been properly executed and recorded.” (CP 34 – FF 8)

4. Following the City’s completion of the utility relocation work in 1987, WSDOT and the City exchanged draft easement documents for the City Utilities pursuant to the Master Agreement, Task Orders and Permit. The draft easements included an easement area legal description for the City Utilities on the Property. The draft easements were never executed or recorded. (CP 34 – FF 14, 15, and 16)

5. In 2005, Appellants Johal and Ostrovski executed a real estate installment contract with WSDOT for the purchase of the Property (the “2005 Contract”), which upon request of Appellants, WSDOT had designated as being surplus right-of-way property eligible for sale for a

purchase price of \$25,000. (CP 34 – FF 19 and 20). The 2005 Contract required Appellants Johal and Ostrovski to make monthly payments to WSDOT, and only after the purchase price and all interest due were fully paid would they receive legal title to the Property by quit claim deed. (CP 34 – FF 24) The 2005 Contract also provided that the Property would be taken “as-is,” and subject to all existing encumbrances. (CP 34 – FF 23)

6. WSDOT failed to disclose to Appellants prior to executing the 2005 Contract that the City Utilities were on the Property and that the City had a legal right to have the utilities there pursuant to the Master Agreement, Task Orders and Permit. (CP 34 – FF 21)

7. Subsequent to Appellants entering into the 2005 Contract with WSDOT, they discovered the presence of the City Utilities on the Property. (CP 34 – FF 26)

8. WSDOT admits that the City has a right to have the City Utilities on the Property, established by agreement between WSDOT and the City. (CP 34 – FF 27) WSDOT also admits that a written easement for the City Utilities had not been executed or recorded, and that WSDOT sold the Property on contract to Appellants without reserving the easement for conveyance to the City. (CP 34- FF 28)

9. Appellants chose not sue WSDOT for the non-disclosure of the City Utilities on the Property, but rather initiated a lawsuit against the City in

2010 for inverse condemnation and to quiet title. The City counterclaimed against Appellants to quiet title and filed a third party complaint against WSDOT as legal owner of the Property, claiming a permanent easement right for the City Utilities on the Property created through part performance. (CP 34 – FF 30 and 32)

#### **IV. SUMMARY OF ARGUMENT**

The part performance of WSDOT and the City established an easement for the City Utilities that is excused from the statute of frauds. (CP 34 – CL 12) By its very nature as an *unwritten* valid conveyance of an easement interest, it cannot be recorded and therefore must be excepted from the recording statute (RCW 65.08.070), taking priority over the subsequent equitable interest of Appellants under the 2005 Contract.

The recording of the 2005 Contract did not void the City's easement by part performance or give automatic rise to a takings claim as Appellants attempt to argue. Executing the contract simply gave them a right to maintain an equitable interest in the Property that, once they had fully paid the purchase price and all interest due as required by the contract, would result in WSDOT transferring legal title for the Property by quit claim deed, "as-is" and subject to all existing encumbrances, including the City's utility easement created by part performance.

Under well-established law in this state, Appellants as subsequent

purchasers have no valid claim for inverse condemnation. In this case, the City Utilities have remained undisturbed in their present locations since 1987, and there has been no act by the City that would constitute a “taking” of the Property or any portion of it on or after the date Appellants and WSDOT executed the 2005 Contract and Appellants gained their claimed equitable interest.

## **V. ARGUMENT**

### **A. Standard of Review.**

Appellants’ Opening Brief fails to discuss, or even mention, the standard of review on appeal.<sup>1</sup> That omission is particularly noteworthy here, because Appellants misleadingly suggest that their appeal presents only pure issues of law. Appellants purport to challenge six of the trial court’s conclusions of law. However, embedded within and necessary to each of those conclusions are unchallenged factual findings that are supported by substantial evidence.<sup>2</sup>

Appellants fail to note, for example, that the bona fide purchaser rule upon which they rely is subject to numerous exceptions. Determining whether or not those exceptions apply requires an examination of the facts.

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<sup>1</sup> RAP 10.3(a)(6) notes that the court “ordinarily encourages a concise statement of the standard of review as to each issue.”

<sup>2</sup> Significantly, Appellants have not challenged any of the trial court’s factual findings. Unchallenged findings of fact are verities on appeal. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010) (citing *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002)).

Appellants' assertion that the rights of a bona fide purchaser are always superior to those of a party that acquired a valid, unwritten conveyance is, as discussed below, a misstatement of Washington law. The rights of a bona fide purchaser may be superior, but that determination depends on the facts of the particular case. Here, the trial court examined the long history of underground City utilities on the Property during and after the time it was a fully functioning city street, the agreements between the City and WSDOT, the fact that Appellants purchased the Property from WSDOT subject to all existing encumbrances, and WSDOT's continuing interest as legal title holder of the Property. Based on those facts, the trial court correctly concluded that the part performance of WSDOT and the City excused the easement from the statute of frauds, and that the City's easement interest is pre-existing and superior to Appellants' claimed equitable interest in the Property. (CP 34 – CL 11 & 12)

The scope of review of a trial court's findings of fact and conclusions of law is limited to ascertaining whether the findings are supported by substantial evidence, and if so, whether the findings support the conclusions of law. *SAC Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.

*Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Further, “the substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party.” *Lewis v. Dep’t of Licensing*, 157 Wn.2d 466, 468, 139 P.3d 1078 (2006).

**B. The Bona Fide Purchaser Rule Does Not Apply and City’s Easement Created by Part Performance is Enforceable Against Appellants Claimed Interest in the Property.**

**1. The City’s valid, unwritten easement is an exception to the Bona Fide Purchaser Rule.**

Appellants incorrectly suggest that the “bona fide purchaser rule” applies to all unrecorded easements by citing *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 999 P.2d 54 (2000). In doing so, Appellants fail to mention that Washington courts have consistently recognized exceptions to the bona fide purchaser rule, as codified within the recording act, RCW 65.08.070<sup>3</sup>. Exceptions to the recording act include: a valid, unwritten prescriptive easement, *Crescent Harbor Water Co. v. Lyseng*, 51 Wn.App. 337, 346, 753 P.2d 555 (1988); title obtained under the vacant land statute, RCW 7.28.080 (see *Williams v. Striker*, 29 Wn.App. 132 (1981) (a prior

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<sup>3</sup> The *Wilhelm* court stated that “a bona fide purchaser of land who has no actual or constructive knowledge of an easement **generally** takes title free of the burden of the easement.” (emphasis added) *Wilhelm* is distinguishable from the case at hand because in *Wilhelm* the easement had in fact been executed in writing and recorded. In contrast, the easement on the Property created by part performance by the City and WSDOT before Appellants entered into the 2005 Contract with WSDOT was not in the form of an executed document subject to the recording act.

party with a valid unrecorded title interest pursuant to the vacant land statute had a superior right to possession and title over a subsequent bona fide purchaser); conveyances of real property by wills, a lease for a term not exceeding two years, and “an instrument granting a power to convey real property as the agent or attorney for the owner of the property” (see RCW 65.08.060); and certain boundary disputes that give rise to a valid real property interest under various doctrines including estoppel<sup>4</sup> and acquiescence<sup>5</sup>.

“Essentially what the boundary adjustment doctrines do is excuse the operation of the statute of frauds, so that oral and implied transfers are enforceable. However, since by definition these are non-documentary transfers of real property interests, there is no instrument to record, ***and nothing upon which the recording act can operate.***”

18 William B. Stoebuck and John W. Weaver, *Washington Practice Real Estate: Transactions* § 14.12 at 158 (2<sup>nd</sup> ed. 2011) (emphasis added)

All of these exceptions are instances where recording is not required, and in many of those cases, not possible. Thus, “interests or powers created by one of the excepted instruments do not need to be recorded to be valid against subsequent purchasers or mortgagees.” *Id.* at 157.

The common law provides for a “first in time, first in right rule” and the recording act is an abrogation of common law. Given that the

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<sup>4</sup> *Thomas v Harlan*, 27 Wn.2d 512, 518, 178 P.2d 965 (1947)

<sup>5</sup> *Lamm v McTighe*, 72 Wn.2d 587, 592, 434 P.2d 565 (1967)

recording statute reverses the “first in right” order of the common law, but the common law also allows for certain types of non-documentary transfers of property interests, it should follow that a subsequent grantee’s notice or lack of notice should be irrelevant in these cases, since the concept of notice is solely introduced by the recording act—and it “should be relevant only in cases in which the recording act applies.” *Id.* at 159

With respect to this case, Appellants failed to address the precedential case that the *Wilhelm* court relied upon, *Crescent Harbor v. Lyseng*. In *Crescent Harbor*, this Court found that the bona fide purchaser doctrine does not apply to an unwritten prescriptive easement, as title acquired by adverse possession is not affected by the recording statutes. (*Crescent Harbor* 51 Wn.App. at 345, citing *Mugaas v. Smith*, 33 Wn.2d 429, 432-33, 206 P.2d 332 (1949). In *Mugaas*, the Washington Supreme Court concluded that a bona fide purchaser of a servient estate does not extinguish title obtained through adverse possession, and importantly, that the recording act “relates exclusively to written titles.” (*Mugaas* 33 Wn.2d at 432, quoting *Scholl v. Williams Vly. R. Co.*, 35 Pa. 191, 204 (1860).

The facts of *Crescent Harbor* compare favorably to the case at hand. In *Crescent Harbor*, plaintiffs Massey and McPhee constructed a water well, pump and pipes on their property, and then sold the property in

1969 to the Guerreros. In 1985, the Guerreros sold the property to Lyseng, who then attempted to deny Massey and McPhee access to their water system. A lawsuit was filed, and the court found that Massey and McPhee held an easement for the water system by prescription. Consequently, the bona fide purchaser doctrine did not apply and Massey and McPhee's easement rights were enforceable against Lyseng's rights as a subsequent purchaser of the property.

In the instant case, WSDOT acquired from the City the former street right-of-way Property by operation of law in the mid-1980s. WSDOT then required and directed the City to relocate and reconstruct the City Utilities on the Property. Almost twenty years later WSDOT entered into the 2005 Contract for sale of the Property to the Appellants, who, like Lyseng in *Crescent Harbor* are subsequent purchasers to which the bona fide purchaser doctrine does not apply. The only factual difference is that while Massey and McPhee acquired their easement by prescription, the City acquired its easement through part performance. This distinction should not operate to deny the City its right to have the City Utilities on the Property simply because WSDOT failed to disclose this fact to Appellants before executing the 2005 Contract.

The Court in *Crescent Harbor* reviewed the evidence in the light most favorable to Lyseng, the bona fide purchaser. However, the Court

still found that the trial court was warranted in finding that an unwritten easement created by prescription and held by the owners of the underground water system on Lyseng's property was valid against Lyseng's title as a subsequent bona fide purchaser. Moreover, the Court found that this unwritten easement was valid and enforceable even though Lyseng had already acquired full legal title by deed.

In this case, the trial court found that the facts supported an unwritten and unrecorded easement created by part performance for the underground drainage pipes and power line. The trial court then correctly held that the City's unwritten easement is valid and enforceable against Appellants subsequent equitable interest in the Property under the 2005 Contract.

Appellants simply fail to recognize the distinction between unrecorded written instruments and non-documentary transfers of property interests by categorizing all prior 'unrecorded interests' as inferior to title held by bona fide purchasers. This glaring omission is contrary to law and is fatal to the Appellants' argument that they have an interest superior to the City. The law in this state provides for reasonable and logical exceptions to the recording act established both by statute and common law for certain types of valid, non-documentary transfers of a property right or interest.

In fact, the manner in which WSDOT acquired the Property highlights another example of an unrecorded property interest being excused from the recording act under Washington law. Pursuant to RCW 47.52.210, WSDOT took title of the Property from the City by “operation of law” when the Property was still a fully functioning city street (20<sup>th</sup> Ave S.), complete with paved surface for two-way vehicular traffic and underground utilities. Because this conveyance occurred by operation of law, the transfer of title was never executed in writing or recorded.

Notably, other jurisdictions have found easements that are created by part performance or estoppel are excused from compliance with the statute of frauds. See *Kluger v. Kubick*, 954 A.2d 262 (Conn. 2008) (affirming trial court’s finding of easement by estoppel for driveway was outside statute of frauds because it was an oral easement created by part performance); see *Enke v. City of Greeley*, 504 P.2d 1112 (Colo. 1972) (City’s installation of public water line without written easement created a vested right-of-way in the City, and subsequent purchaser’s rights were limited to takings accruing only after their acquisition of title); see also *Kohlleppel v. Owens*, 613 S.W.2d 168 (Mo. 1981) (part performance by predecessor owner with respect to relocation of road, and maintenance of fence and ditch in exchange for an easement sufficient to remove oral

agreement from statute of frauds and permit enforcement of oral agreement for easement against subsequent purchaser).

**2. Appellants' reliance on Berg is misplaced because the trial court found an easement created by part performance of WSDOT and the City.**

Appellants point to the holding from *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995) and imply that it is well-established law that an easement created by part performance can never be superior to a bona fide purchaser's interest. That is an incorrect statement of the *Berg* case. First, it must be noted that the *Berg* court determined that the facts in that case did not support an easement by part performance. *Berg*, 125 Wn. 2d at 558. That alone is enough to factually distinguish *Berg* because the trial court in this case did find substantial evidence to support an easement by part performance. Appellants' do not challenge any of those findings of fact.

However, it must also be noted that the *Berg* court's discussion of the general rule relating to the bona fide purchaser doctrine is simply *dicta*. Indeed, Appellant's lengthy quote from the *Berg* case is quite misleading as an argument that it was actually a holding from *Berg* when one reads the very next paragraph:

The Tings never raised the [bona fide purchaser] issue in the trial court, though, and under well-settled principles we will not address the issue.

*Berg*, 125 Wn. 2d at 555-556.

Thus, the *Berg* court's summary dismissal of this issue is based on not considering the issue at all, and certainly not under the facts presented by the instant case.

The court's statements that specific performance of the easement against the Tings should not be enforced if they were found to be bona fide purchasers were only conjecture because the *Berg* court found that the facts in that case did not sufficiently establish the elements of part performance to create an easement.

In this case, however, the City of Seattle has an easement interest established by part performance with WSDOT when WSDOT was sole owner of the Property, having taken ownership from the City for WSDOT's I-90 expansion project by operation of law pursuant to RCW 47.52.210, when the Property was part of a city street. WSDOT has continued to hold legal title to the Property--from the day WSDOT took the city street right-of-way by operation of law and creation of the easement by part performance and WSDOT's execution of the 2005 Contract with Appellants, continuing right to the present day. Here, WSDOT was an essential party to quieting title in this matter, and the City

brought WSDOT in to this suit as a third party defendant when Appellants failed to do so in their original lawsuit as plaintiffs against the City.

**C. The City's Valid Unwritten Conveyance is Not Subject to RCW 65.08.070 and is Not Void.**

The trial court decided that the part performance of the City and WSDOT created a non-documentary easement interest that is excused from the operation of the statute of frauds. The facts supporting the trial court's decision that an easement was created in favor of the City by the part performance of both the City and WSDOT remain unchallenged. Logically, the unwritten easement cannot be required to be recorded (nor by its very nature can it be recorded) in order to have priority over Appellants' subsequent equitable interest in the Property. It is also important to note the trial court's finding of fact that the Appellants' equitable interest is "subject to all existing encumbrances" under their 2005 Contract with WSDOT. (CP 34 – FF 23)

Appellants also cite the recording statute, RCW 65.08.070, as authority for their claim that the recording of the 2005 Contract automatically voids the City's easement interest as against their claimed equitable interest. Appellants fail to recognize the multiple exceptions to this rule, both statutory and in common law, and do not cite any authority to demonstrate that an easement created by part performance prior to their

purchase is inferior to their claimed equitable interest that they took subject to all encumbrances. Instead, Appellants cite only distinguishable cases that involve prior unrecorded *written* conveyances.

Appellants cite *Levien v. Fiala*, 79 Wn.App. 294, 300, 902 P.2d 170 (1995) to support their contention that “. . . the City’s interest was void as against the interest of the plaintiffs unless the plaintiffs had notice of the City’s interest at the time of their acquisition.” (Appellants Brief, p.8) The case at hand is distinguishable, however, in that *Levien* involved the failure to record a written, executed quit claim deed for fee title, whereas this case involves the conveyance of a valid easement interest by unwritten, non-documentary means created by part performance of the easement holder (the City) and a fee owner of the property (WSDOT).

Appellants’ reliance on *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992) is also misplaced. That case arose from a dispute over lakefront property sold by the owner in two separate real estate contracts to different parties. While *Tomlinson* is significant because it extended the bona fide purchaser doctrine to purchasers under certain real estate contracts, it is distinguishable from the present case in that the *Tomlinson* conveyances were written and executed documents. Neither *Levien* nor *Tomlinson* resolve the issue presented by Appellants in this

case, which involve competing real property interests arising from not a deed, but a recorded real estate contract and a prior valid *unwritten and unrecorded* easement created by part performance of the vendor on the contract and the easement holder.

Appellants cite *Ellingsen v. Franklin County*, 117 Wn.2d 24, 810 P.2d 910 (1991) as authority on two points: 1) that *Ritchie v. Griffiths*, 1 Wash. 429, 25 P. 341 (1890) established the bona fide purchaser rule (court held that incorrectly indexed deed does not provide constructive notice to subsequent purchaser), and 2) that the recording statute applies to municipalities as well as individuals. The City does not dispute either point of law, however it should be noted that *Ellingsen* stands for the proposition that a misfiled deed in a county engineer's office does not provide constructive notice. The case at hand does not involve a misfiled, written document, but rather a valid, unwritten conveyance that is excused from the statute of frauds and is therefore not subject to the recording statute.

Appellants point to *Lind v. City of Bellingham*, 139 Wash. 143, 147, 245 P. 925 (1926), which also states that the recording statute applies to municipalities, and *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 127-28, 233 P.3d 871 (2010), which holds that the recording statute

extends to sales by the State. Appellants' repeated references to government entities being subject to the recording statute suggest that the City somehow believes it is exempt from the requirements of the statute. This suggestion is misleading and unfounded. The City does not believe that a municipality is exempt from the recording statute, but rather that an easement created by part performance and excused from the statute of frauds is taken out of the ambit of the recording act because it is a valid unwritten conveyance *that by its very nature cannot be recorded*. The Appellants fail to cite any case law to refute this point, but instead erroneously rely on dicta in *Berg* to argue that Appellants' title is superior to that of the City.

**D. Appellants' Interest is Held "As-Is" and Subject to All Existing Encumbrances.**

Under the terms of the 2005 Contract, Appellants took any interest they may have in the Property "as is," and "subject to all existing encumbrances, including but not limited to, easements, restrictions, and reservations, if any." (see Exhibit A, pp. 2-3) (CP 34 – FF 23) Appellants Johal and Ostrovski were required under the contract to make monthly payments to WSDOT, and only after the purchase price and all interest due were fully paid would they receive legal title by quit claim deed. (CP 34 – FF 23 & 24, CL 5) Significantly, WSDOT did not disclose to

Appellants prior to executing the 2005 Contract that the City Utilities were on the Property and that the City had a right to have its utilities there, established by WSDOT's Master Agreement, Task Orders and Permit to the City all executed during the construction of the WSDOT I-90 improvement project in the 1980s. (CP 34 – FF 21 & 27)

Appellants' status as bona fide purchasers with an equitable interest in the Property arising out of the 2005 Contract cannot create new property rights or include property rights that WSDOT never had or did not have the legal right to pass on to Appellants as contract purchaser of the Property. The part performance of the City and WSDOT (as the vendor of the property) created an encumbrance on the property in the form of a valid, unwritten easement for the City Utilities prior to the execution of the 2005 Contract. Appellants took their interest in the Property "as-is" and "subject to all existing encumbrances," including the pre-existing valid, unwritten easement for the City Utilities, created by part performance of the City and WSDOT, the owner at the time and current legal title holder to the Property.

Moreover, under the terms of the 2005 Contract, only after Appellants completely fulfilled the installment payment terms would WSDOT as grantor execute a quit claim for its fee title interest in the

Property to Appellants. A quitclaim deed merely conveys “all the then existing legal and equitable rights of the grantor.” *Roeder Co. v. K & E Moving & Storage Co., Inc.* 102 Wn.App. 49, 56-57, 4 P.3d 839, 843 (2000) (citing RCW 64.04.050) WSDOT, then, could only pass on to Appellants the property interest they held, no more, no less, subject to the pre-existing easement for the City Utilities as an “existing encumbrance” under the 2005 Contract.

**E. Appellants Are Subsequent Purchasers and Have No Inverse Condemnation Claim.**

Appellants correctly cite the five elements of inverse condemnation. A party alleging inverse condemnation has the burden of showing, and must establish the following elements to prevail on such a claim: (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings. *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998).

The trial court correctly found that no taking of the Property has occurred, and Appellants have suffered no damages or injury caused by the City since the 2005 Contract was executed. (CP 34 – CL 2) The City’s relocation and reconstruction of the City Utilities in the mid-1980s within the street that would later become the Property did not result in a taking

because these actions were done at the direction of the property owner, WSDOT. The City did not exercise eminent domain to “take” the property for the City Utilities from WSDOT because WSDOT not only permitted but *required* the City to perform the utility relocation and reconstruction work on the Property. While the City has a statutory right under RCW 8.12.030 to condemn state property, the City never exercised its power of eminent domain against WSDOT to actually “take” any part or interest in the Property.

Nonetheless, Appellants assert that the alleged taking occurred automatically the moment that they recorded the 2005 Contract, without citing any legal authority for this assertion. Here, Appellants are asking the court to create new law and in doing so extend taking liability to long past acts of a government entity performing work required by another government entity in order to accommodate a transportation project. These types of required and permitted acts should not be defined as an exercise of eminent domain when the work is performed on property that is already owned by a government entity requiring the work.

However, even if the trial court had found that a taking had occurred at the time the City performed the work required by WSDOT on the Property, Appellants would still be barred from maintaining an inverse condemnation claim. In *Hoover v. Pierce County*, 79 Wn.App. 427, 903

P.2d 464 (1995), the court articulated the well-established rule in this state that a purchaser of real property cannot sue for a “taking” of that property occurring before he or she acquired title. Only the owner of the property at the time of taking would have standing to bring such a claim. The court stated:

“The general rule, both under the statutes and in the absence of statutory provision, is that where property is taken or injured under the exercise of the power of eminent domain, the owner thereof at the time of the taking or injury is the proper person to initiate proceeding or sue therefor.”

*Id.* at 433

In *Hoover*, the court barred an inverse condemnation claim by landowners who purchased a piece of property in 1988, and sued Pierce County for a “taking” because a County road and culvert existed on their property. The court held that because the road and culvert had been constructed in 1972, long before plaintiffs acquired the property, and because plaintiffs had identified no new “taking” of the property that had occurred since they purchased it, the plaintiffs had no standing to pursue an inverse condemnation claim against the county. The court stated:

“In summary, the County had not undertaken any new action since installing the roadway culvert in 1972; thus, no new taking cause of action has arisen, and the Hoovers, as subsequent purchasers, may not recover for a taking that occurred prior to their ownership.”

*Id.* at 436.

A similar result was reached in *Riddock v. City of Helena*, 687 P.2d 1386 (Mont. 1984), which was cited by the court in *Hoover*. In that case, a landowner sued for inverse condemnation based on the existence of a pipeline across his property that was owned by the City of Helena. The pipeline, however, had been constructed before the landowner acquired the property. The court barred Riddock's inverse condemnation claim, and stated that "the only person entitled to recover damages for condemnation is the owner of the land at the time of the taking." *Id.* at 1388.

The only "taking" alleged by Appellants is the existence of a City-owned underground power line on a portion of the Property. The City originally installed the power line in 1974, in a City street right-of-way. In the mid-1980s the City replaced the power line in the same location on the Property, and reconstructed two sewer lines as required by WSDOT for the I-90 Project utility work. Appellants did not gain their alleged equitable interest or take possession of the Property until 2005. Moreover, the City has undertaken no new action on the Property since Appellants entered into the 2005 Contract with WSDOT. Thus, under *Hoover*, as a subsequent purchaser under Washington law, Appellants have no valid claim for inverse condemnation against the City. The trial court correctly held that the continuous presence of the City Utilities on the Property

since at least 1987 in their present form does not constitute a taking against the Appellants.<sup>6</sup> (CP 34 – CL 2)

Appellants' constitutional rights have not been violated as they suggest, because no taking or partial taking by the City of the Property has occurred during the time Appellants have held their claimed equitable interest under the 2005 Contract. Nor should the City, as Appellants also state in their brief, have been required to commence a condemnation action against Appellants and WSDOT to acquire the right to continue using the Property for the City Utilities. The City already had that right and had fully paid for that right by fulfilling its obligations under the Master Agreement, Task Orders and Permit with WSDOT.

## **VI. CONCLUSION**

Appellants' attempts to leverage what were rightfully breach of contract and non-disclosure claims against WSDOT into a takings claim

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<sup>6</sup> Notably, as provided under the terms of the 2005 Contract, any taking or partial taking of the Property would be grounds for rescission of the contract, and any taking compensation awarded to Appellants would have to be paid to WSDOT and applied to the outstanding contract balance. (*see Exhibit A*, p. 6 (submitted and cited by Appellants as Exhibit 5)). If a taking or partial taking by the City were to be found in this case, WSDOT would be unjustly enriched. The City would be paying a *second time* for its right to have the City Utilities on the Property some 25 years after the City's payment in full for that very right and completion of all its obligations pursuant to the Master Agreement and Task Orders with WSDOT for the I-90 utility relocations.

against the City were correctly dismissed by the trial court. For the foregoing reasons, the City requests that this Court affirm that ruling.

DATED this 15<sup>th</sup> day of March, 2012.

PETER S. HOLMES  
Seattle City Attorney

By:   
Stephen R. Karbowski, WSBA # 25659  
Assistant City Attorney  
Attorneys for Respondent, City of Seattle

**CERTIFICATE OF SERVICE**

I certify that on this date I caused a copy of City of Seattle's Response Brief to be filed with the court by legal messenger and served by U.S. Mail and email to each of the following parties:

DARYL A. DEUTSCH  
Three Lake Bellevue Dr. Suite 100  
Bellevue, WA 98005  
[Daryl@RDTlaw.com](mailto:Daryl@RDTlaw.com)

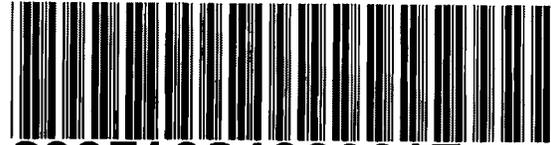
AMANDA G. PHILLY  
Assistant Attorney General  
State of Washington  
7141 Clearwater Dr. SW  
Tumwater, WA 98501-6503  
[Amandapl@atg.wa.gov](mailto:Amandapl@atg.wa.gov)

Signed at Seattle, Washington this 15<sup>th</sup> day of March, 2012.

  
\_\_\_\_\_  
Hazel Haralson

# EXHIBIT A

After Recording, Please Return To:  
Attn: Real Estate Services  
Department of Transportation  
P.O. Box 47338  
Olympia, WA 98504-7338



**20051024000017**  
YEVGENI OSTROV REC 51.00  
PAGE001 OF 020  
10/24/2005 09:00  
KING COUNTY, WA

Document Title: Real Estate Contract  
Reference Number of Related Document: N/A  
Grantor (s) : State of Washington  
Grantee (s) : Yevgeni Ostrovske & Karnail Johal  
Legal Description: Portion of the SW1/4, SW1/4, Sec 4, T24N, R4E, W.M.  
Additional Legal Description is on Page 1 & 2 of document  
Assessor's Tax Parcel Number: Surplus Highway Right of Way to be attached to 872810-061004, 872810-062002, and 872810-0630

**E2163825**  
10/24/2005 08:59  
KING COUNTY, WA  
TAX \$10.00  
SALE \$0.00

PAGE001 OF 001

*Parcel 83*

## REAL ESTATE CONTRACT

SR 90, Jct. SR 5 to W. Shore Mercer Island Sec.1, Jct SR 5 to Bradner Place S.

THIS REAL ESTATE CONTRACT (hereinafter Contract), dated this 10<sup>th</sup> day of OCTOBER, 2005, is made and entered into by and between STATE of WASHINGTON, DEPARTMENT OF TRANSPORTATION (hereinafter Seller) and YEVGENI OSTROVSKE, a single man and KARNAIL JOHAL, a single man (hereinafter Purchaser).

### 1. PROPERTY.

A. Seller agrees to sell to Purchaser and Purchaser agrees to purchase from Seller the following described real property in King County, State of Washington:

That part of the Southwest quarter of the Southwest quarter of Section 4, Township 24 North, Range 4 East, W.M., described as follows:

Beginning at Highway Engineer's Station (hereinafter referred to as HES) L 59+49.05 (519.35' LT) on the L Line Survey of SR 90 Jct. SR 5 to W. Shore Mercer Island Sec. 1, Jct. SR 5 to Bradner Place S; thence North to HES 20<sup>th</sup> /Jud.

March 3, 2003

60+00.89 (33.54' RT); thence Southeasterly along the L Line Survey to HES 20<sup>th</sup>/Jud. 62.03.99 (33' RT) ; thence Westerly to HES L 59+49.05 (519.35' LT) and the POINT OF BEGINNING.

The specific details concerning all of which may be found on Sheet 6 of that certain plan entitled SR 90 Jct. SR 5 to W. Shore Mercer Island Sec. 1, Jct. SR 5 to Bradner Place S, now of record and on file in the office of the Secretary of Transportation at Olympia, Washington, bearing date of approval February 29, 1980.

Subject to all existing encumbrances, including but not limited to, easements, restrictions, and reservations, if any.

2. TIME IS OF THE ESSENCE. Time is specifically declared to be of the essence of this Contract and of all acts required to be done and performed by the parties, including, but not limited to, the proper tender of each of the sums required by the terms to be paid.

3. POSSESSION. Purchaser shall be entitled to possession of the Property on October 15, 2005.

4. PURCHASE PRICE. The purchase price is TWENTY FIVE THOUSAND AND NO/100 DOLLARS (\$25,000.00), of which TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$2,500.00) has been paid, the receipt thereof is hereby acknowledged, and the Purchaser agrees to pay the balance of said purchase price as follows:

ONE HUNDRED EIGHTY ONE AND 26/100 DOLLARS (\$181.26) or more, at Purchaser's option, on or before the fifteenth day of, November, 2005 and ONE HUNDRED EIGHTY ONE AND 26/100 DOLLARS (\$181.26), or more, at Purchaser's option, on or before the fifteenth day of each succeeding month until the balance of the purchase price is fully paid. Purchaser further agrees to pay interest on the balance of the purchase price and the diminishing amounts thereof at the rate of 7.5 percent per annum from the fifteenth day of October, 2005, which interest shall be deducted from each monthly installment and the balance of each installment applied in reduction of principal. All payments shall be made payable to the Department of Transportation and sent to the Department of Transportation Assistant Director Property Management, P.O. Box 47338, Olympia, Washington 98504-7338. Seller may change the address for payments by designating a different address and notifying Purchaser in writing of

such change. All sums herein referred to shall be calculated by and payable in the lawful currency of the United States.

5. CHARGE FOR LATE PAYMENT AND NSF CHECK.

A. If any sums payable to Seller are not received by the fifteenth (15<sup>th</sup>) day following its due date, Purchaser shall pay Seller, in addition to the amount due, for the cost of collecting and handling such payment, an amount equal to the greater of One Hundred and no/100 Dollars (\$100.00) or five percent (5%) of the delinquent amount. In addition, all delinquent sums payable by Purchaser to Seller and not paid within fifteen (15) days of the due date shall, at Seller's option, bear interest at the rate of twelve percent (12%) per annum, or the highest rate of interest allowable by law, whichever is greater; provided that if the highest rate allowable by law is less than twelve percent (12%) interest charged hereunder shall not exceed that amount. Interest on all delinquent amounts shall be calculated from the original due date to the date of payment. Also there shall be a charge for any check returned uncollectable in accordance with WAC 468-20-900. Seller and Purchaser agree that such charges represent a fair and reasonable estimate of the costs incurred by Seller by reason of late payments and uncollectable checks.

B. Acceptance of late payment charges and/or any portion of the overdue payment by Seller shall in no event constitute a waiver of Purchaser's default with respect to such overdue payment, nor prevent Seller from exercising any other rights and remedies authorized by law.

C. When a delinquency exists, any payments received will be applied first to the late payment charge and late payment fees, next to delinquent payments, and any balance remaining to the current month's payment.

6. DEED. Seller agrees, upon full compliance by Purchaser with its agreements herein, to execute and deliver to Purchaser a Quitclaim Deed to the Property, excepting any part which may have been condemned, free of encumbrances except those existing at the date hereof, and any that may accrue hereafter through any person other than Seller.

7. CONDITION OF PROPERTY. Purchaser hereby accepts the Property in its current conditions and confirms that neither Seller nor any agent or representative of Seller has made any warranty or representation whatsoever concerning the physical condition thereof or the uses or purposes to which the same may now or hereafter be placed.

8. IMPROVEMENTS.

A. Purchaser shall not, without the prior written consent of Seller, make or permit any alterations, additions or improvements to or of the Property or to any portions thereof nor permit any demolition or removal of any such improvements. Seller agrees not to unreasonably withhold written consent if the action proposed will not materially affect the value of the Property or violate the terms of this Contract or of any prior encumbrance. Purchaser shall not cause, authorize or permit any mechanic's or materialmen's liens to be placed on the Property. Purchaser shall defend, indemnify and hold harmless Seller from and against any and all liens of every kind and nature that may be levied against the Property caused by or through Purchaser. Purchaser shall have the right to contest said liens so long as a foreclosure thereof is prevented, and if such contest is pursued in good faith, the filing of the lien and the nonpayment of the lien amount so disputed shall not constitute a default under the Contract. In the event Purchaser shall alter, repair or improve the Property or erect the Property or any part thereof, all such alterations, repairs, improvements, shall immediately be and become the property of Seller and subject to all of the terms, covenants and conditions of this Contract.

B. All buildings, improvements and fixtures now or hereafter made to or placed on the Property shall become a part thereof and shall not be removed without the prior written permission of Seller and shall remain in place in case of forfeiture.

9. TIMBER AND MINERALS. Purchaser shall not remove any timber, trees, gravel, minerals or other earth materials without prior written permission from Seller.

10. USE OF PROPERTY.

A. Purchaser shall not make or allow any unlawful use of the Property.

11. MAINTENANCE OF PROPERTY.

A. Purchaser shall keep and maintain the Property and all improvements and personal property currently or hereafter situated thereon in good repair and shall not make any material alterations without the prior written consent of Seller. Purchaser shall not commit or

suffer to be committed any waste or other willful or negligent damage to or destruction of the Property or any part or portion thereof.

B. Breach of this provision shall entitle Seller, upon the giving of three (3) days' notice, to go upon the Property and perform such services and acts as are necessary to comply with this section. The necessary costs and expenses of these services and acts shall be considered an indebtedness immediately payable to Seller, which Seller shall have the right to collect or at Seller's option shall be considered an obligation under this Contract, shall be added to the principal of this Contract and shall bear interest at the contract rate from the date that the indebtedness was incurred. The methods of giving notice as herein provided shall be in the same manner as provided for in RCW 61.30.050(2)(b).

12. **SELLERS RIGHT OF ENTRY AND INSPECTION.** Seller shall have the right, at reasonable times and hours, to inspect the Property to ascertain whether Purchaser is complying with all of the terms, covenants and conditions of this Contract.

13. **UTILITIES.** Purchaser shall pay for the cost of all electric, power, gas, sewer, water, telephone, cable television, refuse disposal service, and any and all other utilities furnished to or used or consumed in, on, or about the Property by Purchaser or by any person following the date of this Contract, and Purchaser shall contract for the same solely in Purchaser's own name.

14. **ASSESSMENTS AND TAXES.** Purchaser shall pay before delinquency all taxes, assessments, water rents or water assessments, utility charges, and operation or construction-charges not now delinquent and all levied or assessed against the Property and hereafter falling due;. In the event any taxes, assessments, rents or charges to be paid by Purchaser are paid by Seller, Purchaser shall promptly reimburse Seller. Upon failure of Purchaser to pay any taxes, assessments, rent or charge, any amount so paid shall be added to and be secured in the same manner as the unpaid purchase price, bear interest at the rate of 7.5 per annum and be due immediately.

15. **LEINS, CHARGES AND ENCUMBRANCES.** Purchaser shall pay, before a delinquency of any debts secured thereby, all liens, charges or encumbrances hereafter lawfully imposed on the Property, assumed by Purchaser in this Contract or subject to which this purchase and sale is made, and shall not allow any part of the Property to become subject to liens, charges

or encumbrances having priority over the rights of Seller in the Property. Notwithstanding anything to the contrary provided above in this paragraph, Purchaser shall not be responsible for any liens or encumbrances (or payment of title obligations secured thereby) imposed upon said Property subsequent to the date of this Contract by or through Seller unless such liens, encumbrances or obligations are expressly assumed by Purchaser.

16. CONDEMNATION. If the Property or any part shall be taken and condemned, such taking shall be a ground for rescission of this Contract. The award made for the taking shall be deemed to be the property of the Purchaser, but shall be paid to Seller to apply upon the purchase price, not exceeding any amounts then unpaid hereunder.

17. DAMAGE TO PROPERTY. In the event of damage to or destruction of any building or improvements upon the Property, such damage as between the parties shall be the loss of the Purchaser and shall not constitute a failure of consideration or provide a basis for rescission of this Contract nor relieve the Purchaser of obligations to pay the remaining installments due under this Contract.

#### 18. INSURANCE

A. All Risk Insurance. Purchaser shall, at Purchaser's own cost and expense, keep the Property insured against loss or damage by fire, windstorm and all other casualties covered by "all risk" endorsements available in the State of Washington and with such additional coverage or endorsements as the Seller may reasonably require from time to time. The insurance shall be in an amount not less than the greater of (i) the amount of coverage necessary to avoid the insured being treated as a co-insurer, or (ii) one hundred twenty percent (120%) of the lien unpaid principal balance of the purchase price for the Property, or (iii) in such higher amount as may be required by the terms of any prior encumbrance, and shall be placed with an insurance company authorized to do business in the State of Washington. The insurance policy shall expressly include the seller as a named insured, shall contain a waiver of subrogation clause, shall include provisions to the effect that they cannot be materially modified or canceled prior to Seller receiving not less than thirty (30) days written notice thereof and shall be deposited with the Seller upon request. In the event of loss or damage to the Property that is required to be insured hereunder, the insurance proceeds shall be promptly used to repair, rebuild or replace all improvements and personal property that may have been destroyed or damaged, in

accordance with a construction contract and plans and specifications therefor, acceptable to Seller, or at Seller's election, if Purchaser elects not to so repair or reconstruct, the insurance proceeds shall be applied against the unpaid principal balance due and owing. The parties agree to make elections provided for in this paragraph within thirty (30) days following written request to do so. Damage to or destruction of the Property or any portion thereof shall not constitute a failure of consideration or provide a basis for rescission of the Contract, nor shall such circumstances relieve Purchaser of obligations to pay the remaining installments due hereunder. In the event of any failure of Purchaser to comply with the terms of this paragraph, Seller may require Purchaser to deposit with Seller with each installment an amount reasonably estimated by Seller to be necessary to discharge the next ensuing premiums for the insurance policies, said estimates to be adjusted by Seller to reflect the actual amount of such liabilities on an annual basis. Upon the satisfaction of the amounts due under this Contract, the payments so made which have not been applied against such liabilities shall be returned to Purchaser without interest.

B. Personal Injury and Property Damage Insurance.

(1) At its sole expense, Purchaser shall secure and maintain in effect a policy providing public liability insurance issued by an insurer licensed to conduct business in the State of Washington. The insurance policy shall provide liability coverage for any and all claims of bodily injury, property damage, and personal injury arising from Seller's use of the Property. The insurance policy required by this section shall provide coverage as follows: if the Property are to be used for commercial purposes, no less than One Million and no/100 Dollars (\$1,000,000.00) bodily injury and property damage or combined single limit of liability per occurrence, with a general aggregate limit of no less than Three Million and no/100 Dollars (\$3,000,000.00) per policy period; and if the Property is not to be used for commercial purposes, no less than Five Hundred Thousand and no/100 Dollars (\$500,000.00) bodily injury and property damage or combined single limit of liability per occurrence, with a general aggregate limit of no less than One Million and no/100 Dollars (\$1,000,000.00). Such aggregate limits shall apply for this Property location, and coverage under said policy shall be triggered on an "occurrence basis", not a "claims made" basis.

(2) If the Property is to be used for commercial purposes, the coverage required by this section shall be at least as broad as that provided by the most current Commercial General Liability Policy form ISO (Insurance Services Office, Inc.) policy form CG 00 01 07 98 as amended, and shall be endorsed to include pollution liability coverage under ISO

form CG 00 39 10 90, or its equivalent without modification, in amounts previously stated. Purchaser shall provide additional endorsements and/or increase the policy limits at its sole cost, when and if the Seller deems it necessary due to Purchaser's use of the Property, within ten (10) days of Seller's written request to do so.

(3) Seller shall be named as an additional insured by endorsement of the liability policy required by this section utilizing ISO Form 2026 (Additional Insured – Designated Person or Organization) or its equivalent without modification. The endorsement shall require the insurer to provide Seller, with not less than thirty (30) days written notice before any cancellation of the coverage required by this section.

(4) No changes whatsoever shall be initiated as to the coverage without prior written approval by Seller and written authorization by Seller to make any requested changes.

(5) Unless approved by Seller in advance and in writing, the liability coverage required by this section shall not be subject to any deductible or self-insured retentions of liability greater than Five Thousand and no/100 Dollars (\$5,000.00) per occurrence if the Property is to be used for commercial purposes, or One Thousand and no/100 Dollars (\$1,000.00) per occurrence if the Property is not used for commercial purposes. The payment of any such deductible or self-insured retention of liability amounts remains the sole responsibility of Purchaser.

(6) Purchaser assumes all obligations for premium payment, and in the event of nonpayment is obligated to reimburse Seller the cost of maintaining the insurance coverage and any legal fees incurred in enforcing such reimbursement in the event Purchaser fails to pay the policy premiums.

(7) Coverage, if obtained by the TENANT in compliance with this section, shall not be deemed as having relieved Purchaser of any liability in excess of such coverage.

(8) Purchaser shall provide Seller with a certificate of insurance reflecting the insurance coverage required by this section within ten (10) business days of the execution of this Contract. Such certificates shall also be provided upon renewal of said policies and changes in carriers.

19. INDEMNIFICATION. Purchaser, its successors or assigns, will protect, save, and hold harmless Seller, its authorized agents and employees, from all claims, actions, costs,

damages or expenses of any nature whatsoever by reason of the acts or omissions of Purchaser, its assigns, agents, contractors, licensees, invitees, employees or any person whomsoever arising out of or in connection with any acts or activities related to this Contract or the Property. Purchaser further agrees to defend Seller, its agents or employees, in any litigation, including payment of any costs or attorney's fees, for any claims or actions commenced thereon arising out of or in connection with acts or activities related to this Contract or the Property. This obligation shall not include such claims, costs, damages or expenses which may be caused by the sole negligence of Seller or its authorized agents or employees; Provided that, if the claims or damages are caused by or result from the concurrent negligence of (a) Seller, its agents or employees, and (b) Purchaser, its assigns, agents, contractors, licensees, invitees, or employees, or involves those actions covered by RCW 4.24.115, this indemnity provision shall be valid and enforceable only to the extent of the negligence of Purchaser, its assigns, agents, contractors, licensees, invitees, or employees.

## 20. ENVIRONMENTAL LAWS AND INDEMNIFICATION.

A. Purchaser represents, warrants and agrees that it will conduct its activities on and off the Property in compliance with all applicable environmental laws. As used in this Contract, Environmental Laws means all federal, state and local environmental laws, rules, regulations, ordinances, judicial or administrative decrees, orders, decisions, authorizations or permits, including, but not limited to, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., the Clean Air Act, 42 U.S.C. § 7401, et seq., the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11001, et seq., the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et seq., the Toxic Substance Control Act, 15 U.S.C. § 2601 et seq., the Oil Pollution Control Act, 33 U.S.C. § 2701, et seq., and Washington or any other comparable local, state, or federal statute or ordinance pertaining to the environment or natural resources and all regulations pertaining thereto, including all amendments and/or revisions to said laws and regulations.

B. Toxic or hazardous substances are not allowed on the Property the prior express written permission of Seller and under such terms and conditions as may be specified by Seller. For the purposes of this Contract, Hazardous Substances shall include all those substances identified as hazardous under the Comprehensive Environmental Response,

Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., and the Washington Model Toxics Control Act, RCW 70.105D et seq., including all amendments and/or revisions to said laws and regulations, and shall include gasoline and other petroleum products. In the event such permission is granted, the disposal of such materials must be done in a legal manner by Purchaser.

C. Purchaser agrees to cooperate in any environmental investigations conducted by Seller staff or independent third parties where there is evidence of contamination on the Property, or where Seller is directed to conduct such audit by an agency or agencies jurisdiction. Purchaser will reimburse Seller for the cost of such investigations, where the need for said investigation is determined to be caused by Purchaser's use of the Property. Purchaser will promptly provide Seller with notice of any inspections of the Property, notices of violations, and orders to clean up contamination. Purchaser will permit Seller to participate in all settlement or abatement discussions. In the event that Purchaser fails to take remedial measures as duly directed by a state, federal, or local regulatory agency within ninety (90) days of such notice, Seller may elect to perform such work, and Purchaser covenants and agrees to reimburse Seller for all direct and indirect costs associated with the Seller's work where said contamination is determined to have resulted from Purchaser's use of the Property. Purchaser further agrees that the use of the Property shall be such that no hazardous or objectionable smoke, fumes, vapor, odors, or discharge of any kind shall rise above the grade of the right of way.

D. For the purposes of this Contract, Costs shall include, but not be limited to, all response costs, disposal fees, investigatory costs, monitoring costs, civil or criminal penalties, and attorney fees and other litigation costs incurred in complying with state or federal environmental laws, which shall include, but not be limited to, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., the Clean Water Act, 33 U.S.C. § 1251 et seq., the Clean Air Act, 42 U.S.C. § 7401 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, and the Model Toxics Control Act, RCW 70.105D et seq., including all amendments and/or revisions to such laws and regulations.

E. Purchaser agrees to defend, indemnify and hold Seller harmless from and against any and all claims, causes of action, demands and liability including, but not limited to, any costs, liabilities, damages, expenses, assessments, penalties, fines, losses, judgments and attorneys' fees associated with the removal or remediation of any Hazardous Substances that have been released, or otherwise come to be located on the Property, including those that may

have migrated from the Property through water or soil to other properties, including without limitation, the adjacent Seller property, and which are caused by or result from Purchasers activities on the Property. Purchaser further agrees to retain, defend, indemnify and hold Seller harmless from any and all liability arising from the offsite disposal, handling, treatment, storage, or transportation of any Hazardous Substances removed from the Property.

F. The provisions of this section shall survive the termination or expiration of this Contract.

21. DEFAULT.

A. Default by Purchaser.

(1) Purchaser shall be in default under this Contract if it (a) fails to observe or perform any term, covenant, or condition herein set forth, or (b) fails or neglects to make any payment of principal or interest or any other amount required to be discharged by Purchaser precisely when obligated to do so, or (c) become or is declared insolvent or make an assignment for the benefit of creditors, or file any debtor's petition or any petition is filed against Purchaser under any bankruptcy, wage earner's reorganization or similar act, or (d) permit the Property or any part thereof or Purchaser's interest therein to be attached or in any manner restrained or impounded by process of any court, or (e) abandon the property, if improved, for more than thirty (30) consecutive days (unless the Property is otherwise occupied), or (f) convey the Property or a portion thereof without any prior written consent of Seller.

(2) In the event Purchaser defaults under this Contract, Seller may, at its election, take the following courses of action:

(a) Suit for Delinquencies. Seller may institute suit for any installments or any other sums due and payable under this Contract including sums advanced by Seller pursuant to this Contract, together with interest on all of said amounts at the interest rate provided in this Contract.

(b) Acceleration. Upon giving Purchaser not less than fifteen (15) days written notice of its intent to do so (within which time any monetary default may be

cured without regard to the acceleration), Seller may declare the entire unpaid balance of the purchase price and all interest then due thereon and any prepayment premium to be immediately due and payable and institute suit to collect such amounts, together with any sums advanced by Seller pursuant to this Contract, and together with interest on all said sums as provided in this Contract from the due date or date of each such advance to and including the date of collection where there has been a default by the Purchaser as follows:

(1) Purchaser has failed to timely pay any principal, interest, insurance premium, tax, or other sum of money required to be paid under this Contract; or

(2) Purchaser sells, transfers, attempts to assign any part or interest in this Contract that either evidences the indebtedness owed by Purchaser to Seller or the Property, or contracts to transfer title or possession to all or part of the Property, by deed, contract of sale, assignment, lease, mortgage, lease with option to purchase or similar agreement, whether voluntary or by operation of law, or otherwise has failed to obtain any consent of Seller required for a transfer of Purchaser's title to the Property; or

(3) Purchaser commits waste on the Property.

(c) Interest Rate Adjustment. If Purchaser sells, transfers, assigns, mortgages or in any way diminishes or encumbers its interest in the Property or in the Contract, voluntarily, involuntarily or by operation of law, or assigns or pledge any of the rents, issues or profits thereof to any person without the prior written consent of Seller, Seller may adjust the interest rate on this Contract effective as of the date of the transfer; Provided, if Seller elects this option, it shall not have the right to accelerate the remaining balance of the purchase price as provided elsewhere in this section.

(d) Forfeiture and Repossession. Seller may exercise all powers and rights to the full extent allowed by chapter 61.30 RCW, including but not limited to those rights stated herein. Seller may cancel and render void all rights, titles and interests of Purchaser in this Contract and in the Property (including all of Purchaser's then existing rights in and timber, crops, and improvements) by giving a Notice of Intent to Forfeit pursuant to RCW 61.30.040-070, and said cancellation and forfeiture shall become effective if the default therein

specified has not been fully cured within ninety (90) days thereafter and Seller records a Declaration of Forfeiture pursuant to RCW 61.30.040-070. Upon the forfeiture of this Contract, Seller may retain all payments made hereunder by Purchaser and may take possession of the Property ten (10) days following the date this Contract is forfeited and summarily eject Purchaser and any person or persons having possession of the Property by, through, or under the Purchaser who were properly given the Notice of Intent to Forfeit and the Declaration of Forfeiture. In the event Purchaser or any person or persons claiming by, through, or under remain in possession of the Property after such cancellation, Purchaser, or such person or persons, shall be deemed tenants at will of Seller and Seller shall be entitled to institute an action for summary possession of the Property, and may recover from Purchaser or such person or persons in any such proceedings the fair rental value of the Property for the use thereof from and after the date of cancellation, plus costs, including Seller's reasonable attorneys' fees and costs. Purchaser agrees that Seller may condition the acceptance of any delinquent payments on the payment of an additional sum to cover the reasonable costs of any work on forfeiture proceedings which may have been undertaken by Seller and agrees to pay such additional sums.

(e) Specific Performance. Seller may institute suit to specifically enforce any of Purchaser's covenants hereunder, and the same may include redress by mandatory or prohibitive injunction.

(f) Judicial Foreclosure. Seller may institute suit to foreclose this Contract, which suit may include a provision for a deficiency judgment against Purchaser and its successors or assigns. Seller may exercise any and all other remedies allowed by chapter 61.30 RCW.

(g) Agricultural Land. If the parties have indicated that the Property is used principally for agricultural or farming purposes, Seller shall have the right, following three (3) days prior written notice to Purchaser, to enter upon the Property from time to time to perform any one or more of the functions required of Purchaser in the agricultural provisions of this Contract, and to tend and care for any livestock and harvest, transport, store and sell any of the crops that may be grown on the Property in such manner as Seller shall elect, and for the purposes of this paragraph, Purchaser does hereby grant to Seller a security interest in all crops, and the products and proceeds thereof, which may now or at any time hereafter be located on the Property or be harvested therefrom. The exercise of this right shall not affect the

liabilities of Purchaser. If Seller receives any sums as a result of actions hereunder Seller shall apply the same to discharge the costs and expenses reasonably incurred in taking such action, together with interest thereon at the rate stated in this Contract from the date of expenditure to including the dates that proceeds are received, and the balance of the proceeds shall be applied against the purchase price principal last due and owing. In the absence of receiving any such proceeds, or if to the extent the same are insufficient to reimburse Seller for such amounts and interest, Purchaser shall reimburse Seller for such amount and interest on demand, with said interest being calculated to and including the date of payment.

B. Seller's Remedies are Cumulative. Seller's remedies stated herein are cumulative and not mutually exclusive and Seller may pursue any other or further remedies to enforce its respective rights under this Contract. However, Seller shall not have the right to accelerate the remaining balance of the purchase price in the event Seller elects to cancel this Contract and forfeit Purchaser's interest in the Property and such forfeiture is being enforced or is completed or if Seller elects to adjust the interest rate of this Contract as provided in **Section 20.A(2)(c)** above. In any action or proceeding to recover any sum or to enforce any remedy provided for herein, no defense of adequacy of security or that resort must first be taken against any particular security or any other person shall be asserted, and Purchaser hereby expressly waives any legal or equitable rights that Purchaser may have with respect to marshalling of assets. Seller shall not be required to tender its Quitclaim Deed in fulfillment of this contract as a condition precedent to the enforcement of any remedy hereunder. In the event any check is tendered which is not honored upon first presentation because of any stop payment directive or insufficient funds, Seller's rights shall be reinstated as if such check had not been delivered.

C. Default by Seller. In the event Seller defaults under this Contract and such default continues for fifteen (15 days) after Purchaser gives Seller written notice specifying the nature thereof and the acts required to cure the same, Purchaser shall have the right to institute suit for Purchaser's damages caused by such default, or pursue any other remedy which may be available to Purchaser at law.

22. **PERFORMANCE.** If Purchaser fails to timely pay and discharge any payments or sums for which Purchaser has agreed to be responsible herein and said failure constitutes a default under this Contract, or shall by any other act or neglect violate the terms and any conditions of this Contract or of any prior encumbrance, the other party hereto may pay, effect, or

March 3, 2003

discharge such sums as are necessary to cure such default upon giving the party required to make such payments not less than fifteen (15) days prior written notice (except in any instance in which Purchaser fails to obtain or maintain any insurance required herein or when immediate payment is required to avoid immediate hazards to persons or property or any foreclosure of or a similar action against or affecting any portion of the Property, in which cases such notice may be given concurrently with or immediately following such payment). The party making such payment may recover from the defaulting party, upon demand, or through offsetting the same against existing or future debts, the full cost and expense of so doing, including Purchaser's reasonable attorney's fees and together with interest on said expenditures and fees at the interest rate of this Contract from the date of expenditure to and including the date of collection or the due date of any sum against which such offset is effected.

23. ENFORCEMENT COSTS. If either party shall be in default under this Contract, the defaulting party shall pay all costs and expenses incurred by the nondefaulting party, including without limitation, court costs, collection agency charges, notice expenses, title search expenses, and reasonable attorneys fees (with or without litigation), and the failure of the defaulting party to promptly pay the same shall in itself constitute a further and additional default. In the event either party institutes any action to enforce the provisions of this Contract, the prevailing party in such action shall be entitled to reimbursement by the other party for its court costs and reasonable attorneys' fees, including such costs and fees that are incurred on appeal. All reimbursements required by this paragraph shall be due and payable on demand, may be offset against any sum owed to the party so liable in order of maturity, and shall bear interest at the interest rate of this Contract from the date of demand to and including the date of collection or the due date of any sum against which the same is offset.

24. NONDISCRIMINATION. Purchaser as part consideration herein does hereby agree to comply with all civil rights and anti-discrimination requirements of Chapter 49.60 RCW, as to the Property.

25. ASSIGNMENT.

A. Purchaser shall not, without the prior written consent of Seller, sell, transfer, assign, mortgage or in any way diminish or encumber its interest in the Property or in the Contract, voluntarily, involuntarily or by operation of law, or assign or pledge any of the

March 3, 2003

rents, issues or profits thereof to any person. If Purchaser is a corporation or partnership, a voluntary or involuntary transfer of any share or partnership interest shall be deemed a transfer of the Property for the purposes of this Contract. If Seller gives consent as required above, such consent shall not waive the requirements of this section as to any subsequent transfer, assignment or other conveyance.

B. If not in default pursuant to the terms of this Contract, Purchaser may lease, rent or otherwise transfer possession of the Property for terms not exceeding three (3) years and without options to renew or purchase, but subject to all of the terms and conditions of this Contract.

C. No transfer of the Property or any portion thereof shall release the transferring party from liability on this Contract unless such release is expressly acknowledged by Seller in writing.

## 26. SEVERABILITY.

A. In the event any portion of this Contract should be held to be invalid by any court of competent jurisdiction, such holding shall not affect the remaining provisions hereof unless the court's ruling includes a determination that the principal purpose and intent of this Contract are thereby defeated.

B. The intention of Seller is to charge Purchaser a lawful rate of interest, and in the event it is determined by any court of competent jurisdiction that any rate herein provided for exceeds the maximum permitted by law for a transaction of the character evidenced by these presents, the amounts so determined to be above the legal rate shall be applied against the last installments of principal due hereunder or, if such principal has been paid, or otherwise at the discretion of the then holding of this Contract, said excess shall be refunded to Purchaser on demand without interest, and the interest rates specified hereunder shall be reduced to the maximum rate then permitted by law for the type of transaction to which this Contract pertains.

27. INDEPENDENT CAPACITY. The parties to this Contract execute the same solely as a seller and a buyer. No partnership, joint venture, or joint undertaking shall be

construed from these presents, and except as herein specifically provided, neither party shall have the right to make any representation for, act on behalf of, or be liable for the debts of the other. All terms, covenants, and conditions to be observed and performed by either of the parties hereto shall be joint and several if entered into by more than one person on behalf of such party, and a default by any one or more of such persons shall be deemed a default on the part of the party with whom said person or persons are identified. No third party is intended to be benefited by this Contract. Any married person executing this Contract hereby pledges his or her separate property and such person's and his or her spouse's marital communities in satisfaction hereof.

28. **BINDING CONTRACT.** Subject to the restrictions contained herein, the rights and obligations of Seller and Purchaser shall inure to the benefit of and be binding upon their respective estates, heirs, executors, administrators, successors, successors in trust and assigns; Provided, however, no person to whom this Contract is pledged or assigned for security purposes by either party hereto shall, in the absence of an express, written assumption by such party, be liable for the performance of any covenant herein. Any assignee of any interest in this Contract, or any holder of any interest in the Property, shall have the right to cure any default in the manner permitted and between the time periods required of the defaulting party, but except as otherwise required by law, no notices in addition to those provided for in this Contract need be given.

29. **INTERPRETATION.** This Contract shall be governed and interpreted in accordance with the laws of the state of Washington and the venue of any action brought to interpret or enforce any provision of this Contract shall be laid in the county in which the Property is situated.

30. **TOTALITY OF AGREEMENT.** This Contract contains the entire agreement of the parties hereto and, except for any agreements or warranties otherwise stated in writing to survive the execution and delivery of this Contract, supersedes all of their previous understandings and agreements, written and oral, with respect to this transaction. Neither Seller nor Purchaser shall be liable to the other for any representations made by any person concerning the Property or regarding the terms of this Contract, except to the extent that the same are expressed in this instrument.

31. **MODIFICATIONS.** This Contract may be modified or amended only by written instrument executed by Seller and Purchaser.

32. WAIVER. No waiver of any rights of either party under this Contract shall be effective unless specifically evidenced in a written agreement executed by the waiving party. Any forbearance by Seller, including without limitation, Seller's acceptance of any payment required herein or part thereof after the due date or any extension thereof, shall not be considered a waiver of Seller's rights to pursue any remedy in this Contract for any other existing or subsequent defaults of the same or a different nature or for breach of any other term, covenant, or condition hereof.

33. NOTICES. Notices or correspondence to be sent to Seller shall be delivered or sent by certified mail addressed to P.O. Box 47338, Olympia, Washington 98504-7338. Notices or correspondence to be sent to Purchaser shall be delivered or sent by certified mail to Purchaser at the address set forth under Purchaser's signature on the signature page of this Contract. Either party may change such address for notice. All notices shall be deemed effective when delivered.

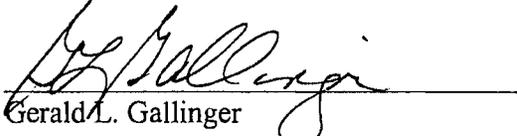
IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the date of their respective signatures, as set forth below.

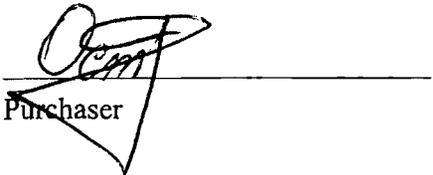
Purchaser has read, understands, and agrees to the terms set forth herein.

Executed by the seller this 10<sup>th</sup> day of October, 2005.

Executed by purchaser at Bellevue, Washington, this 19 day of August 2005.

STATE OF WASHINGTON  
DEPARTMENT OF  
TRANSPORTATION

  
Gerald L. Gallinger  
Director, Real Estate Services

  
Purchaser

  
Purchaser

March 3, 2003

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I.C. #1-17-06877

949 ABERDEEN AVE SE #109  
RENTON, WA 98056

Purchasers' Address

STATE OF WASHINGTON )

) ss

COUNTY OF THURSTON )

I, the undersigned, a Notary Public in and for the State of Washington, do hereby certify that on this 10<sup>th</sup> day of OCTOBER, 2005, before me personally appeared Gerald L. Gallinger, to me known to be the duly appointed Director, Real Estate Services, for the Department of Transportation, State of Washington, and that he executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of the State of Washington, for the uses and purposes therein set forth, and on oath states that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Ronald A. Carvalho  
Notary (print name) RONALD A. CARVALHO  
Notary Public in and for the State of Washington  
Residing at OLYMPIA  
My Commission Expires 9/15/2006

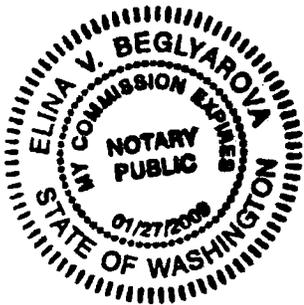
STATE OF WASHINGTON )

: ss.

County of King )

On this 19<sup>th</sup> day of August 2005 before me personally appeared Yevgeni OSTROVSKI to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal the day and year last above written.



Elina  
Notary (print name) ELINA BEGLYAROVA  
Notary Public in and for the State  
of Washington,  
Residing at Redmond, WA  
My Appointment expires 1/27/09