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No. 70663-2

COURT OF APPEALS,  
DIVISION I,  
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

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APPELLANT CITY OF WOODINVILLE'S REPLY BRIEF

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**A. REPLY ARGUMENT**

1. Core arguments made in the Response Brief (“RB”) incorporate misrepresentations of fact used to frame non-existent issues in the RB.

As described in the City’s Opening Brief, the City seeks through this Appeal a determination that the funding obligations contained in the Development Agreement, clarified in the TRIP Agreement, and quantified in the judgments, to pay for frontage improvements benefitting the WVA<sup>1</sup> Property, have priority over the Deed of Trust that has been assigned to WVP and would survive in the event of a foreclosure sale.

The arguments made in the Response Brief are based upon misrepresentations of record fact and used to create non-existent issues (RB 3) based upon those factual misrepresentations. Frontier Bank did not record a first position deed of trust (RB 1). The FBDOT was recorded subsequent to the Development Agreement (CP 18). The parties to the Development Agreement did not agree to negotiate the TRIP Agreement (RB 1), the parties in §9.1.2 of the Development Agreement specifically agreed to enter into the TRIP Agreement (CP 136). WVA’s obligation to

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<sup>1</sup> The same abbreviations used by Appellant in its Opening Brief will be used herein: **WVA** = Woodinville Village Associates; **WVP** = Woodinville Village Partners; the **City** = Appellant City of Woodinville; **FBDOT** = Frontier Bank Deed of Trust; and the **Property** = Woodinville Village property.

contribute to the TRIP project improvements in the amount of the cost of the frontage improvements constructed by the City was not conditioned upon WVA's election to proceed with the Project (RB 1). There is no qualifying or conditional language in §9.1.2 or in §5.1.2 of the TRIP Agreement, stating that the "Developer shall remit to the City payment sufficient to complete such frontage improvements along SR-202..." (CP 210) Section 7.0 of the TRIP Agreement allowing for "Project Withdrawal," has no significance to this dispute because there is no evidence before the Court and no citation in the RB to the record supporting even an inference that WVA withdrew the Project from permitting consideration prior to building permit issuance, prior to construction of the TRIP improvements, or at any time (CP 213). The record evidence is to the contrary (CP 1071; 1095-96). The implication made at RB 2 that the City went ahead with the TRIP Project knowing WVA could not pay for the frontage improvements and did so against WVA's objections is contrary to the record (CP 1085-87; 1099-1103; 1104-1112). The representation the City filed this litigation in July 2011, alleging the City obtained an interest in the Property because of the Judgment, which the City argues has priority over the FBDOT (RB 2), is false. The City's Complaint alleges it had an interest in the property

arising out of the Development Agreement and that the obligations arising out of the Development Agreement had priority over the FBDOT. With regard to the Judgment, the City alleged only that the Judgment quantified the amount owed arising from WVA's obligation in the Development Agreement to mitigate traffic by partnering with the City in the TRIP Project (CP 13). This factual misrepresentation is woven into the RB's "Issues on Appeal" no. 1 and 3 (RB 3). The issue is not whether the City liquidated its claim for traffic mitigation to judgment, or whether a judgment in favor of the City has priority over the FBDOT, because the City does not argue the City's judgment has lien priority over the FBDOT (except alternatively, to be granted priority based upon unjust enrichment or loss of the City's subrogation rights, *infra*). The judgment quantifies the amount of money owed the City arising from WVA's obligations under the Development Agreement, as specified in the TRIP Agreement.

2. WVA's funding obligations arising from the Development Agreement and the TRIP Agreement are pre-existing covenants which should be given priority over the FBDOT and would survive foreclosure.

WVP and WVA concede in their Response Brief that if the TRIP Agreement is considered a covenant running with the land relating back to the recording date of the Development Agreement, it must be given priority over the FBDOT and would not be extinguished in the event of a

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foreclosure. (RB 16) Servitudes, including covenants, are not extinguished by foreclosure of a lien against the estate burdened by the servitude unless the lien has priority in time over the servitude. *Restatement (Third) of Property: Servitudes* § 7.9, cmt. a, (2000).

On one hand, the City has argued that the Development Agreement and the TRIP Agreement from which WVA's funding obligations arise must be construed as a single agreement. If these Agreements are considered as one, it is unnecessary for the Court to determine whether the TRIP Agreement itself constitutes a covenant running with the land. It is undisputed that the Development Agreement was recorded prior in time to the FBDOT and that development agreements are binding on successors as covenants running with the land in accordance with State law. RCW 36.70B.190; RCW 58.17.035 (all conditions and requirements of binding site plans, including the referenced Development Agreement, are legally enforceable against purchasers). In addition, the Development Agreement at issue specifically provided the terms and conditions contained therein would be binding upon their successors and assigns. (CP 141 and 143) (Development Agreement, §17.1, 17.2, and 22.6). To the extent the TRIP Agreement is considered to be integrated into the Development Agreement, it is prior in time to the FBDOT. However, to the extent the

Court concludes the Development and TRIP Agreements must be construed as separate agreements, the City established the TRIP Agreement is a covenant running with the land which relates back or arises from the Development Agreement and should be given the same priority. The City addresses each argument below.

a. The Development and TRIP Agreements are integrated as a single agreement.

As cited in the City's Opening Brief, when several instruments are made as part of the same transaction, they will be read together and construed with reference to each other.<sup>2</sup> *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877 (1975). WVA and WVP argued in response that "incorporation by reference" does not apply to enable consideration of the Development and TRIP Agreements as one because the TRIP Agreement

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<sup>2</sup> WVA and WVP argue that the City has raised the "single agreement" or "incorporation by reference" theory for the first time on appeal and need not be considered by the Court. (RB 24) The City argued to the superior court that the TRIP Agreement and the Development Agreement should be read as one (CP 395, 1190, and 1075-1083) with the TRIP Agreement clarifying the Development Agreement. The City has consistently argued in all its briefing that the Development Agreement created the obligation, the TRIP Agreement clarified the obligation and the Judgment quantified the obligation. There is no new claim of error claimed or issue raised not before the superior court. Cases cited by the City in its Opening Brief explaining why the relation back claim is supported in the law are not within the scope of RAP 2.5 or the authority cited in the RB. Authority not argued to the trial court, as long as it relates to the same general theory that was argued is considered on appeal. *Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990) (cited in WASHINGTON APPELLATE PRACTICE DESKBOOK (Wash. State Bar Assoc. 3d ed. 2005 & Supp. 2011) at Sec. 17.2(3)). The Court also has discretion to consider an issue raised for the first time on appeal if it is "arguably related" to issues raised in the trial court. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 160 P.3d 1089 (2007), *aff'd*, 166 Wn.2d 264, 208 P.3d 1092 (2009).  
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did not exist at the time the parties entered into the Development Agreement. However, for the doctrine to apply, it is not necessary for the agreements to either exist or be executed simultaneously.

The City previously cited *Miller v. Citizens Sav. & Loan*, 248 Cal. App. 2d 655 (1967), in which the Court considered eighteen separate subordination agreements to be construed together with a subordination clause contained in a deed of trust executed several days prior, concluding the 18 separate agreements were “treated as designed only to make the original provision specific and to implement it” by specifying the amount of the loans. It is useful to compare *Northern State Const. Co. v. Robbins*, 76 Wn.2d 357, 457 P.2d 187 (1969), wherein Washington Supreme Court examined whether a construction contract and multiple personal guarantees executed by owners of a corporation were intended as a single, integrated agreement. Though the Court concluded in that particular case the agreements would not be construed as one, the Court acknowledged the personal guarantees need not have been executed prior to or simultaneously with the construction agreement to be an integrated, single agreement:

Plaintiff also argues that it is not necessary that the guaranty agreement be executed prior to or simultaneously with the construction contract if the construction contract was conditionally executed and delivered, or if the two

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documents were intended as part of a single transaction. *While we do not disagree with plaintiff's argument as an abstract principle, we cannot find a conditional delivery or a single transaction under the trial court's findings of fact.*

*Id.* at 360-61 (emphasis added). Rather, the Court based its decision on the fact that, at no time prior to the execution of the construction agreement did plaintiffs indicate to defendants that they were “requesting, demanding, expecting, bargaining for or relying upon a guaranty” in order to enter into the construction agreement. *Id.* at 361.

In contrast to the facts presented in *Northern State*, the City presented ample, undisputed evidence to the trial court that WVA’s promise to financially contribute to the TRIP project and frontage improvements was a prerequisite to the City’s approval of the Development Agreement for the WVA project. This extrinsic evidence has never been disputed by the Respondents. For example, MJR (WVA’s predecessor in interest also owned by Mike Raskin) provided TRIP a funding commitment letter as part of the City’s grant application for state funds prior to the approval of the Development Agreement. (CP 445-446) More importantly, at the public hearings held prior to the City Council’s approval of the Development Agreement, the Public Works Director testified that because it was still unknown what traffic solution (roundabout design) would be approved by WSDOT and whether the grant

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application would be approved for funding, the Development Agreement provided that a supplemental funding agreement would be entered into at a later time. (CP 528-578) The City Council was adamant in its discussion during the public hearings held prior to the Development Agreement's approval that WVA be "on the hook" for funding if TIB grant funds were not secured. (CP 519) Thus, like the situation in *Miller*, the Development and TRIP Agreements should be construed as a single, integrated agreement because the TRIP Agreement was "designed to make the original" Development Agreement "specific and to implement it" by specifying the amount of WVA's required contribution. That the TRIP Agreement was approved two months after the Development Agreement was recorded is of no consequence where the extrinsic evidence presented by the City and undisputed by Respondents demonstrates the City was relying upon WVA's TRIP project financial contribution prior to entering into the Development Agreement.

WVA and WVP also argue that the "uncontroverted evidence" in both the Development Agreement and the TRIP Agreement proves that the parties intended for the two agreements to remain "independent and distinct" from one another. (RB 26). However, as explained in the preceding paragraph, the evidence is, at the very least, disputed about what

the parties intended by the phrase “independent and distinct” in §9.2.1, precluding summary judgment in favor of WVA and WVP.

The City has asserted that the Development Agreement language in §9.2.1 (CP 31) was used to signify that the specifics of the parties’ financial contributions could not be worked out until it was determined whether grant funding would be available for the TRIP project, though the general, enforceable obligation for WVA to pay for a portion of the TRIP project was established by the Development Agreement. WVA and WVP do not dispute the City’s assertion, but agree the Court need not go beyond the language of §9.2.1 to determine the parties’ intent. Contrary to WVA and WVP’s assertions, it is permissible for the Court to consider extrinsic evidence to construe the meaning of contract terms and to ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990). The City does not offer extrinsic evidence to contradict or modify the written word or establish a party’s unilateral or subjective intent as to the meaning of a contract word or term. Rather, the undisputed extrinsic evidence is offered to clarify the intent of the parties. Where that undisputed evidence shows the Development and TRIP Agreements were part of the same transaction and became one integrated

agreement, the TRIP Agreement obligations must be considered as part of the Development Agreement and prior in time to the FBDOT.

- b. The TRIP Agreement is a covenant running with the land which relates back or arises from the Development Agreement and should be given priority.

WVA and WVP assert that the specific funding obligations contained in the TRIP Agreement are merely a contract right pertaining to land as opposed to a covenant running with the land binding on successors. (RB 18) In support of this argument, WVA and WVP point to the lack of a legal description, notarized signatures, and specific language citing that the TRIP Agreement was intended to be a running covenant. (RB 19-20) However, where the Development Agreement contains these elements and must be construed as a single transaction with the TRIP Agreement, these omissions are not significant.<sup>3</sup>

More fundamentally, however, standing alone the funding obligations contained in the TRIP Agreement were intended by the parties

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<sup>3</sup> “No American decision has been found in which a court has held that the word ‘assigns’ must be used. The most that can be said, from the little American authority on the point, is that, in some general way, there must be an intent that a running covenant bind successors. . . . In fact, it seems *if a covenant is found to touch and concern, this alone may often be enough to show an intent that it should bind successors.*” *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 259, 215 P.3d 990 (2009) (citing 17 Stoebuck & Weaver, *Washington Practice: Real Estate Property Law* § 3.4, at 137; and I Wash. State Bar Ass’n, *Washington Real Property Deskbook* § 14.2(2)(d), at 14–14 (3d ed.1997)) (emphasis added).  
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to touch and concern the land. Washington courts have not adopted a strict test for “touch and concern,” but instead have opted for an analytical approach:

Generally speaking, a covenant touches or concerns the land if it is such as to benefit the grantor or the lessor, or the grantee or lessee, as the case may be. As the term implies, the covenant must concern the occupation or enjoyment of the land granted or demised and the liability to perform it, and the right to take advantage of it must pass to the assignee. Conversely, if the covenant does not touch or concern the occupation or enjoyment of the land, it is the collateral and personal obligation of the grantor or lessor and does not run with the land.”

*1515-1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 146 Wn.2d 194, 203-04, 43 P.3d 1233 (2002). In order to be a running covenant, a promise to pay money must restrict the use of the funds to the benefit of the property. *Mullendore Theatres, Inc. v. Growth Realty Investors Co.*, 39 Wn. App. 64, 66, 691 P.2d 970 (1984) (holding that a promise to pay a security deposit was not a covenant running with the land because there were no restrictions on the security deposit; landlord was not required to spend the money on repairs or maintenance or in any other way on the property) (citations omitted).

For example, in *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 295 P.2d 714 (1956), the court held a promise to pay assessments for

street maintenance to be a running covenant, distinguishing the obligation from one which provided for the payment of dues to a property owners association but did not specify how the money was to be spent. The Court noted that the homeowners, by taking ownership of the land, obtained a right of common enjoyment in the streets. Performance on the part of the commission in maintaining the streets would inure to the benefit of appellants' property. *Id.* at 576.

In this case, the TRIP Agreement funding obligations touch and concern the land because the TRIP Agreement specified the purposes for which the money was to be used (roundabout construction and associated frontage improvements) and because the City's construction of those improvements inured to the benefit of the Property. (CP 551)<sup>4</sup> There should be no doubt that WVA and the City recognized that the City's

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<sup>4</sup> The specific sections of the TRIP Agreement tying WVA's financial contribution to the roundabout improvements include the *Recitals* ("WHEREAS, the Developer has agreed to support the roundabout project, which support includes . . . a financial contribution."); *Section 5.1.2* (No later than from receipt by Developer of an invoice from the City in relation to one or more specific frontage improvements, Developer shall remit to the City payment sufficient to complete such frontage improvements along SR-202, including but not limited to any curb, gutter, sidewalk, landscaping, and street lighting improvements required by the this TRIP Funding Agreement, the Development Agreement or applicable City regulations. The actual payment for said frontage improvements costs shall reflect actual costs for such frontage improvements. PROVIDED, that In lieu of remitting payment to the City under this section, Developer may in its discretion complete all required frontage improvements in accordance with applicable City standards.) , and *Section 3.0* (The parties anticipate that the general public and all properties in the area including those related to the Project will benefit from the successful completion of the roundabout project. The City has identified this intersection as needing improvements for traffic safety and capacity. Developer has proposed a development project that requires frontage improvements, right-of-way dedication, and traffic mitigation).  
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performance, *i.e.*, construction of the roundabouts and frontage improvements, would benefit the WVA property. WVA proposed a development that necessitated frontage improvement and traffic mitigation; WVA's financial contribution was required to address impacts to the intersection that would arise from its development. Thus, WVA's financial contribution would necessarily benefit the WVA property, laying the foundation for potential development. (CP 418-419; 503-506; 1094)

WVA and WVP cite *Bremmeyer Excavating, Inc. v. McKenna*, 44 Wn. App. 267, 721 P.2d 567 (1986), which held that an agreement to provide labor and materials to fill a parcel of land was a personal obligation rather than a covenant. Bremmeyer was given the exclusive right to haul onto or from the subject property all fill material of any nature and to install any and all water and sewer utilities. *Id.* at 268. When the property was sold and the purchaser filled the property without Bremmeyer's services, Bremmeyer sued, arguing the contract created a covenant running with the land. *Id.* The court determined the contractual obligations did not "touch and concern" the land because they did not require or prevent fill, but rather restricted the property owner's personal choice of contractor to provide fill and site improvements if the owner decided to proceed. *Id.* at 269-70. The court likened this agreement to a

right of first refusal to purchase property, in which the person with the right of first refusal acquires no present rights to the property, but only holds a right to acquire an interest later should the property owner decide to sell. *Id.* at 270 n. 1. WVA's obligations under the TRIP Agreement are not analogous to the contract in *Bremmeyer* because WVA had the immediate obligation to pay frontage improvement costs upon receipt of the City's invoices, which could only be cancelled upon the act of withdrawing permits from consideration (which never happened). (CP 213, §7.0)

WVA's funding obligations under the TRIP Agreement must further be given priority over the FBDOT because they relate back to the date of the Development Agreement, recorded prior to the FBDOT.<sup>5</sup> The TRIP Agreement and the obligations contained therein relate back to the recording of the Development Agreement because, quite simply, the Development Agreement required WVA to enter into the TRIP Agreement to establish the specific obligations relating to the construction and

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<sup>5</sup> WVA and WVP argue that the TRIP Agreement does not relate back to the Development Agreement because the City failed to allege the "relation back" theory in the TRIP litigation initiated by the City to obtain a judgment for the amounts owed the City by WVA. (RB 23) However, the City initiated the litigation only to obtain the judgment -- not to determine the priority of the City's judgment. Determining the priority of WVA's funding obligations, quantified by the judgment, is properly the subject of a declaratory judgment action and was not a necessary claim in the City's litigation to obtain a judgment where the threat of foreclosure had not yet arisen.  
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financing of the TRIP project. The TRIP Agreement expressly states that it was made because of the Development Agreement in the opening recital, and §8.3.2 and §9.1.2 of the Development Agreement require the City and the Developer to “execute an agreement” to coordinate work on the TRIP and to detail funding obligations. Moreover, as described above, undisputed extrinsic evidence provided to the trial court establishes that TRIP coordination and funding was a material condition for both the City’s approval of and WVA’s acceptance of the Development Agreement. Therefore, the TRIP Agreement can only be characterized as arising from or relating back to the Development Agreement.

The City’s reliance upon *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 248 P.3d 1067 (2011), was not for the purpose of establishing the TRIP Agreement is a covenant running with the land, as claimed by WVA and WVP. (RB 23-24) The funding obligations in the TRIP Agreement are a covenant running with the land for the reasons described above. Namely, the TRIP Agreement specifically requires WVA’s funding contributions to be used for construction costs of the roundabout and frontage improvement project benefitting the Property. The City relies on *Columbia* for the proposition that agreements to agree, such as the Development Agreement provision requiring the parties to

enter into the subsequent TRIP Agreement, are enforceable in Washington. The enforceable nature of this provision further establishes and confirms that the TRIP Agreement arises from and relates back to the Development Agreement, which was prior in time to the FBDOT.

In sum, whether the Court considers the Development and TRIP Agreements as a single, integrated agreement or as separate instruments that are covenants running with the land relating back to the Development Agreement, the result is the same. The funding obligations clarified in the TRIP Agreement must be accorded priority over the FBDOT and would not be extinguished in the event of a foreclosure. At the very least, the City has established that undisputed extrinsic evidence bearing on whether the Agreements may be considered as a single agreement or whether the TRIP Agreement relates back to the Development Agreement should have precluded summary judgment in favor of WVA and WVP.

3. Frontier Bank officers' signatures on the First and Second Amendments to the Binding Site Plans effectively subordinated the FBDOT to the funding obligations in the TRIP Agreement.

WVA and WVP criticize the City's failure to cite authority for the argument that, by signing the amendments to the BSPs, the officers of Frontier Bank recognized the priority of the obligations set forth in the Development Agreement. However, no additional authority need be cited.

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The BSP amendments themselves each incorporate the restrictions, conditions, dedication, notes, and easements delineated on the face of the original BSP and state that they are subject to the Development Agreement. As established previously, the Development Agreement contained an obligation to execute an agreement addressing the funding for the TRIP improvements, and the original BSP contained Condition No. 20, requiring that the City and the Developer “shall execute an agreement to coordinate their work” on the TRIP.

Mary Jobe and David Dorsey, the Bank’s representatives, acknowledged these obligations on behalf of Frontier Bank and its interests in the Property. RCW 58.17.035 confirms that “[a]ll provisions, conditions, and requirements of the binding site plan shall be legally enforceable on the purchaser or any other person acquiring a lease or other ownership interest of any lot, parcel, or tract created pursuant to the binding site plan.” There should be no doubt that the obligations contained in the conditions and restrictions would be binding upon the Bank, subordinating its deed of trust to the same, especially if the Bank became a “purchaser” at a FBDOT foreclosure sale. That the Bank officials failed to review any of these documents should not preclude their legal effect. (CP 449-465)

4. WVA and WVP, as owners of the Property benefitted by the TRIP improvements, would be unjustly enriched if a foreclosure extinguishes the obligation to pay the amount of the judgment.

In the alternative, the City asserts that if, as a matter of law, the FBDOT is considered prior to the TRIP funding obligations, quantified in the City's Judgment, then equity requires that that the FBDOT be subordinated to the Judgment in order to avoid unjustly enriching WVA and WVP from the value of the TRIP improvements.

WVA and WVP first argue that they would not be *unjustly* enriched because the improvements were not made under mistake, coercion, duress, fraud, illegality of contract, or impossibility of performance. (RB 28) However, the City previously cited authority directly on point in *Town Concrete Pipe v. Redford*, 43 Wn. App. 493, 717 P.2d 1384 (1986). There, the court stated that "if a lender forecloses on a completed project the courts are more inclined to invoke the doctrine of unjust enrichment" (as opposed to where the project is incomplete at the time of foreclosure, in which case the lender may not be unjustly enriched if it has already disbursed funds earmarked for the work). The conclusion in *Town Concrete* is enough to satisfy the element that it would be "unjust" to retain the benefit that was conferred. Nowhere in the opinion

did the court require that the lender have obtained the benefit through fraud, mistake, or any other misdeed.

It further is incorrect to assert, as WVP has done, that the City has no valid claim for unjust enrichment because WVP does not own the Property, but rather only the underlying note. The point is that, as described in *Town Concrete*, upon foreclosure WVP will own the Property and will receive the benefit of the City's improvements without having paid for it. Nor is it relevant whether WVA breached the TRIP Agreement by failing to pay. The relevant consideration is whether, upon foreclosure, WVP will be unjustly enriched by the TRIP improvements such that the FBDOT must be subordinated (and the TRIP funding obligations are not extinguished).

WVA and WVP also argue that the City volunteered the improvements because the City had planned to construct the TRIP improvements regardless of whether WVA developed the Property. However, this assertion is not supported by the record. While the City may have identified the intersection as needing improvement prior to entering into a "partnership" with WVA, the funding contribution by WVA was necessary to actually make the project happen and to obtain grant funding from the state. (CP 534-547) As stated above, obtaining and

ensuring WVA's commitment to fund TRIP improvements was of great concern to the City Council prior to approving the Development Agreement. In addition, WVA's attorney threatened to sue the City if it did not move forward with construction despite an already on-going dispute about the specific amount WVA would be required to pay. (CP 1108-1113) In short, the City in no way volunteered the improvements absent WVA's funding commitments and, in fact, constructed the improvements in reliance upon that commitment and under threat of litigation by WVA. Again, at the very least, material issues of fact exist precluding summary judgment in favor of WVA and WVP on the theory of unjust enrichment where the City has provided ample evidence that it did not "volunteer" the improvements.

5. The City's right of subrogation against the Raskin Guaranty was impermissibly damaged by WVP's release of the Guaranty, entitling the City to equitable relief (subordination of the FBDOT).

The City previously argued that it had a right of subrogation against the Raskin Guaranty which was extinguished by WVP when it released that Guaranty, with full knowledge of the City's claims and interest in the Property. As a result of the damage caused by WVP, the City should be granted an equitable remedy requiring the lien of the WVP FBDOT be subordinated to the City's judgment.

{KNE1145923.DOCX;2/00046.050047/ }

Contrary to WVA and WVP's argument, the holding in *MGIC Financial Corp. v. H. A. Biggs Co.*, 24 Wn. App. 1, 600 P.2d 573 (1979), is applicable to the facts of this case. Principles discussed in *MGIC* apply not only to a sale of property, but also to rights of junior property interest holders generally. As stated in *MGIC*: "In simplest terms the principle is that courts must protect subrogation rights of junior interest holders against prejudicial acts by senior interest holders." As further described by the Washington Supreme Court in *Fluke Capital & Management Services Company v. Richmond*, 106 Wn.2d 614, 622, 724 P.2d 356 (1986), previously quoted in the City's Opening Brief, at p. 44, the holding in *MGIC, supra.*, concerned the "protection of the security interest of a holder of a second deed of trust."

Until WVP released Raskin from his guaranty of the Note secured by the FBDOT acquired by WVP, the City had a right to be subrogated to WVP's claim against the Raskin guaranty. As also quoted in the City's Opening Brief, at p. 43, the Court of Appeals, in *MGIC, supra.*, stated: "Subrogation entitles the party paying the debt to all of the rights, priorities, liens and securities the senior mortgagee had against the mortgagor."

The Washington Supreme Court, in *Fluke, supra.*, further stated:

The court [the Court of Appeals in *MGIC*] stated that the junior lienor had the right to (1) pay off the debt secured by the senior mortgage, and (2) then stand in the shoes of the senior lienor and assert that party's rights, which could include personally suing the mortgagor.

While no published Washington State opinion could be found specifically addressing a subrogee's rights to assert claims against a guarantor of the debt held by a senior creditor, the City's Brief quoted the Maryland Court of Appeals opinion in *Bachmann v. Glazer & Glazer, Inc.*, 316 Md. 405, 412, 559 A.2d 365, 369 (1989):

Since a person entitled to subrogation stands in the shoes of the creditor, he is ordinarily entitled to all the remedies of the creditor, and he may use all the means which the creditor could employ to enforce payment. (citation omitted) This means that a subrogee can enforce the obligation of a guarantor of the debtor.

Respondents also argue, incorrectly, that the City may not claim damage from loss of Raskin's guaranty unless and until it pays off the senior secured loan. To the contrary, the Court of Appeals in *MGIC, supra*. granted relief based upon the loss of subrogation rights without conditioning that relief upon prior satisfaction of the senior debt.

The relief requested by the City is based upon the cited equitable principles. If there is any question whether the equities of this case favor that relief, it would hinge upon a review of the relevant facts and a balancing of the equities of the parties. That could constitute an issue of

material fact and should, therefore, require denial of WVP's motion for summary judgment.

6. The City's lien in the Pisani Property due to its incorporation into the recorded Development Agreement, Binding Site Plan, and TRIP Agreement prior in time to 2008 recording of the amended FBDOT, has priority over the FBDOT lien.

The argument that the City's lien is subordinate to the FBDOT lien in the Pisani property because the City did not obtain and record its Judgment until 2010 (RB 34) is erroneous. The argument ignores that the City's lien priority flows from the earlier recordings of the Development Agreement, Binding Site Plan and TRIP Agreement, which predated amendment of the FBDOT to add the Pisani property.

7. Tract X of the subject Property is not subject to the lien of the FBDOT.

"A deed of trust creates a lien against the property it describes." *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 247 n. 14, 46 P.3d 812 (2002) (citing RCW 61.24.020: "Except as provided in this chapter, a deed of trust is subject to all laws relating to mortgages on real property.")

The real property description attached to the original FBDOT included "Parcels A through F of Woodinville Village Binding Site Plan Recorded December 22, 2005 under recording number 20051222002236." {KNE1145923.DOCX;2/00046.050047/ }

(CP 205) The December 2005 BSP, on sheet 3 of 5, depicts Tract X as being separate and not a part of Parcels A through F. (CP 117) The amendment to the FBDOT, filed on February 27, 2008, did not change the original property description, except to add the “Pisani Property” (parcel number 340470020603) as additional collateral. That added property description did not include Tract X. (CP 220)

WVA’s ownership of Tract X is not at issue; at issue is whether Tract X was described in, and therefore encumbered by, the FBDOT. Clearly, Tract X was not included in the original or amended legal description, so it is not encumbered by the FBDOT. However, since owned by WVA, Tract X is subject to the City’s recorded judgment against WVA. RCW 4.56.190-200.

8. The City objects to the Court’s consideration of Defendants Union Bank and the Lanz Firm’s Motion for Summary Judgment.

The Defendants previously designated Union Bank and the Lanz Firm’s Motion for Summary Judgment for inclusion in the Clerk’s Papers. However, the Union Bank/Lanz Firm Motion for Summary Judgment was never heard, nor was it considered by the trial court on the cross motions for summary judgment that are the subject of this appeal. (CP 1193-1197)

**B. CONCLUSION**

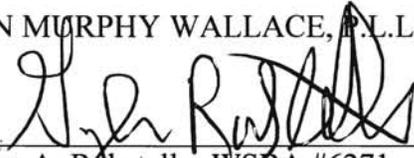
The summary judgment in favor of Respondents should be reversed. At minimum material issues of fact regarding the intent of the parties in the language of the Development Agreement prevent summary judgment. The City's motion for summary judgment is supported by an undisputed record showing the intent of the parties in the Development Agreement to partner in the TRIP Project Costs and to clarify that partnership cost sharing in the TRIP Agreement. The denial of the City's summary judgment motion should be reversed. The City's lien priority in the Pisani property and Tract X need also to be recognized as a matter of law.

RESPECTFULLY SUBMITTED this 28th day of February, 2014.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By

  
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**DECLARATION OF SERVICE**

I, Charolette Mace hereby make the following declaration:

I certify that on February 28, 2014, I filed a copy of the Appellant City of Woodinville's Reply Brief with the Court of Appeals, Division I, and sent a copy of this document via legal messenger to the following counsel:

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

DATED this 28th day of February, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Charolette Mace, Legal Assistant