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BY RONALD G. GARDNER  
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Court of Appeals No. 85202-2

IN THE WASHINGTON STATE SUPREME COURT

IN THE MATTER OF THE PETITION OF THE CITY OF  
WOODINVILLE, a Washington optional code, non-charter  
municipal corporation, TO ACQUIRE BY CONDEMNATION  
CERTAIN REAL PROPERTY FOR PUBLIC USE AS  
AUTHORIZED BY ORDINANCE NO. 449 OF SAID CITY

Condemnor/Respondent,

v.

HOLLYWOOD VINEYARDS LIMITED PARTNERSHIP, a  
Washington limited partnership.

Condemnee/Appellant,

BRIEF OF APPELLANT

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## I. INTRODUCTION

This eminent domain case asks the court to decide a clear legal question: Whether a Conditional Settlement Agreement, which has not been identified as a thirty day offer under RCW 8.25.070, and which the City of Woodinville ("City") has admitted is not such an offer, is a qualifying offer under that statute?

In this case, the facts are undisputed. In the fall of 2009, Hollywood Village Limited Partnership ("Hollywood") entered into a settlement agreement with the City. That settlement was conditional upon a third party and adjoining property owner granting Hollywood an easement over their property. That condition, even as of the date of this brief, has not occurred—the adjoiner has not granted the easement.

After the settlement agreement was reached, and during negotiations with the adjoiner, the City sent an offer pursuant to RCW 8.25.070 in March 2010 in which it stated that the offer stated therein was an alternative to the settlement agreement. Hollywood did not accept the offer.

The trial of the matter was continued seven times in part to allow for the contingency to occur. In the spring of 2010 it became clear that the adjoiner would not grant an easement. Trial eventually began on June 28, 2010.

The City failed to make a 30 day offer subsequent to the March 2010 offer. A trial occurred and on Hollywood's motion for attorneys fees, the trial court concluded that the conditional settlement agreement constituted a thirty day offer and denied Hollywood's request.

As a matter of law, the trial court erred. The conditional settlement agreement was never identified as an offer pursuant to RCW 8.25.070 and the City did not treat it as such.

In addition to this legal question, there are serious policy questions raised. This case is a classic example of how a condemning authority abuses the eminent domain process with a piecemeal litigation strategy designed to significantly increase the costs to the condemnee. The trial court should be reversed and Hollywood awarded its attorneys fees and costs

## **II. ASSIGNMENT OF ERROR**

The trial court erred by denying Hollywood's Motion for an Award of Attorneys Fees and Costs.

## **III. ISSUES RAISED**

Issue No. 1: Whether a CR 2A Conditional Settlement Agreement, the performance of which requires an act of a third party, constitutes a qualifying thirty day offer within the meaning of RCW 8.25.070?

Issue No. 2: Whether a condemning authority must specifically identify an offer as a 30 day offer within the meaning of RCW 8.25.070?

Issue No. 3: Whether a condemning authority, who fails to make a 30 day offer within the meaning of RCW 8.25.070, may rely on a prior Conditional Settlement Agreement as a qualifying offer

#### **IV. STATEMENT OF THE CASE**

##### **A. SUBSTANTIVE FACTS**

This suit is a prime example of the devastating consequences a City's piecemeal litigation strategy has on a condemnee.

##### **1. The Project: The City's Economic Development Plan**

The project at issue in this eminent domain action consisting of the installation of three roundabouts<sup>1</sup> at and in the vicinity of the intersection of NE 145<sup>th</sup> Street and SR 202/Woodinville-Redmond Road NE commonly known as the "TRIP Project" ("Project").<sup>2</sup> It was constructed in conjunction with a proposed development on the property immediately to

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<sup>1</sup> Of those three roundabouts, two are smaller and one is larger. It is this larger roundabout that affects the Property

<sup>2</sup> Hollywood has filed a Supplemental Designation of Clerk's papers. The supporting document is found therein at *Trial Exhibit 3; 4; 6; 32.*

the west of the Hollywood Property owned by MJR Development.<sup>3</sup> That proposed development envisioned a shopping mall with big box stores, a hotel, restaurants and retail shops as a part of the tourist district overlay zone in the City.<sup>4</sup> In short, this project is a part of an economic development plan for the City.<sup>5</sup> WMC 21.38.065.

The Project and the Property are all located near the Chateau St. Michelle Winery, the Columbia Winery and the Red Hook Brewery as part of Woodinville's tourist district. MJR's Development, as a part of the City's economic redevelopment plan and tourist district, was and is intended to compliment these famous locations.

## **2. Property Description**

Hollywood is a Washington limited partnership owned by the Gorman Family. CP 1783. The Gormans have owned the Property since the mid 1980's. A photograph of the Property designated in the Supplemental Clerks Papers as Trial Exhibit 4.

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<sup>3</sup> *Supp. Design. Clerk's Papers, Trial Exhibit 254.*

<sup>4</sup> *Supp. Design. Clerk's Papers, Trial Exhibit 2; 32.*

<sup>5</sup> *Supp. Design. Clerk's Papers, Trial Exhibit 2; 32.* As of the date of this brief, that development has not occurred. There are no existing and open permits for its development. The property remains as vacant land.

The Property is a high end “strip” mall with well known tenants such as Tullys, Purple Restaurant, Quiznos and Sutter Home and Hearth.<sup>6</sup> It also counts as tenants a travel agency, a day spa, an insurance agency and a sushi restaurant. *Id.* Prior to the Project, the Gormans accessed the Property from two points—one from an access point from the East along SR 202, the second from a dirt road from the Northwest from NE 145<sup>th</sup>.<sup>7</sup> This second access has been completely eliminated by the Project. *Id.* The first access remains but has been altered.

The take here is a strip of land on the northerly and easterly portion of the Property. Trial Exhibit 48 is a map depicting the take<sup>8</sup>. As a result of the project, the roadways and intersection were located to within 161 feet of the building which is on the Property.<sup>9</sup>

## **B. PROCEDURAL HISTORY**

The procedural history of this litigious suit has been lengthy and costly for the Gormans resulting in a several year battle with the City thus far.

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<sup>6</sup> *Suppl. Design. Clerk's Papers Trial Exhibit 298, HVLP 2395.*

<sup>7</sup> *Suppl. Design. Clerk's Papers, Trial Exhibit 298; 301.*

<sup>8</sup> *Suppl. Desgn. Clerk's Papers, Trial Exhibit 48, HVLP 0661.*

<sup>9</sup> *Suppl. Desgn. Clerk's Papers, Trial Ex. 48, HVLP 0630.*

**1. Initiation of the Action**

The City initiated this action in eminent domain for the partial taking of property owned by Hollywood Vineyards on March 17, 2008. CP 0001-0035. A Stipulation and Order for Immediate Use and Possession was signed and entered into the court on June 6, 2008. CP 0041-0047.

**2. Trial Continuances & Pre-Trial Motions: The City Contests Obvious Rules of Law**

While the trial in the matter was originally scheduled for November 10, 2008, it eventually occurred on June 28, 2010 after seven (7) continuances. CP 0289-0290. Trial was first set for November 10, 2008 under the original Scheduling Order. CP 0036-0040. On September 16, 2008, this Court entered an Order Amending Case schedule changing the trial date to April 6, 2009. CP 0057. On February 27, 2009, this Court entered an Order Continuing Trial Date and for Adjustment of Case Schedule extending the trial date to May 25, 2009. CP 0058-0059. On or about April 1, 2009, present counsel for Hollywood entered the case. CP 0060-0061. On April 30, 2009, this Court entered an Order Amending Case Schedule extending the trial date to August 24, 2009. CP 0062.

On July 16, 2009, this Court entered an Order Amending Case Schedule extending the trial date to October 19, 2009. CP 0071-0072

### **3. The City Disputes that the Date of Possession & Use Was the Proper Date of Valuation**

In June 2009, a dispute arose between the City and Hollywood regarding the property valuation date. Hollywood contended that the proper valuation date was June 6, 2008, the date of the stipulation giving possession and use.<sup>10</sup> The City contended that it was the trial date despite having lost on that argument in a companion case involving the same project.<sup>11</sup> As with that companion case, the City lost the motion in this action as well. CP 0083-0085.

### **4. The September 2009 Thirty Day Offer**

On September 18, 2009, the City made its first offer within the meaning of RCW 8.25.070 for \$240,000.00 and expired according to its terms at 9:00 a.m. on October 5, 2009 ("September 2009 Offer"). CP 2072.. On October 2, 2009, Hollywood made a motion to invalidate this September 2009 Offer as the City had stated that it was changing its valuation approach in the matter. CP 0086-0100. At that time, the City had engaged in a strip-take analysis of the property as opposed to the traditional before-and-after analysis required by law. CP 0089-0092;0184;0189. It also

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<sup>10</sup> *Suppl. Designation of Clerk's Papers Respondents' Motion to Establish Valuation Date.*

<sup>11</sup> *Suppl. Designation of Clerk's Papers Woodinville's Response to Motion to Establish Valuation Date*

indicated that it intended to change its appraisal approach. CP 0189.

**5. A Conditional Settlement is Reached**

On October 5, 2009, the parties engaged in a mediation which resulted in a conditional settlement agreement ("Conditional Settlement Agreement"). CP 0874-0876. It states in relevant part:

This agreement is contingent upon the adjoining property owner, MJR Development, granting an easement for ingress & egress over the property immediately to the west of the Subject Property in resolution of the pending lawsuit by HVLP against it. The City agrees to assist HVLP in acquiring this easement and use its best efforts in doing so.

CP 0874-0876. The monetary settlement was for \$317,500.00. As a result of the settlement, the Motion to Invalidate the 30 Day Offer was rendered moot.

**6. All Efforts to Obtain a Negotiated Easement with the Adjoining Property Owner Failed- The Condition to the Settlement Was Not Met**

On October 8, 2009, this Court again entered an Order Amending Case Schedule extending the trial date to January 19, 2010 to accommodate the Conditional Settlement Agreement. CP 0337-0338. As no agreement had been made with MJR, again, on January 8, 2010, the trial was continued to April 19, 2010. CP 0285-0286.

From December 2009 through the Spring of 2010, Hollywood attempted to negotiate an easement with MJR and

suggested a mediation of the matter. CP 0839. That offer of mediation was rejected by MJR. CP 0845-0846. As of the date of this brief, MJR has not granted Hollywood an easement over its property as described in the Conditional Settlement Agreement.

### **7. The March 2010 Thirty Day Offer**

The City made a second offer pursuant to RCW 8.25.070 on March 18, 2010 in the amount of \$307,000.00 which expired according to its terms at 5:00 p.m. on Friday, March 26, 2010 ("March 2010 Offer"). CP 0278-0279. The March 2010 Offer stated:

The existing settlement agreement requiring an easement from MJR would become null and void if this settlement offer is timely accepted.

This offer is intended as a 30 day pre-trial offer and should be considered as an optional means to settlement in addition to the conditioned settlement reached in mediation. With an April 19, 2009 trial date, the City needed to re-evaluate its highest 30 day settlement offer, since there is yet no clarity as to whether the final contingency of the Conditional Settlement Agreement will be timely satisfied.

CP 0278-0279. Hollywood did not respond to this offer. On March 29, 2010, for the seventh time, the trial was continued to June 28, 2010. CP 0289-0290.

### **8. Spring 2010: The Conditional Settlement Agreement Failed; The City Did Not Make a Thirty Day Offer**

Under the Court's Scheduling Order dated March 29, 2010 (CP 0289-0290) and as the trial date was June 28,

2010, any offer qualifying under RCW 8.25.070 was due on June 1, 2010.<sup>12</sup> CP 0289-0290.

No other offer identified as a 30 day offer, other than the September 2009 Offer and the March 2010 Offer, was communicated by or received from the City pursuant to RCW 8.25.070. At no time did the City ever identify the Conditional Settlement Agreement as a 30-day offer within the meaning of RCW 8.25.070.

Further, on June 4, 2010 (three days after a 30 day offer was due), the City finally provided Hollywood a copy of a new appraisal (which had been promised in the Fall of 2009) which engaged in a different appraisal approach than that used previously in the case. CP 0350-0450. That appraisal virtually doubled the City's initial valuation opinion from \$103,000 to \$191,360. *Compare* CP 1213; 0354

**9. Hollywood Asks the Court to Determine the Issue on the Conditional Settlement Agreement and Attorney Fees Prior to Trial**

Hollywood filed several motions on June 10, 2010, two of which relate to this appeal:

- (1) A Motion for Order Acknowledging Respondents Right to Attorney's Fees, Expert

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<sup>12</sup> Pursuant to RCW 8.25.070, any offer was due 30 days before the trial date, thus making the offer due date on Saturday, May 29, 2010. However, under CR 6, an offer due on a Saturday pushes the due date to the following day that is not a Saturday, Sunday, nor legal holiday. Monday, May 31, 2010 was a legal holiday under RCW 1.16.050. Therefore, under CR 6, the offer was due on Tuesday, June 1, 2010.

Witness Fees and Costs (CP 0293-0313, 0466-0656), and

- (2) Motion to Declare the Settlement Agreement Invalid (CP 0861-0871).

The Court did not enter an order on either of these motions. The City moved for a continuance trial yet again on June 16, 2010.<sup>13</sup> The City's motion was denied and the matter went to trial on June 28, 2010.

#### **10. Trial of the Eminent Domain Action**

At trial, Hollywood sought just compensation not only for the strip of land taken by the City but also for the loss of the northerly access point it claimed it had perfected by adverse possession/prescriptive easement in an amount of \$1,425,000.00.<sup>14</sup> The City contested Hollywood's claim for the lost access point. While Hollywood was permitted to present damages on the lost access claim and closing argument on the damages, the trial court refused to instruct the jury on the elements of an adverse possession/prescriptive easement claim and refused to allow counsel to argue those points although it allowed evidence to be presented on the claim. VRP 43-44. The jury's award was \$215,000.00. CP 1523.

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<sup>13</sup> *Supplemental Designation of Clerk's Papers-- Petitioner City of Woodinville's Motion for Trial Continuance and to Compel Respondent to Participate in Good Faith Negotiation of an Easement Strictly Complying with Provision No. 5 of the Settlement Agreement and for Sanctions.*

<sup>14</sup> *Suppl. Designation of Clerk's Papers -- Trial Exhibit 301.*

### **11. Post Trial Attorney Fees Motion**

After the verdict, Hollywood made a motion for attorneys' fees again claiming that no thirty day offer was in place on June 1, 2010. CP 1545-1615. The court asked for additional briefing on the following question:

It appears that the lower offer was intended to withdraw the higher, but the Court would appreciate a five-page brief from each side with that party's view of the application of contract law to the status of the CR2A offer in light of the March 18 written offer.

CP 2495-2496. On September 21, 2010, the Court issued its order denying Hollywood's motion for attorneys' fees ("Order"). CP 2510-2512. The Order states:

Therefore the CR2A was still open to the Respondent up to the date of trial and is a qualifying offer. The judgment awarded as a result of the trial was less than that offer, and therefore the Respondent does not meet the requirements for an award of fees and costs.

A Decree of Appropriation was also entered. CP 2513-2520.

Hollywood withdrew the just compensation award from the court registry. This appeal follows on the issue of attorneys fees and costs pursuant to RCW 8.25.070.

#### **C. OTHER PENDING ACTIONS RELATING TO HOLLYWOOD'S LOST ACCESS POINT**

This court should take judicial notice of the below pending cases which relate to this matter. ER 201. Judicial notice is allowed at any stage of the proceeding. *Spokane Research &*

*Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

A judicially noticed fact is one that is not subject to reasonable dispute because it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b).

*In re Adoption of B.T.*, 150 Wn.2d 409, 414, 78 P.3d 634, (2003)

The general rule is that a court may take judicial notice of a record "in proceedings en-grafted, ancillary or supplementary to it."

*Id.* Black's Law Dictionary defines the term "supplementary proceeding" as "a proceeding that in some way supplements another." BLACK'S LAW DICTIONARY (9<sup>th</sup> ed. 2009). The terms engraft and ancillary appear to be synonyms for the term "supplementary."

A further rule is that a Washington court will not take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.

*Spokane Research*, 155 Wn.2d at 98. Hollywood does not ask the court to take judicial notice of any of the decisions or orders made in the below described matters. Rather, the Court is asked to take judicial notice of the existence of these other pending matters and the fact that Hollywood is litigating with the City in several matters which relate to the Project and the City's eminent domain actions here

**1. *Gorman v. MJR Development, King County*  
Cause No. 09-2-06908-5 SEA**

As a parallel action, Hollywood filed suit against MJR Development seeking to establish a prescriptive easement in *Gorman v. MJR Development, King County Cause No. 09-2-06908-5 SEA* ("MJR Matter") for access to the westerly portion of the Hollywood property. This suit relates to the lost access point which Hollywood sought to claim damages for in the trial of the underlying case in this appeal. The Conditional Settlement Agreement required the City to assist Hollywood in memorializing its claim of prescriptive easement as a part of an effort to resolve this dispute. CP 0874-0876.

However, at the time the Conditional Settlement Agreement was signed, the City was engaged in litigation with MJR (under the name of Woodinville Associates<sup>15</sup>) over a dispute involving its obligations to contribute to the costs of the project. The matter is entitled *Woodinville Associates, LLC v. City of Woodinville, 09-2-18636-7 SEA*. In this dispute, the City claimed \$1,075,243.67 from Woodinville Associates/MJR("WA/MJR") for its share of the costs of the Project. WA/MJR filed suit against the City which was

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<sup>15</sup> On information and belief, MJR is the name of the entity in title to the property adjoining the Subject Property. Woodinville Associates is the development company associated with MJR.

dismissed. A subsequent appeal, the final decision of which was entered on November 15, 2010, failed. *Woodinville Associates, LLC v. City of Woodinville*, 2010 WL 4596283 (Docket No. 65052-1-I.<sup>16</sup> Thus WA/MJR was engaged in serious and contentious litigation with the City at the same time the City was to be assisting Hollywood with reaching a negotiated settlement regarding its lost access point. An obligation was entered against Woodinville Associates in the City's favor in the amount of \$1,075,243.67 in the matter. The City did not disclose this matter to Hollywood.

In the *Gorman v. MJR* matter, a hearing on a motion for summary judgment is set for February 11, 2011. Trial is set for April 25, 2011. An easement has still not been granted.

**2. *Gorman v. City of Woodinville*,  
King County Cause No. 07-2-22368-1**

In this action, filed in King County Superior Court on July 6, 2007, entitled *Gorman v. City of Woodinville*, Cause No. 07-2-22368-1, the Gorman's filed a quiet title action seeking to obtain a court order acknowledging a previously perfected prescriptive right in property dedicated to the City in the binding site plan by MJR.<sup>17</sup> This property is a part of the lost access point claimed by Hollywood but not within the

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<sup>16</sup> This is an unpublished opinion and is not cited as authority. GR 14.1(a).

<sup>17</sup> *Supp. Desig. Clerk's Papers -- Trial Exhibit 254.*

property in dispute with MJR. The trial court dismissed the claim under CR 12(b)(6) based on the City's motion (on the eve of trial) that RCW 4.16.160 barred the claim against the City. The Gormans appealed and the matter is pending in Division One of the Court of Appeals under Docket No. 63053-9-I. Oral argument occurred on Wednesday, January 19, 2011. A decision is pending.

In summary, Hollywood claims this area (called "Tract Y") based on adverse possession/prescriptive easement and claims that all the elements of the claim had been perfected prior to MJR's dedication of Tract Y to the City in a binding site plan submitted as evidence in this matter.<sup>18</sup> The City contends that the dedication cut off any claim by Hollywood.

### **3. Remaining Claim: Inverse Condemnation Looms**

In addition to the above pending matters, Hollywood still retains a claim for inverse condemnation against the City relating to the lost access point. As the trial court barred any argument or instruction on the prescriptive claim, the claims for loss are not *res judicata*. *E.g. Spokane County v. Miotke*, \_\_\_ Wn. App. \_\_\_, 240 P.3d 811 (2010).

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<sup>18</sup> *Supp. Desig. Clerk's Papers -- Trial Exhibit 254.*

## V. ARGUMENT

### D. SUMMARY OF ARGUMENT

Despite the very serious public policy questions posed by this case, most seriously the abuse of the judicial process by the City, the legal question posed by this appeal is a clear one: Does a Conditional Settlement Agreement (which has not been identified as an offer within RCW 8.25.070 and in fact which the City admits was not such an offer) constitute a qualifying offer within the meaning of the statute? Further, can a conditional settlement agreement, which requires the act of a non-party to the action, ever constitute a qualifying offer within the meaning of RCW 8.25.070?

Hollywood contends the answer is an unequivocal "No".

If a Conditional Settlement Agreement is permitted to qualify as a 30 day offer under RCW 8.25.070, then, as is demonstrated by this case, the payment of just compensation could (and would) be held up by the satisfaction of the condition, here the voluntary act of a third party. That is not a circumstance envisioned by RCW 8.25. Further, it is incumbent on a condemning authority to identify what offer it considers to be a 30 day offer under RCW 8.25.070.

**B. DE NOVO IS THE PROPER STANDARD OF REVIEW**

In this matter, the facts are not in dispute. Rather, what is presented are questions of law as to what constitutes a qualifying offer within the meaning of RCW 8.25.070 and whether there was any offer present on June 1, 2010, thirty days before the scheduled June 28, 2010 trial date. CP 0289-0290.

If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion. Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied. If, however, a pure question of law is presented, such as whether public policy precludes giving effect to a forum selection clause in particular circumstances, a de novo standard of review should be applied as to that question.

(Citations omitted.) *Dix v. ICT Group, Inc Id.* at 1020. This

Court has also stated:

In *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989), we noted that the appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence. This principle was drawn from the general rule that

where the record both at trial and on appeal consists entirely of written and graphic material-documents, reports, maps, charts, official data and the like-and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a

court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.

*Smith v. Skagit Cy.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969) ... Under such circumstances, the reviewing court is not bound by the trial court's findings on disputed factual issues. *Smith*, 75 Wn.2d at 718-19, 453 P.2d 832.

(Other citations omitted.) *Progressive Animal Welfare Soc.*

*v. University of Washington*, 125 Wn.2d 243, 252-253, 884 P.2d 592 (1994). The *de novo* standard of review is the proper standard to apply. Additionally, attorneys fees and costs decisions are appealable separately from the just compensation award. *State v. Trask*, 91 Wn. App. 253, 957 P.2d 781 (1998).

**C. WASHINGTON LAW ACKNOWLEDGES THAT THE CONSTITUTIONAL REQUIREMENTS OF 'JUST COMPENSATION' DOES NOT MAKE A CONDEMNEE WHOLE**

The State of Washington, (this Court included) has concluded that an award of fees and costs under RCW 8.25.070 is an effort to rectify the long acknowledged inequity posed by the just compensation standard contained in Article 1, Section 16 of Washington Constitution. *State v. Roth*, 78 Wn.2d 711, 479 P.2d 55 (1971). Section 1 of Article 16 of the Washington Constitution provides in relevant part:

... No private property shall be taken or damaged for public or private use without just compensation having been first made ...

CONST. Art. 1, §16. In 1913, a Washington historian reported that this clause was designed to prevent great injustices

imposed upon property owners whose property was subject to eminent domain:

Most of the constitutions now in force prohibit the taking of private property for public use without just compensation, but experience has demonstrated that such a general provision is entirely inadequate to prevent great injustice, and often the most serious oppression. The taking of private property in many cases is of even less consequence than the injuries inflicted by the use of adjacent property; so, in many state constitutions, provision is made for that class of cases **by adding the words "or damaged," in order that the rights of the individual to the enjoyment of his possessions shall not be invaded and he be wrongfully deprived of his property by measures not falling literally within the prohibition against taking private property.** So far no state has receded from this provision wherever guaranteed in its constitution.

Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, THE WASH. HIST. Q., Vol. IV, No. 4, p. 236 (October, 1913).

**D. THIS COURT HAS LONG ACKNOWLEDGED THE UNFAIRNESS THAT IS JUST COMPENSATION**

Throughout this Court's jurisprudence, the unfairness of "just compensation" has been recognized. This policy is reflected in this Court's decision in *Lange v. State*, 86 Wn.2d 585, 589, 547 P.2d 282 (1966) where it stated:

The reason for the existence of the just compensation language in the state and national constitutions is to insure the fair treatment of individuals whose rights in property must at times be subordinated to the needs of society as a whole.

It is well established that the condemnee is entitled to be put in the same position

monetarily as he would have occupied had his property not been taken.

(Citations omitted.) *Lange*, 86 Wn.2d at 589-90. This Court went on to say:

In carrying out our duty to achieve fairness in condemnation awards, we have recognized that just compensation must be calculated from the standpoint of what the property owner loses by having his property taken, not by the benefit which the property may be to the condemnor.

*Lange*, 86 Wn.2d at 589-90.

In *State v. Roth*, 78 Wn.2d 711, 479 P.2d 55 (1971), this Court reviewed the-then recently enacted statutory scheme under RCW 8.25 and stated:

Article I, section 16 of the Washington State Constitution, as amended by Amendment 9, provides that private property shall not be taken or damaged for public use without 'just compensation' having first been made. Originally the determination of 'just compensation' was limited to an inquiry of the fair cash market value of the property involved. *In re Medina*, 69 Wn.2d 574, 418 P.2d 1020 (1966); *In re Issaquah*, 31 Wn.2d 556, 197 P.2d 1018 (1948).

Experience in the field of eminent domain made it evident, however, that while gross compensation awarded property owners may have been Just in terms of the fair cash market value of the property involved, it was Unfair in terms of the net compensation actually received by litigating property owners. The gross award often was drastically reduced by legitimate costs of litigation to the point that property owners found it an expensive luxury to defend, or even to prepare to defend, a legitimate dispute. The necessary expense of litigation often forced property owners to accept the condemnor's offer even though they felt it was not just compensation.

78 Wn.2d at 712. This Court then reviewed the statutory scheme enacted in 1965 under RCW 8.25, and described it as a legislative action intended "to rectify the situation." *Id.* This Court also noted that the enactment of RCW 8.25.070 in 1967 was: "The legislature's remedy to attain a measure of equality between just compensation and the condemnee's net compensation." *Id.*

In *Wash. State Conv. & Trade Cntr. v. Evans*, 136 Wn.2d 811, 966 P.2d 1252 (1998), this Court again acknowledged the inequity between just compensation and net compensation in the eminent domain setting.

History demonstrates these words of article I, section 16, were carefully chosen to strengthen our guarantee over rejected language from other state constitutions (similar to that of the Fifth Amendment), affording our residents enhanced constitutional guarantees against injustice and oppression. W. Lair Hill, *Washington, A Constitution Adapted to the Coming State* 8 (1889).

*Evans*, 136 Wn.2d at 830.

**E. MODERN COMMENTATORS POINT OUT THAT THE "JUST COMPENSATION" STANDARD FOMENTS ABUSE**

Increasingly, commentators are noting the unfair nature of the "just compensation" approach (as it is presently defined) and the process of the eminent domain action itself, particularly when the process is used for economic development as here.

First, the only real available challenge to the public use and necessity stage<sup>19</sup> of an eminent domain action is arbitrary and capricious conduct or fraud. *Petition of Port of Grays Harbor*, 30 Wn. App. 855,863, 638 P.2d 633 (1982). Because of the difficulty of proving such a claim, one commentator has called for a resurrection of the proceedings so as to more closely scrutinize a condemning authority's decision to take property. In Robert C. Byrd, *Reviving Necessity in Eminent Domain*, 33 HARV. J.L. & PUB. POL'Y, 239 (2010), the author calls for reviving an actual necessity standard in the possession and use stage of an eminent domain instead of the usual "rubber stamp" that such proceedings are given.

Mr. Byrd states:

For judges, necessity thus becomes another procedural rule and the landowner's home just another object to be parceled according to the commands of books and briefs. Yet this problem is not merely theoretical. People and businesses suffer. Neighborhoods are torn apart. The municipal recklessness that a nonexistent necessity doctrine invites imposes severe consequences for landowners.

(Footnote with citations omitted.) *Id.* at 246.

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<sup>19</sup> "Once an entity with the power of eminent domain makes its initial determination to authorize a condemnation action of private property, the matter moves to the superior court for the condemnation, which involves the court determining public use and necessity, fixing the amount of just compensation, and transferring title. *In re Petition of Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005); see also WASH.CONST. art. I, § 16." *Public Util. Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC*, 159 Wn.2d 555, 151 P.3d 176 (2007).

Second, there is growing evidence and concern that property owners receive disparate treatment from condemning authorities: some are treated well and others face the “take it or leave it” attitude and thus the burden of litigation costs. In the summer of 2010, Mr. Benjamin L. Schuster called for the application of the “class of one” equal protection doctrine in eminent domain actions to such situations. Benjamin L. Schuster, *Fighting Disparate Treatment: Using the “Class of One” Equal Protection Doctrine in Eminent Domain Settlement Negotiations*, REAL PROPERTY, TRUST & ESTATE LAW JOURNAL 369 (2010). Mr. Schuster acknowledges the unfair and unequal position in which a property owner is placed when forced to an eminent domain action by a municipality:

A property owner who believes that she is being unfairly treated cannot simply walk away from the transaction. Instead, the property owner is forced to choose between two undesirable options: either acquiesce to the proffered treatment by accepting the condemning authority’s offer or refuse the offer, leading to an eminent domain action in court which the property owner bears the costs of litigation.

*Id.* at 375. Additionally, Mr. Schuster acknowledges that there is quantifiable economic evidence that similarly property owners receive disparate treatment in the eminent domain process. *Id.* at 372 citing Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH.

L. REV. 101, 131 (Oct. 2006); see also Yun-chien Chang *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990-2002*, 39 J. LEGAL STUD. 201, 206 (2010) (saving litigation expenses is one reason property owners settle eminent domain cases without a real analysis of fair market value).

Third, even the Washington Attorney General agrees that the eminent domain process is abused in the State of Washington. Washington Attorney General, FINAL REPORT OF THE EMINENT DOMAIN TASK FORCE p. 17 (2009), <http://www.atg.wa.gov/EminentDomain.aspx>.

The Task Force concluded that the Legislature should adopt legislation barring condemnation for economic development. *Id.* at page 23. The Task Force further recommended the adoption of model rules governing best practices in eminent domain as to reduce if not eliminate costly litigation. *Id.* at 23-24.

The Task Force believes that such model rules could provide a great benefit to both the citizens of Washington and to local governments intending to exercise their eminent domain authority. By providing a centralized resource for best procedural practices, the Attorney General's Office could aid in many small cities and towns, prevent costly litigation, and conserve important local government resources.

(Emphasis in the original.) *Id.* at 24.

This matter is one of those cases that the commentators and others caution against.

**F. THE PURPOSE OF THE 30 DAY OFFER PROCESS IS TO PROMOTE A SETTLEMENT ENVIROMENT BASED ON OPEN COMMUNICATION**

The purpose of RCW 8.25.070 "is to avoid litigation in eminent domain proceedings when possible by encouraging both parties to make a good faith attempt at pre-trial settlement." *Daviscourt v. Peistrup*, 40 Wn. App. 433, 447, 698 P.2d 1093 (1985). This statutory scheme reflects Washington's rejection of "trial by ambush". *Lybbert v. Grant County*, 141 Wash.2d 29, 40, 1 P.3d 1124 (2000) ("We have observed that the "trial by ambush style of advocacy has little place in our present-day adversarial system."); *see also Harris v. Drake*, 152 Wn.2d 480, 499, 99 P.3d 872 (2004).

The eminent domain statutes outline a process which is designed to promote open and mutual disclosure of appraisal information and to promote settlement between the parties. The first statute on point is RCW 8.25.120 which addresses the mutual exchange of appraisal information between the parties. The statute states:

After the commencement of a condemnation action, upon motion of either the condemnor or condemnee, the court may order, upon such terms and conditions as are fair and equitable the production and exchange of the written conclusions of all the appraisers of the parties as to just compensation owed to the condemnee, as prepared for the purpose of the

condemnation action, and the comparable sales, if any, used by such appraisers. **The court shall enter such order only after assurance that there will be mutual, reciprocal and contemporaneous disclosures of similar information between the parties.**

(Emphasis added.) RCW 8.25.120.

The second statute, which is a part of the process, is RCW 8.25.070 which provides that a condemning authority may choose to make a 30 day offer to the property owner.

That statute provides:

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

- (a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or
- (b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

Here, Hollywood never had a chance at good faith negotiations with the City. The City first presented an appraisal engaging in an inappropriate strip-take analysis of the property as opposed to the traditional before-and-after analysis required by law.

CP 0089-0092. It also indicated that it intended to change its appraisal approach, which it did nearly eight months later on June 4, 2010, with an appraisal that virtually doubled the City's initial valuation. CP1213;0354. Hollywood with a mere 24 days until trial and without a 30 day offer in place had nothing in which to base their decision whether to proceed with trial.

**G. WASHINGTON LAW DOES NOT DEFINE WHAT IS REQUIRED FOR A QUALIFYING OFFER**

We have not found any Washington cases that address the questions posed by this case, namely what is required for a qualifying offer under RCW 8.25.070 and whether a conditional settlement agreement constitutes one. Further, we have not found a reported case which addresses the condemning authority's obligation to identify a thirty day offer as such.

Here, an identified 30 day offer was not in place 30 days prior to trial, thus bringing the issue of attorneys fees to the forefront.

The rules relating to attorneys fees in eminent domain actions were recently addressed by this Court in *State v. Costich*, 152 Wn.2d 463, 98 P.3d 795 (2004). There, when faced with an appeal relating to the award of attorneys fees and costs to a condemnee made under RCW 8.25.070, this Court was asked to decide whether the 30 day requirement

set forth in RCW 8.25.070(1)(b) imposed a durational requirement (meaning that the offer was required to be held open for 30 days prior to trial) or whether it imposed a temporal requirement (meaning that the offer must be in effect 30 days prior to trial but not held open for a 30 day period). This Court stated that the statute imposed a temporal requirement (meaning that the offer must be in place 30 days before trial and could be withdrawn within the 30 days before trial). In *Costich*, the Washington Department of Transportation's offer expired after an 8 day period but was in place 30 days before trial.

The second case is one from Division One of the Court of Appeals. In *Central Puget Sound Regional Transit Authority v. Eastey*, 135 Wn.App. 446, 144 P.3d 322 (2006). In *Eastey*, Sound Transit made an offer 30 days before trial as described by RCW 8.25.070 which stated:

This offer shall remain open until accepted or rejected, or until the close of business on Friday, January 14, 2005.

*Id* at 453. However, because of some rulings in the case, made after the offer was communicated, Sound Transit withdrew the offer prior to the cited January 14 date. *Id*. Division One held that this process was proper in view of *Costich* and RCW 8.25.070. The court stated:

Eastey alternatively contends that if the revocation of the offer was effective, then Transit did not have an offer "in effect" 30 days before trial as is required under the statute to avoid incurring the obligation to pay the condemnee's attorney fees. RCW 8.25.070(1)(a). But the settlement offer of \$327,600 was in effect 32 days before trial and for the next three and a half days. Revoking it three and a half days after it was made did not mean it never existed. Eastey could have accepted it at any time until it was revoked.

We conclude that Transit had a qualifying statutory settlement offer in place 30 days before the trial. Because the judgment obtained by Eastey did not exceed the offer, the trial court correctly denied Eastey's request for an award of fees.

*Eastey* at 455-456.

In the present case, as is shown below, no qualifying offer as described by RCW 8.25.070, or *Costich* or *Eastey* was in effect on June 1, 2010 as a matter of law. The trial court should be reversed

**H. NO OFFER WAS IN PLACE ON JUNE 1, 2010--THE CITY HAS ACKNOWLEDGED THIS**

The City has acknowledged that no offer was in place 30 days prior to trial, they rely on the Conditional Settlement Agreement with a conditional provision to qualify as a 30 day offer, this is improper as described below

**1. General Contract Principles Apply to the 30 Day Offer**

General contract principles apply to the 30 day offer process as described by RCW 8.25.070. *Eastey*, 135 Wn. App. at 454-456.

An offer consists of a promise to render a stated performance in exchange for a return promise

being given. RESTATEMENT OF CONTRACTS, §24 (1932).

*Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 556, 608 P.2d 266 (1980). In *Pacific Cascade*, the dispute was whether a letter expressing an intent to lease a portion of property constituted an offer to lease. Division One of the Court of Appeals ruled that it did not. *Id.* at 559-560. In so doing, the court noted:

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given further expression of his assent, he has not made an offer.  
RESTATEMENT OF CONTRACTS, §25 (1932).

*Pacific Cascade*, 25 Wn. App. at 557.

Here, the March 2010 Offer manifested an intent by the City to provide a settlement option within RCW 8.25.070. The March 2010 Offer specifically acknowledged that the Conditional Settlement Agreement did not fall within the provisions of RCW 8.25.070. Again, the City stated:

This offer is intended as a 30 day pre-trial offer and should be considered as an optional means to settlement in addition to the conditioned settlement reached in mediation.

CP 0278-0279. Clearly, if the Conditional Settlement Agreement was a qualifying offer within RCW 8.25.070, the City had an obligation to so state.

An offer must be communicated to an offeree, if it is to be the basis of a contract. 1  
RESTATEMENT, CONTRACTS, 28, 59, §§ 23, 53,  
comment a.

*Farrell v. Neilson*, 43 Wn.2d 647, 650, 263 P.2d 264 (1953).

"It is the objective manifestations of the offeror that count and not the secret, unexpressed intentions." *Barnes v. Treece*, 15 Wn. Ap. 437, 549 P.2d 1152 (1976). Courts "search for [the parties] intent through the objective manifest language of the contract itself." *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.2d 221 (2008).; *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 459, 287 P.2d 735 (1955) (courts do not "delete terms from an offer, nor can we ignore them, to make a binding contract for the parties where none exists.").

Had the City intended to change its position as stated in the March 2010 Offer, and thus treat the Conditional Settlement Agreement as a qualifying offer within RCW 8.25.070, then by at least June 1, 2010, it was required to so inform Hollywood. As the City failed to do this, the Conditional Settlement Agreement is not a qualifying offer.

## **2. Washington Law Does Not Allow Courts to Add Specific Implied Terms to 30 Day Offers**

In *Eastey*, the court rejected the property owner's argument that a specific implied term should be included in an offer made under RCW 8.25.070. *Eastey*, 135 Wn. App. at 454. The court rejected the property owner's claim. *Id.*

Here, the trial court included an implied term in the Conditional Settlement Agreement, *i.e.*, that it was an offer within the meaning of RCW 8.25.070. This Court should do as Division One did in *Eastey* and refuse to impute specific terms in or to the Conditional Settlement Agreement.<sup>20</sup> As a matter of law, there is no stated or implied term that the Conditional Settlement Agreement constituted an offer under RCW 8.25.070. In fact, and again, the City has admitted as much in the March 2010 Offer. CP 0278-0279.

### **3. Hollywood Did Not Have the Power to Accept**

The making of an offer is not the creation of a contract, and does not in and of itself have binding force or impose any obligation, but it is always a conditional promise and may become a contract. It creates a power of acceptance in the offeree, and once the offer has been made there is nothing left for the offeror to do but to wait for the offeree to close the contract.

#### **CJS CONTRACTS § 40**

The Conditional Settlement Agreement which the City claims is a 30 day offer has no power of acceptance because the remaining contingency was never met. The statute only envisions that the power of acceptance lies with the condemnee.

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<sup>20</sup> Hollywood does not contend that there are no implied general terms such as the general duty of good faith imposed by Washington Law. *E.g. Ross v. Tigor Title Ins. Co.*, 135 Wn. App. 182, 190, 143 P.3d 885 (2006) ("Every contract carries with it an implied covenant of good faith and fair dealing...").

Restatement (First) of Contract Law §29 addresses how an offer may be accepted:

An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offerree is given the power to make a selection in his acceptance.

Here not only did the remaining contingency remain unperformed, but the City also did not perform on their offer to pay Hollywood the remaining \$214,500.00 into the registry. No additional money was ever deposited into the court. The power to accept must solely be with the condemnee, and here Hollywood had no power to accept the settlement agreement without the remaining contingency being satisfied.

**4. The Conditional Nature of the Conditional Settlement Agreement Takes it Out of RCW 8.25.070**

The The Conditional Settlement Agreement was based on a number of contingencies, one of which is at issue here: The grant of an easement by third party MJR. This contingency was a condition precedent to the formation of the Agreement. As it has failed, no Agreement was in place. 25 WASHINGTON PRACTICE § 8:3. *Conditions precedent* ("Where there is a condition precedent to the formation of a contract, the contract itself does not arise unless and until the condition occurs."). The "failure to perform a condition precedent will

discharge the duties of the parties to a contract.” *Quinn v. Cherry Lane Auto Plaza, Inc.* 153 Wn. App. 710, 721, 225 P.3d 266 (2009). In *CHG Intern. Inc. v. Robin Lee, Inc.* 35 Wn. 512, 515, 677 P.2d 1127(1983), the court stated:

[Where] a condition precedent to the contract was neither performed nor excused within the time required, both parties’ contractual duties were discharged.

Here, MJR has not, and now will not (apparently) grant an easement. Thus, the condition precedent failed as a matter of law and thus the Conditional Settlement Agreement failed.

The thirty day process under RCW 8.25.070 should not be held hostage by the voluntary act of a third party. Here, the City and MJR were engaged in ongoing and difficult litigation regarding MJR’s contribution to the costs of the Project at all relevant times. Given that, the willingness of MJR to voluntarily grant an easement to Hollywood was suspect from the date of the signing of the Conditional Settlement Agreement and MJR’s position, the satisfaction of such a condition was never realistic and could never have been met. This was obviously the City’s intent given its position as stated in its Motion for Trial Continuance in a

delay tactic on payment of the agreed upon settlement amount.<sup>21</sup>

**I. HOLLYWOOD HAS LOST THEIR ACCESS TO JUSTICE DUE TO THE CITY'S PIECEMEAL LITIGATION STRATEGY**

This case presents an access to justice issue. The Legislature, in enacting the Washington Equal Access to Justice Act ("WEAJA"), RCW 4.84.350, encouraged citizens to defend themselves against unreasonable state action. 1995 Laws Ch. 403, §901 (now codified as RCW 4.84.350).

In so doing,

The legislature felt it necessary to encourage individuals to pursue judicial review "because of the expense involved in securing the vindication of their rights." The legislature believed the problem was compounded by the greater resources and expertise that administrative agencies could bring to bear in litigation. Therefore the Legislature adopted the WEAJA "to ensure that these parties have greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights."

(Footnotes omitted.). D. Greg Blankenship, *The Washington Equal Access to Justice Act: A Substantial Proposal for Reform*, 77 WASH L. REV. 169, 175 (2002) *citing* 1995 Laws Ch. 403, §901.

The situation that Hollywood finds itself is the same situation that the legislature was concerned with when enacting the WEAJA.

Here, Hollywood finds itself litigating two separate lawsuits against the City and a third against an adjoining property owner all

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<sup>21</sup> Again, these documents are being provided to the Court under a Supplemental Designation of Clerk's Papers.

as a result of the Project. If those cases were not enough, Hollywood still retains a claim for inverse condemnation against the City based on its refusal to acknowledge Hollywood's claims for prescriptive easement relating to its lost access point.<sup>22</sup> The practical impact of all of this unnecessary litigation is that Hollywood has lost a needed access point and has and is incurring significant costs to preserve it or find a solution to the problems caused by the loss. Further, as is acknowledged by the WEAJA, the cost of defending oneself and one's rights can sometimes be significant.

In addition to the contractual arguments, Hollywood's due process rights have been violated RCW 8.25.070 only envisions a process between the condemnor and the condemnee, i.e. parties to the action. It does not envision third parties

**J. HOLLYWOOD'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED AS THE CITY FAILED TO IDENTIFY THAT THE CONDITIONAL SETTLEMENT AGREEMENT WAS A 30 DAY OFFER**

Article 1, Section 3 of the Washington Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." See also U.S.C.A. Const. Amend. 14. "At a bare minimum, procedural due

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<sup>22</sup> Washington law does not require a court order to perfect a claim based on prescription. Once the elements have been met for the 10 year period, title vests in the possessor as a matter of law. *Mugaas v. Smith*, 33 Wash.2d 429, 431, 206 P.2d 332 (1949).

process 'requires notice and an opportunity to be heard.'" *In re Bush*, 164 Wn.2d 697, 705, 193 P.3d 103 (2008).

RCW 8.25.070 does not contain specific language that notice of a thirty day offer must be given to the condemnee. Rather, the notice requirement is implied as stated by Subsection (1) which provides in pertinent part:

If condemnor fails to make any **written** offer in settlement to condemnee at least thirty days prior to commencement of said trial;

(Emphasis added.).

The written offer must contain a statement that it is an offer within the meaning of RCW 8.24.070 without such a statement, a condemnee is left to guess. This is what the notice requirement of due process is intended to protect against.

The Revised Code of Washington is replete with statutory requirements demanding that written notice of an act be given to persons who may be affected by a governmental action or decision. For example, and without limitation, in the eminent domain setting, a condemning authority must give certain notices to property owners who are affected, or potentially affected by a public project. RCW 8.25.090. The same should be true for a thirty day offer given

that a condemnee's rights are significantly affected by such an offer.

This Court has the power to clarify this issue and should do so.

If a statute does not contain all of the process which is due, this court will impose the requirements necessary to satisfy due process. This court has inherent authority to supplement statutory provisions by requiring additional procedures to satisfy the requirements of procedural due process. *In re Young*, 122 Wash.2d 1, 46, 857 P.2d 989 (1993) (imposing additional procedures to ensure the sexually violent predator provisions of the Community Protection Act of 1990 are fairly enforced); *In re Harris*, 98 Wash.2d 276, 287, 654 P.2d 109 (1982) (this court has inherent power to require procedural due process).

*State v. Thorne*, 129 Wn.2d 736, 769, 921 P.2d 514 (1996).

**K. THE "JUST COMPENSATION" STANDARD  
RENDERS A CONDEMNEE TREATED  
DIFFERENTLY FROM OTHERS**

While *State v. Lange* acknowledges the principle that the eminent domain process is intended to put a person in the same monetary position as they were before the case was initiated, *State v. Roth*, acknowledges that this is not the case. The statutory framework under RCW 8.25 is clearly intended to provide the opportunity to put condemnee's closer to the position of financial parity that the law seeks..

This is consistent with other areas of the law. For example, in tort cases, the following is the standard:

" 'The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation.' ... Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act."

*Shoemaker v. Ferrer*, 168 Wn. 2d 193,198, 225 P.3d

990(2010). Further, when real property is damaged, the injured party is entitled not only to a loss in value but also to repair costs.

*Pugel v. Monheimer*, 83 Wn. App. 688, 692 P.2d 1377 (1996). In the world of breach of contract, there is the policy that a non-breaching party be made whole. *E.g. Cornish College of Arts v.*

*100 Virginia Limited Partnership*, \_\_\_ Wn. App. \_\_\_, 242 P.3d 1, 15

(2010). In cases involving rescission claims, the "vendee is entitled to be made whole by being placed in the financial condition in

which he would have been had he not entered into the transaction."

*Kaas v. Privette*, 12 Wn. App. 142, 150-51, 529 P.2d 23 (1974). As

is shown by this case, the concept of just compensation is not consistent with other areas of the law.

#### **L. HOLLYWOOD IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL**

For the above stated reasons, Hollywood is entitled to an award of its attorneys fees on appeal pursuant to RCW 8.25.070 and RAP 18.1.

#### **M. CONCLUSION**

There is a bias in our society against citizens who own property—we are all conditioned to believe that individuals who own

or have an interest in real estate are not really hurt by having their property taken from them by the government. We think to ourselves, " they are successful, so they'll make it back" or similar thoughts. We also think "glad it didn't happen to me."

This bias is dangerous as we are all in real estate in one way or another. Every one of us works somewhere, lives somewhere, plays somewhere. This attitude affects all of us and is really an expression of the fallacy that is the phrase "property rights." The United States Supreme Court said it best:

**... the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.**

The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, *Of Civil Government* 82-85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Cocker, *Democracy, Liberty and Property* 121-132 (1942); 1 W. Blackstone, *Commentaries* 138-140. Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983 and 1343(3). We do no more than reaffirm the judgment of Congress today.

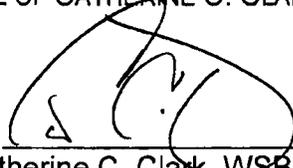
(Emphasis added.) *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S. Ct. 1113, 1122, 31 L. Ed. 424 (1972) (the Court also stated that the garnishment of a personal savings account could profoundly affect personal liberty).

Here, Hollywood has been damaged and its rights trampled upon. It has a basic right to know what is to be treated as a thirty day offer under RCW 8.25.070 so that it may make an informed choice. The treatment of any document as a qualifying offer under RCW 8.25.070 without that document having been identified as one on the thirtieth day before trial violates fundamental fairness, due process and basic principles of contract law. The fact that the City specifically stated that the Conditional Settlement Agreement here was not within RCW 8.25.070 in its March 2010 Offer makes matters worse.

There are fundamental rights at issue in this case. As the legislature has acknowledged in the WEAJA that defense of those rights is expensive and should be repaid to a citizen in certain circumstances as here. The Court should reverse the trial court and award Hollywood both its attorneys fees and costs at the trial level and in this court.

Dated this 29<sup>th</sup> day of January, 2011.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

Catherine C. Clark, WSBA 21231  
Melody Staubitz, WSBA 40871  
Attorneys for Hollywood Vineyards

ST

11 JAN 27 PM 4:30

**DECLARATION OF SERVICE**

BY RONALD L. COOPER  
On said day below I sent a true and accurate copy of: Brief of Appellant in  
Supreme Court Cause No. 85202-2 to the following party by Messenger hand delivery:

Greg Rubstello  
2100 Westlake Ctr Tower  
1601 Fifth Ave.  
Seattle, WA 98101  
Attorney for City of Woodinville

Original sent by email for filing with:  
Washington State Supreme Court  
Clerk's Office  
415 12<sup>th</sup> Street W.  
Olympia, WA 98504  
Supreme@courts.wa.gov

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

DATED: January 27, 2010, at Seattle, Washington.

  
Kim Fennessy, Legal Assistant to  
Catherine C. Clark, WSBA 21231  
Melody Staubitz, WSBA 40871  
Attorneys for Hollywood Vineyards

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**From:** Gong, Jennifer [<mailto:jennifer@loccc.com>]  
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Hello Supreme Court Clerk,

Attached please find the following documents to be filed with this court:

- Brief of Appellant
- Declaration of Service

For the following matter:

Case name: City of Woodinville v. Hollywood Vineyards

Case number: 85202-2

Filed by:  
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Attorney for Hollywood Vineyards  
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Thank you.

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