

No. 68978-9-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

WASHINGTON FEDERAL SAVINGS & LOAN ASSOCIATION,
a federal association,

Plaintiff/Appellant,

v.

THE McNAUGHTON GROUP, a Washington limited liability company,
And SILVER LAKE WATER AND SEWER DISTRICT,

Defendants/Respondents.

BRIEF OF RESPONDENT THE McNAUGHTON GROUP, LLC

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ORIGINAL

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I. INTRODUCTION

In 2003 and 2006, Respondent The McNaughton Group, LLC (“TMG”) contracted with Respondent Silver Lake Water and Sewer District (the “District”) – through Development Extension Agreements (collectively “DEAs”) – to construct a sewer lift station and 3,250 lineal feet of water/sewer main (hereinafter the “Sewer Facilities”) in exchange for the District’s provision of sewer and water services to property owned by TMG in the benefit area. The DEAs required TMG to transfer title to the sewer lift station and appurtenances to the District when complete. Indeed, the District is the only entity under Washington law with the right to operate these Sewer Facilities.

In 2007, TMG granted Horizon Bank (“Horizon”) a deed of trust on property located in a plat known as Sommerwood (“2007 DOT”). At that time, the sewer lift station had not been completed, had not yet been conveyed to the District, and was located within the boundaries of the Sommerwood. Not until February 2009 did TMG convey the sewer lift station and appurtenances to the District via a bill of sale. The real property on which the sewer lift station is located was not conveyed to the District until 2012 and is now fully owned by the District.

In September 2009, Horizon foreclosed on the Sommerwood plat. In October 2009, the District and TMG executed a “Latecomer’s Agreement” enabling TMG to be reimbursed for the construction cost of the Sewer Facilities by property owners (both within and without the Sommerwood plat) who would benefit when they seek to connect to that sewer system (commonly known as “Latecomer’s Fees”).

In January 2010, Appellant Washington Federal (“WaFed”) succeeded to the interests of Horizon through an agreement with the Federal Deposit Insurance Corporation (“FDIC”). WaFed suddenly decided that the Latecomer’s Fees belonged to it under the 2007 DOT. It lost on summary judgment in the trial court because the 2007 DOT does not, and cannot be construed to, collateralize Latecomer’s Fees. The fact that the 2007 DOT fails to specify as collateral any “rights to reimbursement,” other “development-related entitlements,” or the category “general intangibles” supports this conclusion.

Contrary to WaFed’s argument, TMG does not continue to owe it any money. Horizon non-judicially foreclosed on the Sommerwood plat and WaFed obtained that property through its takeover of Horizon. No deficiency exists by operation of law. The only issue in is whether the

Latecomer's Fees – Reimbursement Rights – are collateral secured by the 2007 DOT.

II. STATEMENT OF ISSUES

1. Whether the trial court properly determined TMG had standing to enter into the Latecomer's Agreement after Horizon foreclosed on the Sommerwood property because at the time it owned other properties in the defined benefit area and had expended all the funds for the construction of the Sewer Facilities.

2. Whether the trial court properly concluded that neither TMG nor Horizon intended to include Latecomer's Fees as collateral in the 2007 DOT because the Sewer Facilities were never intended to become part of the Sommerwood plat because:

- Neither TMG nor Horizon contemplated including Latecomer's Fees as collateral for the 2007 DOT;
- The DEAs were entered into before the 2007 DOT was signed and the preliminary plat for Sommerwood issued in 2004 provided that the Sewer Facilities were to be conveyed to the District on completion; and
- No personal property was conveyed to WaFed by the trustee's deed.

3. Whether the trial court properly concluded that Latecomer's Fees were not adequately described in the 2007 DOT as collateral, and therefore, are not security for the 2007 DOT.

III. STATEMENT OF THE CASE

A. TMG was Obligated to Convey the Sewer Facilities to the District Before the 2007 DOT Was Ever Signed

In 2003 and 2006, before the 2007 DOT was signed, TMG executed the "Silver Lake Water District Application and Agreement to Construct Extension to Sewer System" with the District for the construction of the Sewer Facilities: a sewer lift station and related improvements, including 3,250 lineal feet of sewer/water main within the 180th St. SE public right-of-way (the "2003 DEA") and located offsite of the Sommerwood property. CP 573-84. Indeed, only 42 percent of the cost of constructing the Sewer Facilities were spent constructing the lift station located in the Sommerwood plat, the remainder was spent on the sewer/water main in the public right-of-way. CP 926-28. In 2006, TMG executed a second "Silver Lake Water District Application and Agreement to Construct Extension to Sewer System" regarding the same Sewer Facilities (the "2006 DEA"). CP 586-600.

In 2004, also before the 2007 DOT was signed, the Sommerwood plat received preliminary approval. And at that time, the tract on which

the sewer lift station itself was to be built was identified, and TMG agreed to convey it and the sewer lift station to the District when the final plat was recorded. CP 939-47 & 946, ¶16. Had Horizon's representative bothered to review the preliminary plat map and TMG's DEA agreements with the District, all signed before the 2007 DOT was inked, Horizon would have realized that it could not have relied on the sewer lift station to provide value as collateral as TMG had a pre-existing obligation to convey that lot to the District.

B. The 2007 DOT Between TMG and Horizon Initially did not Secure the Sommerwood Plat

In 2005, TMG obtained a collateral pool line, otherwise known as a line of credit from Horizon (the "Line of Credit"). CP 805-06. The Line of Credit allowed TMG to acquire bare land and/or developed plats. *Id.* ¶4. As security for the Line of Credit, TMG granted Horizon a deed of trust over a plat known as Bear Creek Highlands ("Bear Creek") – not the Sommerwood plat. *Id.* ¶5.

TMG refinanced the Bear Creek property through Columbia State Bank in 2007. *Id.* Because the refinance required TMG to grant a third-party lender a first position security interest in Bear Creek, TMG asked Horizon to substitute Sommerwood as the security for the Line of Credit.

Id.; CP 602. Horizon agreed, and TMG granted Horizon a new DOT on March 15, 2007 for the Sommerwood plat. CP 806 ¶5. The DOT gave Horizon a security interest in the following Sommerwood collateral:

[A]ll of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters (the "Real Property") located in Snohomish County, State of Washington....

CP 604-13 at CP 605.

Absent from the DOT is any reference to TMG's right to reimbursement for construction costs related to the Sewer Facilities (the Latecomer's Fees) or any other development-related rights or entitlements. Also absent is any reference to "general intangibles," or any other UCC category that could encompass such rights. Id. Moreover, at the time that Horizon substituted Sommerwood as collateral in place of the Bear Creek Highlands property, it valued Sommerwood on an "as is"/raw land basis of \$16,800,000. Horizon relied on that value alone to support its Line of Credit with TMG. That is, Horizon did not analyze any collateral other

than the “as is” value of the raw land of Sommerwood when agreeing to substitute it as collateral for the Line of Credit. CP 617-21 (Hall Dep. at 16:20–20:24), 633-40. Indeed, if Horizon intended to rely on Latecomer’s Fees as collateral for the Line of Credit, it could have required TMG to apply for a Latecomer’s Agreement as part of the consideration for the Line of Credit. Horizon did not include any such requirement in the DOT or any other loan document related to the Line of Credit.

C. TMG Completed the Sewer Facilities and Transferred Them to the District as it was Contractually Obligated to do

TMG substantially completed the Sewer Facilities in 2007. CP 806, ¶6. As required under the 2003 DEA and the 2006 DEA, TMG conveyed the Sewer Facilities to the District through a bill of sale dated February 26, 2009. CP 671-73. In fact, there were two bills of sale. One for the sewer improvements executed in late February 2009 and another for water improvements associated with the lift station executed June 1, 2009.

D. Horizon Foreclosed Without Ever Asserting a Right to Latecomer’s Fees

Horizon foreclosed on the Sommerwood plat a few months later, on September 18, 2009. Brain Decl. ¶8. Notably, the trustee’s deed does not purport to convey any personal property as part of the foreclosure sale.

CP 220-24. Rather it conveys only “real property.” Id. Likewise, the excise tax affidavit accompanying the Trustee’s Deed also fails to identify any personal property transferred by the trustee. CP 226-27. The absence of personal property from the trustee’s deed is consistent with the fact that the Latecomer’s Fees, a general intangible personal property right, were never collateralized (or intended to be collateral) by Horizon.

E. The Latecomer’s Agreement Followed Foreclosure Because TMG Continued to Own Property in the Defined Benefit Area

On October 7, 2009 – after Horizon’s foreclosure – TMG entered into a Latecomer’s Agreement with the District that required property owners within a defined benefit area to pay Latecomer’s Fees as pro rata reimbursement to TMG for the costs TMG incurred to construct the Sewer Facilities. CP 642-69. The defined benefit area includes other properties, not just Sommerwood, that will connect to the Sewer Facilities as properties are developed. CP 947, ¶17. At the time the Latecomer’s Agreement was signed in October 2009 (after Horizon’s foreclosure sale), TMG owned several of the properties that fell within this category and would receive sewer and water service through the Sewer Facilities that TMG constructed. These properties include (1) the Brookfield property; (2) portions of the King’s Corner I and II property; (3) the King’s Corner

III property; (4) the Fairfield property; (5) the Thornberg property; and (6) the Yorkshire property. Id.

F. WaFed Succeeded to Horizon's Limited Security Interests

In January of 2010, the FDIC shut down Horizon and became the receiver of its assets. CP 570, ¶11. The FDIC then sold those assets to WaFed, including TMG's Line of Credit. At the time WaFed purchased the Line of Credit, Horizon had already realized on the collateral described in the 2007 DOT because it had already foreclosed on the Sommerwood property. CP 570, ¶12. Nonetheless, on June 18, 2010, more than three years after Horizon originally described the collateral covered by its security interest (in March 2007) and after the foreclosure took place (in September 2009), WaFed attempted to expand the scope of Horizon's security interest by filing a UCC financing statement that, in addition to describing the Sommerwood real property, purported to attach to "that certain Latecomers Agreement dated October 7, 2009 and all rights to payment arising therefore, together with proceeds." CP 675-76.

As argued below, WaFed cannot perfect a security interest that never existed. WaFed's security interest never attached to the Latecomer's Fees because, as described below, Horizon never intended to

include Latecomer's Fees as collateral for its Line of Credit, and thus, never described that collateral in the 2007 DOT.

G. Horizon Never Intended That Latecomer's Fees Would be Collateral for its Line of Credit

The undisputed evidence demonstrates that Horizon never intended for the Latecomer's Fees to be secured by the 2007 DOT. Former Horizon loan officer, Michael Hall, testified, consistent with the documents produced from Horizon's loan file, that the only collateral for the Line of Credit was the Sommerwood property in its "as is" condition, as raw land. CP 619, 621, 623 (Hall Dep. at 18:3-5; 20:21-24; 23:14-25). Mr. Hall testified that he never discussed with TMG, or with anyone else at Horizon, the possibility of including as collateral TMG's right to reimbursement for future construction costs associated with the Sewer Facilities. CP 622-23 (Hall Dep. at 21:21-23; 22:4-6). Indeed, at the time TMG executed the 2007 DOT in March, Mr. Hall did not consider that Latecomer's Fees could or would be a source of repayment for the Line of Credit. CP 623-23, 625 (Hall Dep. at 31:17-25; 21:21-22:11).

Mr. Hall also testified that, in contrast to real property, for security interests in non-titled types of collateral, such as intangibles, accounts receivable, inventory, and non-titled equipment, Horizon filed UCC

financing statements. CP 627-28 (Hall Dep. at 49:23–50:14). Horizon did not file such a financing statement before its 2009 foreclosure of the 2007 DOT to perfect any purported security interest WaFed now claims in the Latecomer’s Fees for the Sewer Facilities despite the fact that in August 2009, before the trustee’s sale, Horizon knew TMG intended to seek Latecomer’s Fees. CP 626 (Hall Dep. at 46:13-19).

H. The District Now Owns the Sewer Facilities Free and Clear

One month after WaFed unsuccessfully argued its first motion for summary judgment, it sold the Sommerwood property to Sommerwood Place, LLC (“Sommerwood Place”). Sommerwood Place subsequently developed the Sommerwood property and recorded a final plat in February 2012. Sommerwood Place, in March 2012, deeded to the District the tract within the Sommerwood final plat on which the lift station portion of the Sewer Facilities is located. CP 678. As a result of the bills of sale for the Sewer Facilities (in 2009) and transfer of the lift station tract’s real property (in 2012) to the District, WaFed can claim no ownership interest in either the real or personal property constituting the Sewer Facilities or any portion of the real property on which they were constructed.

Indeed, under Washington law, only the District may operate the Sewer Facilities; hence, they are worthless to any other person or entity.

And without sewer and water service, Sommerwood, Bear Creek, King's Corner, and the other properties meant to be serviced by those facilities also would be worth only their value as undeveloped raw land – the value that Horizon relied on when substituting Sommerwood as collateral for the 2007 DOT. CP 244-46.

I. Procedural History

In June 2011, WaFed unsuccessfully moved for summary judgment against TMG, claiming it was exclusively entitled to the beneficial interest of TMG's Latecomers Agreement. .CP 204-05 TMG opposed WaFed's motion, arguing, among other things, that TMG never intended to encumber its right to seek reimbursement for construction costs of the Sewer Facilities, and never discussed with Horizon the notion that its reimbursement rights under a Latecomer's Agreement was available as collateral for the Line of Credit. Because genuine issues of material fact surrounded the intent of TMG and Horizon as to what collateral was included at the time the 2007 DOT was executed, TMG argued that summary judgment was improper. Id. The Court agreed. CP 174-77.

In May 2012, after the completion of discovery, TMG and WaFed cross-moved for summary judgment on the issue of whether the 2007

DOT collateralized the Latecomer's Fees. TMG prevailed, and this appeal followed.

IV. ARGUMENT

A. Standard on Review

As appellate court reviews summary judgment orders de novo, performing the same inquiry as the superior court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The superior court properly grants summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Morin v. Harrell, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)). Here, the trial court properly interpreted the 2007 DOT, finding that Latecomer's Fees were not part of the security given by TMG to Horizon to secure its Line of Credit.

B. TMG Had Standing to Enter Into the Latecomer's Agreement

As an initial matter, WaFed argues that TMG could not enter into the Latecomer's Agreement because it no longer owned the Sommerwood property at the time the agreement was signed. But RCW 57.22.010 provides that an owner of property within the district's boundaries may contract with the district "for the purpose of permitting extensions to the district's system to be constructed by such owner at such owner's sole cost

where such extensions are required as a prerequisite to further property development.” That is, owners of any property within the district’s boundaries may contract for latecomer’s fees if they construct sewer facilities from which other property owners would benefit. Here, Sommerwood was not the only property that benefited from TMG’s construction of the Sewer Facilities.

TMG owned several other plats within the District’s boundaries that benefited from the Sewer Facilities. Therefore, TMG and the District were in full compliance with RCW ch. 57.22 when the Latecomer’s Agreement was signed after Horizon’s foreclosure of the 2007 DOT.

C. Security Agreements are Construed as Contracts

Security agreements are subject to the same rules of construction as contracts. Parker Roofing Co. v. Pac. First Fed. Sav. Bank, 59 Wn. App. 151, 155, 796 P.2d 732, 734 (1990) (citations omitted). Basic principles of contract law require that parties to a security agreement reach a meeting of the minds. In re Barton, 37 B.R. 545, 547 (E.D. Wash. 1984). Interpreting the scope of a security agreement requires dealing “with the intent of two parties to a contract in an effort to determine their relationship and the obligations flowing therefrom.” Id. A mixed question of law and fact, the parties’ intent will be determined from

considering “the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.” Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). When extrinsic evidence leads to only one reasonable interpretation of a contract, intent can be decided as a matter of law on summary judgment. Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

D. Neither TMG Nor Horizon Intended to Include as Collateral TMG’s Right to Reimbursement for Construction Costs

Latecomer’s agreements, also referred to as recovery contracts or reimbursement agreements, document the right of a property owner who has installed street or utility improvements to recover a portion of the costs of those improvements from other property owners who later develop property in the vicinity and benefit from the improvements. See Poulsbo Group, LLC v. Talon Dev., LLC, 155 Wn. App. 339, 347 n.3, 229 P.3d 906 (2010). Such contracts are specifically authorized under RCW ch. 57.22, et seq. And such contracts may be used as collateral so long as the

parties intend that purpose and the security agreement reasonably describes them.

1. Testimony from Horizon and TMG Demonstrates Neither Party Intended to Secure the 2007 DOT with Latecomer's Fees

Whether an asset is included as collateral does not depend on the categories that the parties specified in the security agreement but depends instead on “affidavits relating to the factual intent of the parties at the time of execution of the security agreement.” Barton, 37 B.R. at 548. That is, the parties’ intent determines whether an asset is properly included as collateral under a security agreement.

In Barton, the court considered whether a creditor had a security interest in payments made to a debtor from the United States Department of Agriculture. Id. at 545. The court found that the principal inquiry was whether the creditor and debtor, “in an effort to determine their relationship and the obligations flowing therefrom,” intended the security interest to encompass these payments. Id. at 547. Ultimately the court concluded that the payments were a “general intangible,” and found that the security agreement expressly covered general intangibles. However, these factors were not dispositive in the absence of an intent by the parties to include the specific collateral. Id. at 546-47.

Here, Mr. Hall, testified that in 2007, at the time the Sommerwood property was substituted as collateral, he never discussed including Latecomer's Fees as collateral with Dick Buss (TMG's former CFO) or anyone else at TMG. That is, at the time TMG executed the 2007 DOT, neither party contemplated that TMG's right to reimbursement for future construction costs would be a source of repayment or collateral for Horizon's Line of Credit. Mr. Hall's testimony is supported by the documents in Horizon's loan file, which consistently value Horizon's collateral on an "as is" raw land basis. And his testimony is consistent with the conspicuous absence of a UCC financing statement collateralizing general intangibles, which would encompass TMG's reimbursements in the form of Latecomer's Fees under the Latecomer's Agreement with the District.

Hence, regardless of WaFed's arguments that payments under TMG's right to reimbursement constitute "rents," "profits" or "proceeds," the intent of both debtor and creditor are unmistakable. Neither Horizon nor TMG ever intended, let alone contemplated, that TMG's right to reimbursement for future development would be collateral for the Line of Credit secured by the Horizon DOT.

2. The Sewer Facilities Were Always Intended to be Conveyed to the District; Thus, no Intent Existed for Them to be Treated as an Improvement or Fixture

RCW 57.08.005(9) empowers a water and sewer district to compel every property owner within its boundaries to obtain water and sewer service from it. WAC 173-240-104(1) takes that mandate a step further providing that “domestic sewage facilities will not be approved unless ownership and responsibility for operation and maintenance is by a public entity.” Hence WaFed’s claim of any ownership right in the sewer facilities (the lift station and 3,300 lineal feet of water/sewer main, hereinafter “Sewer Facilities”) fails as a matter of law, since WaFed could never own or operate the Sewer Facilities.

In compliance with this statutory mandate, from the time the Sommerwood plat received preliminary approval in 2004, the tract on which the sewer lift station was to be located was earmarked to be severed from the Sommerwood plat and conveyed to the District. (The bulk of the sewer main is located within the public right-of-way, off-site of the Sommerwood property, so no deed to the District was necessary.)

It cannot be said that the 2007 DOT reasonably contemplated Latecomer’s Fees as “proceeds” of the Sewer Facilities when TMG was

under a pre-existing duty, and Horizon was on constructive notice because of the plat approval, to convey the Sewer Facilities to the District in consideration for the District's agreement to provide water and sewer services. Indeed, the "right" that Horizon received through the trustee's deed (and to which WaFed is entitled as successor-in-interest to Horizon) was the right to receive those water and sewer services from the District – not TMG's right to receive Latecomer's Fees as reimbursement for constructing the Sewer Facilities.

3. No Personal Property was Conveyed to Horizon via the Trustee's Deed Confirming the Parties' Lack of Intent to Collateralize Latecomer's Fees

Washington law provides that where a deed is clear on its face, one does not have to look to extrinsic evidence for interpretation. Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 56, 64, 277 P.3d 18 (2012). Here, the Trustee's Deed conveys only real property to the grantee, not personal property:

The Grantor, ... as present Trustee ... under that Deed of Trust, as hereinafter particularly described, in consideration of the premises and payment recited below, hereby grants and conveys without representation or warranty, expressed or implied, to HORIZON BANK, GRANTEE, that real property, situated in the County of Snohomish, State of Washington, described as follows: See Exhibit A.

CP 220-24. Exhibit A provides the legal description of only real property.

Exhibit A contains no mention of any personal property.

RCW 61.24.050 provides:

When delivered to the purchaser, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired.

Because every word in the trustee's deed must be given meaning, construing the deed to convey personal property would render the term "real property" meaningless. Newport Yacht Basin, 168 Wn. App. at 67; Albice v. Premier Mort. Svcs. of Wash., Inc., 157 Wn. App. 912, 923, 239 P.3d 1148 (2010) (citations omitted) (holding every word, clause and sentence must be given effect in a deed); Bain v. Metropolitan Mort. Grp., Inc., 175 Wn.2d 83, 109, 285 P.2d 34 (2012) ("This is a significant power, and we have recently observed that "the [deed of trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.""). Moreover, once the bid is accepted and the trustee's deed recorded the sale is final. RCW 61.24.050. Here the recording took place on September 25, 2009 and has the

recording number 200909250526. Assuming arguendo TMG's right to Latecomer's Fees was a personal property right secured by the 2007 DOT (which it was not), the fact that no personal property was conveyed at the foreclosure sale both destroys WaFed's claim to the security as part of Horizon's collateral and supports TMG's position that the potential, future right to Latecomer's Fees was never meant to be included as collateral.

E. Collateral Must be Reasonably Identified in the Security Agreement

A creditor must use descriptions which can "reasonably identify the collateral" in the security agreement. RCW 62A.9A-108(b). The best, most complete method for describing collateral is to list it specifically – e.g. "reimbursement rights" or "other development related rights or entitlements." Id.

For example, in Stockton, Whatley, Davin & Co. v. C.I.T. Corp., 414 So.2d 606 (Fla. 1982), a Florida court addressed a similar scenario in which a secured creditor tried to collect latecomer's, or reimbursement fees, from a developer even though the parties' security agreement failed to specify such fees. Id. at 607. Although the parties had included as collateral sewer service fees, they did not specifically list the developer's right to sewer reimbursement/connection fees. Id. at 607-08. The court

denied relief to the complaining creditor, holding the creditor “could have properly protected itself by more artfully drafting its document to include connection fees, but having failed to do so, it cannot now claim such an interest.” Id.

Like the creditor in Stockton, Horizon had the opportunity to protect itself. Had Horizon intended to include TMG’s right to reimbursement for construction costs of the Sewer Improvements as collateral for the Line of Credit, Horizon could have listed specifically the right to reimbursement, or the right to Latecomer’s Fees, in the 2007 DOT. Had Horizon done so, TMG would have been on notice that the right to reimbursement for construction costs (Latecomer’s Fees) constituted collateral under the 2007 DOT to which WaFed succeeded. But Horizon did not specifically identify as collateral either the right to reimbursement or Latecomer’s Fees.

1. A Security Agreement May Use Categories to Reasonably Identify the Collateral

Aside from specifically describing as reimbursement rights or Latecomer’s Fees, Horizon could have included the category “general intangible.” A catch-all or residual category under the UCC, “general intangible” means personal property, including payment intangibles and

“things in action” (e.g. choses), other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. RCW 62A.9A-102(a)(42); see also Crichton v. Himlie Properties, 105 Wn.2d 191, 194-95, 713 P.2d 108 (1986) (affirming bankruptcy court’s finding (on certified question) that the right to payment from a real estate contract assignment constituted a general intangible, not a contract right).

In 2007 TMG’s right to seek Latecomer’s Fees was a contingent right that required several events to occur before that right vested – such as the actual construction of the Sewer Facilities, the execution of a contract between TMG and the District providing for the collection of Latecomer’s Fees, and future connections to the Sewer Facilities by third parties. The UCC categorizes such potential, future rights as “general intangibles” because they do not fall under any other category of personal property. RCW 62A.9A.102(42). Courts repeatedly hold such contingent rights to be “general intangibles”: Crichton, 105 Wn.2d at 194-95, supra, Friedman, Lobe & Block v. C.L.W. Co., 9 Wn. App. 319, 321-22, 512 P.2d 769 (1973) (holding the assignment of a portion of an expected recovery in a pending lawsuit to be a general intangible); In re Plasterer’s

Estate, 49 Wn.2d 339, 341-42, 301 P.2d 539 (1956) (holding the right to payment of money from Seller's Assignment of Contract and Deed to be a general intangible); In re American Home Furnishings Corp., 48 B.R. 905, 908 (W.D. Wash. 1985) (holding interest in a tax refund to be a general intangible); In re Fort Dodge Creamery Co., 121 B.R. 831, 833 (1990) (also categorizing tax refunds as general intangibles); Matter of Litchfield Const. Mgmt, Inc., 137 B.R. 98 (D. Conn. 1992) (holding debtor's right to return of cash bond upon completion of construction to be a general intangible).

2. Contingent Future Rights Such as Latecomer's Fees are not Proceeds

Contrary to WaFed's position, the potential, future right to receive Latecomer's Fees is not a "proceed," and TMG joins in the District's brief analyzing this issue. The Latecomer's Fees cannot be proceeds from an improvement or fixture for three reasons: (1) as the District points out in its brief, no intention ever existed for the Sewer Facilities to be annexed to the Sommerwood property; (2) Latecomer's Fees are not derived from use or disposition of the Sewer Facilities; and (3) assuming that Latecomer's Fees were derived from the use or disposition of the Sewer Facilities, then the District, not WaFed, would have the right to collect those fees.

Proceeds are generally derived from the disposition or use of collateral itself as the lists defining proceeds demonstrate: (1) “sale, lease, license, exchange, or other disposition of collateral;” (2) “whatever is collected on or distributed on account of, collateral;” (3) “rights arising out of collateral.” RCW 62A.9A-102(64). For example, WaFed’s sale of the collateral to Sommerwood Place, LLC in July 2011 constitutes a “disposition” of that property from which proceeds are realized. CP 249-62.

And when the Sommerwood property was conveyed to the District, the District agreed, as consideration, to provide sewer and water services to those that connect to the District’s system. Hence, no monetary proceeds exist from the “sale, lease, license, exchange, or other disposition of collateral.” RCW 62A.9A-102(64)(A). Rather, a right to water and sewer service exists as a result of that conveyance – a right that WaFed inherited from Horizon under the 2007 DOT.

Further, while the usage fees collected by the District technically may be proceeds from the sewer facilities, only the District has the statutory right to collect these proceeds: TMG never had any right to those usage fees. These usage fees are not Latecomer’s Fees. See CP 929-30 ¶¶ 9-14. That is, usage fees are not collected by the District for

purposes of reimbursing TMG for its construction costs under the Latecomer's Agreement. Rather usage fees are generated by the operation or use of the water and sewer facilities as contemplated by the language: "whatever is collected on or distributed on account of, collateral." RCW 62A.9A-102(64)(B).

3. Latecomer's Fees are not "All Other Rights" or Rights "Arising Out of the Collateral"

The phrase "all other rights" is too vague to adequately describe a general intangible like the potential future right to Latecomer's Fees. So, for example, In re I.A. Durbin, 46 B.R. 595, 600 (1985), the security agreement failed to include the category "general intangibles." Id. at 597, 600-01. And, the phrase "all property rights" was too broad to give notice to a creditor that the collateral may consist of general intangibles. Id. at 600; see also Ingersol v. Seattle-First Nat'l Bank, 63 Wn.2d 354, 355-57, 387 P.2d 538 (1963) (holding that mortgage secured by a farm and "all other supplies and equipment...located thereon" did not include the cattle as "cattle" were not specifically mentioned or identified by marks, brands and location).

The same analysis applies here. No reservation of rights in general intangibles or Latecomer's Fees appears in the 2007 DOT. And the phrase "all other rights" is not specific enough to capture these payments either.

Moreover, the potential future right to Latecomer's Fees does not "aris[e] out of [the] collateral." RCW 62A.9A-102(64)(C). That is, Latecomer's Fees are not automatic; they must be requested by the developer and then third parties must connect to the sewer facilities. Indeed, they are not related to the presence of the collateral on the land, but rather to the cost of construction. For example, the bulk of the sewer main is located in the public right of way, which TMG did not own, and which is located outside of the Sommerwood plat. Yet TMG is entitled to reimbursement for the cost of constructing the sewer main in the public right-of-way under RCW 57.22.020.

The cost of construction is shared on a pro rata basis by all property owners served by the Sewer Facilities installed by TMG under RCW 57.22.020. So, for example, if TMG owned all of the properties that connected, TMG would not have requested Latecomer's Fees because the practical effect would be that it would simply be paying itself. CP 267-68. And if properties not owned by TMG did not connect to the sewer improvements, then again no Latecomer's Fees would be paid.

F. Washington Federal Cannot Remedy Horizon Bank's Failures by Filing a Post-Foreclosure Financing Statement

Horizon's failure to include "general intangibles" in its DOT is not an anomaly. From a sampling of 10 deeds of trust from the Snohomish County's Recorder's website that Horizon recorded in 2007, none include development-related rights, entitlements, or the category "general intangibles." CP 680-775. Indeed, Mr. Hall testified that for non-real property collateral, Horizon generally filed a UCC financing statement. Hence, it would be unusual for general intangibles to have been included. And indeed, Horizon filed no such UCC financing statement here.

Discovering Horizon's failures was no doubt disappointing to WaFed, which includes routinely in its deeds of trust a reference to its recorded "Master Form Deed of Trust." This master deed of trust specifically identifies a security interest in "[a]ll general intangibles relating primarily to the development or use" of property, a common practice with security agreements related to real property development. CP 776-88; see U.S. v. Ross, 131 F.3d 970, 977-78 nn.2-3 (11th Cir. 1997) (involving a security agreement that described collateral as "the General Intangibles and Developer's Rights"); ConocoPhillips Co. v. Milestone Pac. Prop., LLC, No. C 10-00079 SBA, 2010 WL 3619576, at

*2 (N.D. Cal. Sept. 13, 2010) (involving deed of trust that described as collateral “all general intangible relating primarily to the development or use of the [Real Property].”).

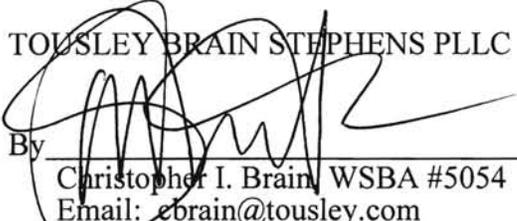
Try as it might, WaFed cannot create, attach and perfect a security interest out of thin air. The UCC financing statement WaFed filed in June 2010 is useless because the underlying security agreement – the 2007 DOT – neither generally identifies the category of general intangibles, nor specifically identifies TMG’s right to Latecomer’s Fees, reimbursement or development rights, or entitlements, prerequisites to an effective financing statement. Mitchell v. Shepherd Mall State Bank, 458 F.2d 700, 704 (10th Cir. 1972) (holding that a financing statement cannot enlarge a security agreement so as to create a security interest in collateral that is not described therein).

V. CONCLUSION

For the foregoing reasons, TMG respectfully moves the Court to uphold the trial court’s order on summary judgment.

DATED this 12 day of December, 2012.

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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 6th day of December, 2012, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Gregory R. Fox, WSBA #30559	<input type="checkbox"/>	U.S. Mail, postage prepaid
Michael A. Nesteroff, WSBA #13180	<input checked="" type="checkbox"/>	Hand Delivered
Ryan P. McBride, WSBA #33280	<input type="checkbox"/>	Overnight Courier
LANE POWELL PC	<input type="checkbox"/>	Facsimile
1420 Fifth Avenue, Suite 4100	<input type="checkbox"/>	Electronic Mail
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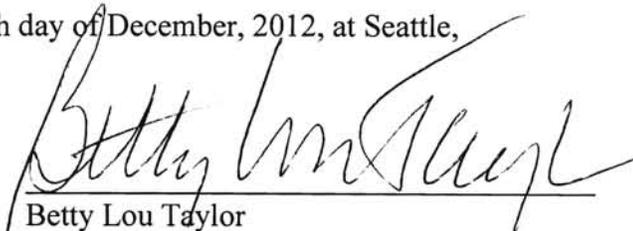
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 6th day of December, 2012, at Seattle, Washington.


Betty Lou Taylor