

No. 70513-0-I

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

EDWARD J. ELEAZER and MAYA E. ELEAZER,
Husband and Wife and Their Marital Community,
Appellants,

v.

BUSH HOUSE, L.L.C., A Washington Limited Liability Company,
its Successors and Assigns; SNOHOMISH HEALTH DISTRICT,
a Municipal Corporation of the State of Washington; and
LOYAL MARY NORDSTROM, an individual,
Respondents.

ON DISCRETIONARY REVIEW FROM
SNOHOMISH COUNTY SUPERIOR COURT

**RESPONDENTS BUSH HOUSE LLC'S RESPONSE TO
APPELLANT ELEAZERS' BRIEF**

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I. INTRODUCTION

Except for a very few facts amended below, Commissioner Kanazawa, who granted Discretionary Review of this case, wrote a “FACTS” section which can hardly be improved upon; better than any party to this case has ever put forward. The Commissioner’s Facts will, therefore, be incorporated by reference, subject only to corrections made below.

Commissioner Kanazawa granted Discretionary Review based on her legal analysis of two legal issues: Merger and Agreement to Agree, the latter of which includes Specific Performance. The Commissioner specifically stated near the middle of page 8 of her Ruling that “Other issues raised by the Eleazers do not meet the stringent criteria for discretionary review.” Although she stated that other issues raised by the Plaintiffs/Appellants (hereinafter “Eleazers”) could also be pursued, the principle Defendant/Respondent (hereinafter Bush House) will concentrate on the Commissioner’s issues. Frankly, Bush House will not address issues for which Discretionary Review was not granted. They were addressed before the Commissioner in a brief, incorporated by this reference. (They may be referenced by a brief from Ms. Nordstrom’s counsel.) Since the Commissioner’s Ruling was not challenged,

Discretionary Review should be limited to issues which she felt met the stringent criteria required in order to qualify for the expedited Extraordinary Writ procedure such Review was designed to replace. Crooks, *Discretionary Review of Trial Court Decisions Under Washington Rules of Appellate Procedure*, 61 WASH L REV 1541 (1986).

II. Amended Facts

1. The last 2 lines at the bottom of the 1st page of the Commissioner's Ruling should be amended to read "... 2-sentence promise contained in a *Northwest Multiple Listing Service (NWMLS) Form 34* addendum *included with Eleazers' offer in an NWMLS Form 21* Real Estate Purchase and Sale Agreement (*REPSA*) *which was accepted by Nordstrom and closed 6½ years ago in May 2007.*" CP580-82; 673, ¶s 3&4; 679.

2. The 4th and 5th to last lines on Ruling page 2 contain a sentence which is not based on the record. Anyone who is at all familiar with septic systems – and that covers virtually all parts of Snohomish County outside the Urban Growth Areas (UGAs), and even some areas within UGAs – knows that a Reserve Area is a location reserved for the next drainfield if and when a drainfield fails. Further, Eleazers have never claimed they did not know what Reserve Area meant on the as-built

diagram for the Bush House septic system. See Exhibit A, CP289; 569, ¶4 and 577; 335, ¶3; CP674, ¶8; 7, ¶5 – 9, ¶10; 62.

3. On Ruling page 3, the boilerplate language in most deeds warranting against easements materially affecting the value of, or unduly interfering with, a buyer's reasonable use of property being purchased, quoted with "emphasis added" by underlining the easement language, was inappropriate. This same language reappeared at the middle of page 13 of the Ruling followed by this statement:

If the easement to be granted under the Form 34 agreement materially affects the value of the Eleazer property or unduly interferes with the Eleazers' reasonable use, the agreement is inconsistent with the deed.

The Eleazers admit they knew, before purchase, of the On-Site Septic (OSS) drainfield (CP335, ¶3) and promised to grant a recorded OSS Easement for access and maintenance. CP 673, ¶s 3&4; 679. Eleazers knew how the drainfield affected the value of the property for their reasonable residential use before they offered \$250,000 for it. Frankly, the Commissioner has treated Eleazers as if they were bonafide purchasers (BFP's) for value who had absolutely no knowledge of the drainfield.

That is exactly what the Eleazers' original Complaint was designed to do; namely, create the false impression that Eleazers did not know the OSS drainfield was in their front yard. The original Complaint stated they

didn't know about (because their title insurance company failed to disclose; CP476-477, ¶2 and 480-490; 673, ¶5) the Snohomish Health District (SHD) letter and Declaration of Restrictive Covenants. Both were recorded in lieu of an easement because an easement arguably would have "merged" into the fee if created while Ms. Nordstrom had unity of title. The original Complaint, however, omitted of any mention of Eleazers' Form 34 promise to grant an OSS easement for access and maintenance. CP710-721, *esp.* 712-713. Besides, there is no authority cited or known of which would hold that the properly recorded SHD letter and Declaration of Restrictive Covenants are invalid just because a title company's underwriters negligently failed to find and report them.

4. Similarly, the 3rd through 5th lines from the top of Ruling page 4 failed to note that Eleazers' first attorney did not advise SHD of their Form 34 promise to grant a recorded OSS Easement. CP561-562. As noted above, Form 34 continued to be undisclosed in Eleazers' original Complaint. CP 712-713. This omission made it falsely appear Eleazers bought the property without knowledge of the OSS drainfield in their front yard and Reserve Area in their backyard. CP523, ¶11 – 524.

III. The RAP 2.3(b)(2) Standard For Discretionary Review

In the first half of the first full paragraph on page 8 of the Commissioner's Ruling she correctly notes that there are two elements to establish in order to qualify for discretionary review under RAP 2.3(b)(2) (not argued in Superior Court; CP124-148 and 25-34). The first is "probable error" committed by the trial court. The second is that the trial court decision "substantially alters the status quo or substantially limits the freedom of a party to act". In this case that means that the trial court must have committed probable error regarding the doctrine of merger of the contract into the deed AND with regard to failing to recognize that Form 34 was merely an Agreement to Agree that could not be specifically enforced. It also means that the trial court ruling, that merger did not apply, changed the status quo and/or substantially limited the Eleazers' freedom to act AND that, by enforcing the Form 34 easement agreement against Eleazers, Eleazers' status quo was changed and/or their freedom to act was substantially limited.

As will be argued below, there absolutely was not probable error in holding that merger did not apply and that Form 34 was an enforceable agreement. Those issues are, however, at least arguable. What is not arguable is that the trial court decision altered the status quo or

substantially limited the Eleazers' freedom to act. This is a real estate transaction which closed 6½ years ago. The Eleazers have been living on – had possession of – their property for 6½ years with knowledge -- before offering to buy, before closing and ever since closing -- that there was and is a commercial OSS drainfield in their front yard, as well as its Reserve Area in their backyard. CP 335, ¶3; 569, ¶4 and 577. Eleazers have made no changes to the exterior of the property. Their front yard and back yard are the same today as they were on the day of closing. There has been no change in the status quo by constructing new structures or in their lack of freedom to do so in the easement areas. It is Eleazers' lawsuit which seeks to change the status quo by nullifying the Bush House historic hotel's use of its 20 year old commercial OSS drainfield. This would make it impossible for the hotel to reopen and render the hotel and its real property unusable. In short, the Commissioner's Ruling stands the second element of RAP 2.3(b)(2) on its head.

This is not merely an adversarial conclusion. It is supported by the 1986 article by the then Court Commissioner of the Washington State Supreme Court. Crooks, *supra*, **Discretionary Review**, 61 WASH L REV AT 1544-1547 which includes the following statements:

It can be argued, however, that subsection (b)(2) should be applied only when a trial court's order has immediate effect

outside the courtroom. This interpretation of the “status quo” test and “freedom of a party to act” test would fit with the notion that subsection (b)(2) was intended to focus on injunctions and the like.

x x x

The appellate system operates with a plain and intentional bias against interlocutory review.

The rest of this brief will reverse discussion of the two legal issues which Commissioner Kanazawa concluded met the stringent criteria for discretionary review. Bush House simply finds that reversing the order is more comfortable.

IV. The Merger Doctrine Does Not Apply

A. Legal Background for Analysis of Seven Factors

In 2001, counsel for the Bush House was counsel for Lisa Brown in an appeal before this Division entitled *Brown v. Johnson*, 109 Wn App 56, 34 P.3d 1233 (2001). One of the two major issues in Lisa Brown’s cross-appeal involved the doctrine of merger of the contract into the deed. What was discovered almost immediately was that the word “merger” was thaumaturgic language, *i.e.* a magic word, which seemed to bring analysis to a standstill. At least, that was true until the unanimous panel opinion written by the late Judge William Baker, who was joined by Judges Grosse and Ellington. The panel did not “follow” the argument as stated in Lisa Brown’s brief. But the opinion did apply merger as analyzed by

Brown's counsel.¹

Unfortunately, the word “merger” continues to produce a knee-jerk automatic reaction among many attorneys and judicial officers. Probably the biggest reason for that stems from a lack of extensive analysis of every factor in the cases. It is a common law doctrine and, as Justice Oliver Wendell Holmes, Jr. pointed out, “The life of the law has not been logic; it has been experience.” *THE COMMON LAW* (1881). Because only one or two of multiple factors are involved in singular cases, analysis (or even listing) of all factors does not occur.

Discovering and listing the factors is not easy as our own State Supreme Court stated in *Black v. Evergreen Land Developers, Inc.*, 75 Wn2d 241, 248, 450 P.2d 470(1969):

Intrigued by the problem presented [by the doctrine of merger of the contract into the deed], we have made an extensive, intensive, and, we must confess, frustrating exploration of the authorities to discover some way (on solid ground) around what Kent C. J. ... called “the impairment of the deed,” which he was unable to “surmount.”

Nevertheless, there are at least seven (7) inter-related factors to the doctrine of merger of the contract into the deed. Application of this

¹ Coincidentally, Judge Baker also authored another merger 2001 opinion. Merger of estates – the smaller estate (an easement) into a larger estate (a fee) – is “disfavored” when a subsequent unity of title occurred between the dominant and servient estates. *Radovich v. Nuzhat*, 104 Wn App 800, 805, 16 P.3d 687 (2001).

particular doctrine of merger to this case has not only been erroneous overall, but in direct conflict with most, if not all, of those factors. The most tangible example of that misapplication in Commissioner Kanazawa's Ruling is found at page 12. It reads as follows:

... Division 3 of this Court held in Barnhart an agreement to grant an easement in a real estate contract was "central, not collateral, to the agreement to convey" title, and any contractual right to enforce such agreement ended when a deed was issued. ...

X X X

Under Barnhart, the Form 34 agreement to grant an easement appears to be central, not collateral, to the agreement to convey title.

This is an application of the word "merger" which fails entirely to distinguish the facts in *Barnhart v. Gold Run, Inc.*, 68 Wn App 417, 843 P.2d 545 (1993) from the facts of the instant case. In the *Barnhart* contract, the *seller* (Gold Run) promised to convey the dominant estate *together with a plat easement* over the adjoining servient estates. In fact, the seller's deed did exactly that. The deed contained both the lot conveyed as well as the appurtenant plat easement so the easement was "central" to the deed. 68 Wn App at 422.²

² But it was held that the plat easement "shifted" to a prescriptive easement so the plat easement was quieted in neighbors. 68 Wn App at 423. Barnhart wanted the plat easement as well as the prescriptive one but the "shifted over" rule treats prescription as a fully fungible alternative and a total substitute so the contract and deed were read as in compliance. Then, because the contract and deed – identical to one another – "merged," and the "shift" made their conveyance compliant, there was no breach to which the

But in the instant case, it was the *buyers*, Eleazers, who contractually promised – in Form 34 – to grant a recorded OSS Easement for access and maintenance. CP679 & 582. The seller, Ms. Nordstrom, did not contractually promise the OSS easement. Rather, Ms. Nordstrom promised to convey the servient property and she did. Her seller's deed did exactly what the contract promised she would do. The deed was not supposed to grant, declare or reserve an easement.

Therefore, the Eleazers' contractual promise to grant an OSS Easement was not "central" to the *seller's* deed Ms. Nordstrom promised to convey. The easement was "collateral" to the seller's promise to convey title. In fact, the seller's deed was not capable of "granting" an easement to the seller. A document other than the deed had to be executed – after conveyance of the deed – in order to grant an OSS Easement back to the seller. If that is not obvious enough, an examination of the seven inter-related "factors" based on treatise and caselaw language hopefully will be. The seven factors are:

1. Merger is tied to the *seller's* contractual promise to convey a specific quality of title in the *seller's* deed.

attorney fee clause could apply. 68 Wn App at 424. It is not really a merger case except as to the attorney fee clause.

2. The seller's contractual promise to convey a specific quality of title is, therefore, "central" to the function of the seller's deed in the transaction.

3. Merger usually arises only if the conveyance of title in the seller's deed is "different than" the contract promised.

4. The sellers' contractual duty to convey a specific quality of title is "presumed," in the absence of contrary evidence, to merge into the seller's deed because the parties have the "privilege" of changing their agreement up until the seller's deed is granted and the agreed property is conveyed to the buyer.

5. But this presumption will be overcome if it would be contrary to the parties' "apparent intent," would defeat their "expectations" or would produce an "inequitable result."

6. In contrast, any contractual promises beyond the seller's conveyance of title, by either the buyer or seller, are "collateral" to the conveyance function of the seller's deed and, therefore, do not merge into, but instead survive, the deed conveyance. (It appears this "collateral" factor is sometimes referred to as "terms that are not inconsistent with the deed".)

7. Finally, as Judge Baker opined in *Brown v. Johnson*, 109 Wn App at 60, beyond these inter-related factors are exceptions for fraud and mistake. It seems likely that fraud and mistake enter into the equation when one of the parties is arguing for a result (a) contrary to the parties' apparent intent, (b) which would defeat the parties' expectations and/or (c) producing an inequitable result, as indicated in factor 5 above.

B. Treatise Authority Establishes Six of Seven Factors

As noted by the late Professor William Stoebeck and his successor, Professor John Weaver, the word "Merger has a number of different meanings in the legal lexicon". Stoebeck and Weaver, 18 WASH PRAC §16.4, page 236 (Thomson/West 2nd Ed. 2004) (appears in section involving Merger of negotiations into a written contract). In another section of their treatise the two professors more dramatically add that "'Merger' is a curious word in the law, which has various meanings in several contexts." Stoebeck and Weaver, *supra*, 18 WASH PRAC §18.29, page 360 (in a section on Merger of a lesser estate into a greater estate). The two professors also note that "Merger does not operate with mechanical finality." Stoebeck and Weaver, *supra*, 17 WASH PRAC §6.87, page 461 (in a section on Merger of Estates). In a different section the two professors restate this proposition as follows. "[M]erger does not operate

with mechanical absoluteness.” Stoebeck and Weaver, *supra*, 18 WASH PRAC §18.29, page 360 (in another section on Merger of estates). And in yet another location the two professors refer to the word “merger” as “wonderfully pliable.” Stoebeck and Weaver, *supra*, 18 WASH PRAC §14.2, page 117 (in a section on Merger of the contract into the deed). “Merged” together, these five sections cover three of the “number of different meanings in the legal lexicon” that the word “merger” has; merger of negotiations into a contract, merger of a lesser estate into a greater estate and merger of the contract into the deed.

1. Factor 5 (and 7)

With respect to Merger of the lesser estate into the greater estate, the two professors elaborate on their comment that “Merger does not operate with mechanical *finality*” as follows in 17 WASH PRAC §6.87 at pages 461-462:

A major qualification on the doctrine is that there will be no merger if it would be contrary to the intent of the grantor and grantee, would defeat their expectations, or perhaps if it would produce an inequitable result. This qualification accounts for several situations in which Washington’s supreme court has refused to find a merger ... The Washington decisions give the overall impression that the supreme court has been quite willing to find reasons to avoid mergers.

See also Stoebeck and Dial, 2 WASH REAL PROP DSKBK, §17.12(2)(i) (WSBA 4th Ed 2009).

Likewise, in another section on Merger of Estates in 18 WASH PRAC §18.29 at page 360-361 the two professors elaborated on their comment that “merger does not operate with mechanical *absoluteness*” as follows:

It is sometimes said that merger does not operate if it would be contrary to the parties’ apparent intent or if it would defeat their expectations.

x x x

Washington and other jurisdictions say that no merger will occur if it is against the expressed or ... “presumed intention” [of the parties].

Frankly, discussion of the doctrine in Washington has occurred more with respect to its exceptions than to its actual application. Thus, Professors Stoebuck and Weaver inadvertently have some language in footnote 17 of §14.2 in 18 WASH PRAC at page 118 which particularly emphasizes that the exception is more the rule than the doctrinal application in Washington. There is a sentence in the text at page 118 which reads that:

Every other Washington decision that cited the [merger of the contract into the deed] doctrine held that it did not apply because the facts of the case fell within an exception to it.¹⁷

Footnote 17, at the end of this sentence, and after a string cite of five cases, states that:

The “diligent search” referred to in the text consisted of examining the citations to *Davis v. Lee*, which appears to be the original Washington decision on the doctrine, and of examining all decisions cited in the later opinions.

In the 2013 Supplement, footnote 17 is “replaced” with a new footnote 17 which adds an additional paragraph to the original footnote 17, but does not delete the language quoted above about a “diligent search.” But turning back to the text of §14.2 one will search in vain for the words “diligent search.” The reason is that the sentence containing those words was edited out of the text of the 2004 edition. It was not, however, edited out of the footnote. The footnote is referring to language which was in the 1995 edition of 18 WASH PRAC. In that 1995 edition, the “diligent search” language was found in §13.2 because the 2004 edition inserted a new chapter which changed the section number to §14.2. The “diligent search” language was found in the following text from the 1995 edition:

However, the vitality of the [merger of the contract into the deed] doctrine in Washington is open to question. As far as a diligent search shows, while the doctrine has been asserted in a number of Washington decisions, it has been applied in only one case, and that one did not involve title covenants.

More importantly the sentence was edited out not because the Professors disagreed with the statement, but because a new sentence was added in the 2004 edition after the above quote to make reference to a

subsequent case. *Barber v. Peringer*, 75 Wn App 248, 877 P.2d 223 (1994) became the second case applying the doctrine. In *Barber* it was applied by the Court of Appeals. The Supreme Court was the “only one case” referenced in the quote above from the 1995 edition. All of this discussion merely underscores an earlier quote from the treatise stating that “The Washington decisions give the overall impression that the Supreme Court has been quite willing to find reasons to avoid mergers.” 17 WASH PRAC, §6.87, page 462.

Perhaps the most recent example of the Supreme Court’s unwillingness to apply the merger doctrine with mechanical finality or absoluteness -- but to instead recognize that the doctrine is based upon presumed intention which, when evidence establishes it is inconsistent with the parties’ actual intentions and/or would be inequitable, merger will not be applied -- is *Ross v. Kirner*, 162 Wn2d 493, 172 P.3d 701 (2007). There the Supreme Court upheld the Court of Appeals’ reversal of a trial court which “granted summary judgment to Kirner, reasoning that the merger of the contract’s terms into the deed rendered Kirner’s failure to disclose the easements irrelevant...” 162 Wn2d at 498, 172 P.3d at 704. The trial court had applied merger with mechanical finality and absoluteness which was error. Both the Court of Appeals and Supreme

Court looked at the facts to see whether the presumption of merger should apply and found that it did not.

In *Ross v. Kirner* the real estate contract between the parties made no mention of an earlier easement which Kirner, the seller, did not disclose to Ross, the purchaser. After the contract was executed, but before the deed was conveyed, a survey Kirner commissioned “showed two new 15-foot-wide easements running east-west across the lot Kirner was selling to Ross.” 16 Wn2d at 497. Although a supplemental title report mentioned these two easements, it did not call special attention to them or include a copy of the new survey map showing where they were. Nevertheless, when Kirner signed the Statutory Warranty Deed the two new easements were included. Ross apparently didn’t discover this until about two years later. 162 Wn2d at 496-497. When Ross sued Kirner, as already noted, the trial court applied merger with mechanical finality and absoluteness. This was reversed. The exception applicable was that Ross claimed that Kirner’s failure to disclose the two new easements was a negligent misrepresentation.

2. Factors 2, 6 and 7

But the exception most frequently invoked in Washington cases is that the provisions of a contract are not merged into the deed if they are

promises or undertakings that would not be “central” to, *i.e.* within the function of, the seller’s deed of conveyance based on the contract. Such seller promises or undertakings are “collateral” to the seller’s conveyance of title. Stoebuck and Weaver, *supra*, 18 WASH PRAC §14.2, page 118.

In this case, the contractual provision in issue is the *buyers’ (Eleazers’) promise to grant* an OSS easement for access and maintenance. That means that the deed from the seller, Ms. Nordstrom, could not possibly be involved. Ms. Nordstrom could not “grant” herself an easement in her deed to Eleazers. And if Ms. Nordstrom had “reserved” an easement in her deed to Eleazers she would not have been in compliance – indeed, would have breached – the real estate contract between the parties. Further, although Eleazers now argue that Ms. Nordstrom could have “declared” an easement and recorded it before signing her deed to the Eleazers, she would have been committing a tort similar to that which Kirner committed against Ross by adding an easement between the time of the real estate contract and the deed.

3. Factors 1 and 3

There is one last point about the merger of the contract into the deed doctrine which also needs to be pointed out from treatise authority. In Stoebuck and Weaver, 18 WASH PRAC §14.2 at page 117 there is a

portion of text which has not yet been quoted. It reads as follows with emphasis supplied to certain key words because of their importance to analysis:

Generally when a *grantee* receives a deed, it is in fulfillment of *a promise the grantor has made to convey title*, either in an earnest money agreement or a real estate installment sale contract. Should the title covenants of the deed differ from those promised in the contract, *the party who complains of the difference, who is usually the grantee*, will be met by the doctrine of merger.

In other words, the doctrine of merger involves a *contractual promise by the deed grantor* (the seller) to the deed grantee (the buyer), which contractual promise is lacking in the deed. When the buyer complains, *the seller asserts the doctrine of merger*. It should hardly need to be pointed out that is the exact opposite of what is happening in this case. Here, Eleazers are the deed grantee buyers who made a contractual promise to grant an easement. Ms. Nordstrom (on behalf of her successor, the Bush House) is the deed grantor seller who complained, and it is the deed grantee buyers, Eleazers, who are asserting the doctrine of merger. In short, assertion of the doctrine of merger in this case stands the doctrine on its head.

The Eleazers will assert, as they have in the past, that all of these arguments are based upon “citation of secondary authority.” As will be

shown below, however, the secondary authority cited so far merely summarizes what the caselaw holds.

C. Seven Factors Are Set Forth in Washington Caselaw

1 (and 6). Merger Only Applies to the Seller's Duty to Convey A Specific Quality of Title and Non-Conveyance Promises Are Collateral And Not Subject To Merger At All.

Dunseath v. Hallauer, 41 Wn2d 895, 898-9, 253 P.2d 408 (1953)

quoted from and followed an annotation in 84 ALR 108, 1018 as follows:

“Where a contract for sale of land embraces stipulations other than those relating to the conveyance of the subject-matter, and imposes upon the vendor the duty of performing acts other than those required to assure to the vendee the character of title stipulated for, the contract is something more than one for the mere conveyance of the subject-matter at a designated time, hence the execution and delivery of the [vendor's] deed of the land is merely the performance of the provisions relative to transfer of the title. It is one of several executory acts stipulated for, therefore its performance does not affect the vitality of the original contract as to collateral matters which a vendor has obligated himself to perform. Accordingly, where there are collateral undertakings expressed in such a contract which are not satisfied by a subsequently executed deed of the subject-matter, these undertakings survive the acceptance of the deed, unless there are provisions in the [vendor's] deed inconsistent with the survival of such covenants or stipulations.” (Bold italics supplied.)

The above quote establishes two important points. First, that merger involves vendor (seller) duties in a contract, not vendee (buyer) duties. This is important because, as the two professors pointed out, it is

the seller who asserts merger against the buyer. The buyer cannot properly assert merger against the seller. 18 WASH PRAC, §14.2 at page 117. Second, seller duties do not merge if they do not have anything to do with the conveyance of title, *i.e.* are “collateral” to the real estate conveyance.³

2. The Seller’s Contractual Promise to Convey a Specific Quality of Title is “Central” to the Deed.

There are two recent Washington Court of Appeals cases which specifically use the term “central.” Their importance is that they establish that the seller’s contractual promise to convey a specific quality of title is “central” to the seller’s deed’s function in the particular transaction that was involved in each case. *Barnhart v. Gold Run, Inc., supra*, 68 Wn App at 424 and *Barber v. Peringer, supra*, 75 Wn App at 254.

3. Merger Usually Arises Only If the Seller’s Deed Conveys Title Different Than the Contract Promised.

As the two professors noted earlier, most Washington cases fall within some kind of “exception” to the merger doctrine. 18 WASH PRAC at §14.2, page 118. Probably the closest Washington law comes to expressly recognizing that merger usually arises only when the deed conveys title which is different from that promised in the contract is this Division’s case, *Barber v. Peringer, supra*, 75 Wn App 248.

³ In fact, because seller’s contractual obligations that do not deal with the seller’s duty to convey title are “collateral,” assertion of merger is incorrect and improper when collateral issues are involved.

Barbers bought a lot from Peringers. It had a driveway which, it was discovered after closing, encroached into adjoining property. Barbers sued the neighbor to establish prescriptive rights and, after Barbers won, sought contractual attorney fees from their seller, Peringer. Since the driveway was outside the legal description, since warranties only apply to property within a legal description, and since Barbers won the driveway, Barbers could not pursue a warranty claim or attorney fees expended against the neighbor.⁴

Under the circumstances, Barbers asserted that paragraph 24 of the contract regarding good and marketable title was breached by Peringer. If so, Barbers could get contractual attorney fees from Peringer. In other words, Barbers' claim was that the contract promised good and marketable title which, Barbers argued, included the driveway. But the deed did not convey title to the driveway. The deed used the record legal description whereas the driveway encroached beyond the record legal description into adjoining property.

Accordingly, the facts fit Factor 1, that the seller arguably promised more in the contract than the deed granted. Under those

⁴ *See* Stoebuck and Weaver, 18 WASH PRAC end of §13.5: "It is ironic that, to win [a warranty claim], the [deed grantee] must lose [to the third person claiming superior title]."

circumstances, Peringer as the seller was in a position to assert the doctrine that the contract merged into the deed. The question became whether the encroaching driveway violated the substantive contract provision providing for good and marketable title. If it did, the procedural attorney fee clause of the contract could be enforced against Peringer.

The late Judge Agid, who wrote for the unanimous panel, held that, even assuming paragraph 24 applied to a driveway outside the legal description, the deed did not include any legal description for the encroached upon property -- which it would have been the deed's function to do. Therefore, paragraph 24 was "central," it merged into the deed and attorney fees were, consequently, not available under the contract. 75 Wn App at 252.

Again, the present case is entirely inapposite. The deed in this case could not be used at all by Eleazers, the buyers, to "grant" an OSS easement to Ms. Nordstrom, the seller. The Form 34 OSS Easement promise was, therefore, "collateral" to the deed in this case. Moreover, as buyers, Eleazers have no standing to assert merger at all.

4. Merger Is A Presumption

Davis v. Lee, 52 Wash 330, 335-336, 100 Pac 752 (1909) is identified in previously quoted footnote 17 in Stoebuck and Weaver,

supra, 18 WASH PRAC §14.2, page 118 as “the original Washington decision on the doctrine” of merger of the contract into the deed. *Davis v. Lee*, decided in 1909, is already over 100 years old but perhaps even more interestingly, it quoted and followed a then-already 50 year old 1859 New York case which it quoted in 52 Wash at 335-336:

In all cases then, when there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. If plainly expressed in the very terms of the deed, the evidence will be decisive. If not so expressed, the question is open to other evidence, and I think in the absence of all proof, there is no *presumption* that either party, in giving or accepting a conveyance, intends to give up the benefits of covenants of which the conveyance is not a performance or satisfaction. (Bold italics supplied).

This quotation establishes two points: First, Factor 1 regarding contract stipulations to which merger is applicable only involve the title the grantor (seller) promised to convey; and Second, if the grantor’s (seller’s) conveyance of title is not the contractual provision in issue, then there is no *presumption* of merger. For current purposes, the second point is the most important. Merger is a presumption. It is not, as the two professors have already pointed out, to be applied with mechanical finality

or absoluteness. 17 WASH PRAC §6.87 page 461 and 18 WASH PRAC §18.29, page 360.

5 and 7. The Presumption Is Overcome If It Would Be Contrary to the Parties' Intentions Or Expectations Or Produce An Inequitable Result.

The lead case in the State of Washington regarding Factor 5 is *Black v. Evergreen Land Developers, Inc., supra*, 75 Wn2d 241. If ever there was a case that establishes that Washington's Supreme Court has refused to apply merger with mechanical finality or absoluteness it is *Black v. Evergreen*. The Supreme Court refused to apply merger contrary to the parties' intentions, expectations, or in an inequitable manner.

In 1962, Mr. and the late Mrs. Black bought Lot 72 of a hillside real estate development which looked east across Lake Washington. They were verbally promised that their territorial view of the Lake would not be impaired by future development. Unfortunately, these promises all occurred in a brochure and orally. They were not placed in the contract, nor were they placed in the deed. Two years later, in 1964, Lot 38 in front of Blacks' Lot 72 was sold and a house began to be built which would obstruct their view. Unsuccessful negotiations to reduce, if not resolve view obstruction which the Supreme Court voluminously recited, led Blacks to sue the developer, the real estate broker, the real estate agent, the

other lot owner and the other lot owner's builder. 75 Wn2d at 242-246.

Although the testimony at trial verified everything that the Blacks said about the oral representations, the developer, broker and agent all asserted merger of the contract (which had an integration clause) into the deed. In 75 Wn2d at 250, a unanimous Supreme Court stated:

There is no evidence in the record to show it was the intention on the part of either party that the oral covenant be merged either into the deed or the earnest money agreement. Rather, the asserted merger in the pleadings of the defendants appears clearly to be an afterthought relied upon by the defendants after suit was taken against them.

In other words, when the buyers complained that the promised covenant against view obstruction had not been provided, the sellers were the ones who asserted merger. This complied with Factor 1 of the doctrine. The Court didn't analyze the oral covenant as being "central" to a deed, but clearly a covenant against view obstruction would be "central" to the title promised. While the written contract wasn't different than the deed, the oral contract was. So Factor 3 was also involved. The Supreme Court did not discuss merger as a "presumption," but clearly the evidence established that intention and expectation of all parties was totally contrary to merger so it was overcome as a presumption that was contradicted by the evidence. Thus Factor 4 was also present.

Nevertheless, where *Black v. Evergreen* really stands out is in the Supreme Court's refusal -- despite its admitted extensive, intensive but frustrating research -- to apply merger contrary to the parties' intentions, expectations and in a manner which would produce an inequitable result. The above quote already establishes that point, but pages 249-252 of the decision contain multiple additional examples. Although several extensive body quotations could be made, perhaps the most applicable example would be the following in 75 Wn2d at 251:

To now hold that the "boilerplate" at the conclusion of the earnest money agreement would vitiate the manifest understanding of the parties as evidenced by this record *would amount to a constructive fraud practiced by the defendants upon the plaintiffs*. ... This [oral] covenant, though not recorded, is not contrary or inconsistent with the deed and, therefore, did not merge with the conveyance of the deed; rather, it has been shown to be an integral part of the purchase contract and is enforceable under the doctrine of partial integration. (Emphasis supplied.)

Here, misapplication of merger by the buyer against a seller (whose central contractual conveyance promises were identical to her deed), would be contrary to the parties' intention and expectation as set forth in Form 34 (the buyer's collateral promise to grant a recorded OSS easement), would produce an inequitable result and amount to a constructive fraud.

IV. Response to Eleazers' Agreement to Agree Argument

A. A Late Argument

The Agreement to Agree argument was never developed until the Request for Discretionary Review was filed in Superior Court by Eleazers' third and present counsel. (Compare CP366-367 with 131-137.) This is important for at least two reasons. First, the trial court did not have the time to consider, nor did the Defense have much time to respond to, the argument. Unlike the 28 day summary judgment timeframe, Eleazers' third counsel gave the minimum 5-day notice – even though the date had been chosen by agreement 1½ months earlier. CP50-51.

Second, as the Commissioner noted on page 8, the trial court never made a ruling on any argument. Therefore, the trial court could not have committed “probable error” as found by Commissioner Kanazawa and as required by RAP 2.3(b)(2). CP1-4, *esp.* 2.

Third, even if there were an argument for “probable error,” the alleged Agreement to Agree does not have any facts which support the “change in status quo” element of RAP 2.3(b)(2). The Eleazers bought their property with actual knowledge of the Bush House Hotel's commercial OSS drainfield in their front yard and it's Reserve Area in their backyard. CP335, ¶3; 289; 577; 7, ¶5 – 9, ¶10; 62; 674, ¶8. They lived there without any change in the property from 2007 to 2010, when

their failure to grant the easement was discovered, and from 2010 to 2012, when they filed suit, and from 2012 to the 2013 present. Eleazers want to change the status quo which has existed for 20 years, since 1993, 14 years before they purchased, and to the 2013 present, another 6 years. Therefore, Commissioner Kanazawa's conclusion that this second element of RAP 2.3(b)(2) was met stands the element on its head. It is the Bush House's status quo and freedom to act which would be destroyed if Eleazers' Review succeeded.

B. Eleazers' Form 34 Promise to Grant a Recorded OSS Easement for Access and Maintenance is One Term Of An Otherwise Fully Executed, 25 page, Real Estate Contract, Not An Agreement to Agree Too Indefinite To Specifically Perform/Enforce.

Commissioner Kanazawa concluded the Form 34 promise was an Agreement to Agree and then, as part and parcel of that conclusion, also concluded that the Form 34 terms were not specifically performable/enforceable because they were too indefinite.

1. Form 34 is Not An Agreement to Agree.

The Eleazers' REPSA with Ms. Nordstrom was 25 pages long. The entire contract was never put in the record because none of the issues litigated have much, if anything, to do with the details of the REPSA, except for Eleazers' Form 34 promise to grant an OSS Easement for

access and maintenance. Only the cover page and Form 34 are in the record. CP580-582; 673, ¶s 3&4; 679. Significantly, however, Eleazers' offer, including their Form 34 promise to grant a recorded OSS Easement for access and maintenance, was dated February 25, 2007. It was accepted by Loyal Nordstrom 5 days later on March 2, 2007. Two months later Eleazers signed their closing papers – and asked the Escrow/Closing Agent where the OSS Easement was (CP335, ¶4) – on May 8, 2007. These closing documents are not in the record, but this Court is asked to take judicial notice of the date Eleazers signed the attached pages 1, 14 & 15 of Eleazers' Deed of Trust (CP586 and Exhibit B), recorded right after their Deed from Ms. Nordstrom (CP327-330; 492-495; 584), in order to secure their purchase money loan from Venture Bank. Loyal Nordstrom then signed the Statutory Warranty Deed conveying what is now their property to Eleazers on the following day, May 9, 2007.⁵

The importance of this chronology is multi-faceted. First, this is a real estate purchase which occurred – was fully executed, but for the OSS

⁵ Eleazers' Declaration of May 13, 2013 (CP335, ¶14), quotes the escrow agent as telling Eleazers that Ms. Nordstrom had already signed the closing papers and so he was encouraging them to do so also. The conversation with the escrow agent about not knowing anything concerning a drainfield easement may be accurate, but the rest of the Eleazers' statement (that the escrow agent encouraged them to sign because Ms. Nordstrom already had) has to be a fable made out of whole cloth because, as documents cited in the prior sentence prove, Ms. Nordstrom signed closing papers the day after Eleazers, not before Eleazers. And the conversation did not "assure" Eleazers of anything, much less "reassure" them that the easement was waived. CP 126 vs 54.

Easement – in May 2007, 6½ years ago. This is not a preliminary negotiation case, but an all but fully executed, 6½ year old, 25-page written contract. Form 34, Eleazers’ offer, and accepted promise, to grant a recorded OSS Easement for access and maintenance, was one (1) term on one (1) page of an otherwise fully executed 25-page contract. It was not, and is not, an entirely separate pre-contractual, preliminary agreement to negotiate a recorded OSS Easement as the Eleazers belatedly argued – an argument Commissioner Kawazawa erroneously accepted.

2. Eleazers’ Cases Are All Distinguishable

Second, all of the cases Eleazers’ third counsel has cited in support of this belated Agreement to Agree argument are unequivocally distinguishable and cited only for their “sound-bite” quotes. They all involve preliminary negotiations for a new legal relationship, not enforcement of an existing, otherwise fully executed 6½ year old contract.⁶ And none of them involve existing easement uses.

⁶ See *FDIC v. Uribe, Inc.*, 171 Wn App 683, 287 P.3d 694 (2012) (an existing, written fully executed financing agreement was enforced (contrary to Eleazers’ summary), but an alleged separate oral agreement for an irrevocable line of credit, beyond the scope of the written financing agreement, lacked specific terms and consideration so that disputed facts about whether or not the contractor could obtain his own bond were not material facts which would overcome summary judgment that there was not, as a matter of law, an enforceable oral contract for a line of credit); *PE Sys., LLC v. CPI Corp.*, 176 Wn2d 198, 289 P.3d 638, 645 (2012) (a fully executed document, with an Addendum calling for a calculation with the answer left blank, was an enforceable “agreement with an open term,” the open term being supplied by a court or another authoritative source. If followed here, the Eleazers’ “material terms” in addition to Form 34 would be supplied

by easement common law and the terms regulatorily required by SHD); *16th Street Investors, LLC v. Morrison*, 153 Wn App 44, 52, 223 P.3d 513 (2009) (a detailed REPSA, with all printed terms agreed, attached a separate memorandum which was signed by all parties as part of the REPSA and was a conditional Agreement to Agree based on inclusion of future tense words such as “would” and “shall agree” so the entire “package as a whole” was not specifically enforceable. If this case were followed, the Eleazers would be required to return their home to Ms. Nordstrom and the Bush House in a 6½ year, after-the-fact rescission); *Keystone Land and Development v. Xerox Corp.*, 152 Wn2d 171, 177, 94 P.3d 945 (2004) (preliminary negotiations for purchase and sale of a commercial facility under two alternative theories – an agreement to sell and an agreement to negotiate in good faith a purchase and sale agreement – failed as a matter of law because the first theory was defeated by an express reference to the need for further negotiations – an Agreement to Agree – which is unenforceable in Washington, and the second theory – a contract to negotiate – also did not exist and the duty of good faith only exists with respect to the specific terms of an existing contract; there is no “free-floating” duty of good faith that is unattached to an existing contract); *Kruse v. Hemp*, 121 Wn2d 715, 853 P.2d 1373 (1993) (a lease with option to purchase requires that exercise of the option – creating a brand new entirely separate legal relationship – include specific and agreed material terms, usually by attachment of an agreed real estate contract form, which was not done -- over and above failure to attach a legal description or to discuss a proposed non-existing access easement); *Setterlund v. Firestone*, 104 Wn2d 24, 700 P.2d 745 (1985) (an earnest money agreement for commercial real estate with no note and deed of trust attached, as recited, and also not provided at trial, is not definite enough on material terms to allow specific performance, but is an unenforceable preliminary agreement); *Pacific Cascade Corp v. Nimmer*, 25 Wn App 552, 608 P.2d 266 (1980) (3 separate negotiation proposals for a ground lease for a commercial store, leading to an informal exchange of letters, and a 58 typewritten page draft lease, did not amount to an enforceable contract, especially when expressly conditioned on “appropriate [sic] documentation and signing” even though a survey and soils test were conducted, because no possession was taken as required to meet the part performance exemption to the statute of frauds); *Johnson v. Star Iron & Steel Co.*, 9 Wn App 202, 203-205, 571 P.2d 1370 (1973) (an exchange of letters between a company looking for financing and two associates who were financial brokers amounted to an offer, a counter-offer, a withdrawn counter-offer and an attempted acceptance of the counter-offer after it was withdrawn which it was “axiomatic” was nothing but negotiation); *Plumbing Shop, Inc. v. Pitts*, 67 Wn2d 514, 408 P.2d 382 (1965) (a subcontractor who provided a cost breakdown in support of his bid to the general contractor, who was low bidder for construction of a brand new ranger station, did not establish a contract for which he could claim damages because even an “implied contract” must include all material terms whereas, in this case, except for price, there were no specifics about material terms regarding manner of payment, time for completion, penalty provisions, bonding and time for progress payments when the parties contemplated a written contract; also custom and usage of trade are admissible to interpret specific contract terms, but cannot create a contract); *Sandeman v. Sayres*, 50 Wn2d 536, 314 P.2d 428 (1957) (a contract of employment specified an exact salary but also provided for an incentive bonus to be decided upon after 3 months performance based upon the market and acceptability of the do-it-yourself furniture product being sold, but no amount, percentage or process for bonus

None of Eleazers' cases involves one term of an existing 6½ year old written and otherwise fully *executed* contract. They all involve allegations about preliminary negotiations to enter into brand new *executory* agreements. None of them involve 6½ years of possession of the property. None of them involve an existing easement use.

Further, points of law distinguished in the cases, like the duty of good faith only applying to terms of an existing contract, and custom and usage only being applicable to interpretation of terms in an existing contract, apply here. Thus, Eleazers had (and have) a duty of good faith with respect to their promise to grant a recorded OSS Easement for access and maintenance in order that Ms. Nordstrom, then owner of the Bush House, may obtain the full benefit of performance. *Badgett v. Security State Bank*, 116 Wn2d 563, 569, 807 P.2d 356 (1991), cited by *Keystone*

determination was ever agreed upon and employment was eventually terminated by mutual agreement, after which the employee sued for the bonus which was held to be optional, entirely discretionary on the part of the employer because "to be decided by the company" and an agreement to agree concerning which there was not even a maximum or minimum range of payment, much less a final agreement); *Keys v. Klitten*, 21 Wn2d 504, 151 P.2d 989 (1944) (an earnest money agreement for purchase of a hotel's furniture, fixtures and equipment, conditioned on an acceptable 5-year lease of the hotel premises, did not amount to a specifically enforceable contract because the lease the buyer/lessee had prepared was entirely unsatisfactory to the seller/lessor); *Weldon v. Degan*, 86 Wash 442, 150 Pac 1184 (1915) (a written document signed in Chicago, Illinois to form a brand new corporation for manufacturing shoes, with an agreement to forfeit \$2,500 if any signer did not follow through, was not an enforceable contract when some signers decided on their own to create the corporation in Milwaukee, Wisconsin and only the corporate purpose, only one of six statutorily required elements for corporate formation, were specified by the written document).

Land and Development v. Xerox, supra, 152 Wn2d at 177. Likewise, custom and usage are applicable here to interpret Eleazers' specific, written, contractual terms promising to grant a recorded OSS Easement for access and maintenance of the OSS drainfield. *Badgett, supra*, 116 Wn2d at 572 and *Plumbing Shop v. Pitts, supra*, 67 Wn2d at 518.

3. The *Sandeman* Case Is Especially Distinguishable.

Bush House will, however “reply” to an argument Eleazers may make; that one of their cases is factually similar to the Form 34 promise to grant an OSS Easement for access and maintenance as an “Agreement to Agree within an existing contract.” In *Sandeman v. Sayres, supra*, 50 Wn2d at 539 there was a written employment contract for an exact salary with, Eleazers would argue, an Agreement to Agree to an incentive bonus within it. Therefore, Eleazers would argue, one term of an existing contract may be unenforceable as an “Agreement to Agree.” Not so.

Sandeman is clearly distinguishable for multiple reasons. First, the terms for the incentive bonus promised nothing except to decide whether any bonus at all would be paid. It was, as the employer itself admitted, an “illusory” promise. 50 Wn2d at 541. In contrast, Eleazers' promise was specific as to (1) a grant of (2) a recorded OSS Easement for (3) access and (4) maintenance and (5) other terms agreeable to Ms. Nordstrom. The

Form 34 language is “agreeable to both parties,” but Eleazers would certainly not choose terms “disagreeable” to them. Therefore, the offer and promise is that the terms would be agreeable to Ms. Nordstrom.

Second, because the Form 34 language is “agreeable to both parties,” it is also not in Eleazers’ sole discretion and/or sole option and/or illusory about terms -- in addition to unconditionally promised access and maintenance -- as the entire incentive bonus was in *Sandeman*.

Third, there was no custom and usage – or even a range such as that in *Sibley v. Stetson and Post Lumber Company*, 110 Wash 204, 188 Pac 389, 390, (1920), distinguished in *Sandeman, supra*, 50 Wash at 542. But with Eleazers’ promise there certainly are 6 years of custom and usage between the parties, as well as with respect to what is ordinarily and usually specified, if not regulatorily mandated, in OSS drainfield easements. CP717-721; 317-320; 602-639, *esp.* 604-606.

Fourth, the bonus in *Sandeman* was specifically conditioned on (1) passage of at least three months and (2) the company’s evaluation of the market for and acceptability of its “do-it-yourself” furniture products – without any guarantee that the employee’s input would have weight, much less that the employee’s agreement was required. But Eleazers’ Form 34 promise is NOT conditioned in any way, shape or form. The promise is to

grant a recorded OSS Easement for access and maintenance, period. It is not “conditioned on” terms agreeable to both parties. Form 34 promised the easement could include, in addition to promised access and maintenance, other terms agreeable to Ms. Nordstrom as well as Eleazers.

Fifth, perhaps most dramatically, the employment contract in *Sandeman* was for a brand new position for a brand new product manufacturer with a bonus conditioned on uncertain success as well as the employer’s optional discretion. But Eleazers’ promised easement related to an existing, 14 year old OSS drainfield which they knew was in the front yard and for which they had as-built drawings by which they could have exactly located it in the ground. CP569, ¶4 and 577; 7, ¶5 – 9, ¶10. It is the difference between a cloud and a rock.

C. Form 34 is Specifically Performable/Enforceable.

In short, all the material terms are present, just as would be true of a contractual promise for an “easement over an existing drive,” or a claim for an easement implied from prior use based on such an “existing drive.” Eleazers promised to grant a recorded OSS Easement which would allow access and maintenance to a then 14 year old OSS drainfield. No other terms are necessary. But if there were to be additional terms – including more specific provisions for access and/or maintenance – they would be

agreeable to both parties, Ms. Nordstrom as well as the Eleazers. Given this case involves an easement, and given that easement law is somewhat unique because courts have been determining the “scope” of easements where the instrument is silent, or where there is no instrument at all because it is a prescriptive or implied easement, the scope of Eleazers’ easement can also be determined by the common law.

D. Easement Common Law Fills In Any Other Terms Eleazers Want To Argue Are “Material”

Easement law is somewhat unique because it involves dual ownership. Therefore, it “balances” the rights of the fee owner, whose property has the burden, and the easement user whose property has the benefit of easement rights in the fee. There are many common law, court-made balancing rules and all are now well-established legal principles in American law. Korngold, *Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes*, Chapter 4, Scope and Protection of Easements, **e.g. esp.** §4.14 (Juris 2d Ed 2004).⁷ To support establishment regarding common law rules applicable in this case, string citations of Washington cases, referencing exact case page numbers, are

⁷ Professor Korngold is currently at NYU Law School after serving as McCurdy Professor of Law at Case Western Reserve University School of Law. His treatise has been cited as authority over 25 times by the RESTATEMENT OF PROPERTY (Third) – Servitudes and has been called a “gem of a treatise” by Professor Susan French of the UCLA Law School who serves as an Advisor to the RESTATEMENT.

supplied in footnotes. The statements of law referenced in this brief are not adversarial hyperbole.

1. Balancing Rights

It is because there are two separate rights in one parcel of land that rights must be balanced. As a much cited Supreme Court case noted regarding the fee/easement relationship, “The respective rights of the two parties ... [easement user and fee owner] are not absolute, but must be construed to permit a due and reasonable enjoyment ... so long as that is possible.”⁸

2. The Statute of Frauds Is Not Applicable to Non-Record Easements.

Creation of an “express” or “record” easement requires compliance with the Statute of Frauds; it must be written, signed and acknowledged (notarized).⁹ On the other hand, however, there are a number of legal doctrines by which one can acquire a “non-record” easement. Implied and prescriptive easements involve elements which either require known use of an existing area or past association between

⁸ *Thompson v. Smith*, 59 Wn2d 397, 409, 367 P.2d 798 (1962); *See also Littlefair v. Schultze*, 169 Wn App 659, 278 P.3d 218, 222 (2012), *Cole v. Laverty*, 112 Wn App 180, 185, 49 P.3d 924 (2002), *Richardson*, 108 Wn App 881, 884, 26 P.3d 970 and amending opinion 34 P.3d 828 (2001) *rev.den.* 146 Wn2d 1020 (2002), and *Lowe v. Double L Properties, Inc.*, 105 Wn App at 894, 20 P.3d 500 (2001).

⁹ RCW 64.04.010 and 64.04.020. *Berg v. Ting*, 125 Wn2d 544, 551, 886 P.2d 564 (1995); *State ex rel Shorett v. Blue Ridge Club*, 22 Wn2d 487, 494, 156 P.2d 667 (1945); *Richardson, supra*, 108 Wn App at 890; and *Beebe v. Swerda*, 58 Wn App 375, 379, 793 P.2d 442 (1990).

two properties which leads to *an implication that grant of an express easement was unintentionally overlooked*.¹⁰ (It was not overlooked in the instant contract; it was promised. It was, however, unintentionally overlooked at closing by some and, perhaps if not apparently, intentionally overlooked by others.) Regardless, as non-record easements, they are not based upon a formal conveyance and, therefore, are not subject to the Statute of Frauds requirements. The fact is, therefore, non-record easements are enforceable with NO TERMS whatsoever! That dispenses with Specific Performance analysis.

3. Interpreting the Scope of Express Easements

When considering the “scope” or “extent” -- that is, the permissible uses of an express easement¹¹ -- the Court’s primary objective is to effectuate the intent of the original parties who created it.¹² Interpretation of the terms of a written easement is a mixed question of law and fact.¹³ More specifically, what the original parties intended is a question of fact and the legal consequence of that intent is a question of law.¹⁴

¹⁰ *Stoebuck & Weaver, supra*, 17 WASH PRAC at §2.4. *Adams, infra*, 44 Wn2d at 507 ff.

¹¹ *Stoebuck, supra*, 17 WASH PRAC at §2.9.

¹² *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn2d at 880, 73 P.3d 369 (2003), *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn App 297, 306, 253 P.3d 470 (2011) and *Butler v. Craft Eng. & Constr. Co.*, 67 Wn App 694, 698, 843 P.2d 179 (1992).

¹³ *Niemann v. Vaughn Cmty Church*, 154 Wn2d 365, 374, 113 P.3d 463 (2005), *Veach v. Culp*, 92 Wn2d 570, 573, 599 P.2d 526 (1979) and *Wilson, supra*, 162 Wn App at 305.

¹⁴ *Sunnyside, supra*, 149 Wn2d at 880, *Littlefair, supra*, 278 P.3d 221 and *Wilson, supra*, 162 Wn App at 305.

If there is ambiguity or silence about the scope of an express easement, the Court will utilize extrinsic evidence to determine intent.¹⁵ In such cases, the Court will consider extrinsic evidence regarding three factors: (1) the intention of the parties connected to the original creation of the easement, as shown by the *circumstances at the time of execution*, (2) the nature and situation of the properties subject to the easement, and (3) the manner in which the easement has been used and occupied, documenting the parties' practical construction by conduct.¹⁶ The parties' historical "mode of use" of a particular easement will help the Court determine what a "reasonable use" is.¹⁷ In other words, ***the Court will establish express terms for easements even if the written document is entirely silent on the issue!***

In considering these factors, courts in this state have used similar terms with different shades of meaning while determining scope.

a. Some Washington cases have held that the owner of the dominant estate, the easement user, can make "no larger use," and cannot "change the character," of the easement in any way so as to "materially

¹⁵ *Wilson, supra*, 162 Wn App at 306; *Colwell v. Etzel*, 119 Wn App at 432, 439, 81 P.3d 895 (2003); *Rupert v. Gunter*, 31 Wn App 27, 31, 640 P.2d 36 (1982); *Logan v. Brodrick*, 29 Wn App 796, 799, 631 P.2d 429 (1981).

¹⁶ *Sunnyside, supra*, 149 Wn2d at 880; *Seattle v. Nazarene*, 60 Wn2d 657, 663, 374 P.2d 1014 (1962), *Evich v. Kovacevich*, 33 Wn2d 151, 162, 204 P.2d 839 (1949), *Colwell, supra*, 119 Wn App at 439, *Lowe, supra*, 105 Wn App at 893, *Steury v. Johnson*, 90 Wn App 401, 405, 957 P.2d 772 (1998); *Green v. Lupo*, 32 Wn App 318, 321, 647 P.2d 51 (1987); *Rupert, supra*, 31 Wn App at 31, *Logan, supra*, 29 Wn App at 799 and *Broadacres, Inc. v. Nelson*, 21 Wn App 11, 14, 583 P.2d 651 (1978).

¹⁷ *Thompson, supra*, 59 Wn2d at 408 and *Littlefair, supra*, 278 P.3d at 222.

increase” the burden.¹⁸

b. Other cases make a distinction between “increased use,” which may be permitted, and a “changed use” which is not.¹⁹

c. Still other cases have held that Courts will also bear in mind that *the law assumes parties to an easement may have contemplated changes in its use that did not exist at the time of the grant!* These cases hold that “normal changes” in the manner of use may be permissible. But if the changes are not normal, so that they constitute an “unreasonable deviation” from the original grant, the changes will be found unacceptable.²⁰

d. And still other cases have held that when the owner of a servient estate is being subjected to “a greater burden than originally contemplated” by the easement grant, the servient owner has the right to restrict such use by reasonable means which do not unreasonably interfere with the dominant party’s rights.

A larger use which has changed the character in a way which is not normal, but rather is an unreasonable deviation from the burden originally

¹⁸ *Little-Wetzel Co. v. Lincoln*, 101 Wash 435, 445, 172 Pac 746 (1918) and *Evich, supra*, 33 Wn2d at 160.

¹⁹ *Snyder v. Haynes*, 152 Wn App 774, 781, 21 P.3d 787 (2009) and *Lowe, supra*, 105 Wn App at 894.

²⁰ *Wilson, supra*, 162 Wn App at 306, *810 Properties v. Jump*, 141 Wn App 668, 696-97, 170 P.3d 1209 (2007) and *Logan, supra*, 29 Wn App at 800 citing FIRST RESTATEMENT, PROPERTY §484 (ALI 1944). In Stoebuck, *supra*, §2.9 at n.2, after citing *Logan*, another Stoebuck treatise is cited for the proposition that “changes may keep pace with ‘evolutionary’ but not ‘revolutionary’ growth.”

contemplated, is revolutionary, not evolutionary.²¹ One case from Division 3 has stated in dictum that the servient owner -- the fee owner whose property the easement burdens (Eleazers) -- has the burden of proof.²²

If a servient property establishes it is being subjected to a greater burden than originally contemplated, a “misuse” has occurred.²³ Once the facts are established, the legal consequence of the proven, undisputable and/or admitted facts is determined as a matter of law by the Court.²⁴

4. The Scope of Implied, Prescriptive and Privately Condemned Easements

Assuming for the sake of argument that Eleazers’ Form 34 promise to grant an express recorded OSS easement was too ambiguous or uncertain for (or not applicable to) the common law rules for express easements already discussed, the Bush House would seek leave of court to amend its counterclaims to add implied, prescriptive and/or privately condemned legal theories for an easement.²⁵ Determining the “scope” of such non-record easements is, therefore, relevant.

²¹ Stoebuck, *supra*, §2.9 n.2.

²² *Logan, supra*, 29 Wn App at 800.

²³ *Logan, supra*, 29 Wn App at 800.

²⁴ *Sunnyside, supra*, 149 Wn2d at 880 and *Richardson, supra*, 108 Wn App at 892.

²⁵ Indeed, the possibility of private condemnation of a utility (septic) easement was mentioned by Eleazers’ third counsel in answer to a question from the Superior Court Judge on September 10, 2013. The question was whether the intention now was to permit no access and no use because agreement was not reached on other terms. Eleazers’ counsel said “I haven’t reached a definite decision on that myself. Bush House could pursue their private right of condemnation.” That RCW Ch. 8.24 remedy not only awards

a. Easements Implied From Prior Use

The “cardinal consideration” regarding easements by implication from prior use is the presumed intention of the original parties concerned. This is disclosed by the extent and character of the prior use, nature of the property and the relationship of the original parcels to each other.²⁶ Perhaps surprisingly, this is very similar to the 3-part test used for determining the scope intended by the original parties in cases of express record easements.

Professors Stoebuck and Weaver, citing the caselaw, emphasize two major points. First is that “prior use” means there is an existing known use or “quasi-easement.” The “apparentness” of this actual use leads to the “implication” that an easement was within the seller’s and buyer’s “contemplation.” Form 34 proves it was contemplated here and there is no evidence of later negotiations abandoning that intent. The “scope” of the judicially declared implied easement is limited to the “scope” of the quasi-easement at severance. More “necessity” is required for implying a

the appraised value of the condemned easement, under RCW 8.24.030 it also grants attorney and appraiser fees in order that the value of the easement is not dissipated by such fees. Being paid now for an OSS easement they promised as part of their purchase appears to be one of the Eleazers objectives based on Maya Eleazer’s 9/8/13 Declaration. CP18, lines 11, 17 and 18.

²⁶ *Adams v. Cullen*, 44 Wn2d 502, 505-06, 268 P.2d 451 (1954), *Evich, supra*, 33 Wn2d at 157, *Rogers v. Cation*, 9 Wn2d 369, 379, 115 P.2d 702 (1941) and *MacMeekin v. Low Income Housing Institute, Inc. (LIHI)*, 111 Wn App 188, 196, 45 P.3d 570 (2002).

reservation than a grant, because a grantor may generally not derogate from his own grant.²⁷

b. Easements Implied From Necessity

Again, citing the caselaw, Professors Stoebuck and Weaver write about the chief difference between easements implied from prior use and those implied from necessity. With the latter, there need have been no prior known quasi-easement use. And as far as “scope” is concerned, it is “the necessity existing at the moment [of severance], and not at some prior or later time [which] defines the scope of the easement.”²⁸

c. Prescriptive Easements

Again, citing the caselaw, Professors Stoebuck and Weaver write that “The nature of use defines the nature, or scope, of the easement that may be obtained by prescription and its location.”²⁹ The FIRST RESTATEMENT puts more meat on these bones than any other legal authority. In Volume V, Chapter 39, Sections 477-481, the RESTATEMENT addresses the Extent (Scope) of prescriptive easements. It analyzes elements of time, place,

²⁷ Stoebuck, *supra*, §2.4.

²⁸ Stoebuck, *supra*, §2.5.

²⁹ Stoebuck, *supra*, §2.7 and *Mahon v. Haas*, 2 Wn App 560, 563, 468 P.2d 713 (1970) holding “The extent of any prescriptive rights ... is fixed and determined by the uses in which it originated.” *See also* Korngold, *supra*, **Private Land Use Arrangements**: §4.04 pp.134-137 and Smith, **Neighboring Property Owners** (Shepards McGraw-Hill 1988), §7:8.50, page 158 (West 2010-2011 Supp.)

manner and purpose of the use. Whatever the level of use had been it is the scope and it can only be increased by an increase that lasts for a new 10 year period. Thus the servient owner is protected against unpermitted levels of use in excess of what he was willing to endure without giving permission.

d. Privately Condemned Easements of Necessity

RCW Chapter 8.24 on private condemnation is strictly construed and not favored.³⁰ If there is a different (even if less feasible) way to obtain an easement use, specifically including other legal theories for implied or prescriptive easements, they must be asserted and found legally insufficient before private condemnation may be used.³¹ The burden of proving there is no other easement theory available is on the private condemnor.³²

But of particular relevance here is the “scope” of a privately condemned easement. It cannot differ from, be incompatible with or otherwise impair the use of the condemnee; that is, the servient owner whose property is being condemned.

³⁰ *Brown v. McAnally*, 97 Wn2d 360, 367-370, 644 P.2d 1153 (1983) and *Jobe v. Weyerhaeuser Co.*, 37 Wn App 718, 724 ff. *rev.den.* 102 Wn2d 1005 (1984).

³¹ *Roberts v. Smith*, 41 Wn App 861, 862-866, 707 P.2d 143 (1985), *State ex rel Carlson v. Superior Court*, 107 Wash 227, 233 and 237, 181 Pac 689 (1919), *State ex rel Wheeler v. King Co.*, 154 Wash 117, 118-119, 281 Pac 7 (1929) and RCW 8.24.025.

³² *Roberts, supra*, 41 Wn App at 862, *Dreger v. Sullivan*, 46 Wn2d 36, 37-8, 278 P.2d 647 (1955), *Carlson, supra*, 107 Wash at 232 and 238, *State ex rel Stephens v. Superior Court*, 111 Wash 205, 211-212, 190 Pac 234 (1920) and *State ex rel Miller Logging Co. v. Superior Court*, 112 Wash 702, 191 Pac 830 (1920).

Thus, our State Supreme Court has held that private condemnation does not authorize more intensive development of the condemnor's land. New, different, expanded and enlarged (overburdening) uses impairing the condemnee fee owner's land and existing use "greatly exceed the rights contemplated by" private condemnation.³³ Similarly, Division 1 has held that use of a privately condemned easement must not differ from, and must not be incompatible with, the use which the condemnee has been making of their property.³⁴

The bottom line is that easement law has established rules for what Eleazers argue are "material terms" even when an express easement is ambiguous or silent on an issue and, even more importantly, even when there is no express easement at all. If the facts exist for judicially granting an implied, prescriptive or privately condemned easement, there are specific "scope" rules. Those rules balance and protect the rights of both parties; especially servient owners against overburdening.

E. Summary

Commissioner Kanazawa accepted Eleazers' erroneous argument that Form 34 was a separate preliminary negotiation about an entirely separate contract proposal. It was not. It was – and is – one term on one

³³ *McAnally, supra*, 97 Wn2d at 368ff.

³⁴ *Jobe, supra*, 37 Wn App at 725.

page of a 25-page otherwise fully executed REPSA that closed on all those other pages and terms in May 2007, followed by 6½ years of possession. The trial judge recognized this and correctly held that Eleazers had a duty of good faith to implement their promise so that Ms. Nordstrom and the Bush House could, like Eleazers, obtain the full benefit of performance. For that reason, the trial judge offered Eleazers an opportunity to negotiate in good faith regarding additional terms qualifying their promise to record an OSS Easement beyond simply allowing access and maintenance. As the record documents, that opportunity produced no objection to the terms proposed by any of the Defendants/Respondents (Bush House, SHD, Ms. Nordstrom).

First, Eleazers produced an easement presented to them on October 21, 2010 as an enclosure to a letter signed by Ms. Nordstrom who promised to pay up to \$500.00 in attorney fees if Eleazers would follow her recommendation to consult an attorney. CP336, ¶¶7 and 339-346. *See also* C453. There is no record of any response – pro or con – to the terms of the enclosed easement from 2010 until 2013 when it again became an issue after Eleazers filed this lawsuit.

Second, immediately after the trial judge ordered the Eleazers to negotiate in good faith about the terms of the OSS easement to be

recorded, there were oral discussions and, later, a series of email exchanges between counsel for the parties. These discussions and emails were attached to the Motion and Declaration for Appointment of a Special Master. CP213-19; 232-248; 173-174; 163. One of those emails was dated June 18 and was from Eleazers' second counsel. CP244. It attached a proposed "Temporary Easement" pending an appeal Eleazers had just filed. CP179-186. It was unacceptable to SHD. CP177 and 246. The Temporary Easement was virtually identical to the easement sent by Ms. Nordstrom 3 years earlier. The main differences related to its temporary nature pending appeal and non-emergency access changed from 8-5 Monday-Saturday to 9-5 Monday-Friday. CP179, ¶C; 180, ¶s 1 and 3c. Not one single other change was requested – because the provisions were all protective statements of each party's common law rights.

Third, as already noted in footnote 25, Eleazers' third counsel acknowledged Bush House could pursue private condemnation of an OSS easement in the trial court. Counsel did not say so, but obviously this would not only provide Eleazers with the appraised value of the OSS easement, it would also provide appraiser and attorney fees under RCW 8.24.030. Getting paid something for an OSS easement has been one of Eleazers' objectives since 2010. CP527, lines 17-20. Indeed, Mrs.

Eleazer's Declaration of 9/8/13 makes 2 direct and 3 more indirect references to money being desired; a Freudian slip acknowledging that objective. CP18, lines 11 and 17-18; 20, lines 3 and 15; 21, line 7.

The thing is that this private condemnation strategy is also a Freudian slip. It is an acknowledgement that Ms. Nordstrom and the Bush House are entitled to an OSS easement. But private condemnation is only available if there is no other easement theory available.³⁵ In this case the elements of an implied easement from prior use,³⁶ very recently reviewed in the context of an OSS easement in one of this Court's unpublished decisions,³⁷ would appear most applicable; (1) a landowner conveys part of his land and (2) retains part, usually an adjoining parcel; (3) before the conveyance, there was a usage existing between the parcel conveyed and the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part; (4) this usage is reasonably necessary to the use of the part to which it would have been appurtenant; and (5) the usage is "apparent."³⁸

³⁵ Refer to Footnotes 31 and 32, *supra*.

³⁶ *McMeekin v. LIHI, supra*. 111 Wn App at 195; *Roberts, supra*, 41 Wn App at 865; *Adams v. Cullen, supra*, 44 Wn2d at 505-06 and *Bays v. Haven*, 55 Wn App 324, 329, 777 P.2d 562 (1989).

³⁷ *Goodman v. Goodman*, No. 68416-7-1 (11/25/13) pages 5-7.

³⁸ Stoebeck and Weaver, *supra*, 17 WASH PRAC at §2.4.

RELIEF REQUESTED

It is respectfully requested that this Court DENY Eleazers' Review and AFFIRM the Superior Court. Merger does not apply at all and Form 34 contains all necessary material terms for an easement for a 14-year old OSS drainfield. Even if Form 34 does not answer every "parade of horrors" Eleazers have raised, after the fact, easement common law answers all those issues for both express record, as well as implied, prescriptive and privately condemned non-record, easements.

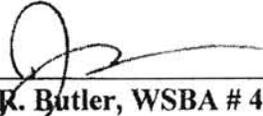
DATED this 18th day of December, 2013.

Presented by:



Gary W. Brandstetter, WSBA # 7461
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Separately Attested by:



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(425) 774-1199; jules.butler@butlerlaw.org

Exhibit A

Exhibit B

UNRECORDED



200705100991 15 PGS
05/10/2007 3:22pm \$47.00
SNOHOMISH COUNTY, WASHINGTON

Return To:
VENTURE BANK

P. O. BOX 1367, OLYMPIA, WA
98507

Assessor's Parcel or Account Number 00479902402500

Abbreviated Legal Description

LOTS 25-28, BL 24, PLAT OF INDEX, V 3, PAGE 66

[Include lot, block and plat or section, township and range]

Full legal description located on page 3

Trustee TALON GROUP

Additional Grantees located on page

[Space Above This Line For Recording Data]

DEED OF TRUST

MIN 1002543-0000002028-4

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16

(A) "Security Instrument" means this document, which is dated May 3, 2007, together with all Riders to this document

(B) "Borrower" is EDWARD J. ELEAZER and MAYA E. ELEAZER, HUSBAND AND WIFE

Borrower is the trustor under this Security Instrument

(C) "Lender" is VENTURE BANK

ELEAZER

6195311370

WASHINGTON-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

Form 3048 1/01

WAP -6A(WA) (0012)

MW 12/00 01

Page 1 of 15

Initials *EJE*

VMP MORTGAGE FORMS - (800)521-7291 *ME*



Talon Group

1003141

A division of First American Title Insurance Company

15/48

UNRECORDED

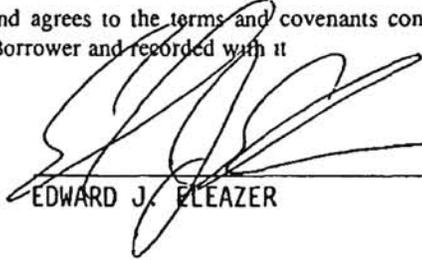
25. Use of Property. The Property is not used principally for agricultural purposes

26. Attorneys' Fees. Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees," whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by Lender in any bankruptcy proceeding or on appeal

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it

Witnesses



EDWARD J. ELEAZER (Seal)
-Borrower



MAYA E. ELEAZER (Seal)
-Borrower

(Seal) _____ (Seal)
-Borrower -Borrower

(Seal) _____ (Seal)
-Borrower -Borrower

(Seal) _____ (Seal)
-Borrower -Borrower

ELEAZER

 -6A(WA) (0012)

6195311370

Page 14 of 15

Form 3048 1/01

STATE OF WASHINGTON

County of *Snohomish*

} ss:

On this day personally appeared before me EDWARD J. ELEAZER and MAYA E. ELEAZER

to, me known to be, the individual(s) described in and who executed the within and foregoing instrument, and acknowledged that he/she/they signed the same as his/her/their free and voluntary act and deed, for the uses and purposes therein mentioned

GIVEN under my hand and official seal this 8th day of May 2007



Bobbe M. Percy

Notary Public in and for the State of Washington, residing at

Bohem
My Appointment Expires on 2/9/10

ELEAZER

6195311370

LAMP -6A(WA) (0012)

Page 15 of 15

Initials *ME*

Form 3048 1/01

EJE

No. 70513-0-I

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

| | | |
|--------------------------------|---|----------------|
| EDWARD J. ELEAZER and |) | |
| MAYA E. ELEAZER, husband |) | |
| and wife and their marital |) | |
| community, |) | CERTIFICATE OF |
| |) | SERVICE |
| Appellants, |) | |
| |) | |
| v. |) | |
| |) | |
| BUSH HOUSE, L.L.C. a |) | |
| Washington limited liability |) | |
| company, its successors and |) | |
| assigns; and SNOHOMISH |) | |
| HEALTH DISTRICT, a |) | |
| municipal corporation of the |) | |
| State of Washington; and LOYAL |) | |
| MARY NORDSTROM, an |) | |
| individual, |) | |
| |) | |
| Respondents. |) | |
| <hr/> | | |

2013 DEC 19 11 59 25
STATE OF WASHINGTON
KJ

I certify as follows:

1. I am the attorney of record for Respondent Bush House LLC in this case.
2. On December 18, 2013, I served on Appellants Eleazers and Respondents Snohomish Health District and Loyal

Mary Nordstrom a copy of Respondent Bush House LLC's Response to Appellant Eleazers' Brief as follows:

> Gary Manca, attorney for Appellants Eleazers, by email to gm@manca-law.com

> Steve Uberti, attorney for Respondent Snohomish Health District, by email to suberti@shipmanuberti.com

> John Weston, Jr., of attorneys for Respondent Loyal Mary Nordstrom, by email to westonassociates@msn.com

> Jules Butler, of attorneys for Respondent Loyal Mary Nordstrom, by email to jules.butler@butlerlaw.org

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

DATED this 18th day of December, 2013.



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Attorney for Respondent Bush House LLC