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NO. 37738-1-II

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

BARBARA A. STEPHENSON,

Respondent,

v.

CUMULATIVE, LLC,

Appellant.

BRIEF OF APPELLANT

A. STEPHEN ANDERSON, PS

Attorney for Appellant

999 N Northlake Way, Ste 300
Seattle, WA 98103, 206.306.9464
WSBA # 8369

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I. INTRODUCTION

Joseph Kaiser, assignee of Cumulative LLC, Inc. appeals the decisions of the Kitsap County Superior Court granting summary judgment to defendant Linda Pleger, denying Joseph Kaiser's motion for reconsideration, and granting summary judgment to defendant Daniel Pleger.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of September 7, 2007, granting defendant Linda Pleger's motion for summary judgment.

2. The trial court erred in entering the order of October 26, 2007, denying Joseph Kaiser's motion for reconsideration.

3. The trial court erred in entering the order of April 18, 2008 granting defendant Daniel Pleger's motion for summary judgment.

a. Issues Pertaining to Assignments of Error

i. Does RCW 84.64.080 prohibit a property owner from selling his/her interest in surplus tax foreclosure sale proceeds to a third party?

ii. Does an application of RCW 84.64.080 that requires funds in which a party has a legitimate property interest, to be dispersed to a third party without providing notice or an opportunity to be heard to the property owner violate the owner's procedural due process rights?

iii. Does an application of RCW 84.64.080 that requires funds in which a party has a legitimate property interest, to be dispersed to a third party constitute a taking of private property for private use?

III. STATEMENT OF THE CASE

On July 8, 2005, the Plaintiff, Kitsap County Treasurer (hereinafter "County"), issued and filed a Certificate of Delinquency concerning

real property Parcel No. 222401-2-090-2008
(hereinafter "Property"). At that time Linda
Pleger and her now ex-husband Daniel Pleger were
the record owners of the property (CP 194).

On February 8, 2006, Linda and Daniel Pleger
entered into separate agreements with Cumulative
LLC (of which Joseph Kaiser is an assignee)
whereby the Plegers - for valuable consideration
- sold and assigned to Cumulative the subject
property and their interest in any excess
proceeds, or overages, from the tax foreclosure
sale of their property (CP 195).

On February 10¹, 2006 the tax foreclosure
sale of the property commenced and resulted in an
overage of \$37,522.02 (CP 243,245, and Appendix
A-6).

¹ In her summary judgment motion, Ms. Pleger falsely claimed that the tax sale took place on February 3, several days before she sold her property and her interest in any tax overages to Cumulative.

On March 30, 2006 Cumulative LLC sent a letter to the County requesting payment of the excess tax proceeds pursuant to their agreement with Defendants Linda Pleger and Daniel Pleger. In response to this request, the County interpleaded the funds with the court and commenced this action. On October 10, 2006, Defendant Linda Pleger submitted an application to the County also requesting payment of the excess proceeds from the foreclosure sale - proceeds that she had already sold and assigned to Cumulative along with her interest in the property (CP 195).

Defendant Linda Pleger filed a summary judgment motion with the court requesting the court to order \$18,776.01 (fifty-percent of the proceeds) dispersed to her pursuant to RCW 84.64.080 (CP 193-197). This motion was granted and in addition the court voided the Cumulative-Pleger assignment agreement based on its

interpretation of RCW 84.64.080 (CP 298-299).

Joseph Kaiser filed a motion for reconsideration with the trial court, which was denied on October 26, 2007 (CP 340-341).

Subsequent to that denial Daniel Pleger filed a motion for summary judgment also requesting dispersal of \$18,776.01 (the remaining fifty-percent of the proceeds). This motion was granted on April 18, 2007 ² (CP 356-357). This appeal followed.

IV. ARGUMENT

a. **The Court Erred in Ruling that Under RCW 84.64.080 Cumulative Never Had the Right to Contract with the Record Owners (Linda and Daniel Pleger).**

In granting Linda and Daniel Pleger's motions for summary judgment the trial court also voided their assignment agreements with Cumulative LLC. The court voided the agreements

² This order was implicitly based on the court's rationale in granting summary judgment to Linda Pleger. The two orders are viewed as identical.

as a violation of public policy based on its interpretation that RCW 84.64.080 prohibited the Plegers from selling and assigning to the Cumulative their interest in the tax overages (CP 298-299). This is an erroneous interpretation of the statute.

i. RCW 84.64.080 On Its Face Does Not Abrogate the Overage Agreement.

RCW 84.64.080 states in part:

"... the excess shall be refunded following payment of all water-sewer district liens, on application therefore, to the record owner of the property. The record owner of the property is the person who held title on the date of issuance of the certificate of delinquency. Assignments of interests, deeds, or other documents executed or recorded after filing the certificate of delinquency shall not affect the payment of excess funds to the record owner."

This statute sets forth the procedures used for the tax foreclosure of real property. By its plain language, RCW 84.64.080 directs payments of funds; it does not establish an ownership

interest. Although the statute provides for the distribution of proceeds to the record owner despite any subsequent assignments or conveyances, RCW 84.64.080 does not prohibit such assignments nor invalidate them. Well-established rules of statutory construction provide that "A court must not add words to a statute where the legislature has chosen not to include them." *Restaurant Development Inc. v. Cananwill Inc.* 150 Wn. 2d 674 at 682, 80 P.3d 598 (2003). In writing RCW 84.64.080 the legislature could have included language that explicitly prohibits the assignment of overage interests, but it chose not to. This decision is in concert with the fact that the statute is procedural in nature and intended to direct the actions of the treasurer, not create a property interest.

ii. The Legislative History of RCW 84.64.080 Supports the Plain Language Meaning of the Statute.

In her Reply to Opposition to Pleger's Motion for Summary Judgment (CP 293-297), Ms. Pleger correctly states that the applicable language of RCW 84.64.080 was inserted in a 2003 amendment (CP 294). Pleger incorrectly asserts however, that the purpose of the amendment was to protect parties such as herself. This is an attempt to import intent into the statute that the legislature simply did not have.

The amendment began in the House Local Government Committee in 2003 as HB 1564. The House Bill Report for HB 1564 (A-3) gives a synopsis of the testimony given in favor of the Bill. In this testimony the bill is described as "a culmination of changes in the law that will assist county treasurers to operate in a more effective manner" (A-5). This language makes it clear that the purpose of the amendment is to provide guidance to treasurers in executing their duties. Nowhere in the legislative history of HB

1564 is there a suggestion that the statute was intended to prohibit an owner of record from selling their property rights or to prohibit any other type of contractual relationship. The trial court's interpretation of the statute conflicts with the legislature's established purpose.

iii. The Trial Court's Interpretation of RCW 84.64.080 Results in an Unconstitutional Application of the Statute.

The trial court's application of RCW 84.64.080 denies Joseph Kaiser two constitutional protections: (1) procedural due process, and (2) the right to be free from an unconstitutional taking of private property. The court's interpretation should be overturned so that the statute may be construed to achieve its underlying purpose and so that constitutional infirmities can be avoided. *Washington State*

Republican Party v. PDC, 141 Wn.2d 245, 280
(2000).

1. Procedural Due Process

The United States Constitution requires that: "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." U.S. Const. amend. XIV, §1. Likewise, under the Washington Constitution "no person shall be deprived of life, liberty, or property, without due process of law." WA. Const. art. I, §3. It is well established that procedural due process requirements are not limited to judicial proceedings, but extend to every proceeding which may interfere with those rights, whether judicial, administrative, or executive. *Baldwin v. Moore*, 7 Wash. 173, 177, 34 P. 461 (1893).

For due process protections to be implicated, a plaintiff must assert an individual interest that is encompassed within the protection of life, liberty, or property. *Silver Firs Town Homes, Inc. v. Silver Lake Water District*, 103 Wn. App 411, 425, 12 P.3d 1022 (2000), review denied, 143 Wn.2d 1013 (2001). A property interest may be created by the terms of a contract or by a mutually explicit understanding between parties that support a claim of entitlement to a benefit. *Gray v. Pierce County Hous. Auth.*, 123 Wn. App. 744, 752-3 (2004).

Here, Kaiser has a property interest in the disputed tax overage as both the deed holder of the property immediately prior to the foreclosure and as the assignee of the overage.

Under *City of Redmond v. Moore* a constitutional challenge to a statute can come in

the form of a facial challenge or an as-applied challenge. *Redmond*, 151 Wn.2d 664, 668-9, 91 P.3d 875 (2004). Here, Kaiser asserts an as-applied challenge. It would be unconstitutional for Kitsap County to disburse tax overages to a prior record holder of interest when at the time of the disbursement the County has notice that Cumulative LLC/Kaiser is the legal assignee of the overage, and on the basis of the statute the County is allowed to disperse such funds to Pleger without allowing Cumulative LLC/Kaiser an opportunity for a hearing. Such an application represents a patent denial of Kaiser's due process rights guaranteed by both the federal and state constitutions.

In *Redmond*, the court stated: "Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Redmond*, 151

Wn.2d at 670 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). To determine whether existing procedures are sufficient to satisfy due process, the court must consider the following three factors:

- (1) the private interest affected by the official action;
- (2) the risk of erroneous deprivation of such interest through the procedures used and the value of additional safeguards, and
- (3) the governmental interest, including the cost and administrative burden of additional procedures.

Redmond, 151 Wn.2d at 670, quoting *Mathews*, 424 U.S. at 355.

Applying these factors here, the trial court's application of RCW 84.64.080 violates due process because it does not provide an assignee the opportunity for any hearing prior to the County dispersing an assignee's funds to a "record holder" of interest.

A. THE FIRST MATHEWS FACTOR: The private interest affected by the official action.

In this case, Kaiser's private interest is of constitutional magnitude as it is a constitutionally protected interest in property. Cumulative LLC purchased from Pleger any future tax proceeds from a tax foreclosure sale, and subsequently assigned that interest to Kaiser. The right to alienate property is essential to its use and enjoyment as well as the right to acquire it, and both are constitutional rights. *Baldwin v. Moore*, 7 Wash. 173, 175, 34 P. 461 (1893)

B. THE SECOND MATHEWS FACTOR: The risk of erroneous deprivation of such interest through the procedures used and the value of additional safeguards.

This factor weighs heavily in favor of Cumulative/Kaiser as well. It is almost certain

that in any case where there has been a subsequent assignment or conveyance by the "record holder" that the procedures of RCW 84.64.080, as applied by the trial court, will result in an erroneous deprivation because the statute provides for disbursement without a hearing. Kaiser will suffer an erroneous deprivation if the County disburses Kaiser's property to Pleger, who no longer holds an ownership interest in the property. The value of RCW 84.64.080 providing an assignee an opportunity for a hearing prior to disbursement would resolve any issues with respect to ownership of the proceeds prior to a wrongful disbursement.

C. THE THIRD MATHEWS FACTOR: The governmental interest including the cost and administrative burden of additional procedures.

Additional procedures to cure the defects of RCW 84.64.080 as applied by the trial court would be minimal. The statute need only provide that if a county has been given notice of an assignee, that assignee has the right to a hearing prior to the disbursement of the funds, and the treasurer should pay any excess proceeds to the registry of the court with funds to be disbursed by later order of the court.

The process of requiring the treasurer to pay the overage to the registry of the court where there are potentially conflicting interests is not unduly burdensome. Significantly, funds are routinely paid to the registry of the court in other actions; for example, interpleader from a trustee sale foreclosure, rent in a landlord tenant dispute, or earnest money disputes. Therefore, the administrative burden is low.

In balancing the three factors set forth in *Mathews*, it is clear that if RCW 84.64.080 infringes upon Kaiser's property interest, it violates procedural due process because of its complete lack of provision for a hearing to an assignee prior to disbursement. The minimum requirement of a hearing is required in order to safeguard Cumulative/Kaiser's constitutional interest in the property. The failure to provide for such a hearing would render the statute unconstitutional as applied by the trial court.

2. Regulatory Taking

In addition to violating Kaiser's due process rights, the trial court's application of RCW 84.64.080 also constitutes an unconstitutional taking of private property.

The trial court's application of the statute, which takes a tax overage rightfully belonging to Kaiser and disburses it to Pleger

amounts to a taking of private property for private use in direct contravention of Article I, section 16 of the Washington State Constitution.

Article I, section 16 of the Washington State Constitution contains an absolute prohibition against the governmental taking of private property for private use, except for a few narrowly drawn exceptions, specifically:

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.

WA. Const. art. I, §16

The Washington Supreme Court has undertaken a comparative analysis of the taking provision under the Fifth Amendment of the United States Constitution and Article I, section 16 of the Washington State Constitution. *Manufactured Housing CMTYS. V. State*, 142 Wn.2d 347, 13 P.3d

183 (2000). Applying the factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986), the court concluded that the Washington State Constitution is more protective of private property ownership rights than the Fifth Amendment with respect to a claim that a government regulation effects a taking of private property for a private use. *Manufactured Housing*, at 361. In reaching this conclusion the court stated: "The eminent domain provision of the Washington State Constitution provides a complete restriction against taking private property for private use." *Id.* at 362.

In this case, Cumulative LLC/Kaiser has an assignment for the overage from the tax foreclosure sale. Furthermore, Cumulative LLC/Kaiser owned the property immediately prior to the sale. Kaiser's right to the proceeds is a fundamental attribute of ownership and a valuable property right. The forced transfer of this

property to Pleger through the trial court's application of RCW 84.64.080 constitutes a taking of private property for private use, and as such is a violation of Kaiser's constitutional rights.

V CONCLUSION

The trial court's interpretation and application of RCW 84.64.080 is not supported by the plain meaning of the statute or the statute's legislative history. Additionally, this application has resulted in the violation of Joseph Kaiser's rights protected by both the federal and state constitutions. Appellant respectfully requests that the court reverse the trial court's summary judgment order and remand the case so that all parties have the proper opportunity to litigate their interests in the disputed funds.

August 15, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. Stephen Anderson", written over a horizontal line.

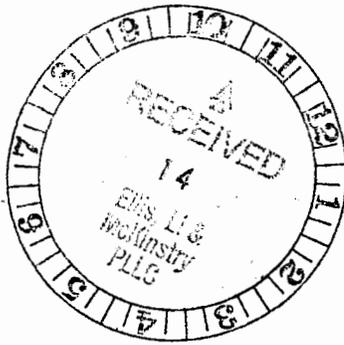
A. Stephen Anderson

Attorney for Appellant

Washington State Bar Association membership number: 8369

VI APPENDIX

1. Order Granting Defendant Linda Pleger Summary Judgment - A1
2. House Bill Report, HB 1564 - A3
3. Tax Deed for subject property -A6



RECEIVED AND FILED
IN OPEN COURT

SEP 07 2007

DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

BARBARA A. STEPHENSON, in her capacity)
as Kitsap County Treasurer,)

No. 06-2-00962-4

Plaintiff,)

vs.)

~~PROPOSED~~ ORDER GRANTING
DEFENDANT LINDA PLEGER
SUMMARY JUDGMENT

CUMULATIVE, LLC; LINDA A. PLEGER;)
DANIEL E. PLEGER; TONEY M.)
MONTGOMERY; BEVERLY J.)
MONTGOMERY; and GLEN P. PSZCZOLA, in)
his capacity as trustee of the Aladdin Trust,)

(Clerk's Action Required)

Defendants.)

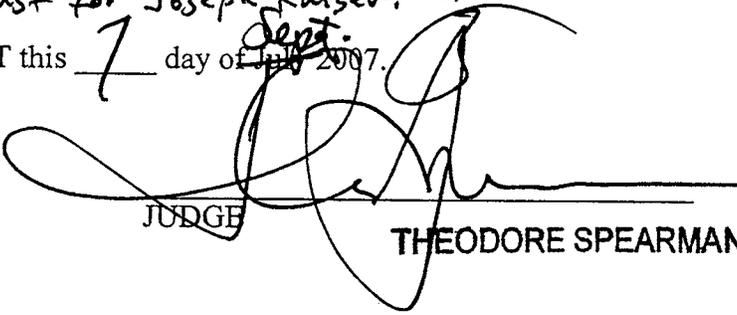
THIS MATTER having come on regularly and the court having reviewed Defendant
Linda Pleger's Motion for Summary Judgment, the Declaration of Patrick Kang in support of
the motion with exhibits attached thereto, and the Declaration of Linda Pleger;
Joseph Kaiser's opposition to the motion, the declaration of Steven O'Ban,
and the declaration of Jared Jamison
_____, and the files and records herein, and the court being fully advised in the premises,
now, therefore, it is hereby

ORDERED that Defendant Linda Pleger's motion for summary judgment is GRANTED
and judgment shall be entered in favor of Defendant Linda Pleger. It is further

1 ORDERED that the Clerk shall disburse the interpleaded funds in the amount of
\$15,776.01

2 ~~\$18,776.01~~ to Defendant Linda Pleger by issuing a check made payable to "Premier Law Group,
3 in trust for Linda Pleger," and \$3,000 to Joseph Kaiser made payable to "Ellis,
4 Li & McKinstry, in trust for Joseph Kaiser." *

5 DONE IN OPEN COURT this 7 day of ~~July~~ ^{Sept.} 2007.

6 
7 JUDGE

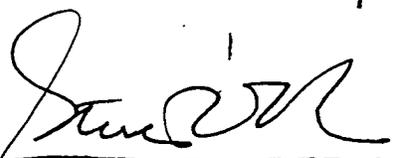
THEODORE SPEARMAN

8 Presented by:

9 PREMIER LAW GROUP, PLLC

10 
11 Patrick J. Kang, WSBA #30726
12 Of Attorneys for Defendant Linda
13 Pleger

14 * This order is based upon the court's ~~finding~~ ^{ruling} that
15 Cumulative never had the right to contract with the
16 record owner based on this Court's interpretation of
17 RCW 84.64.080, and therefore, voids the Cumulative-
18 Pleger assignment, contract, and other agreements as
19 a violation of public policy.

20 
21 Steven O'Ban, #17265
22 Attorney for Joseph
23 Kaiser

HOUSE BILL REPORT

HB 1564

As Reported by House Committee On:
Local Government

Title: An act relating to clarifying county treasurer fiscal provisions.

Brief Description: Clarifying county treasurer fiscal provisions.

Sponsors: Representatives Alexander, Fromhold, Mielke, Kessler and Buck.

Brief History:

Committee Activity:

Local Government: 2/13/03, 2/24/03 [DPS].

Brief Summary of Substitute Bill

Modifies various county treasurer provisions.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Romero, Chair; Upthegrove, Vice Chair; Schindler, Ranking Minority Member; Jarrett, Assistant Ranking Minority Member; Ahern, Berkey, Clibborn, Edwards, Ericksen, Mielke and Moeller.

Staff: Amy Wood (786-7127).

Background:

The county treasurer (treasurer) operates under the authority of various state statutes concerning aspects of receiving, processing, and disbursing funds. The treasurer is the custodian of the county's money and the administrator of the county's financial transactions. In addition to services for the county, the treasurer provides financial services to special purpose districts and other units of local government, including the responsibility to receipt, disburse, invest, and account for the funds of each of these entities. The treasurer receives and disburses funds, invests funds held, and maintains financial records in accordance with accepted accounting principles. The treasurer is also responsible for the collection of various taxes, including legal proceedings to collect past due amounts. The treasurer has other miscellaneous duties such as conducting bond sales

and sales of surplus county property.

Summary of Substitute Bill:

Section 1: The person authorized to establish lines of credit and to pay interest and other finance or service charges for local governments is changed from "fiscal officer" to "treasurer." "Treasurer" is defined in the chapter, whereas "fiscal officer" is not defined.

Section 2: If personal property is sold at auction, any outstanding property taxes will become an automatic lien against the proceeds of the auction, and will be remitted to the treasurer. If any proceeds are distributed in violation of this section, the seller or agent of the seller will be liable for all taxes, interest, and penalties owed to the treasurer.

Section 3: Prohibits real property from being divided until all current year taxes and any delinquent taxes are paid in full.

Section 4: At any time the day before a foreclosure sale of real property, any person owning a "recorded" interest in property may pay the taxes, interest, and cost due to the treasurer.

Section 5: Following a foreclosure sale, the treasurer must refund any amount in excess of the minimum bid price to the record owner of the property. The record owner of the property is the person who held title on the date of issuance of the certificate of delinquency. Any assignments of interests, deeds, or other documents executed or recorded after the certificate of delinquency was filed by the treasurer shall not affect the payment of excess funds to the record owner.

Sections 6 & 7: If the treasurer issues a refund that includes interest, the treasurer shall have the authority not only to remove the amount of the overpaid tax but also the interest from the state or the county general fund in the same proportion as it was paid.

Substitute Bill Compared to Original Bill:

The original bill prohibited any person from removing personal property that is subject to tax liens from the county. The substitute requires only that any outstanding taxes paid become an automatic lien against the proceeds of an auction. If any proceeds are distributed in violation of this section, the seller or agent of the seller will be liable for all taxes, interest, and costs due to the treasurer.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: This bill is a culmination of changes in the law that will assist county treasurers to operate in a more effective manner. The bill clarifies what a fiscal officer is; requires that proceeds from an auction go to cover the lien first; clarifies that all current year taxes be paid in full before an assessor can approve a property that has an undivided interest; clarifies that only a person with a recorded interest or their notarized agent may pay taxes; specifies that if an owner assigns his interest after the certificate of delinquency is filed the treasurer still pays all proceeds to the owner, not an individual collector; and clarifies that all interest on refunds is proportionately charged back to the appropriate taxing district.

Testimony Against: None.

Testified: Rep. Alexander, prime sponsor; and Rose Bowman and Ron Strabbing, Washington State Association of County Treasurers.



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Page: 1 of 2
03/01/2006 09:43A
Kitsap Co, WA

FORECLOSURE KITSAP CO TRE DEED \$33.00

KITSAP COUNTY TREASURER
BOX 169
PORT ORCHARD, WA 98366

KITSAP COUNTY TREASURER EXCISE 02/28/2006

State of Washington }
 }
County of Kitsap }

2006EX01612

Total : \$

Clerk's Initial HTG

TAX DEED 2306

This INDENTURE, Made this 28th day of February, 2006 between Barbara A. Stephenson, as Treasurer of Kitsap County, State of Washington, the party of the first part, and **Satnam Hayer**, party of the second part;

WITNESSETH, THAT WHEREAS, at a public sale of real property, held on the 10th day of February, 2006, pursuant to a real property tax judgment entered in the Superior Court in the County of Kitsap on the 27th day of January, 2006 in proceedings to foreclose tax liens upon real property and an order of sale duly issued by said Court, **Satnam Hayer** duly purchased in compliance with the laws of the State of Washington, the following described real property, to-wit: SE Quarter, NW Quarter, Section 22, Township 24 North, Range 1 East Additional legal on page 2.

Assessor's Tax Account Number: 222401-2-090-2008

and that said **Satnam Hayer** has complied with the laws of the State of Washington necessary to entitle **Satnam Hayer** to a deed for said real property.

Now, THEREFORE, know ye that I, Barbara A. Stephenson, County Treasurer of said County of Kitsap, State of Washington, in consideration of the premises, and by virtue of the statutes of the State of Washington, in such cases provided, do hereby grant and convey unto **Satnam Hayer** heirs and assigns, forever, the said real property hereinbefore described.

Given under my hand and seal of office this 1st day of March, 2006.


County Treasurer

by _____

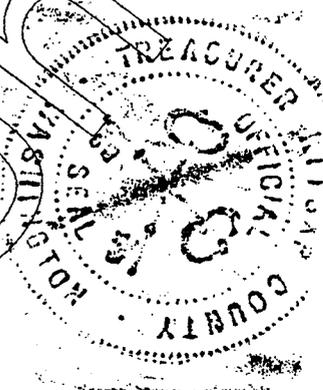


EXHIBIT A

A6