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STATE OF WASHINGTON
BY

No. 42394-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TICOR TITLE,
Plaintiff

v.

SUMMIT UNISERV COUNCIL, a Washington Non-Profit corporation,
Respondent, and WILLIAM B. MOORE, Appellant.

APPELLANT SELLER'S OPENING BRIEF

GORDON THOMAS HONEYWELL LLP
Joe Gordon, Jr.
Attorneys for Appellant

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 01804

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I. INTRODUCTION

This appeal presents questions of first impression on the essentials of contract formation in a commercial real estate purchase and sale transaction, and the legal effect of widely used contract provisions in such a transaction in Washington State. Summit Uniserve Council (Buyer) and William B. Moore (Seller) were each represented throughout by legal counsel, Buyer by Mark Roberts and Seller by Erika Baurecht. The comprehensive Purchase and Sale Agreement (Agreement) was signed on the last page by the parties, but with three "optional" provisions concerning submission to arbitration, waiver of an offering statement under the Condominium Act, and a liquidated damage clause, each initialed by Buyer but not by Seller.[1] (Ex. 3)

The trial court concluded the absence of the Seller's initials on the "optional" paragraphs meant there was no "meeting of the minds" on the entire Agreement. [2] (Conclusion of Law 5, CP 176, lines 10 – 16)

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[1] Exhibit 3 is referenced throughout testimony as the "Agreement". The "original" contract deposited with escrowee Ticor Title, appears substantively identical and is contained in the record at CP 8-27. Relevant pages of the Agreement are attached in Appendix A.

[2] Conclusion of Law 5 states:

> Since the optional paragraph limiting Summit's risk to its earnest money was a material term to Summit's decision to purchase the condominium unit, and Moore never initialed this or any of the other optional paragraphs, nor did Moore ever provide the public offering statement if Moore was not going to agree to the limitation on damages, there was never a meeting of the minds between the parties on these

Alternatively, the trial court concluded the Agreement could be and was "terminated" on July 23, 2007 in accordance with the financial contingency provision of the Agreement,[3] and that termination required an award to Buyer of the "earnest money" escrowed in the mutually-agreed interest bearing "earnest money" deposit with Ticor Title (CP 177, lines 11-15). These conclusions of law were reached even though the Court also found Buyer had subsequently been offered, accepted and paid for bank financing on September 20, 2007. (CP 173, lines 16 - 22)

The trial court awarded Seller, as an offset to the "earnest money" award, a portion of the moneys Seller expended at the request of Buyer in obtaining the "clean" Phase II environmental assessment necessary for Seller to obtain bank financing. (CP 177, lines 11 - 18) Seller's motions for reconsideration and for supplemental findings were denied on June 24, 2011. (CP 188-190) Seller and Buyer have each appealed. (CP 191, 249-50)

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points and thus no contract was ever formed. *Blue Mountain Const. Co. v. Grant County School dist. No.* 150-204, 49 Wn.2d 685, 306 P.2d 209 (1957); *Rorvig v. Douglas*, 123 Wn.2d 845, 859, 873 P.2d 492 (1994).

[3] Conclusion of Law 6 states:

Even if a contract was formed, Summit properly and timely issued a clear and unambiguous notice exercising its right to terminate the PSA pursuant to the financing contingency which Moore timely received. Exhibits 6 and 7. (CP 176, Lines 21-24)

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred as a matter of law in allowing Buyer to amend its answer to include a cross-claim alleging that there was no meeting of the minds and therefore no binding contract with Seller. (4/22/11 Order Denying Summit's Second Motion for Summary Judgment. (CP 132-133; VRP 4/22/11, p. 17, lines 14-17)

2. The Trial Court erred as a matter of law in denying Seller's Motion for Reconsideration and Entry of Supplemental Findings. (CP 188-189)

3. The Trial Court erred as a matter of law in entering the Judgment awarding the earnest money to Buyer. (CP 180-181)

On May 27, 2011 the trial court entered findings of fact and conclusions of law. Seller assigns error to the following findings and conclusions:

4. Finding of Fact No. 4 errs by stating that three optional paragraphs of the Agreement "would only become part of the PSA if the parties initialed those paragraphs." (CP 168)

5. Finding of Fact No. 17 errs by stating that Summit issued a notice on 7/23/07 "expressly terminating the PSA". (CP 172-173)

6. Finding of Fact No. 18 errs by stating Summit remained interested in "possibly" purchasing Unit A if the environmental issues could be satisfactorily resolved. (CP 173)

7. Finding of Fact No. 21 errs in stating that Summit and Moore continued to negotiate with each other regarding a "possible" purchase and sale of Unit A. (CP 174)

8. Conclusion of Law number 1 is an error of law. (CP 175)

9. Conclusion of Law No. 4 is an error of law. (CP 176)

10. Conclusion of Law No. 5 is an error law. (CP 176)

11. Conclusion of Law No. 6 is an error of law and is not supported by substantial evidence. (CP 176)

12. Conclusion of Law No. 7 is an error of law and is not supported by substantial evidence. (CP 177)

13. Conclusion of Law No. 9 is an of error law. (CP 177)

14. Conclusion of Law No. 10 is an error of law. (CP 177)

15. Conclusion of Law No. 11 is an error of law. (CP 178)

Issues pertaining to these assignments of error include:

A. Washington has long been committed to the objective view of contract formation and interpretation. *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503, 115 P.2d 262 (2005). Were the conclusions reached by the trial court on contract formation and interpretation issues consistent with this view?

B. The Agreement conditions the Buyer's obligation to purchase on obtaining financing for a portion of the purchase price. (Ex 3, § 7, p. 6) The Buyer obtained and paid for financing by Timberland Bank on September 20, 2007. (Ex. 63) The Trial Court concluded that the Buyer had previously terminated the Agreement by exercising the financing contingency. Can a Buyer that voluntarily obtains financing base a termination of the Agreement on the financing contingency?

C. RCW 64.04.005, as revised in 2005, no longer requires parties to separately initial a liquidated damages provision in order to create an enforceable contract. The Trial Court concluded that Seller's failure to initial provisions in the Agreement, including a liquidated damages provision, rendered the contract unenforceable. Does the failure of a party to initial provisions in a contract offered by that party mean that party is not bound by those provisions when they are accepted by the other party?

D. Civil Rule 15(a) allows a party to amend a pleading after a responsive pleading has been served only by leave of court, which

"shall be freely given when justice so requires." On April 22, 2011 the Trial Court, *sua sponte* and without argument, authorized Buyer to amend its cross claim to allege that there was no contract between the parties. Did this authorization to amend less than a week before trial constitute an abuse of discretion?

III. STATEMENT OF THE CASE

On June 13, 2007, Seller signed a comprehensive document titled "Purchase and Sale Agreement for Tenth & East Main Commercial Condominium" on the last page in his lawyer's office.[4] (VRP 4/28/11, pgs 29, lines 1-13, 31, lines 5-6, Ex. 3, pg 15) Section 2(a) of the Agreement provides in part "Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, The Unit on the Scheduled Closing Date (as defined in Section 8) . . . in accordance with the terms hereof." (Ex. 3, p 2) Buyer's purchase constituted 40.6% of the entire project. (Finding 3, CP 255)

The Agreement contained widely utilized provisions common to commercial Real Estate Purchase and Sale Agreements, and the three aforementioned "optional" provisions. (Ex. 3, §§ 5, 14 and 15, pgs 4, 9 and 10) Except for square footage ultimately established by a survey, the "offer" appears identical to a document circulated to Buyer and its counsel. (Ex. 2) Buyer's signatory testified she had signed and

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[4] Buyer had been pursuing an interest in the condominium unit for three months since February, 2007, and signed a Reservation Agreement on February 28, 2007. (Ex. 50)

initialed the three "optional" provisions on June 8, 2007.[5] (VRP 4/28/11, pgs 97, lines 4-25, 98, line 1; Ex. 2; Ex. 67, pg 2, lines 11-14) Neither the June 8 document nor the June 20 document bear the initials of Seller opposite the three "optional" provisions. (Exs. 2 and 3, §§ 5, 14 and 15)

Seller testified at trial he had no quarrel with any of the "optional" provisions that had been included by his lawyer in the document, but had not initialed any of them when he signed the Agreement because they were not tabbed "Sign Here" by the "post-its" that were placed on the signature page at the end of the document and the numerous execution copies, and that he intended for the optional provisions to be part of the contract if Buyer agreed. (VRP 4/28/11, pgs 31, lines 4-25, 32, lines 1-16)

On June 18, 2007, Seller's attorney emailed Buyer's attorney that she was holding Seller's signature page in trust pending execution of the document by Buyer. (Ex. 53) Buyer signed on June 20, 2007. (Ex. 3, pg 15)

After both parties had signed the document with an "effective" date of June 20, 2007, they proceeded with the undertakings remaining within their responsibility post execution. Buyer had

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[5] Seller's counsel had forwarded this initial draft of the final agreement to Buyer's counsel on June 1, 2007 requesting "any modifications" Buyer might desire. (Ex. 1)

determined it needed additional space within the complex permitting exclusive rear door access to parking available at the rear of the existing structure. (Compare Exs. 2 and 3; VRP 4/28/07, pgs 99, lines 17-30, 100, line 1) Seller reconfigured the interior partitioning. (VRP 5/5/11, pg 180, lines 14-25, 181, lines 1-5) He also commissioned the survey establishing the exact boundaries of the several condo units to be included in the deeds to be signed and recorded at closing by Ticor. This was accomplished by June 28, 2007. (Ex. 65)

Buyer, as it was obligated to do, applied for financing of the acquisition from Timberland Bank.[6] (Ex. 3, § 7)

By July 20, the "feasibility" contingency to Buyer's obligations expired by its terms, and with it Buyer's right to "terminate" the Agreement pursuant to this contingency, and to obtain a full refund of the three deposits that Buyer had placed in escrow with Ticor. (Ex. 3, § 6)[7]

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[6] Section 7 of the Agreement provides in part "Buyer shall apply for financing within three (3) days after mutual execution of the Agreement."

[7] Section 6 of the Agreement provides in part:

"(a) Buyer's Contingencies. . . . (ii) General Feasibility: Buyer shall have until the date thirty (30) calendar days following the mutual execution of this Agreement to: (1) determine whether the Unit is suited to Buyer's intended purposes and whether the acquisition of the Unit is feasible; and (2) deliver to Seller (if Buyer desires to terminate this Agreement) its written notice of disapproval of the feasibility of the Unit. . . .

If Buyer does give Seller written notice of disapproval within the thirty (30) day period referred to above, then this Agreement shall terminate, all obligations of the parties hereunder (other than those that expressly survive the termination of this Agreement) shall cease and the Earnest Money Deposit (less any charges paid out of escrow for

By the morning of July 23, 2007, the parties become aware that the Phase I environmental assessment that Timberland had required Buyer obtain had identified several off-site hazards that presented serious potential threats to the project, and that a "clean" Phase II assessment would be required to obtain financing.[8] (Ex. 6)

In the late afternoon of July 23 Buyer's attorney reiterated as follows:

> "Until I can discuss this with Erika and we work out a mutually acceptable extension agreement, please consider this Email as notice of Summit Uniserv's intent to exercise the right to terminate the agreement pursuant to the financing contingency as its lender will not provide a loan unless a mutually agreeable Phase II environmental assessment has been performed and the results demonstrate that the property is neither contaminated nor threatened by contamination." (Ex. 7)[9]

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appraisal fees, escrow charges and unpaid sums, if any, owing to the project architect for space planning requested by Buyer) shall be promptly refunded to Buyer."

[8] To obtain financing, Buyer's counsel requested a time extension for the financing contingency and stated, unless Seller provided such, Buyer would reluctantly terminate the Agreement. (Ex. 6)

[9] Section 7 of the Agreement also provides in part:

"Buyer shall have until forty-five (45) business days after mutual execution of the Agreement to provide Seller with written notice that Buyer's financing contingency has been satisfied or waived along with a copy of the approval of financing from Buyer's lender. If Buyer has not, within forty-five (45) business days of mutual acceptance, given notice that Buyer is unable to obtain financing, then this Financing Contingency shall be deemed waived. If Buyer gives notice that Buyer is unable to get financing within the abovementioned time frame, then, unless extension is granted by Seller, this offer shall terminate and the Earnest Money shall be returned to Buyer." (Ex. 3, pg 6)

Seller proceeded to obtain the Phase II assessment (VRP 5/5/11, pg 184, lines 23-24, Ex. 68), and authorized an open extension of time for Buyer to exercise the financing contingency (VRP 4/28/11, pg 52, lines 6-17; 5/5/11, pg 185, lines 21-24; Exs. 9, 13, 14, 16 and 57).

On August 2, 2007 Buyer's attorney again emailed Seller's attorney, stating in part:

> "As we discussed, Summit is very excited about this purchase and is looking forward to closing. However, until we have the loan funded, we are stuck.
>
> The soonest we can meet with the bank to confirm they have everything is August 13. I understand that the results of the Phase II will be available by August 16. We will then immediately provide that to the bank. If they can stick to their 7 business days timing, we should know by the last week of August if they will fund the loan. So I would think we would need to extend the contingency period to August 31. Then it will be a matter of getting the closing documents together and closing, which should not take very long." (Ex. 58)

On August 10, 2007 Buyer's attorney sent Seller's attorney another email as follows:

> "Thank you for the good news. This is a big relief to Summit, who is anxious to complete the transaction, as I know you are also.

> We will let the bank know to expect the report next week and we will try to firm up when the loan will be funded and a closing date." (Ex. 10)

On the same date, Buyer's attorney personally called Seller's home and told Seller's wife, in substance, that this was good news and they expected to be proceeding to closing of the transaction. (VRP 5/5/11, pgs 186, lines 18-25, 187, lines 1-11)

On September 6, 2007 Timberland extended its financing commitment for the transaction. (Ex. 61) On September 20, 2007, Buyer's new president accepted Timberland's commitment by signing and sending the check for the Bank commitment fee. (Ex. 63)

On October 4, 2007, Buyer's attorney sent Seller's attorney an email saying they would not proceed with the transaction, and requested that the "earnest money" deposit be returned. (Ex. 23) Seller proposed alternative dispute resolution of the developing controversy, but this was flatly rebuffed by Buyer's attorney.[10] (Ex. 64) Buyer closed on another commercial space in February, 2008. (Ex. 72)

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[10] Arbitration was one of the optional provisions that Buyer has contended was "material" to its assent to the Agreement.

IV. ARGUMENT

A. Standard of Review

This Court reviews the trial court's findings of fact for substantial evidence in the record and the conclusions of law *de novo*. *Estate of Jones,* 152 Wn.2d 1, 8-9, 93 P.2d 147 (2004). The trial court's grant or denial of leave to amend pleadings is reviewed for abuse of discretion. *Wilson vs. Horsley,* 137 Wn.2d 500, 505, 974 P.2d 316 (1999). The interpretation of a contract is a question of law when the interpretation does not depend on the use of extrinsic evidence or there is only one reasonable inference from the extrinsic evidence. *Lynott v. National Union Fire Ins. Co. of Pittsburgh,* 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

B. Legal Framework for Resolution of the Contract Formation Issue

Washington has been committed to the "objective" view of contract formation and interpretation for many years. As noted in *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503, 115 P.2d 262 (2005):

> "We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations

> of the agreement, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle,* 62 Wash.App. 593, 602, 815 P.2d 284 (1991)."

The objective view has a long pedigree in America. Many credit Oliver Wendell Holmes as the intellectual father of this doctrine. See Oliver Wendell Holmes, The Common Law, pg. 307 (1881)

Courts look first to the writings signed by the parties to determine the intent of the parties. Only if that is unclear will courts next examine the acts and conduct of the parties to determine whether they understood themselves to be bound and their actions to see how they applied the words of their written undertakings. *Brooklyn Life Insurance Co. v. Dutcher,* 95 US 269, 273, 24 L.Ed. 410 (1827):

> "[T]here is no surer way to find out what the parties meant than to see what they have done."

Although "meeting of the minds" sounds like a subjective inquiry, intent is typically determined as a matter of law in contract formation cases and, except infrequently, in interpretation cases where the Court refers to this legal determination as "construing" the words

of the contract as a legal matter. [11] *Berg v. Hudesman,* 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The circumstances at the time of execution and the predispute conduct of the parties is the best guide to the parties' intent, whether the issue is one of contact formation or interpretation. *Berg v. Hudesman, supra,* at pg 668.

The "objective" view of contract formation and interpretation requires a much higher degree of skepticism of what Buyer's post-dispute sense of what it considered to be material than was exhibited by the trial court. The trial court adopted Buyer's argument, formulated almost four years after the contract was signed and only after Buyer's counsel discovered other agreed provisions of the Agreement exposed it to damages, notwithstanding the "optional" liquidated damage provision. (Conclusion of Law 1, CP 262) See the November 15, 2010 billing entry "Additional argument re formation of contract" by Buyer's attorney. (CP 230)

The Agreement between the parties explicitly provides at Section 22, page 12:

> "Should any provision or portion hereof be declared invalid or in conflict with any law . . . the validity of all other provisions and

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[11] "[T]he making of a contract does not depend on the state of the parties' minds; it depends on their overt acts." *Hotchkiss v. National City Bank,* 200 Fed. 287 (S.D. N.Y., 1911) by Learned Hand.

> portions hereof shall remain unaffected and in full force and effect." (Ex. 3)

No provision of an agreement is to be read in isolation to all others, but must be read with a view to upholding the object of the contract taken as a whole. *Colorado Structures v. Ins. Co. of the West,* 161 Wn.2d 577, 588, 167 P.3d 1125 (2007)

By definition, an "optional" provision is not essential to contract formation, even accepting Buyer's argument that it subjectively considered all of those provisions to be "material". Only if Buyers had specified in their acceptance of the Agreement that Seller must also initial the options he offered could these initials be essential to contract formation. An acceptance requesting a modification in terms can consummate the contract so long as the additional terms are not made conditions of acceptance and the acceptance is unequivocal. *Sea-Van Investments Assoc. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994), which is in accord with *Restatement Second, Contracts* § 61 (1981).

These decisions strongly indicate that the trial court, ignoring intent to form a contract on the basis of offer, acceptance and consideration, overreached in voiding not just the "optional" terms of the Agreement which both parties agreed were binding, but virtually all the other essential provisions.

C. **Seller's signed offer of June 13, 2007 extended through his attorney included the three optional provisions. Buyer's initialed acceptance and signature effective June 20, 2007 constituted an integrated legally enforceable contract. Further initials by Seller on the accepted options would have been redundant as a matter of law.**

On June 1, 2007, Seller's attorney provided Buyer and its attorney an advance draft of the final Agreement for possible modification, if any. (Ex 1)

On June 13, 2007, Seller signed the Agreement offering Buyer three "optional" provisions that were not essential for a purchase and sale.

One optional provision, widely used in commercial transactions, required arbitration of all disputes arising under the Agreement. (Ex. 3, §15) A second provision waived the requirement of a public offering statement under the Condominium Act, RCW 64.34.400, an informational statement common to residential condo sales often involving consumers unrepresented by counsel. [12] (Ex. 3, §5) The third provision, at the heart of the issues here, is the liquidated damage clause authorized by RCW 64.04.005 making the "earnest money" deposit an exclusive remedy. (Ex. 3, §14)

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[12] See *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 440-441, 47 P.3d 540 (2002) in which the court differentiated a consumer transaction from a commercial transaction where the parties have more equal bargaining power.

On June 20, 2007, Buyer signed the last page of the Agreement which offered these optional provisions to buyer. Buyer's acceptance of all of these "optional" provisions was manifested by Buyer's initials opposite each. Seller never acknowledged Buyer's acceptance by initialing opposite Buyer's initials. (Ex. 3, pgs 4, 9 and 10)

Throughout the subsistence of the Agreement and the course of the litigation, no evidence was developed or offered that Buyer demanded or was refused arbitration. Rather, Buyer rejected Seller's proposal of alternative dispute resolution when the dispute arose in October, 2007. (Ex. 64)

Likewise, no evidence was offered that Buyer or its attorney ever rescinded Buyer's waiver of a public offering statement under the Condominium Act or demanded Seller provide such a statement.

Finally, Buyer refused to relinquish the "earnest money" deposit designated by the Agreement "as security for Buyer's obligations under this Agreement". (Ex. 3, §4, pg 4) Buyer then cross-claimed to force release of the "earnest money" to it without any allegation of breach by Seller. Buyer also made no payment for HVAC upgrades agreed to be paid by Buyer, or for the cost of environmental clearances associated with financing also agreed to be paid by Buyer (Ex. 3, § 6, pg 4).

In *Chrisp v. Goll,* 126 Wn.App. 18, 104 P.3d 25 (2005), the Court of Appeals ruled that the 1991 revisions of RCW 64.04.005 requiring Liquidated Damage provisions to be separately initialed or signed by the purchaser and seller") nullified entire contracts that failed to conform to this statutory mandate.

The ink on this decision was barely dry when the legislature passed SHB 1699 eliminating the statutory requirement of initials, creating a safe harbor for liquidated damage provisions limited to five per cent of the purchase price, and authorizing contractual deposit provisions in addition to the "earnest money" not to be included in the "earnest money". The Bill also preserved the common law standard that liquidated damage provisions bearing no relation to the damages sustained could be invalidated as a penalty rather than a reasonable forecast of damages too difficult to ascertain. The Final Bill Report is set forth in Appendix B, giving a clear picture of legislative intent. RCW 64.04.005

As revised in 2005, RCW 64.04.005 no longer requires separate initialed provisions in addition to a signature on the last page are no longer a *sine qua non* of contract enforceability. (See Appendix C attached) Hence as held in *Skagit State Bank v. Rasmussen,* 109 Wn.2d 377, 381-384, 745 P.2d 37 (1987), the parties' signature on

the contract binds the parties to all of its provisions, whether read or fully understood or specifically bargained. This is in keeping with the modern trend of decisions in contract formation relating to "assent".

At early common law, no contract was valid unless a seal embossed in wax was affixed. As discussed in the section dealing with the Standard of Review, once it is clear that parties have elected to enter into a contractual relationship, it takes very little in the way of specific knowledge or assent to have different provisions deemed a part of the contract. See *M. A. Mortenson Co., Inc. v. Timberline Software Corporation*, 140 Wn.2d 568, 584, 998 P.2d 305 (2000) in which the court determined, as a matter of law, that a party need not actually have read an agreement in order to be bound by it.

Lambert v. Kysar, 983 F.2d 1110 (1st Cir., 1993), illustrates how assent to provisions different from the original offer may be found if the parties' subsequent conduct clearly acknowledges the existence of a contract. In that case, a Washington Christmas tree grower offered a Massachusetts buyer 2,600 trees at a per tree price. The buyer lowered the number by 950 trees at the same price and seller shipped 1,650. There was no explicit acceptance of the counter-offer, but the court enforced the contract, applying Washington State law.

In the case at bar, both Buyer and Seller behaved and acted as though the purchase and sale agreement was operative. Only when Buyer, instead of relinquishing the earnest money as liquidated damages, sued to recover it, was there any fundamental breach by either Buyer or Seller. A creative lawyer's theory, advanced almost four years after the contract was signed does not invalidate a comprehensive signed agreement with optional terms offered and accepted.

As stated in *Restatement Second, Contracts*, §19(1), (1981), "The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure of an act", a very expansive and liberal view of assent necessary for contract formation. Moreover, in the Agreement between the parties here, Section 22 specifically provides:

> "INVALIDITY OF ANY PROVISION. Should any provision or portion hereof be declared invalid or in conflict with any law of the jurisdiction where this project is situated, the validity of all other provisions and portions hereof shall remain unaffected and in full force and effect." (Ex. 3)

It was error for the trial court to invalidate the entire contract based on subjective allegations there was no "meeting of the minds", made

almost four years after the contract was executed, particularly when the acts and conduct of the parties demonstrated their conviction that they had mutual contract rights and obligations until October, 2007 when Buyer demanded return of the "earnest money" deposit. Buyer's pleadings and sworn declarations that a contract was executed and its new theory that the absence of initials voids the entire contract, does not create a "disputed" fact.

D. The Pre-Dispute Conduct of the parties acting with advice of counsel, confirms the existence of the contract until October, 2007, when the Buyer requested the "earnest money" specified as security for Buyer's obligations.

The trial judge noted in her oral decision that the parties acted throughout the pre-closing period as if they were under contractual obligation, observing "Everybody acted like you had a contract." (VRP 5/11/11, pg 6, line 20)

In opening statement, Buyer's counsel indicated it would prove Seller did not consider himself bound by the "optional" provisions initialed by Buyer as accepted, particularly the provision limiting Seller or Buyer to the "earnest money" deposit as damages. (VRP 4/28/11, pgs 20-21) Seller was the first witness called by Buyer and he was taken through many of the provisions of the Agreement by Buyer's counsel. (VRP 4/28/11, pgs 26-66) Nowhere in Seller's testimony

does Seller indicate he believed himself not bound by any part of the Agreement including the liquidated damage provision. His testimony was that had Buyer relinquished the "earnest money" in October, 2007, that would have been "the end of it". (VRP 4/28/11, pgs 86, lines 12-25, 87, line 1)

Seller had been apprised by Buyer in September, 2007 after a "clean" Phase II environmental assessment had been obtained that financing was "no problem". (VRP 5/5/11, pgs 190, lines 6-10, 21-25, 191, lines 1-5). Indeed, it is clear that on September 20, 2007 Buyer had signed off on Timberland Bank's commitment letter and mailed its check for financing fees in the amount of $5,000 to Timberland. (Ex. 63)

When asked why this was done, Buyer's incoming President testified:

> "Q Can you tell me why you would sign a commitment letter and send a $5,000 check based upon property covered by a purchase and sale agreement that yo0u felt had been terminated?
>
> A We were in negotiations to continue to purchase this property, and we were concerned we did not have a purchase and sale agreement after July 23rd. We understood that Mr. Moore can sell that property out from under us, but we had been moving forward after receiving a

> clean Phase II report and hopeful that we would be able to purchase this property. We had spent a lot of money and time and effort on being able to make this purchase; and we thought – I thought and believed on September 20th that we had come to an understanding of everything regarding the easement, et cetera, that would allow us to move forward and make a purchase of a condominium in the Moore property.
>
> Q Thank you." (VPR 5/5/11, pgs 162, lines 7-25, 163, lines 1-3)

This voluntary act by Buyer "satisfied" the financing contingency and obligated Buyer to proceed to "scheduled closing" pursuant to paragraph 1 (K) and 8 of the Agreement. (Ex. 3, pgs 2 and 7) By the explicit provisions of the Agreement, Buyer's "earnest money" became "nonrefundable" after Seller's recordation of the Declaration and Survey Map on June 28, 2007 and its " satisfaction" of the financing contingency on September 20, 2007 by signing the Timberland commitment and paying the fee, (Ex. 3, § 4, pg 6; Ex. 63; Ex. 65)

Buyer refused to relinquish the "earnest money" as liquidated damages pursuant to the "optional" provision Buyer had accepted. Buyer's refusal of alternative dispute resolution, another "option" it had agreed upon, and its failure to proceed to closing within ten business days as required by Sections 1(k) and 8 of the Agreement breached the Agreement. This opened the door to Buyer's liability for

$200 a day as additional deposit beyond the earnest money. This was expressly permitted by RCW 64.04.005, and set forth at paragraph 8(c) of the Agreement. (Ex. 3, pg 7)

Even without statutory or express contractual provision for damages as available here, a distinguished common law court has awarded full compensating damages when a buyer without contractual justification and without proof of a contract breach by Seller refused to relinquish the "earnest money" to Seller. See *Short Clove Associates, Inc. v. Ilana Realty, Inc.,* 154 B.R. 21, 26-29; 1993 U.S. Dist. LEXIS 6305 (S.D.N.Y. 1993)

The noted provisions of the Agreement providing $200 a day damages and "all other remedies" (Ex. 3, §30, pg 13) were not excised by Buyer or its counsel at contract formation, and are perfectly consistent with Buyer's failure to take a "stitch in time to save nine" by relinquishing the "earnest money" to Seller, thus frustrating and negating the "liquidated damages" as an "exclusive remedy".

E. The trial court's alternative conclusion that Buyer could and did terminate the Agreement on July 23, 2007 misconstrues the financing contingency provision as a matter of law.

On July 20, 2007, the 30-day "feasibility" contingency provided by Section 6(a)(ii) of the Agreement expired by its own terms. (Ex. 3, pg

5) The feasibility contingency basically permits a Buyer to terminate a purchase for any reason.

The "financing" contingency is different. The Buyer is affirmatively obligated by the Agreement to obtain such financing. (Ex. 3, §7, pg 6) Here, Buyer signed and paid for Timberland Bank's Financing Commitment for this purchase on September 20, 2007. (Ex. 63)

The Agreement specifies in Section 7 that Seller may extend the time for exercise or satisfaction of the financing contingency, "unless extension is granted by Seller, this offer shall terminate . . ." (Ex. 3, pg 6) It is a well established rule of contract construction that all provisions are to be read as consistent with each other and, if possible, in a way to give full effect to each. *Colorado Structures v. Ins. Co. of the West,* 161 Wn.2d 577, 588, 167 P.3d 1125 (2007)

The email of July 23, 2007 from Buyer's counsel could not, by the terms of the financing contingency, "terminate" the Agreement once Seller offered an open extension. The email described termination as only an "alternative" if no extension was granted. (Ex. 7)

The t erred as a matter of law by entry of Finding of Fact No. 17 and Conclusion of Law No. 6.

F. The trial court's *sua sponte* order authorizing Buyer to amend its cross-claim to include an allegation that there was no enforceable contract with Seller was an abuse of discretion.

Buyer's answer and cross-claim filed on July 15, 2008 alleged that Buyer and Seller had entered into a purchase and sale agreement for the Tenth & East Main condominium in Puyallup. (CP 29) Seller admitted this allegation in its responsive pleading. (CP 58) This state of the pleadings defining the law of the case remained unchanged until April 27, 2011, the day before trial commenced. (CP 136)

In March, 2011, the month before trial, Buyer's counsel submitted a Declaration by Buyers contract signatory declaring in part as follows: (Ex. 67, pg. 2, § 5)

> "5. On June 20, 2007, I again initialed all three of the alternate paragraphs in Moore's proposed PSA as it was still Summit's intent to have those terms be a part of the PSA. Those alternate paragraphs, and in particular the paragraph limiting Summit's liability to its earnest money, were a critical and material part of Summit choosing to sign the PSA. If those paragraphs were not going to be part of the PSA, Summit would not have signed the PSA." [13]

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[13] At trial, Buyer's counsel elicited testimony from the same declarant stating she only signed the signature page of the agreement (VRP 4/28/11, pgs 101-106), ignoring the earlier sworn declaration stating she had also initialed the optional provisions on preceding pages on June 20, 2007 as well (Ex. 67, pg 3, RP 111-114). The Superior Court ignored the direct contradiction, and found that only the last page of the agreement was signed by Buyers signatory on June 20, 2007. (Findings of Fact No. 7, CP 169) Buyer's signatory testified on cross-examination that when she signed the Agreement on June 20, 2007, there was no discussion of the optional

With a pending trial date of April 28, 2011, Buyer moved for summary judgment on its new theory that the entire Agreement was void *ab initio* by virtue of the absence of Seller's initials on all optional provisions. Buyer argued it would not have entered the Agreement without a liability limitation, hence there was no "meeting of the minds" necessary for contract formation. (VPR 4/22/11, pgs 4, lines 24-25, 5, lines 1-3) Seller's counsel responded that the new theory was untimely, inconsistent with the pleadings and should be barred from consideration. (VRP 4/22/11, pg 5, lines 6-10) Buyer's counsel responded it was in the pleadings by its affirmative defense alleging the Statute of Frauds. (VRP 4/22/11, pg 7, lines 10-16)

The trial court denied both parties' arguments and, on its own motion, authorized Buyer's counsel to submit an amended pleading. (CP 132-133) Buyer's counsel did so on the day before trial began. (CP 134-140)

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provisions including ergo the absence of Seller's initials opposite these provisions. (VRP 4/28/11, pgs 113, lines 12-25, 114, lines 1-6).

There is also no evidence that Buyer or its counsel made Buyer's acceptance of the agreement conditional on Seller also initialing the offer and Buyer accepted "optional" provisions. *Sea-Van Investments v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994), and Restated Second, Contracts* §61 (1981).

Timing of this amendment, almost four years after the Agreement was signed by both parties, deprived Seller of an opportunity for discovery and time to adequately prepare for trial. Also, as noted previously in this brief, an important case and statutory revision were not brought to the attention of the trial court. (App. Brief, pgs 17-18)

In authorizing the Buyer to amend its pleadings, the trial court was required to consider the language and purpose of the court rules even though no formal motion to amend had been made by Buyer. Although CR 15(a) provides that leave to amend shall be freely given when justice so requires, undue delay in proposing the amendment, constitutes a reason for denial when the delay imposes hardship or prejudice upon the opposing party. *Appliance Buyers Credit Corp. v. Upton,* 65 Wn.2d 793, 800, 399 P.2d 587 (1965). The touchstone for denial of an amendment is the prejudice it would cause the nonmoving party. *Caruso v. Local Union No. 690,* 100 Wn.2d 343, 350, 670 P.2d 240 (1983).

The decision to grant leave to amend the pleadings is within the discretion of the trial court and will not be disturbed on review unless that discretion has been abused, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons. *Wilson v. Horsley,* 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Here Buyer was aware of the basis for alleging that there was no meeting of the minds between the parties at least by July 15, 2008 when it filed its original answer and cross-claim, attaching a copy of the Agreement, without Seller's initials on the three "optional" provisions. (CP 35 and 41) Buyer never moved to amend its pleadings, instead filing a second motion for summary judgment which was denied on April 22, 2011. (CP 132-133) It was on that date, six days before trial, that the court summarily, without argument, authorized the amendment to Buyer's pleadings. (VRP 4/22/11, pg 11, lines 14-17) The undue delay by Buyer along with the obvious hardship and prejudice to Seller are apparent, as is the manifest abuse of discretion by the trial court.

G. The trial court's award of Seller's costs in obtaining the environmental clearances required by Buyer's Bank is supported by the Agreement. These costs are properly awarded in addition to the "earnest money", not as a set-off against it.

Section 7 of the Agreement provides in pertinent part: "Buyer shall pay all costs associated with financing . . . (Ex. 3, pg 6) The trial court correctly to awarded these costs to Seller under this provision. It

should, however, been an addition to the "earnest money" deposit pursuant to RCW 64.04.005(2)(a) and not an offset against it.[14]

V. CONCLUSION

Courts seek to uphold the voluntary agreement of parties, absent clear proof of fraud or mistake going to the essence of the contract.

The evidence, both written and testimonial, the acts and conduct of both parties, together with the failure to object to the absence of Seller's initials on the optional provisions amounts to mutual assent to all provisions including the "optional" provisions.

The declared public policy of Washington does away with separate initialing of separate provisions as a basis for invalidating an entire contract in a commercial transaction.

Reasonable minds cannot read Buyer's July 23, 2007 request for a time extension on the financing contingency, which was offered by Seller on several occasions, as an unconditional termination of the Agreement, particularly after Buyer's subsequent overt acts consistent with the Agreement, including satisfaction of the Section 7 financial contingency on September 20, 2007.

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[14] The earnest money deposit "does not include other deposits or payments" required of the "purchaser".

Only Buyer's failure to relinquish the "earnest money" posted "as security for Buyer's obligations" in October, 2007 exposed it to other damages provided by other provisions of the contract. This act removed the cap on damages Buyer would otherwise enjoy.

The decision below should be reversed and remanded for judgment in favor of Seller consistent with these conclusions.

Dated this 13th day of January, 2012.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____
Joe Gordon, Jr.
Attorneys for Appellant
WSBA No. 01804

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on January 13, 2012 I did serve via email and U.S. Mail, true and correct copies of the foregoing by addressing and directing for delivery to the following:

Counsel for Respondent:

Mark Roberts
Roberts Johns & Hemphill PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335
mark@rjh-legal.com

Joe Gordon, Jr.
Attorney for Appellant

PURCHASE AND SALE AGREEMENT
FOR
TENTH & EAST MAIN COMMERCIAL CONDOMINIUM

THIS PURCHASE AND SALE AGREEMENT (the "Agreement") is entered into as of June 20, 2007 (the "Effective Date"), between WILLIAM B. MOORE, an individual, as his separate estate, and/or assigns ("Seller"), and **Summit Uniserv Council,** a Washington Non-Profit Corporation ("Buyer").

RECITALS

A. Seller is the owner of certain real property located in the City of Puyallup, Pierce County, State of Washington, that is described more particularly in Exhibit A hereto, a commercial condominium project to be known as 1004 East Main ("the Project"). The Project consists of five (5) commercial condominium units, more particularly depicted on the depiction of the condominium Units attached as Exhibit B hereto.

B. Buyer is acquiring proposed **Unit A** of the Project, as generally depicted on Exhibit B attached hereto (the "Unit"), consisting of Fifty Nine Thousand Forty **(5,940) square feet** together with use of common elements of the Project. Seller is willing to sell the Unit to Buyer under the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. **DEFINED TERMS.** The following terms are used periodically throughout this Agreement, and their meanings are as follows:

(a) "Articles" means the Articles of Incorporation establishing the Association that will be filed with the Washington Secretary of State's office.

(b) "Association" means the unit owner's association for the Project, a non-profit Washington corporation that will be created and named 1004 East Main Condominium Owners' Association.

(c) "Association Documents" means the following documents related to the organization, management and governance of the Association: (i) the Articles; (ii) the By-Laws (as such term is defined below); (iii) the current annual budget for the Association; (iv) the Association's current balance sheet; and (v) the rules and regulations governing the Association, if any.

(d) "Buyer's Broker" is: Ethan Offenbecher, Offenbecher Commercial, Inc.

(e) "Bylaws" means the by-laws adopted by the Association in accordance with RCW 64.34.324.

(f) "Common Elements" means all portions of the Project other than Units and the Limited Common Elements as will be set forth in the Declaration.

(g) "Declaration" means that certain "Condominium Declaration For 1004 East Main Commercial Condominium," to be recorded in Pierce County, Washington.

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EXHIBIT: A

APPENDIX A

(h) "Escrow Holder" means:

Ticor Title Company
Attn: Jaylyn Moore
437 29th St NE
Puyallup, WA 98372

Phone: 253-840-2560
Fax: 253-840-1767

(i) "Estimated Completion Date" means July 10, 2007.

(j) "Project" means that certain commercial condominium project of which the Unit is a part created by the Declaration and the Survey Map and Plans.

(k) "Scheduled Closing Date" means the date that is the later of (i) seven (7) business days following the date a temporary Certificate of Occupancy (or its equivalent) for the Unit is issued by the local governmental agency; OR (ii) ten (10) business days following the date that the conditions described in Section 6(a) and Section 7 below are satisfied or waived in writing by Buyer. The date that Buyer's funds are disbursed by Buyer or Buyer's lender to Seller, or the date that the deed transferring title to Buyer is recorded, whichever first occurs shall be the "Actual Closing Date".

(l) "Seller's Broker" is: Ethan Offenbecher of Offenbecher Commercial, Inc., located at 101 South Meridian, Puyallup, WA 98371.

(m) "Survey Map and Plans" means that certain survey map and those certain architectural plans with respect to the Project to be recorded in Pierce County, Washington.

(n) "Unit" means a physical portion of the Project designated for separate ownership the Buyer is acquiring, the boundaries of which will be described in the Declaration and shown on the Survey Map and Plans.

2. **PURCHASE AND SALE.**

(a) Unit. Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the Unit on the Scheduled Closing Date (as defined in Section 8) or such other date as specified herein, in accordance with the terms hereof. All sizes, dimensions, areas, and specifications, including Unit areas and the allocation of votes and percentages based on those areas as set forth in the Declaration, the Project documents, or in Agreement are based upon the good faith calculations of Seller's surveyor. With the exception of those documents and this Agreement, Buyer shall not rely upon any statement made by any agent or representatives of Seller regarding those matters including any statements or promotional materials purporting to confirm exact boundaries, dimensions or areas of the Unit or Common Elements.

(b) Purchase Price. The purchase price payable by Buyer for the Unit will be the sum of One Million, Two Hundred Thirty Thousand Four Hundred Forty Dollars and No/100 **($1,230,440.00)** ("Purchase Price") for a total of 6,171 gross square feet. Buyer shall pay the purchase price at the Actual Closing Date in cash or immediately available funds inclusive of the Earnest Money Deposit. On or before to the Actual Closing Date, Seller will provide Buyer with a written as-built survey of the Unit, prepared according to applicable measurement standards. If the as-built area of the Unit is less than the area specified above in this Section 2(b), the Purchase Price shall be adjusted accordingly.

(c) Seller's Reimbursement for Construction Upgrades. Buyer shall reimburse Seller in the amount of One Thousand Five Hundred Ninety Three and no/100 Dollars ($1,593.00) plus sales tax at the Actual Closing Date in cash or immediately available funds for those upgrades to the Seller's Work requested by Buyer, more particularly set forth in Exhibit C.

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in which the Unit is located, the Estimated Completion Date will be extended one day for each day that the construction is delayed

For purposes herein, the term "Force Majeure Delay" shall mean delay which is attributable to any: (a) actual delay or failure to perform attributable to any strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of Seller or its contractors or other representatives), civil disturbance; future order of any governmental entity claiming jurisdiction; act of a public enemy; war; riot, sabotage, blockade, or embargo; or inability to secure customary materials, supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body; (b) unreasonable delay in the issuance of applicable governmental permits, certificates and/or approvals due to action or inaction of the applicable governmental entity; (c) delay in completing plans and specifications because of changes in any laws or building requirements, or the interpretation thereof; or (d) delay attributable to lighting, earthquake, fire, rain, storm, flood, washout, explosion, or any other cause beyond the reasonable control of Seller, or any of its contractors or other representatives. A Force Majeure Delay shall not include a delay due to financial inability of Seller to perform.

4. **EARNEST MONEY DEPOSIT**. As security for Buyer's obligations under this Agreement, Buyer deposited with Campbell, Dille, Barnett, Smith and Wiley the sum of Five Thousand Dollars cash **($5,000.00)** to reserve the right to purchase the Unit ("Reservation Deposit"). Within three (3) business days after mutual execution of this Agreement, Buyer shall deposit the additional sum of Fifty Six Thousand, Five Hundred Twenty-Two Dollars **($56,522.00)** cash ("Purchase Deposit") with Ticor Title Insurance Company ("Escrow Holder" or "Title Company"). Buyer's two deposits totaling five percent (5%) of the Purchase price of the unit in the amount of Sixty One Thousand, Five Hundred Twenty-Two Dollars **($61,522.00)** shall collectively be referred to as the "Earnest Money Deposit", which sum shall be held by Escrow Holder in an interest bearing account. Except in the event of a default on the party of the Seller, Buyer and Seller agree that the Earnest Money Deposit shall become non-refundable to Buyer after Buyer's waiver of Buyer's contingencies set forth in Section 6(a) and Section 7 and the recordation of the Declaration and the Survey Map and Plans. The Earnest Money Deposit will be applied towards the Purchase Price upon Closing.

In addition, Buyer shall pay at the close of escrow any fees, inspection fees and impounds required by its lender and, if requested by Buyer or Buyer's lender, the cost of any excess title insurance associated with ALTA extended policy of title insurance. Buyer and Seller shall pay the recording fees, escrow fees and any other closing costs and fees incurred in closing this purchase and sale transaction as is set forth in Section 8 of this Agreement.

5. **NO PUBLIC OFFERING STATEMENT REQUIRED. AS PERMITTED BY RCW 64.34.400(1), BUYER ACKNOWLEDGES THAT THE PROJECT IS A COMMERCIAL AND NONRESIDENTIAL CONDOMINIUM AND BUYER KNOWINGLY AND VOLUNTARILY WAIVES ITS RIGHT TO RECEIVE A PUBLIC OFFERING STATEMENT ("POS") WITH RESPECT TO THE UNIT, AND BUYER AND SELLER HEREBY EXPRESSLY AGREE THAT NO POS SHALL BE REQUIRED TO BE DELIVERED TO BUYER WITH RESPECT TO THE UNIT OR THE PROJECT. ANY DELIVERY OF A POS TO BUYER SHALL BE FOR CONVENIENCE ONLY IN DESCRIBING THE PROJECT AND UNIT AND MAKING CERTAIN OTHER DISCLOSURES FOR BUYER'S REVIEW UNDER SECTION 7(A) ABOVE, AND SHALL NOT SERVE AS THE BASIS FOR ANY CLAIM THAT SELLER WAS OBLIGATED TO PROVIDE THE POS OR ANY AMENDMENTS TO BUYER OR TO MAKE ANY OTHER DISCLOSURES OR REPRESENTATIONS OR WARRANTIES PROVIDED FOR IN ARTICLE 4.**

INITIALS: **BUYER** _____ **SELLER** _____

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6. **CONTINGENCIES.**

(a) Buyer's Contingencies. Buyer's obligation to purchase the Unit pursuant to the terms of this Agreement shall be conditioned upon Buyer reviewing and satisfying itself, in its sole discretion, within the thirty (30) calendar day period referred to below, of the following matters:

(i) Intended Use: Buyer shall have the right to meet with the City or any other parties to satisfy itself with respect to the zoning, governmental regulations, restrictions, parking limitations and requirements, laws, permits, fees and approvals that apply to the Unit and its intended use. Seller makes no warranty or representation regarding the merchantability or usability of the Unit, the determination of which shall be Buyer's sole responsibility.

(ii) General Feasibility: Buyer shall have until the date thirty (30) calendar days following the mutual execution of this Agreement to: (1) determine whether the Unit is suited to Buyer's intended purposes and whether the acquisition of the Unit is feasible; and (2) deliver to Seller (if Buyer desires to terminate this Agreement) its written notice of disapproval of the feasibility of the Unit and the matters referred to in Section 6(a)(i) above. To assist Buyer with its due diligence, Seller shall provide or make available to Buyer, within five (5) days following the mutual execution of this Agreement, information which shall include the following documents:

(1) Preliminary title report covering the Unit;
(2) The draft Association Documents (as defined in Section 1(c) above;
(3) The draft Declaration (as defined in Section 1(g) above); and
(4) An estimated annual budget for the Association.

Seller shall provide Buyer with a draft of the Survey Map and Plans (as defined in Section 1(m) above) within twenty four (24) hours of its receipt of the draft.

Buyer acknowledges that Seller has begun marketing the other units in the Project prior to the completion of the Project's design and construction. Accordingly, some or all of the foregoing materials may, as of the date of this Agreement, be in draft form, and Seller may continue to revise and amend such materials. In the event that Seller revises or amends such materials, Buyer shall have an additional three (3) days to review and approve such revisions and/or amendments, all of which shall be completed prior to Closing.

If Buyer does give Seller written notice of disapproval within the thirty (30) day period referred to above, then this Agreement shall terminate, all obligations of the parties hereunder (other than those that expressly survive the termination of this Agreement) shall cease and the Earnest Money Deposit (less any charges paid out of escrow for appraisal fees, escrow charges and unpaid sums, if any, owing to the project architect for space planning requested by Buyer) shall be promptly refunded to Buyer.

If, within the thirty (30) day period referred to above, the conditions set forth in Sections 6(a)(i), 6(a)(ii) and Section 7 have not been satisfied and Buyer has not delivered written notice of disapproval to Seller as provided above, then, following the expiration of such thirty (30) day period, Seller shall have the right, but not the obligation, to give Buyer written notice of either: (i) an additional period of time to be determined by Seller during which Buyer may satisfy itself as to any of the matters set forth in Sections 6(a)(i), 6(a)(ii) and Section 7 above; or (ii) at Seller's election, Seller may terminate this Agreement. If Seller elects to terminate this Agreement as provided in the preceding sentence, then this Agreement shall terminate as of the date Seller delivers written notice of termination to Buyer, all obligations of Seller and Buyer hereunder (except for those that expressly survive termination of this Agreement) shall cease and Buyer shall be entitled to a refund of its Earnest Money Deposit.

(b) Seller's Contingencies. Seller's obligations under the Agreement are conditioned upon:

(i) Seller's recordation of the Survey Map and Plans and the Declaration; AND

(ii) Seller receiving from the City of Puyallup and other governmental or quasi-governmental entities all permits and approvals necessary to construct and occupy the Units

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comprising the Project on terms and conditions acceptable to Seller. The conditions stated in this Section shall be deemed satisfied if Seller has not terminated the Agreement on or before June 25, 2007. Seller may terminate the Agreement by delivering written notice of termination to Buyer at any time before June 25, 2007, if any of these conditions fail to be satisfied for any reason other than Seller's intentional misconduct or gross negligence. The conditions stated in this Section are for the sole benefit of Seller. Seller shall determine in its sole discretion whether these conditions are satisfied. In the event Seller terminates the Agreement under this Section 5(b)(ii), Buyer shall be entitled to a refund of its Earnest Money Deposit.

7. **FINANCING.** Buyer's obligation to purchase the Unit pursuant to the Agreement is conditioned on Buyer's obtaining financing for a portion of the Purchase Price. The following provision applies to the Agreement. Buyer shall apply for financing within three (3) days after mutual execution of the Agreement. Buyer shall have until forty-five (45) business days after mutual execution of the Agreement to provide Seller with written notice that Buyer's financing contingency has been satisfied or waived along with a copy of the approval of financing from Buyer's lender. If Buyer has not, within forty-five (45) business days of mutual acceptance, given notice that Buyer is unable to obtain financing, then this Financing Contingency shall be deemed waived. If Buyer gives notice that Buyer is unable to get financing within the abovementioned time frame, then, unless extension is granted by Seller, this offer shall terminate and the Earnest Money shall be returned to Buyer. Buyer understands and agrees to inform Buyer's lender that a FNMA Form 1028 (which certifies that FNMA's standard presale requirement has been met) may not be available by the time of closing and that the approval of financing from Buyer's lender may not provide that the closing of Buyer's loan on the Actual Closing Date will be conditioned on the issuance of a FNMA Form 1028 or achievement of any particular presale requirement.

With respect to any financing required or obtained by Buyer, Buyer shall be solely responsible for maintaining any approval for financing in full force until this sale is completed. Buyer shall pay all costs associated with financing, including, but not limited to, application, processing, and closing costs thereof. Buyer shall not be entitled to terminate the Agreement or hold Seller responsible in the event the lender increases the interest rate, loan fees or otherwise changes the terms of Buyer's loan or if Lender withdraws or conditions its loan approval for any reason, including, without limitation, a delay in construction of the Unit or in closing this sale.

8. **ESCROW, CLOSING DATE, CLOSING COSTS, PRORATIONS AND TITLE.**

Escrow will close on the Scheduled Closing Date (as defined in Section 1(k) above) unless extended as otherwise provided herein. In the event that Buyer and Seller agree upon an alternate Closing Date, that revised date (to be effective) shall be indicated in an Addendum to be attached to this Agreement and executed by both Buyer and Seller.

Notwithstanding anything to the contrary contained elsewhere in this Agreement, as a condition to Buyer's obligation to close escrow hereunder, the following events shall have occurred on or before such closing:

(a) In accordance with RCW 64.34.435(1), all deeds of trust affecting the Unit, if any, shall have been released from the Unit or reconveyed or partially reconveyed so as to no longer encumber the Unit, or the holder(s) of the deeds of trust shall have executed a release agreement or reconveyance which agreement or reconveyance shall have been deposited with Escrow Holder with instructions to record the same on or before the closing hereunder;

(b) Seller (or its surveyor or general contractor) shall have recorded the Certificates of Completion required by RCW 64.34.200(2) with respect to the Unit, the Declaration and the Survey Map and Plans; and

(c) Buyer shall be provided with a standard form ALTA policy of title insurance for the Unit (including an endorsement insuring Buyer against unrecorded mechanics' liens), consisting of a commercial condominium unit and an undivided interest in the common area, or Escrow Holder shall be

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committed and willing to issue to Buyer a standard form ALTA policy of title insurance and an endorsement insuring Buyer against unrecorded mechanics' liens. The title insurance shall contain no exceptions other than those previously approved by Buyer.

If Escrow does not close on the Scheduled Closing Date referred to above due solely to Buyer's default, Escrow Holder is hereby authorized and instructed to debit or charge Buyer and credit Seller carrying charges at the rate of Two Hundred Dollars ($200.00) per day from the Scheduled Closing Date to the date that Buyer's funds are disbursed by Buyer or Buyer's lender to Seller, or the date that the deed transferring title to Buyer is recorded, whichever first occurs ("Actual Closing Date"). Notwithstanding the foregoing sentence, nothing stated in this Section shall obligate Seller to extend the actual date for close of Escrow beyond the Scheduled Closing Date referred to above.

Real property taxes, insurance premiums, assessments, utilities and other customarily prorated items shall be prorated according to the rate of square footage of the purchased Unit to the total applicable to the entire Project as of the Actual Closing Date. If the amount of any installment of real property taxes or assessments applicable to the Unit is not known as of the Actual Closing Date, then a proration of such real property taxes and assessments shall be made by the parties based on a good faith estimate by Seller of the real property taxes and assessments applicable to the Unit as set forth below, and a final adjustment shall be made within twelve (12) months after the Actual Closing Date to the extent precise figures are determined or become available. Buyer acknowledges that although the Survey Map and Plans have been or will be recorded as of the Actual Closing Date, the county assessor may not have segregated, as of the Actual Closing Date, the assessed value of the Unit from the assessed value of the parcel(s) from which the Unit was created. To the extent the county assessor has not segregated, as of the Actual Closing Date, the assessed value of the Unit (or assessments allocable to the Unit) from the assessed value of (or assessments allocable to) the parcel(s) from which the Unit was created, Buyer hereby agrees that Seller may instruct Escrow Holder to prorate such real property taxes and assessments based upon Seller's good faith estimate of the real property taxes and assessments allocable to the Unit as of the Actual Closing Date. To the extent that the actual real property taxes and assessments allocable to the Unit for the fiscal period in which the Closing occurs and any subsequent fiscal period(s) prior to the real property taxes and assessments being segregated are more than or less than the real property taxes and assessments estimated by Seller as provided above, then an appropriate adjustment shall be made so that Seller shall reimburse Buyer any amount of prorated real property taxes or assessments overpaid by Buyer at Closing or Buyer shall pay to Seller any amount of prorated real property taxes or assessments underpaid by Buyer at Closing. Such adjustment and payment shall be made by the parties within fifteen (15) days following the date the actual amount of real property taxes and assessments allocable to the Unit becomes known and written request of either party is made to the other. The obligation to adjust the real property taxes and assessments after the Actual Closing Date, and to make such payments based on such adjustments as described above, shall survive the Close of Escrow.

Buyer shall receive a standard form ALTA policy of title insurance at the Actual Closing Date insuring title in Buyer's name free and clear of liens (including an endorsement insuring Buyer against unrecorded mechanics' liens) and encumbrances (except those created by Buyer) and subject only to the lien of current taxes and assessments (not delinquent), the Declaration, the Survey Map and Plans, and any and all easements, reservations, rights and rights of way and other matters of record previously approved by Buyer. The title insurance premium for such title policy and endorsement shall be borne by Seller. All bonds and assessments that are part of or paid with the property tax bill will be assumed by Buyer. Current installments will be prorated as of the Actual Closing Date.

Closing costs shall be apportioned as follows: Seller shall pay (i) the real estate excise tax due on the sale of the Unit; (ii) one-half the Escrow Holder's escrow fee (plus tax); and (iii) the premium for the ALTA standard owner's policy of title insurance insuring title to the Unit in Buyer in the amount of the Purchase Price (plus tax) and the mechanic's lien endorsement referred to in Section 8(c) above (plus tax);. Buyer shall pay (a) one-half the Escrow Holder's escrow fee (plus tax); (b) all recording costs and fees; (c) the cost of any title insurance endorsements except the mechanic's lien endorsement referred to in Section 8(c) above; and (d) any and all costs related to Buyer's financing of the purchase. Each party

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shall bear its own attorneys' fees, if any. All other closing costs shall be allocated between Buyer and Seller according to the local custom in the county in which the Unit is located.

9. **OWNERS' ASSOCIATION.** Buyer acknowledges that the Association (defined in Section 1(b) above) will be established for the purpose of operating and maintaining the common areas and facilities of the Project where the Unit is located, and Buyer agrees that it shall automatically become a member of the Association by virtue of its purchase of the Unit and that as a member of the Association it shall be subject to and bound by the terms and conditions of the Association Documents. The monthly maintenance and operational assessments to be paid to the Association by the owner of each unit in the Project (which assessments will be set forth in an annual budget for the Association) will be based upon Seller's best estimates. The budget may be revised annually.

10. **MANAGEMENT BY SELLER.** Seller, or his/its designee, as Declarant, may retain for the period stated in the Declaration the full effective management authority of the Association.

11. **NOTICES.** Any notices shall be sent to Buyer and Seller at their addresses set forth below. If notice is sent by personal delivery or courier, notice shall be deemed given when actually received by Buyer or Seller, as the case may be. If sent by mail, notice shall be deemed given 48 hours after deposit in the United States mail, postage prepaid. Either party may change its address for the purposes of this Section 10 by giving written notice in the manner set forth herein. BUYER UNDERSTANDS AND ACKNOWLEDGES THAT BUYER IS RESPONSIBLE FOR ADVISING SELLER OF ANY CHANGE IN BUYER'S ADDRESS FROM THE ADDRESS STATED IN THIS AGREEMENT, AND SELLER SHALL BE ENTITLED TO RELY UPON THE ADDRESS OF BUYER STATED IN THIS AGREEMENT UNLESS AND UNTIL IT HAS BEEN CHANGED BY BUYER IN THE MANNER SET FORTH IN THIS SECTION 11.

12. **POSSESSION.** Possession shall be delivered to Buyer on the Actual Closing Date. If Seller is unable to deliver possession of the Unit in accordance with this Agreement for any reason (other than Buyer's default hereunder or delays in completion of the construction of the Unit or the building in which the Unit is located caused by Buyer or any of its agents, employees, contractors or other representatives), Buyer's sole remedy shall be the rescission of this Agreement and the return of all Deposits and other payments made by Buyer pursuant hereto.

13. **WARRANTIES.**

(a) **Waiver of Article 4 of the Washington Condominium Act; Warranty.** RCW 64.34.400 allows the parties to waive Article 4 of the Washington Condominium Act, codified at RCW 64.34.400 through RCW 64.34.465, inclusive ("Article 4"), because the Unit described in this Agreement is restricted to nonresidential use. As permitted by RCW 64.34.450(1), Seller and Buyer hereby agree that Seller expressly disclaims any and all implied warranties pursuant to RCW 64.34.445. Provided, however, that Seller expressly warrants for a period of one (1) year from the Actual Closing Date or Buyer's possession of the Unit, whichever is longer, that the unit and the common and limited elements in the Project and that the improvements made or contracted for by Seller are:

(i) In accordance with this Agreement and amendments hereto;
(ii) Free from defective materials;
(iii) Constructed in accordance with sound engineering and construction standards;
(iv) Constructed in a workmanlike manner; and
(v) Constructed in compliance with all laws then applicable to such improvements.

The provisions of this Section 13 have been freely negotiated by Seller and Buyer, and, except to the extent expressly provided otherwise in this Agreement, are intended to be a complete exclusion and negation of any other warranties by Seller, express or implied, with respect to the condition of any portion

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of the Unit or the common areas of the Project, arising pursuant to the laws of the State of Washington or any other applicable laws, as now or hereafter in effect.

(b) **No Sound and View Warranties.** Buyer acknowledges that at the time of taking possession of the Unit and for an indefinite period thereafter, construction of the Project and 1100 East Main, including construction of additional units, might not be completed and that renovation or construction work may be continuing, creating a possible inconvenience or nuisance. Seller agrees to exercise reasonable efforts to minimize any inconvenience or nuisance to Buyer and during such periods shall keep said common areas open and functional to the extent not affected by such construction.

Buyer acknowledges that Seller makes no representation or warranty as to any sounds audible within the Unit which may arise from activities in any other unit, any common element of the Project, or anywhere outside the Project. Buyer further acknowledges that Seller makes no representation or warranty that the view from the Unit, as of the date this Agreement is signed or as of Closing, will not be obstructed or changed in whole or in any part at any time in the future. Buyer acknowledges that Seller undertakes no obligation to investigate or disclose real estate developments in the area that are possible, planned, permitted or under construction, nor does Seller undertake any duty to protect views. This means that even though Seller may know of developments that could affect views, Buyer acknowledges that Buyer is not relying on Seller to disclose such developments, and Buyer acknowledges that Buyer is releasing Seller from any duty Seller might otherwise have to disclose such developments known to Seller. Buyer acknowledges that Buyer is purchasing a Unit in an area that may experience considerable and rapid development, and such developments could affect views. Buyer acknowledges that Seller does not undertake any duty to investigate or disclose any developments that may involve Seller or any company affiliated with Seller and including any development that is now known to Seller or becomes known to Seller after this Agreement is signed. If Buyer desires to investigate the potential for future development in the area, information is available from the City of Puyallup and from other sources. Real estate agents are generally not experts on future real estate developments, and Seller requires that Buyer not rely on statements from real estate agents.

14. **LIQUIDATED DAMAGES.** THE PARTIES HERETO AGREE THAT IN THE EVENT BUYER FAILS, WITHOUT LEGAL EXCUSE, TO COMPLETE THE PURCHASE OF THE UNIT UNDER THIS AGREEMENT, SELLER'S DAMAGES, INCLUDING, BUT NOT LIMITED TO THE CONSTRUCTION COSTS INCURRED BY SELLER TO TAILOR THE UNIT TO BUYER'S SPECIFIC REQUESTS PRIOR TO CLOSING, SELLER'S ECONOMIC DETRIMENT RESULTING FROM THE REMOVAL OF THE UNIT FROM THE REAL ESTATE MARKET FOR AN EXTENDED PERIOD OF TIME AND ANY CARRYING AND OTHER COSTS INCURRED AFTER THE REMOVAL OF THE UNIT FROM THE REAL ESTATE MARKET, WOULD BE IMPRACTICABLE OR EXTREMELY DIFFICULT TO ASCERTAIN. ACCORDINGLY, THE PARTIES HERETO AGREE THAT IN THE EVENT OF ANY SUCH FAILURE OR DEFAULT BY BUYER, SELLER SHALL BE ENTITLED TO RETAIN, AS ITS SOLE REMEDY, THE SUM OF THE INITIAL DEPOSIT, THE ADDITIONAL DEPOSIT AND ANY OTHER DEPOSIT(S) MADE BY BUYER PURSUANT TO ANY ADDENDUM OR AMENDMENT HERETO (COLLECTIVELY, THE "DEPOSITS") AS LIQUIDATED DAMAGES. BUYER AND SELLER AGREE THAT THE DEPOSITS CONSTITUTE A REASONABLE ESTIMATE OF THE DAMAGES THAT WILL BE INCURRED BY SELLER IN THE EVENT OF A BREACH OR DEFAULT OF THIS AGREEMENT BY BUYER, AND THAT THE RECEIPT OF THE DEPOSITS BY SELLER SHALL NOT BE DEEMED TO CONSTITUTE A FORFEITURE OR PENALTY. SELLER HEREBY WAIVES THE REMEDY OF SPECIFIC PERFORMANCE WITH RESPECT TO ANY DEFAULT BY BUYER OF ITS OBLIGATION TO PURCHASE THE UNIT, AND AGREES THAT THE LIQUIDATED DAMAGES SET FORTH HEREIN SHALL BE SELLER'S SOLE REMEDY IN THE EVENT BUYER BREACHES OR DEFAULTS IN ITS OBLIGATION TO PURCHASE THE UNIT HEREUNDER. THIS LIQUIDATED DAMAGES PROVISION SHALL NOT BE APPLICABLE TO ANY BREACH BY BUYER OF ANY INDEMNIFICATION, DEFENSE OR HOLD HARMLESS OBLIGATION OF BUYER UNDER THIS AGREEMENT, OR ANY OTHER OBLIGATION OF BUYER THAT EXPRESSLY SURVIVES THE TERMINATION OF THIS AGREEMENT. THIS LIQUIDATED DAMAGES PROVISION ALSO SHALL NOT SERVE AS A LIMITATION ON THE AMOUNT OF ATTORNEYS' FEES THAT SELLER MAY PURSUE OR COLLECT FROM BUYER IN THE EVENT SELLER INCURS ATTORNEYS' FEES IN ATTEMPTING TO COLLECT OR RETAIN THE

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LIQUIDATED DAMAGES REFERRED TO HEREIN. BY INITIALING THIS SECTION 13 BELOW, SELLER AND BUYER AGREE TO THE TERMS OF THIS SECTION 13.

INITIALS: **BUYER** _____ **SELLER** _____

15. ARBITRATION OF DISPUTES. IT IS AGREED THAT ANY CLAIM OR DISPUTE BETWEEN THE BUYER AND THE SELLER, OR GENERAL CONTRACTOR OR BROKER, ARISING OUT OF THIS AGREEMENT OR RELATING IN ANY WAY TO THE UNIT BEING PURCHASED HEREUNDER AND EVERY OTHER DISPUTE BETWEEN SELLER AND BUYER THAT HAS ARISEN UNDER THIS AGREEMENT, SHALL BE DETERMINED BY SUBMISSION TO BINDING ARBITRATION. ANY ARBITRATION SHALL INCLUDE EVERY CAUSE OF ACTION THAT HAS ARISEN BETWEEN THE BUYER AND THE SELLER UNDER THIS AGREEMENT.

IF THE CONTROVERSY IS REFERRED TO ARBITRATION, THE FOLLOWING SHALL APPLY:

(a) COSTS AND FEES, INCLUDING ONGOING COSTS AND FEES OF THE ARBITRATION SHALL BE PAID AS AGREED BY THE PARTIES, AND, IF THE PARTIES CANNOT AGREE, AS DETERMINED BY THE ARBITRATOR, WITH THE COSTS AND FEES OF THE ARBITRATION TO ULTIMATELY BE BORNE AS DETERMINED BY THE ARBITRATOR;

(b) A NEUTRAL AND IMPARTIAL INDIVIDUAL SHALL BE APPOINTED TO SERVE AS ARBITRATOR, WITH THE ARBITRATOR TO BE APPOINTED WITHIN A PERIOD OF TIME, WHICH IN NO EVENT SHALL BE MORE THAN 60 DAYS FROM THE ADMINISTRATOR'S RECEIPT OF A WRITTEN REQUEST FROM A PARTY TO ARBITRATE THE CLAIM OR DISPUTE;

(c) VENUE OF THE ARBITRATION TO BE IN THE STATE OF WASHINGTON, PIERCE COUNTY, UNLESS THE PARTIES AGREE TO SOME OTHER LOCATION;

(d) THE ARBITRATOR SHALL BE AUTHORIZED TO PROVIDE ALL RECOGNIZED REMEDIES AVAILABLE IN LAW OR EQUITY FOR ANY CAUSE OF ACTION THAT IS THE BASIS OF ARBITRATION; PROVIDED HOWEVER THAT THERE SHALL IN NO EVENT BE ANY AWARD OF PUNITIVE DAMAGES.

(e) A JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY WASHINGTON LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

THE BUYER HAS READ AND UNDERSTANDS THE FOREGOING AND AGREES TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION. BY PLACING THEIR SELLER'S INITIALS HERE:

BUYER _____ **SELLER** _____ THE PARTIES AGREE TO ARBITRATION

ARBITRATION OF ANY MATTER PURSUANT TO THIS CLAUSE SHALL NOT BE DEEMED A WAIVER OF THE ATTORNEY / CLIENT OR ATTORNEY / WORK PRODUCT PRIVILEGE IN ANY MANNER.

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22. **INVALIDITY OF ANY PROVISION.** Should any provision or portion hereof be declared invalid or in conflict with any law of the jurisdiction where this project is situated, the validity of all other provisions and portions hereof shall remain unaffected and in full force and effect.

23. **NO WAIVER.** The waiver by Seller of any term, condition or provision of this Agreement shall not be considered a waiver of any other term, condition or provision hereof.

24. **DESTRUCTION OF IMPROVEMENTS.** If the improvements in the Unit are wholly destroyed or materially damaged prior to close of escrow, and Seller elects not to repair or replace, Buyer may terminate this Agreement by written notice delivered to Seller and the Escrow Holder, and all Deposits will be immediately returned; provided, however, Buyer shall not have the right to terminate this Agreement and receive back its Deposits if such destruction or damage is caused by Buyer or any of its agents, employees, contractors or other representatives. In the event that Buyer does not elect (or is not permitted) to terminate this Agreement, Buyer will be entitled to receive, in addition to the Unit, at closing any insurance proceeds from Seller's policies for restoring the Unit or any improvements constructed therein. For purposes of this Section 24, the improvements in the Unit shall not be deemed materially damaged if the cost to repair or restore the same is less than $100,000 and the restoration work can be completed within forty-five (45) days.

25. **BUYER'S OFFER:** Buyer has read and understood the provisions contained herein and offers and agrees to purchase the Unit on these terms. Buyer further understands that this Agreement initially is an offer only and will not become a binding contract until accepted by Seller, and, until executed by Seller, is subject to the possible acceptance by Seller of an offer from another buyer. Buyer grants the Seller's Broker or, if applicable, Buyer's Broker, the right for a period of 5 days from the date hereof to obtain an acceptance of this offer by Seller.

26. **GOVERNING LAW.** The laws of the State of Washington shall govern this Agreement.

27. **ENTIRE AGREEMENT: NO OTHER REPRESENTATIONS:** This Agreement constitutes the sole and entire agreement between Buyer and Seller with respect to the subject matter contained herein. Buyer understands that no employee or agent of Seller has authority to modify the terms hereof or to make any representations, warranties or inducements other than as set forth in this Agreement. No representations, warranties or inducements, express or implied, have been relied upon by Buyer except as set forth in this Agreement.

28. **COMPLETE AGREEMENT. REPRESENTATIONS. AMENDMENTS.** This Agreement constitutes the sole and entire agreement between Buyer and Seller with respect to the subject matter contained herein. There are no other *written or oral* express or implied agreements, promises or representations except as set forth herein or in the Public Offering Statement. **Buyer and all agents acknowledge that no sales agent, job superintendent, contractor or subcontractor has the authority to make, or has made, any agreement, promise or representation on behalf of Seller.** ***No oral representations or statements are part of the agreement between Buyer and Seller, and no oral past or future representations or statements shall be deemed a part of this Agreement.*** This Agreement may not be amended except by an agreement in writing signed by both Buyer and Seller.

29. **TIME:** Time is of the essence in the performance of each of the parties' respective obligations contained herein.

30. **COMMUNICATIONS. RESCISSION.** Buyer understands that Seller may need to communicate from time to time with Buyer, or Buyer's Agent, concerning a variety of issues prior to closing that may affect the Unit and/or the Project. Because time is of the essence, Buyer must respond promptly to Seller, but in any event, unless Buyer and Seller agree in writing to some other time period, Buyer must respond no later than three (3) business days after receipt of any written communication from Seller. If Buyer does not respond within such time period, Seller shall notify Buyer that in the event a response is not received within forty-eight (48) hours, Buyer shall be in material default of the Agreement and the Agreement may, at Seller's election, be terminated. Upon such termination, Seller shall have

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those remedies provided in this Agreement in addition to all other remedies. Buyer acknowledges that it will not be necessary for a rescission agreement to be signed if this Agreement is terminated in accordance with the terms of any part of this Agreement. If Buyer defaults as provided in this Agreement, Seller shall have the right to resell the Unit to a third party even if there is a dispute over whether Seller is permitted to retain the Earnest Money Deposit as damages.

31. **BUYER TO EXECUTE ALL DOCUMENTS**: Buyer shall execute promptly all documents and make all deposits required by this Agreement, title company, Escrow Holder, lender or governmental agencies having jurisdiction over matters in question.

32. **DISCLAIMER**. Buyer acknowledges that it has had the opportunity under this Agreement to investigate the Project and the Unit and the Project documents and the Survey Map and Plans with respect thereto and has determined the acceptability of same in its sole discretion. Buyer further acknowledges that, except as set forth in the Deed and in this Agreement, neither Seller, nor any principal, agent, attorney, employee, broker or other representative of Seller has made any representations or warranties of any kind whatsoever regarding the Project and the Unit, either express or implied, and that Buyer is relying on its own investigation and review, and not on any warranty, representation or covenant, express or implied, with respect to the Project and Unit, except as set forth in the deed and in this Agreement. In particular, but without limitation, except as set forth in the Deed and in this Agreement, Seller makes no representations or warranties with respect to the Project and Unit or its use or condition of any kind or nature, express or implied, including, without limitation, none as to the condition of the soils or groundwaters of the Project and Unit or the presence or absence of hazardous or toxic materials or substances on or under the Project and/or Unit. Buyer represents that it is knowledgeable in real estate matters and that upon completion of the investigations and reviews contemplated or permitted by this Agreement, Buyer will have made all of the investigations and reviews Buyer deems necessary in connection with its purchase of the Unit, and that approval by Buyer of such investigations and reviews pursuant to this Agreement will be deemed approval by Buyer without reservation of all aspects of this transaction, including, but not limited to, its use, title and the financial aspects of the operation of the Project and Unit.

33. **ATTORNEYS' FEES**. If either party hereto fails to perform any of its obligations under this Agreement or if any dispute arises between the parties hereto concerning the meaning or interpretation of any provision of this Agreement, then the defaulting party or the party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other party on account of such default and/or in enforcing or establishing its rights hereunder, including, without limitation, court costs and reasonable attorneys' fees and disbursements.

34. **COUNTERPARTS**. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument. Signed copies of this Agreement transmitted by facsimile or e-mail shall be deemed the same as an original and shall be binding on such party signing the same.

35. **INTERPRETATION OF AGREEMENT**. The parties hereto acknowledge and agree that this Agreement has been negotiated by the parties hereto, or their respective attorneys, and that, although this Agreement has been prepared by Seller, this Agreement shall be construed or interpreted in accordance with its fair meaning. The doctrine that ambiguities in an agreement should be interpreted against the drafting party shall not be employed in connection with this Agreement.

36. **SUBORDINATION**. Buyer acknowledges and agrees that this Agreement, and Buyer's rights and interest in the Unit created by this Agreement, are and shall be subordinate until the close of escrow to any financing now or hereafter secured by the Unit and the parcel upon which the Unit is or will be situated.

37. **ADDENDUM**: If initials of Buyer and Seller appear below, this Agreement is hereby amended by the terms of an Addendum attached hereto and executed on even date herewith.

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BUYER:

SUMMIT UNISERV COUNCIL
a Washington non-profit corporation

By: _____
Margaret Langston
Dated: June 20, 2007

12812 - 101st Ave Ct E, Suite 203
Puyallup, WA 98373
Phone: 253.845.4535
Fax: 253.845.1437

SELLER:

WILLIAM B. MOORE, an individual as his separate estate, and/or assigns

By: _____
William B. Moore
Dated: June 13, 2007

c/o Eric Burecht
BSL 999 Third Ave. Seattle 98104
Phone: (206) 516-3210
Fax: (206) 292-1995

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EXHIBIT A

LEGAL DESCRIPTION OF PROJECT

PARCEL A
The North 240 feet of Block 25, except the East 60 feet thereof;
And the North 240 feet of the West 170 feet of Block 26, Frank R Spinning's First Addition to the Town of Puyallup, according to the plat recorded in Book 4 of Plats at page 86, in Pierce County, Washington

Except therefrom that portion conveyed to the City of Puyallup by deed recorded under recording number 9801270097

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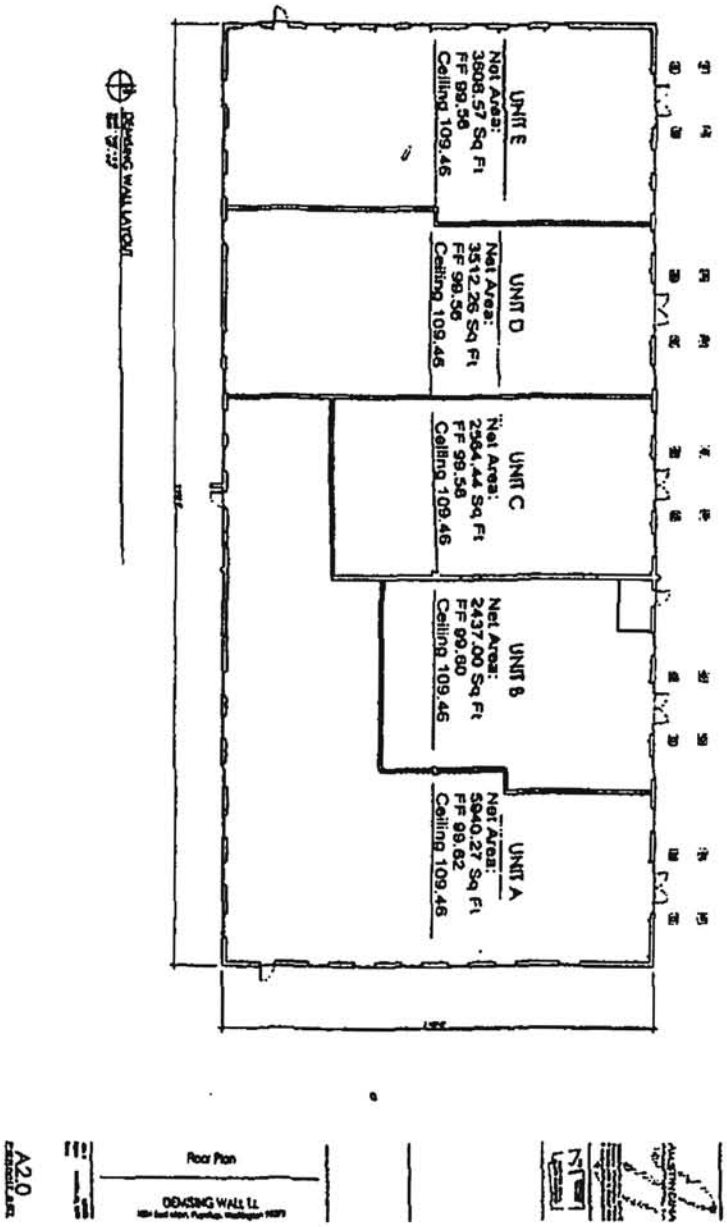
EXHIBIT B

DEPICTION OF THE PROJECT



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FINAL BILL REPORT
SHB 1699

C 186 L 05
Synopsis as Enacted

Brief Description: Regulating agreements for the purchase and sale of real estate.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Lantz, Priest and Tom).

House Committee on Judiciary
Senate Committee on Judiciary

Background:

Liquidated Damages Clauses

When a party breaches a contract with another, the party hurt by the breach has several options. For instance, the injured party may sue for damages, seek restitution or return of property held by the breaching party, or request that the court compel the breaching party to perform its end of the bargain. The parties may also specify other remedies in the contract itself.

Sales contracts often include a "liquidated damages" clause. These clauses establish a defined amount of money that the parties agree to pay as damages if they breach the agreement. Parties use liquidated damages agreements to reduce litigation over damages and manage risk when the parties have difficulty predicting the actual harm of a contract breach.

Common Law Requirements for Liquidated Damages Clauses

Courts will not enforce liquidated damages clauses unless they satisfy several common law requirements. Most importantly, the amount specified in the liquidated damages clause must be a reasonable estimate of the possible harm from a future breach. Traditionally, courts would also only enforce the clause if the parties inserted the clause because of anticipated difficulty in determining actual damages when a breach occurs. More recently, however, the Washington Supreme Court has treated actual damages more as a factor in evaluating the reasonableness of the liquidated damages clause than as an independent requirement.

Much of the controversy concerning these clauses revolved around whether an injured party must prove actual damages from the breach before claiming the liquidated damages amount. Before 1989, courts never considered actual damages. In *Lind Building Corporation v. Pacific Bellevue Developments*, however, the Washington Court of Appeals departed from the traditional view, holding that a party who does not prove any actual damages could not enforce the liquidated damages clause even if its estimate of future damages was reasonable when first written. Five years later, the Washington Supreme Court overruled *Lind*, holding

APPENDIX B

that lower-than-expected actual damages were, at most, evidence of an unreasonable liquidated damages clause.

Earnest Money Deposits

Many real estate transactions use an earnest money deposit provision. One party (typically the purchaser) agrees in the purchase and sale agreement to deposit a sum of money. A party forfeits the deposit by breaching the contract, allowing the other party to keep the money. Courts treat these arrangements as a form of liquidated damages.

In 1991, the Legislature responded to the *Lind* decision by creating a new law governing earnest money deposits. The law guarantees enforcement of an identified earnest money clause regardless of actual damages so long as the clause satisfies the law's requirements. This guarantee only applies when the agreement designates payments as an earnest money deposit and provides that forfeiture of the deposit is the seller's exclusive remedy if another party backs out of the deal.

For earnest money provisions to be enforced under this provision, they must meet the following amount, language, and notice requirements:

- *Maximum Amount.* The maximum amount to be forfeited may not exceed 5 percent of the purchase price.
- *Standard Language.* The agreement must include a forfeiture clause using language set out in the statute.
- *Notice.* In residential home sales, the forfeiture clause must be in the same size typeface as the rest of the agreement and must be initialed by all the parties.

Consequences of Defective Earnest Money Forfeiture Clauses

According to a recent Court of Appeals decision, the earnest money deposit law bars enforcement of an earnest money clause when the clause is defective with respect to the amount, language, and notice requirements. In *Chrisp v. Goll,* decided January 3, 2005, the home seller elected forfeiture of an earnest money deposit as the sole remedy, but the parties did not separately initial the clause as required by law. The Court refused to enforce the earnest money provision, holding that the statute's plain language required that the parties retain all remedies allowed by law if the earnest money clause violated the amount, language, and notice requirements. Consequently, if the purchaser reneges on a deal with a defective earnest money clause, the seller may pursue remedies in addition to recovery of the earnest money deposit. *Chrisp* is currently being appealed.

The consequences of violating the amount, language, and notice requirements do not apply to liquidated damages clauses that are not earnest money deposits within the scope of the statute. For example, courts have upheld contracts where the total amount forfeited (including an earnest money deposit and other payments) is as much as 17 percent of the purchase price so long as the earnest money portion itself is no greater than 5 percent of the price. Similarly, if forfeiture of the deposit is not the sole and exclusive remedy, the statute does not apply, and the provision need not meet the amount, notice, and language

requirements. These liquidated damage clauses must still comply with the common law reasonableness requirement.

Summary:

Liquidated Damages

The guaranteed enforcement requirement in the earnest money deposit law is extended to all forms of liquidated damages clauses in real estate agreements. Courts must enforce the liquidated damages clause regardless of the seller's actual damages if the following conditions exist:

- the agreement expressly identifies the liquidated damages clause as such;
- the seller's sole and exclusive remedy for a party's failure to complete the purchase is recovery of the liquidated damages; and
- the amount of liquidated damages is no greater than 5 percent of the purchase price.

These requirements apply equally to residential and commercial property transactions.

Liquidated damages clauses that do not satisfy the statute's requirements are instead governed by the common law requirements.

Earnest Money Deposits

The notice and language requirements are eliminated, making the requirements for guaranteed enforcement of earnest money deposits identical to the requirements for all liquidated damages clauses. Courts must now enforce an earnest money forfeiture clause regardless of the seller's actual damages if the following conditions exist:

- the agreement expressly identifies the amount paid as an earnest money deposit;
- the seller's sole and exclusive remedy for a party's failure to complete the purchase is recovery of the forfeited earnest money deposit; and
- the amount of earnest money to be forfeited is no greater than 5 percent of the purchase price.

These requirements apply equally to residential and commercial property transactions.

Consequences of Defective Earnest Money Forfeiture Clauses

Failure to meet the statutory requirements no longer renders the earnest money forfeiture clause totally ineffective. Instead, courts will evaluate a defective earnest money deposit clause under the common law liquidated damages requirements.

Application

The act applies only to contracts executed on or after the effective date of the act.

Votes on Final Passage:

House	96	0	
Senate	46	0	(Senate amended)
House	95	0	(House concurred)

C
West's Revised Code of Washington Annotated Currentness
Title 64. Real Property and Conveyances (Refs & Annos)
Chapter 64.04. Conveyances (Refs & Annos)
64.04.005. Liquidated damages--Earnest money deposit--Exclusive remedy--Definition

(1) A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable, regardless of whether the other party incurs any actual damages. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.

(2) For purposes of this section:

(a) "Earnest money deposit" means any deposit, deposits, payment, or payments of a part of the purchase price for the property, made in the form of cash, check, promissory note, or other things of value for the purpose of binding the purchaser to the agreement and identified in the agreement as an earnest money deposit, and does not include other deposits or payments made by the purchaser; and

(b) "Liquidated damages" means an amount agreed by the parties as the amount of damages to be recovered for a breach of the agreement by the other and identified in the agreement as liquidated damages, and does not include other deposits or payments made by the purchaser.

(3) This section does not prohibit, or supersede the common law with respect to, liquidated damages or earnest money forfeiture provisions in excess of five percent of the purchase price. A liquidated damages or earnest money forfeiture provision not meeting the requirements of subsection (1) of this section shall be interpreted and enforced without regard to this statute.

CREDIT(S)

[2005 c 186 § 1, eff. April 26, 2005; 1991 c 210 § 1.]

Current with all Legislation from the 2011 Regular and 1st Special Sessions, Initiative Measures 1163 and 1183, and laws from the 2011 2nd Special Session effective through January 1, 2012

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APPENDIX C