

NO. 45433-5-II

WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

Tom Moyer Theatres, an Oregon Partnership,

Plaintiff-Respondent,

v.

Michael J. Walker, Deborah A. Wray, and Kristin D.
Stump, Co-Trustees of the Amended and Restated Walker
Family Trust dated August 18, 2001; and Greenway
Terrace, LLC, an Oregon limited liability company,

Defendants-Appellants.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. Barbara D. Johnson)

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This case illustrates why Washington requires clear and unequivocal proof that parties actually entered into an alleged contract, before a court may order specific performance of that contract.

The Walker family owns property in Vancouver Washington, through a family trust. In 2001 the trust entered into a written purchase and sale agreement, under which it sold a portion to TMT Development, Inc, which then assigned its interest in the acquired property to Tom Moyer Theaters (“TMT”). The trust, in turn, assigned the portion of the property it had retained to Greenway Terrace, LLC (“Greenway”).

A mobile home park was (and still is) located on Greenway’s portion, served by utilities running across what was now TMT’s property. The 2001 agreement provided that: (1) the seller would reserve an easement to access the lines; and (2) the buyer would have the right to relocate the lines. TMT has admitted that the agreement did not say that the buyer could relocate the utilities onto the portion of the property retained by the seller.

At the time of the sale, no utility lines existed into which the mobile home utilities could be connected from the portion of the property retained by the trust. *Relocation of the utilities onto the portion of the property retained by the trust therefore would have meant depriving the mobile home park residents of water and power.*

The post-sale Greenway-TMT relationship was marred by repeated disputes over the utilities, some of which ended up in court.

In 2005 the building of an elementary school across from Greenway's property meant that utility lines now existed to which the mobile home utilities could be connected. In 2008 TMT demanded that Greenway accept a plan developed by TMT for moving the water meter and waterlines onto Greenway's property, and connecting them to the new lines. When Greenway raised several concerns (in a letter from Greenway's counsel in February 2009), TMT responded by insisting that Greenway accept the proposal in full and threatening to sue if Greenway did not. TMT claimed it had the right under the parties' 2001 agreement to move the utilities onto Greenway's property, even if Greenway objected.

Greenway did not accept; TMT sued. TMT sought a decree of specific performance ordering Greenway to allow TMT to move the utilities onto Greenway's property.

The case went to trial in the Summer of 2013, in Clark County Superior Court, before the Honorable Barbara D. Johnson. TMT insisted on its right to a decree of specific performance, even though TMT:

- admitted that the 2001 agreement was "silent" on whether TMT was entitled to move the utilities onto Greenway's property;
- offered no contemporaneous documentary evidence of any kind (drafts, letters, e-mails, handwritten notes) showing such an understanding was reached;
- offered the testimony of just one witness in support of its claim -- Mr. Alan Laster, an experienced real estate attorney who admitted

that a right of the kind TMT was now claiming typically would be stated in writing, and that the parties' 2001 agreement contained no such term; and

- never denied that, at the time of the sale, moving the utilities onto the portion of the property retained by Greenway *would have cut off the mobile home park residents from access to water and power, because there were no utility lines to which their utilities could be connected from the portion retained by Greenway.*

Greenway vigorously disputed TMT's claim, including through the testimony of its principal (Michael Walker) and its lawyer (Steven Zipper), both of whom participated in the formation of the 2001 agreement.

The trial court acknowledged that it would have been impossible at the time of the 2001 agreement to move the utilities onto Greenway's property and still maintain service to the mobile home park residents. The court nevertheless found there was clear and unequivocal evidence that the parties in 2001 intended for TMT to have the right to make such a move, even if Greenway objected. The trial court never identified what constituted the clear and unequivocal evidence that TMT had been granted that right. The trial court ordered Greenway to accept one of three proposals for carrying out the move -- none of which were shown to have been discussed by the parties when making their agreement in 2001. The trial court awarded TMT its prevailing party fees, based solely on the fees provision of the 2001 agreement.

This Court should reverse. Specific performance may only be granted if the party seeking it proves their right to it by clear and

unequivocal evidence. Although the trial court found that the parties intended TMT to have the right to move the utilities onto Greenway's property, the record does not contain substantial evidence to sustain that finding -- particularly when the evidence is reviewed, as it must be, in light of TMT's burden to establish its right not by a mere preponderance *but by clear and unequivocal evidence*.

The trial court made clear its belief that it would be "better" for the parties if the utilities were moved onto Greenway's property. Merely because something may be thought "better" for all concerned does not entitle a trial court to order a party to do that something, when that party objects and the party demanding it has not shown a clear right to enforce its demand. The authority of the chancellor in equity does not go that far, nor should it.

The trial court also erred in its decision to admit several documents, including the February 2009 letter from Greenway's counsel. These documents were all inadmissible under ER 408. The trial court placed great weight on the February 2009 letter, and to the extent that letter can be read as supporting TMT's claim, its admission (along with the other documents) was prejudicial to Greenway.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

Defendants and Appellants Michael Walker, Deborah Wray, and Kristin Stump, Co-Trustees of the Amended and Restated Walker Family

Trust dated August 18, 2001 and Greenway Terraces, LLC (collectively “the Walkers”), make the following assignments of error¹:

1. The trial court erred by finding that Greenway specifically requested that TMT move all of the utilities in response to TMT’s proposed plan to move the waterlines and water meter off of the TMT Property and onto the Greenway Property. CP 382 (FoF 11).
2. The trial court erred by finding that the parties reached a mutual agreement that leaving the Utilities on the TMT Property is contrary to their original agreement. CP 382 (FoF 15).
3. The trial court erred in entering Conclusions of Law Nos. 1 and 2. CP 383 (CoL 1 & 2).
4. The trial court erred by admitting Exhibits 13 through 18, and 20. RP (6/25/13) at 19, 59, 86, 88-91, 93; RP (6/26/13) at 258-60.

B. Statement of Issues.

1. **Clear and Unequivocal Evidence Requirement for Ordering Specific Performance.** Whether a trial court errs by ordering specific performance of a written agreement, where that agreement is silent as to the alleged existence of the term being specifically enforced and where the Plaintiff otherwise fails to offer clear and unequivocal evidence that the parties agreed to the relevant term. (Assignments of Error Nos. 1, 2 and 3.)
2. **ER 408 Protections for Settlement Communications.** Whether a trial court errs when it admits evidence of settlement discussions, where the pre-suit statement occurred after the parties had a dispute with the potential for litigation and where the post-suit statements contained communications about the terms under which the

¹ The Walkers elect to insure they have fully met their obligations under RAP 10.4(c) by attaching a copy of the Findings and Conclusions to this brief (App. A).

Defendant would agree to allow the Plaintiff to take the actions that were the subject of the Plaintiff's lawsuit. (Assignment of Error No. 4.)

III. STATEMENT OF THE CASE

A. The Parties' Predecessors-in-Interest Agreed in 2001 to a Sale of Land Subject to a Utilities Easement. The Agreement Said Nothing About the Buyer Being Able to Relocate the Utilities Off the Land It Was Buying and Onto the Seller's Land.

The Walker Family Trust² agreed to sell 6.25 acres of land from an 18.48 acre parcel to Plaintiff TMT's predecessor-in-interest, TMT Development Co., Inc., on December 13, 2001. Exh. 2 (December 13, 2001 Purchase and Sale Agreement) (copy attached as App. B to this Brief); CP 381 (FoF 1 & 4). TMT Development Co., Inc., assigned its interest in the 6.25 acre parcel (the "TMT Property") to Tom Moyer Theaters ("TMT"). Exh. 24 (January 22, 2002 assignment); CP 381 (FoF 5).³ The Walker Family Trust conveyed the TMT Property to TMT by statutory warranty deed signed January 22, 2002, and recorded in Clark County, Washington on January 23, 2002. Exh. 1 (January 23, 2002 Statutory Warranty Deed); CP 381 (FoF 6). The Walker Family Trust transferred its interest in the remaining 12.23 acre parcel (the "Greenway Property") to Greenway Terrace, LLC ("Greenway").⁴ Exh. 26 (March 28, 2002 deed); CP 381 (FoF 7 & 8).

² The Walker Family Trust is formally known as The Amended and Restated Walker Family Trust dated August 18, 2001. Michael Walker, Deborah Wray, and Kristin Stump are co-trustees of the Walker Family Trust and were named as defendants.

³ TMT Development Co. is the management company for Tom Moyer Theaters. RP (6/25/13) at 65.

⁴ Greenway was created out of the Walker Family Trust and is managed by Michael Walker. RP (6/25/13) at 65.

The 6.25 acre parcel was immediately south of property also owned by TMT Development Inc., Co., and referred to as the Lowe's project. Exh. 2 (page B-001); RP (6/26/13) 169. 117th Avenue abutted the 6.25 acres to the east. RP (6/26/13) at 175. The property to the north of the Greenway Property was, and still is, a pit owned by Clark County. RP (6/26/13) at 175. A subdivision abutted the western edge of the Greenway Property. RP (6/26/13) at 174-75, 213. The property to the south of the Greenway Property had not been developed yet at the time of sale. RP (6/26/13) at 174-75. While NE 69th Street now runs parallel to the southern border of the Greenway Property, it was not there at the time of the sale: nor was there any known proposal to build a street in that location at the time of the sale. RP (6/26/13) at 174-75.⁵

A mobile home park was (and still is located) on the Greenway Property; the utilities -- water, cable, phone, electric, gas -- that serviced the park on the Greenway Property ran across what would be the TMT Property after the sale. RP (6/25/13) at 151-52; Exh. 51 (perpetuated testimony of Steven M. Zipper) at p. 8. An easement therefore would be required to allow Greenway to access and repair the utilities running across what was to become the TMT Property. RP (6/26/13) at 151-52; Exh. 51, at p. 8. Accordingly, the parties' 2001 purchase and sale

⁵ Aerial maps showing the area and its state of development at the time of the sale in 2001, and how that changed (most critically, due to the construction in 2005 of a school and the related creation of NE 69th Street immediately to the south of the mobile home park), were introduced into evidence. Greenway has taken two of those maps, admitted as Exhibits 41 and 44, marked a portion of each of them to indicate the property lines and other key features, and attached these marked portions as Appendices C and D to this brief.

agreement (the “2001 Agreement”) provided that “Buyer and Seller will execute an easement at closing for the benefit of Seller’s rear property to provide access to the existing mobile home park, and to provide access to utilities for normal maintenance and repair.” Exh. 2 (p. 2 of 12).

The parties agreed the easement would be in the form of an addendum to the primary agreement. *Id.* The Addendum provided that the seller would reserve for itself a nonexclusive appurtenant easement over the TMT Property for access along the existing roadway and to provide for “any necessary repairs and maintenance to the underground utilities.” Exh. 2 (p.10 of 12). The Addendum also provided that:

Buyer shall have the right to relocate or alter utilities which are located in the 6.25 acres after closing, but in no event shall such relocation or alteration interrupt Seller’s utility service without Seller’s prior express written consent.

Id. The parties fulfilled their obligation to execute an easement to provide access to utilities for normal maintenance and repair by recording a deed in which the seller “reserve[d] for itself, its heirs, successors, and assigns the nonexclusive easement appurtenant benefitting the real property described in the attached Exhibit B [the Greenway Property] and burdening the real property attached in Exhibit A [the TMT Property] on the terms and conditions contained in Exhibit C [the Addendum to the 2001 Agreement], . . .” Exh. 1; CP 381 (FoF 8 & 9).

The waterlines running across the TMT Property were shallow and not all in one location. Exh. 51, at p. 13. They would have to be moved to allow for development of the TMT Property. *Id.* Moving the utilities to

go along the road on the northern side of the TMT Property was contemplated during the purchase and sale discussions. Exh. 51, at pp. 13, 19 & Deposition Exhibit 103. *See also* RP (6/26/13) at 173-74. The intent of the relocation provision was to allow TMT the flexibility needed to develop its properties, while making sure Greenway was also protected. *See* Exh. 51, at pp. 17-18. Mr. Walker, who represented the Walker Family Trust during negotiation of the terms and conditions of the property sale, testified that he understood that TMT would relocate Greenway's utilities to a spot on TMT Property. RP (6/25/13) at 61; *see also* RP (6/26/13) at 176 (Mr. Walker testifying that TMT was allowed to relocate the utilities anywhere they wanted on its property). Mr. Zipper, who served as attorney for the Walker Family Trust during the negotiation of the sale, testified that the provision was not intended to allow TMT to move the utilities off the TMT Property. Exh. 51, at pp. 6, 19.⁶

Mr. Zipper explained that there was no discussion of moving the utilities off the TMT Property because such a move would not have been possible at the time of sale. Exh. 51, at pp. 13-14; RP (9/26/13) at 174-75, 212. At the time of the sale "there would have been no other way to eliminate that easement, that utility easement unless [Greenway] went and purchased an easement from somebody else":

⁶ The Walkers will discuss in Section V.A.2 of this brief the testimony of Mr. Alan Laster, the *one* witness called by TMT to substantiate TMT's claim that the parties agreed in 2001 that TMT would have the right to move the utilities onto Greenway's property.

Where [Mr. Moyer] put it on his property was up to him. But there is no way to get a water line to [the Greenway] property *because it's landlocked at that point*.

RP (6/26/13) at 213 (emphasis added); *See* Exh. 41; App. C (marked version of Exh. 41). TMT did not dispute that, at the time of the 2001 sale, there were no utility lines to which the mobile homes could have been hooked up, had the utilities been moved from the portion of the property acquired by TMT to the portion of the property retained by Greenway.⁷

B. After the Sale, The Parties Had an Ongoing Dispute Related to the Waterlines Running Under the TMT Property, and Attempted to Negotiate a Solution to that Dispute Before and After the Filing of this Lawsuit by TMT.

In 2002, Greenway and TMT began having trouble over the utilities buried under what was now TMT's Property:

- In October 2002, a contractor working for TMT spliced into the waterline connecting to Greenway Terraces through TMT's property, leading to an increase in the amount of water usage for which Greenway Terrace was responsible. RP (6/26/13) at 183-85, 227-28; Exh. 27 (Oct. 4, 2002 letter).

- In November 2003, Greenway became concerned about missing signs (under the easement allowing Greenway Terraces to post

⁷ The 2002 aerial photograph, admitted as Ex. 41, shows the absence of development on the south side of the Greenway portion, necessary to support utility lines to which the mobile homes could hook up. (A marked portion of that exhibit, as indicated, is App. C to this brief.) Without that development, the waterlines would have had to have been run across the property upon which the Orchard Elementary School was later built in 2005, RP (6/25/13) at 124; Exh. 46, and doing that would have required paying for an easement across that property. RP (6/25/13) at 124; RP (6/26/13) at 213. The only other pre-2005 option for relocating the waterlines would have been connecting to the waterline stub ending at the cul-de-sac of NE 71st, on the northern border of the TMT Property. RP (6/25/13) at 124-25; Exh. 46.

signs), about changes to the easement for access, and whether any road improvements had affected the utility easement. Ex. 28 (Nov. 11, 2003 letter).

- In November 2004, TMT granted the Evergreen School District No. 114 an easement across its property for the construction of a new elementary school south of the TMT and Greenway Properties. Exh. 30. During the construction, Greenway's waterlines were broken five (5) times between December 2004 and October 2005. RP (6/26/13) at 193-94; Exh. 40 (Jan. 5, 2006 letter to TMT and School District); Exh. 51, at p. 13.

Greenway sued TMT (and other parties) in January 2005, claiming that TMT had unreasonably interfered with Greenway's property rights by allowing the school district's construction equipment to drive over the utility easement. CP 204. Greenway sought damages and a declaration prohibiting the school district from accessing the construction site over TMT property. CP 205.⁸

With the construction of Orchards Elementary School came a new waterline, installed in 2005 on the southern border of the Greenway property and running under the newly opened NE 69th Street. RP (6/25/13) at 119-124; RP (6/26/13) at 175, 187, 197; Exh. 46. That line meant that, *for the first time*, water could be provided to the mobile home park without having to pass over the TMT Property. See RP (6/25/13) at 124-25; Exh. 46.

⁸ There was another damaged waterline in December 2005, the replacement of which interrupted service to the mobile home park. RP (6/26/13) at 197; Exh. 40.

In response to this development, TMT's engineer developed plans to move the waterlines off the TMT property. RP (6/25/13) at 128-29. The first plan was prepared in 2008. RP (6/26/13) at 69.⁹ TMT then approached Greenway and presented the plan for Greenway's acceptance, under which the waterlines would be moved off TMT's property and onto Greenway's property. RP (6/26/13) at 197-98; Exh. 51, at pp. 45-48. Although Greenway did not believe this plan was covered by the parties' original agreement -- "that was not the agreement ever" -- Greenway considered the plan as a possible step towards resolving the problems over the utilities. RP (6/26/13) at 198. Thus, while in Greenway's view nothing obliged it to permit TMT to work on the Greenway Property, Greenway nonetheless started negotiating with TMT about the terms for possibly moving the utilities onto the Greenway property -- in the hope of reaching a final resolution of the parties' ongoing disputes over the utilities. *See* RP (6/26/13) at 198-99. In Greenway's view, TMT and Greenway were not negotiating about their respective rights under the original 2001 Agreement. RP (6/25/13) at 62. Instead, the parties were trying to form "a new

⁹ TMT ultimately developed two plans to relocate the utilities onto the Greenway Property. RP (6/25/13) at 38-39; Exhs. 3 & 4. The alternate engineering plan, depicted in Exhibit 4, was presented to Greenway in 2011. RP (6/25/13) at 45. The engineering plans called for installing a water meter on the Greenway Property and connecting that to the waterline coming in under NE 69th. RP (6/25/13) at 128-29. Robert Pile, the associate vice president of operations for TMT Development, had no way of refuting the assertion that the engineering plans were different from what Mr. Moyer originally contemplated. RP (6/25/13) at 141-42, citing Exh. 17. One of the plans placed the water meter inside a right of way on the Greenway Property; the other proposed location would have required Greenway to give an easement to the City of Vancouver. RP (6/25/13) at 38 (referring to Exhs. 3 & 4)

agreement.” RP (6/25/13) at 62. “The easement did not allow for [TMT]...to put [the utilities]...on [the Greenway] property.” *Id.*

Mr. Zipper stayed involved in the negotiations between the parties to attempt to settle their ongoing dispute over waterlines. *See* Exh. 51, at p. 28. Mr. Zipper’s involvement with attempting to settle matters included communicating with TMT’s lawyers. *Id.* He thought some of those communications would be considered settlement negotiations, although he could not “necessarily say that that [sic] was settlement negotiations *in consideration for a pending trial.*” Exh. 51, at p. 29 (emphasis added). Rather, he was “simply trying to resolve matters.” *Id.*¹⁰ As for the attempt “to resolve matters[,]” Mr. Zipper testified:

That went on for a long, long time. So I don’t really -- I think you can -- once the case was filed and the issues with the waterline became more focused, I think maybe that might be when it was specifically -- oh, I guess I’d say it this way: The negotiations and communications between the parties would probably be considered in furtherance of settlement related to the pending case. Anything outside of that would have been simply the parties trying to settle matters.

Exh. 51, at pp. 29-30 (emphasis added).

Greenway presented a draft “Waterline Relocation Agreement” to TMT in 2008. Exh. 51, at pp. 44-45 and Deposition Exhibit 109; Exh. 12 (Trial Exhibit 12 contains the Waterline Relocation Agreement and the fax cover sheet dated 10/9/08). The Waterline Relocation Agreement set forth

¹⁰ Mr. Zipper did not say which of the communications he did not consider to be an attempt to settle issues that were pending for trial, and further testified that he had not looked at the evidentiary rules on the admissibility of settlement negotiations before making his statement about something not being an attempt to settle an issue pending for trial. Exh. 51, at pp. 30.

the terms and conditions under which Greenway would allow TMT to relocate the waterlines. *See* Exh. 12; RP (9/26/13) at 198-99. There were provisions in the Waterline Relocation Agreement that were not in the original Agreement. RP (6/25/13) at 138-40. The Waterline Relocation Agreement was “intended to resolve the parties’ issues relating to the waterlines.” Exh. 51, at p. 45. That draft agreement represented an attempt by the parties “to address the waterline issues fully and finally before this suit was filed. I think th[is] suit was filed partly in an effort to resolve the issues.” Exh. 51, at p. 45. The goal of the Waterline Relocation Agreement was to “divorce the parties” from the issues and problems related to the waterlines and “to try to eliminate future issues.” Exh. 51, at p. 46.

TMT declined to sign the Waterline Relocation Agreement, taking the position that there was no need for a new agreement. RP (6/25/13) at 85-87. TMT’s refusal to sign the Waterline Relocation Agreement prompted a response letter dated February 13, 2009, from Greenway’s counsel. RP (6/25/13) at 85 (explaining that the February 13, 2009 letter, admitted as Exh. 13 over Greenway’s objection, was the letter received by TMT after it declined to sign the Waterline Relocation Agreement). Greenway did not believe it had to allow TMT to do any work on its property, even if TMT rejected the proposed Waterline Relocation Agreement. RP (6/26/13) at 199. Mr. Walker ultimately told TMT that Greenway was “just going to go with the original agreement,” and that

TMT should put it “wherever you want *on your own property.*” RP (6/26/13) at 202 (emphasis added).

On August 13, 2009, TMT Development Co. sued Michael J. Walker, Deborah A. Wray, and Kristin D. Stump, as co-trustees of the Amended and Restated Walker Family Trust dated August 18, 2001, and Greenway Terraces, LCC. CP 1. Tom Moyer Theatres (“TMT”) then filed against the same defendants what became the presently operative complaint, on January 28, 2011. CP 22. TMT’s primary claim for relief was for specific performance of the 2001 Agreement. CP 24. TMT alleged Greenway was unreasonably withholding consent to allow TMT to relocate utilities, and sought a decree requiring that Greenway consent to TMT relocating utilities. CP 25.

C. The Trial Court Denied a Motion for Summary Judgment Seeking Dismissal of TMT’s Specific Performance Claim, Despite Finding that the 2001 Agreement Was Silent as to the Right TMT Was Suing to Enforce. The Court Ruled that the Pre and Post-Suit Negotiations Over Greenway’s Terms for Resolving the Dispute Were Evidence that Greenway Agreed that TMT Had the Right to Move the Utilities onto its Property.

The Walkers moved for summary judgment on TMT’s specific performance claim, requesting a declaration that TMT was not allowed to move the utilities onto Greenway’s property without Greenway’s consent. CP 89-90. The Walkers asked the Court to rule that the easement allowed TMT the right to relocate or alter Greenway’s utilities on TMT’s property only; the Walkers argued that TMT would be trespassing on Greenway’s property if TMT entered to relocate the utilities on Greenway property

without permission. CP 95. The Walkers further argued that TMT did not have the right to terminate the easement across the TMT Property. CP 96-99.

TMT claimed that it had a right to terminate the easement and move utilities onto Greenway's property because the addendum to the 2001 Agreement describing the terms of the easement did not *prohibit* such an action. CP 103. TMT argued the parties had reached an *unwritten understanding* that the utilities would be moved back onto the Greenway property. CP 108.

TMT admitted that the 2001 Agreement itself was *silent* on whether TMT could relocate the utilities onto Greenway property. RP (6/7/13) at 14. TMT also offered no documentary evidence dating from the formation of the 2001 Agreement (agreement drafts, letters, e-mails, handwritten notes) to support its claim that the parties had reached the "understanding" claimed by TMT.

Instead, TMT cited the following documents, dating from 2008 through 2010, as supposed evidence that Greenway had acknowledged that the parties had reached the understanding in 2001 claimed by TMT:

- a July 7, 2008 e-mail from the City of Vancouver to the parties detailing the arrangements to be made and issues to be clarified if the parties moved the water meter onto the Greenway Property. CP 213.
- a July 24, 2008 fax cover sheet from TMT Development Co. to Mr. Walker stating that TMT Development Co. was

taking steps to ensure that the meter would be on Greenway property. CP 227.¹¹

- a February 13, 2009 letter from Greenway's counsel to TMT Development Co., responding to TMT's refusal to sign the Waterline Relocation Agreement and asking TMT to agree to the conditions under which Greenway would agree to host the waterlines and water meter on its property. CP 238-40.¹²
- a June 4, 2010 letter from counsel for Greenway to counsel for TMT to express Greenway's concerns about one of the two relocations plans from TMT's engineer. CP 121-24.¹³

TMT argued that the parties continued to discuss relocation after 2010. See CP 109, citing CP 136-39 (an email chain between counsel for TMT and counsel for Greenway ending August 29, 2011, and containing a discussion of issues regarding TMT's plans to relocate the waterlines).¹⁴ TMT claimed the discussions failed in November 2012. CP 109, citing CP 150-159 (an email chain ending with a November 7, 2012 email from counsel for TMT proposing that Greenway select between the two plans

¹¹ The Walkers did not move to strike the fax cover sheet during the summary judgment proceedings, and it was admitted by stipulation at trial as Exhibit 11. RP (6/25/13) at 22.

¹² The Walkers moved to strike that letter under ER 408, and moved *in limine* for its exclusion at trial as Exhibit 13. CP 277-79; RP (6/25/13) at 12-14.

¹³ The Walkers moved to strike that letter under ER 408, and later moved *in limine* for its exclusion at trial as Exhibit 14. CP 277-79; RP (6/25/13) at 12-14.

¹⁴ The Walkers moved to strike those emails under ER 408, and later moved *in limine* for their exclusion at trial as Exhibit 16. CP 277-79; RP (6/25/13) at 12-14.

developed by TMT's engineer)¹⁵ & CP 160-61 (an email chain ending in a December 27, 2012 email from Greenway counsel, clarifying that Greenway did not consent to work being done on its property, and containing a December 14, 2012 email from Greenway counsel rejecting TMT's demand that it select one of the engineering plans).¹⁶ TMT argued that Greenway unreasonably withheld consent for TMT's attempt to exercise a supposed contractual right stemming from the parties alleged understanding that the utilities would be moved onto the Greenway Property. CP 110.

The Walkers responded that the parties never had an understanding that the utilities would be relocated onto Greenway's property, and that they instead understood the utilities would be relocated to the north side of the TMT property in order to facilitate development of that property. CP 271-75.¹⁷

The trial court thought it would be "better" if the waterlines were moved off of TMT's property:

That just doesn't make any sense from a practical point of view to say that -- and that is what strikes me in looking at this, is it would

¹⁵ The Walkers moved to strike those emails under ER 408; they were not offered as exhibits at trial.

¹⁶ The Walkers moved to strike those emails under ER 408; they were not offered as exhibits at trial.

¹⁷ As noted, the Walkers moved to strike several of the exhibits submitted in support of TMT's opposition to summary judgment on the grounds that they evidenced attempts between the parties to settle their dispute and were therefore inadmissible under ER 408. The trial court confirmed on the first day of trial that it had intended to, and was now denying that motion to strike. RP (6/25/13) at 9. The renewal of the issue via motion *in limine* for those of the documents sought to be introduced by TMT at trial will be discussed in Section III.D of this brief.

be better, it appears, that the water lines be moved off of TMT's property.

RP (6/7/13) at 21. The trial court also ruled that the parties agreed it would be better to have the utilities on Greenway's property. RP (6/7/13) at 29.

The trial court denied the Walkers' motion for summary judgment because, even though the 2001 Agreement was *silent* as to any right to relocate utilities onto Greenway property, the court reasoned that Greenway must have originally agreed that TMT had the right to move the water meter and waterline onto its property *because it was later willing to negotiate over such a movement*:

Essentially, what Greenway is asking is that the Court find that there is no right of movement of the utilities off of TMT's property onto Greenway's property, contrary to the fact that -- also appears to be undisputed -- that all of the discussion about the movement of the utilities, anticipated relocation to the Greenway property, and that from what counsel has indicated that Greenway wants the utilities moved off of TMT's property onto Greenway's property.

RP (6/7/13) at 28. The trial court made this determination even though the court also acknowledged that "*it's not clear in the agreement* that what the plaintiff has -- or what the moving party, the defendant has asked for is a matter of right as a matter of law. In fact, both agree that it -- the contract is silent as to that." RP (6/7/13) at 29 (emphasis added).

TMT argued that the issue for trial was whether the plan TMT put forward for moving the utilities was reasonable and whether Greenway's reasons for rejecting the plan were reasonable. RP (6/7/13) at 26. The trial court proposed the following standard for trial:

If the plaintiff [TMT] is able to show that what they are requesting is the only practical or reasonable interpretation of their right to relocate the utilities, then that would be something that would be remaining for trial.

RP (6/7/13) at 29.

D. The Trial Court Denied a Motion *in Limine* to Exclude Evidence of Settlement Discussions Sought to be Introduced by TMT.

The Walkers moved *in limine* to exclude evidence of settlement discussions under ER 408. CP 346-48; RP (6/26/13) at 12-21. Specifically, Greenway moved to exclude the settlement discussions evidenced in Exhibits 12-18, 20, and 22. CP 347. The challenged exhibits consisted of the following documents, several of which had been before the court on summary judgment:

- Trial Exhibit 12 was an October 9, 2008 fax cover sheet from a Greenway representative to TMT along with the proposed Waterline Relocation Agreement.¹⁸
- Trial Exhibit 13 was the February 13, 2009 letter from Greenway counsel to TMT Development Co.
- Trial Exhibit 14 was the June 4, 2010 letter from counsel for Greenway to counsel for TMT.
- Trial Exhibit 15 was a June 29, 2010 letter from counsel for Greenway to counsel for TMT.

¹⁸ Exhibit 12 was admitted without discussion at trial. RP (6/25/13) at 23. The Waterline Relocation Agreement portion of Exhibit 12 was also offered by Greenway counsel as Exhibit 109 to Mr. Zipper's deposition, which was admitted at trial. *See* Exh. 51, at page 44-45. No error is being assigned to the admission of Exhibit 12.

- Trial Exhibit 16 was an email chain between counsel for TMT and Greenway ending on August 29, 2011.
- Trial Exhibit 17 was an October 31, 2011 email from counsel for Greenway to counsel for TMT.
- Trial Exhibit 18 was a November 3, 2011 email from counsel for Greenway to counsel for TMT.
- Trial Exhibit 20 was a June 18, 2009 letter from counsel for TMT to counsel for Greenway.
- Trial Exhibit 22 is an email chain ending with a December 11, 2012 email from a City of Vancouver employee to Mr. Walker.

The trial court denied the Walkers' motion, finding there were "indications of the carrying out of the contract and interpretation of the contract post-contract." RP (6/25/13) at 19. The trial court offered additional explanations when the Walkers objected to the admission of the individual exhibits at trial. As for Exhibit 13, the trial court apparently agreed with TMT's contention that Exhibit 13 did not contain settlement discussions and instead was a letter that "states the parties' positions with respect to the original agreement." RP (6/25/13) at 86. The trial court ruled that Exhibit 14 "doesn't appear to contain discussions of any settlement; it is discussing details of the plans and so on." RP (6/25/13) at 88. The trial court made the same ruling for Exhibits 15, 16, 17, 18, 20, and 22. RP (6/25/13) at 59, 89-91, 93.

The trial court made further comments on the admissibility of the contested exhibits at the close of trial. The trial court admitted those exhibits on the basis that the communications “were *more of the nature of attempting to resolve issues under the contract* rather than specifically being to compromise and settle an existing claim at that time.” RP (6/26/13) at 258-60 (emphasis added). The trial court put great weight on the testimony of Mr. Zipper, the lawyer who represented the Walker Family Trust during the formation of the 2001 Agreement, that, in communicating with TMT regarding the waterline relocation plans, he was trying to settle issues between the parties that went on for a “long, long time” and that he could not necessarily say that the communications were for the purpose of settling *an impending trial*. RP (6/26/13) at 259, citing Exh. 51, at p. 29; RP (6/25/13) at 51.¹⁹

The trial court ruled that ER 408 generally applies only after a claim is filed. RP (6/26/13) at 258. The trial court explained that, even if it disregarded Exhibits 14 through 18 on the basis that they were communications which took place after the filing of the lawsuit, it would still reach the same conclusion based on Exhibit 13. The trial court viewed Exhibit 13 as admissible because it evidenced communications occurring before the lawsuit was filed. RP (6/26/13) at 258-60.

¹⁹ “And so some of those letters – I mean I was trying to settle issues between the parties but I wouldn’t necessarily say that that was settlement negotiations in consideration for a pending trial. I was just simply trying to resolve matters. That went on for a long, long time.” Exh. 51, at 29.

E. After a Bench Trial, the Trial Court Found that the Parties Did Not Agree on a Location for the Utilities, But that Leaving the Utilities on the TMT Property Was Nonetheless Contrary to Their Intent and Ordered Specific Performance of TMT’s “Contractual Right” to Move the Utilities onto the Greenway Property.

The parties did not agree on the issue that was being tried. TMT claimed that the issue for trial was the “reasonability and practicality of the plans to relocate the water line.” RP (6/25/13) at 24. The Walkers argued that the reasonability and practicality of the proposed plans to move the waterline was not the issue. RP (6/26/13) at 26. Instead, The Walkers contended that TMT bore the burden of proving that TMT had a contractual right to move the utilities onto the Greenway Property. RP (6/26/13) at 27-30.

TMT’s theory was that the Agreement’s silence on whether the utilities could be relocated only somewhere else on the TMT property meant that TMT had the right to move the utilities onto the Greenway Property. CP 295. TMT requested that the trial court issue a decree approving either of the two engineering plans to move the water meter onto the Greenway Property, or order that TMT pay Greenway a fixed sum to move the water meter onto its own property within 6 months of the decree. CP 303.²⁰ The Walkers’ theory was that the absence of language in the 2001 Agreement giving TMT the right to enter onto Greenway’s property meant that TMT could not meet its burden for obtaining a decree allowing it to do that. CP 352.

²⁰ The last option was not part of the complaint’s request for specific performance. RP (6/26/13) at 25.

TMT's supposed evidence that it had a contractual right to move the utilities onto the Greenway Property came substantially in the form of communications between the parties and their lawyers with regard to the engineering plans proposed by TMT in 2008 and the Waterline Relocation Agreement proposed by Greenway. TMT argued that Greenway understood the 2001 Agreement as giving TMT the right to relocate the water meter onto the Greenway Property because the engineering plans would have located the water meter on the Greenway Property, and Greenway was open to discussing those plans before ultimately rejecting them. RP (6/26/13) at 244-45.²¹

The Walkers moved to dismiss at the conclusion of TMT's case-in-chief, and TMT responded that the court had already stated "that the parties' conduct and the stipulation at that hearing indicated certain agreement that the parties intended that the waterlines would be moved across to Greenway's side of the property line in furtherance of TMT's unequivocal undisputed right to move the utilities." RP (6/25/13) at 157. TMT admitted that the uncertainty involving the original agreement "is the silence that the agreement has with respect to the location of the utilities." RP (6/25/13) at 157. TMT argued that the parties' post-2001 Agreement conduct and communications "all indicate unequivocally that the location would be on Greenway's side of the property." RP (6/25/13) at 157. The

²¹ The only evidence TMT offered from the time frame of the formation of the 2001 Agreement was the testimony of TMT's attorney Mr. Laster, which Greenway will address in Section V.A.2 of this brief.

trial court denied the motion substantially for the reasons proffered by TMT. RP (6/25/13) at 157-58.

At the conclusion of trial, the trial court entered judgment in favor of TMT on its specific performance claim and ordered Greenway to either elect one of the two engineering plans proposed by TMT or to take a fixed sum from TMT to move the water meter onto its own property within 6 months of the decree. CP 377-79. The Walkers moved for reconsideration and amendment of the judgment, in addition to moving to alter the findings of fact and conclusions of law. CP 385-99, 477-80. The trial court denied those motions. CP 523-24, 536-37. The Walkers appealed. CP 526-37.²²

IV. STANDARD OF REVIEW

The issues in this case implicate several standards of review:

- Findings of fact are reviewed for substantial supporting evidence. *Littlefair v. Schulze*, 169 Wn. App. 659, 664, 278 P.3d 218 (2012); *see generally Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). As a general proposition, evidence is substantial if it allows a reasonable person to find the disputed fact. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Substantiality, however, is also a function of the burden of proof. Thus, where a claim must be established by clear and convincing evidence, and not a mere preponderance, this Court will review the record to determine if

²² The parties also tried a subsidiary issue related to reformation of the “maintenance and repair” clause of the Addendum to the 2001 Agreement; the trial court agreed that the parties intended that clause to apply only to the access easement rather than the utility easement, granted TMT’s complaint for reformation, and denied Greenway’s request for additional reformation. CP 383-84. The Walkers are not appealing this determination.

the evidence is sufficiently substantial that a trier of fact could reasonably conclude that the claimant had met its burden to establish its claim by clear and convincing proof. *See, e.g., Dependency of C.B.*, 61 Wn. App. 280, 283, 810 P.2d 518 (1991) (op. per Morgan, J.) (“[E]vidence that may be sufficiently ‘substantial’ to support an ultimate fact in issue based upon a ‘preponderance of the evidence’...may not be sufficient to support an ultimate fact in issue, proof of which must be established by clear, cogent and convincing evidence” (citing and quoting *Estate of Reilly*, 78 Wn.2d 623, 640, 479 P.2d 1 (1970))).

- Questions of law and conclusions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Conclusions of law must flow from the findings of fact. *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

- A “decree of specific performance rests within the sound discretion of the trial court.” *Crafts v. Pitts*, 161 Wn.2d 16, 29, 162 P.3d 382 (2007). A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). An error of law constitutes an abuse of discretion. *Farmer v. Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011).

- A trial court’s interpretation of statutes and evidentiary rules is reviewed *de novo*. *Hensrude v. Sloss*, 150 Wn. App. 853, 860, 209 P.3d 543 (2009). A trial court’s decision on the admission of evidence under a correctly interpreted evidentiary rule is review for abuse of discretion. *Id.*,

n. 10, citing *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). “Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.” *Foxhaven*, 161 Wn.2d at 174.

V. ARGUMENT

A. TMT Did Not Prove, by Clear and Unequivocal Evidence, that the Parties Agreed, as Part of the Sale of Property in 2001, that TMT Would Have The Right to Move the Utilities Onto Greenway’s Property. The Trial Court Therefore Erred in Granting TMT a Decree of Specific Performance Allowing It to Do Just That.

1. TMT Had the Burden to Prove, Clearly and Unequivocally and Not By a Mere Preponderance, that the Parties Agreed at the Time of the Sale of the Property in 2001 That TMT Would Have the Right to Move the Utilities Onto Greenway’s Property.

“[W]hen specific performance is sought, rather than legal damages, a higher standard of proof must be met: clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the contract.” *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (internal quotations and citations omitted). Nor may the trial court sitting in equity presume to impose an agreement on the parties merely because the court believes that the result would be reasonable, because “[w]here the parties have not reached agreement, there is nothing for equity to enforce.” *Haire v. Patterson*, 63 Wn.2d 282, 286-87, 386 P.2d 953 (1963).

Applying these principles to the case at hand compels the following two conclusions. First, TMT had the burden to prove that the parties “reached [an] agreement” in 2001 under which TMT would have the right to move the utilities serving the mobile home off TMT’s property and onto

Greenway's property, even if Greenway objected to such a move. Second, because TMT was seeking a decree of specific performance rather than damages, TMT could not prevail unless it proved the fact of such an agreement "by clear and unequivocal evidence[,] "leav[ing] no doubt as to...[its] existence[.]"²³

2. TMT Did Not Meet Its Burden to Prove Clearly and Unequivocally Its Claimed Right to Move the Utilities Onto Greenway's Property. The Trial Court's Findings In Favor of TMT's Claimed Right Are Not Supported By Substantial Evidence -- Certainly Not When the Substantiality of the Evidence Is Tested Against TMT's Burden to Prove its Case Clearly and Unequivocally.

The trial court made two findings that arguably support TMT's claim that it is entitled to move the utilities onto Greenway's property, even if Greenway objects to such a move. Finding of Fact No. 11 states that Greenway requested that TMT move the utilities in response to TMT's proposed plan to move the waterlines and water meter off TMT's property and onto Greenway's property. *See* CP 382. Finding of Fact No. 15 states that the parties evidenced mutual agreement that leaving the utilities on TMT's property would be "contrary to their original intent." *See id.* Of

²³ The obligation imposed under a clear and unequivocal burden of proof -- sometimes referred to as the "clear, cogent, and convincing" burden of proof -- has also been described by Washington courts as the obligation to establish that a proposition is "highly probable" (as opposed to merely more likely than not, which is all that is required under the less demanding "preponderance of the evidence" standard). *See, e.g.*, Judge Morgan's opinion for this Court in *Dependency of C.B.* (*supra*), 61 Wn. App. at 282-84 (citing and quoting, among other authorities, the Supreme Court's decision in *In re Seago*, 82 Wn.2d 736, 513 P.2d 831 (1973), in which the Supreme Court characterized the clear, cogent, and convincing standard as requiring that a proposition be established as "highly probable"). Thus, one could also say that TMT could not prevail unless it established it was highly probable that the parties agreed that TMT would have the right to move the utilities off its property and onto Greenway's property, even if Greenway objected to such a move.

these two findings, it is No. 15, and in particular its final phrase regarding “original intent,” which comes the closest to constituting a specific finding that the parties “reached [an] agreement[.]” *Haire v. Patterson (supra)*, 63 Wn.2d at 286-87, under which TMT would have the right to move the utilities onto Greenway’s property, even if Greenway objected.

These findings are not supported by substantial evidence -- certainly not when measured against TMT’s burden to establish *convincingly and unequivocally* that the parties entered into such an agreement. The statement in Finding of Fact No. 15, that leaving the utilities on TMT’s property would be “contrary to [the parties’]...original intent[.]” is unsupported by any explanation by the trial court as to what evidence persuaded the court to come to such a conclusion about the parties’ original intent.²⁴ The Walkers have combed the record, and have been able to locate only a *single piece* of evidence that supports TMT’s claim. That evidence is found in the testimony of Mr. Alan Laster, counsel for TMT, who testified as follows to his “understanding” of the meaning of the relocation clause:

Question: Tell me about how that provision came about.

Mr. Laster: Well, the parcel being acquired by the buyer included within it utility lines that served the seller’s property -- other property, which was the mobile home park, which I’m referring to as the mobile home park in the -

²⁴ Conclusion of Law No. 1 is no help on this score, either. There, the trial court merely offers up another summary statement, this time about how TMT “met its burden of proving by clear and unequivocal evidence its contract right to move the Utilities off of the TMT Property and onto the Greenway Property.” *See* CP 383. Nowhere does the court ever identify what *specific* evidence the court considered to be clear and unequivocal proof of TMT’s claimed contract right.

- you know, sort of in the back farther behind the parcel being acquired. And so there needed to be a way for the seller to access the utility lines while they were located on that property in order to be able to maintain and repair them. And so this easement was for that purpose.

Question: *But then -- I want to focus on this "relocate or alter utilities" language.*

Mr. Laster: Mm-hmm.

Question: *What's your understanding of the meaning of that language?*

Mr. Laster: ***I think exactly what it says, is that the buyer had the right to relocate or alter those utilities and move them, move those lines.***

Question: *Move them where?*

Mr. Laster: ***Anywhere, but the discussion was ultimately to move them off of the parcel being acquired and onto other property of the seller*** so that, you know, there would be no further need for this easement. And so the -- you know, the mobile home park would have control over its utilities and service, and it wouldn't be the responsibility of the buyer any more, and the parties could just develop their properties and treat their properties separately.

RP (6/25/13) at 151-52 (emphasis added; bolding of questions deleted).

Immediately after Mr. Laster offered this "understanding" of the relocation language, however, he was forced to make a series of damaging admissions:

- First, he admitted that the alleged "understanding" was not reflected in the language of the parties' written agreement:

Question: *But where do you see all of that language in this sentence?*

Mr. Laster: *I don't see specific language in the sentence that says that -- where they are -- you know, that they -- where they're moved to.*

RP (6/25/13) at 152 (emphasis added; bolding of questions deleted).

- Second, he admitted that permission by Greenway would have to be given before TMT could carry out any relocation, otherwise TMT would be guilty of trespassing:

Question: *So isn't it true that typically when -- that in order to have a right to do any work on another owner's property, you need to have either some sort of permission to do so; isn't that correct? Otherwise, it's a trespass --*

Mr. Laster: Well, typically --

Question: *-- right?*

Mr. Laster: *-- right.*

RP (6/25/13) at 153 (emphasis added; bolding of questions deleted).

- Finally, although Mr. Laster testified that such permission would not “necessarily” have to be documented in a written agreement, he admitted that it should have been documented in the agreement:

Question: And so if this sentence [regarding the right to relocation] means what you're stating it means, that it gives TMT Development Company, Inc., who was the party that entered into this agreement at that time, the right to do work on Greenway -- I'm sorry the Walker Family Trust's property, the seller's property, wouldn't that need to be documented in this agreement?

Mr. Laster: Not necessarily. I think the parties could agree that the right to relocate, you know, included the right to have work done and transfer it across the line. It's probably --

Question: That's --

Mr. Laster: -- not complete, it's probably inartfully drafted. *It could have been probably drafted very specifically to say that.* But this was a late night meeting trying to forge out documents for everybody to get signed and get done, and it was probably not as artfully drafted as it could have been.

Question: *But, Mr. Laster, you had how many years, 18 years of experience as a real estate lawyer at this time, and you had done lots of purchase and sale agreements involving commercial property, correct?*

Mr. Laster: Mm-hmm.

Question: *So if that's what -- so it sounds to me what you're saying is that it's simply not in there, correct?*

Mr. Laster: **Correct.**

RP (6/25/13) at 153-54 (emphasis added; bolding of questions deleted added).²⁵

Even if considered without regard to the other evidence in the record, Mr. Laster's evidence does not constitute clear and unequivocal proof that the parties agreed that TMT would have the right to relocate the utilities onto Greenway's property, even if Greenway objected to such a move. And Mr. Laster's evidence does not stand alone -- it conflicts with the remaining evidence in the record, all of which points to the conclusion that the parties did not enter into such an agreement:

²⁵ Tellingly, TMT never sought to reform the agreement to correct the "inartful..." drafting claimed by Mr. Laster. This may have been because, immediately after making that claim, Mr. Laster admitted that he was not involved in all of the negotiation sessions involving the principals of the buyer and seller, and also admitted that there could have been meetings between the principals to which he was not a party -- even during the "late night meeting" at which he claimed to have acquired his "understanding" about the parties intent to allow TMT to relocate the utilities onto Greenway's remaining property. See RP (6/25/13) at 154-56.

- First, TMT repeatedly conceded that the 2001 purchase and sale agreement was silent as to whether TMT was entitled to relocate the utilities onto Greenway’s property, *see* RP (6/7/13) at 14 (summary judgment hearing); RP (6/25/13) at 157 (trial), and the trial court agreed, finding that “[n]o location for the movement of the Utilities was specified in the Agreement[.]” CP 382 (FoF 14).

- Second, TMT did not offer a single contemporaneous document of any kind (agreement drafts, letters, e-mails, handwritten notes of meetings) to confirm Mr. Laster’s claim of an “understanding.”

- Third, the 2001 Agreement’s silence conflicts with TMT’s claim that Greenway agreed that TMT could move the utilities onto Greenway’s property, whenever TMT might decide that the time had come for such a move. Ownership of property includes the right to exclusive possession. *See Pierce v. Northeast Lake Washington Sewer and Water Dist.*, 123 Wn.2d 550, 560, 870 P.2d 305 (1994). Trespass is “an intrusion onto the property of another that interferes with the other’s right of exclusive possession.” *Phillips v. King County*, 136 Wn.2d 946, 957 n.4, 968 P.2d 871 (1998) (citation omitted). TMT therefore needed Greenway’s permission to enter onto its property to effect a relocation of the utilities, lest it be guilty of trespassing, and the fact that the 2001 Agreement did not grant TNT such permission is strong evidence that the parties never had the “understanding” claimed by TMT.

- Fourth, the evidence in the record shows that the original intent of the parties was only to make sure TMT could move the utilities

around on its property, which it was going to need to do in order to develop the property. Exh. 51, at pp. 13, 17. The intent was “to give [TMT] flexibility to move the utilities on its property so that it could develop the property in the most effective manner.” Exh. 51, at pp. 17-18. Making the utility easement moveable on the TMT Property allowed TMT the flexibility and ability to develop its property. There is *no* evidence that TMT would have been unable to develop its property if it was only allowed to relocate the utilities somewhere on its 6.25 acres, and thus *no* evidence that leaving the utilities on the TMT Property was contrary to the intent of facilitating development.

- Fifth, the record shows there was no way to move the utilities onto Greenway’s retained portion at the time the parties signed the agreement. The plans developed by TMT’s engineer in 2008 to move the waterlines onto the Greenway Property depended on the ability to connect with the waterline under NE 69th Street, RP (6/25/13) at 126-29; Exhs. 3-4, which is the public waterline for Orchards Elementary School to the south of the Greenway Property. RP (6/25/13) at 119-20; RP (6/26/13) at 174-75, 187. *But neither NE 69th Street nor the school existed when the parties made their agreement in 2001.* RP (6/26/13) at 174-75; *Compare* Exh. 41 (2002 aerial photo); App. C (marked version of Exh. 41) *with* Exh. 44 (2007 aerial photo reflecting building of school and opening of street); App. D (marked version of Exh. 44).²⁶

²⁶ The NE 69th Street waterline was not approved and accepted by the City of Vancouver until three years later. RP (6/25/13) at 120-21; Exh. 46.

Before 2005, the only viable option for moving the utilities would have involved moving them to the northern boundary of the TMT Property. RP (6/25/13) at 123-25; RP (6/26/13) at 173-74. There could have been no consideration for moving the utilities off the TMT Property because that was not an option at the time. Exh. 51, at 13-14; RP (6/26/13) at 174-75, 212-13. Or, to put the point another way -- How is it reasonable to conclude that the parties intended to give TMT the right to move the utilities onto Greenway's property, when at the time of the parties' agreement such a move *would have deprived the mobile homes on Greenway's property of access to water and power?*

The answer must be is that it is *not* reasonable, and -- even more to the point presented by this appeal -- it is not reasonable to conclude that TMT proved *clearly and unequivocally* that the parties had such an intent. The parties certainly contemplated that TMT might move the utilities to the north side of the TMT Property. RP (6/26/13) at 173-75, 186-87, 226-27, 232, Exh. 51, at 13-14, 19, 46-47 & deposition exhibit 103; Exhs. 25, 28. Indeed, Mr. Moyer proposed relocating the waterlines on the TMT Property during the purchase and sale negotiations. RP (6/25/13) at 50-51. But connecting the Greenway Property to the NE 69th Street waterline, as the 2008 engineering plans contemplated, was necessarily different from what Mr. Moyer could originally have contemplated, and for the most basic reason of all -- no such connection could be made in 2001 because NE 69th Street and its waterline *did not exist in 2001*.

Nor does the parties' conduct after 2001 establish any agreement that TMT had a right to move the water meter and waterlines across to the Greenway Property under the original 2001 Agreement. That is the argument TMT made when it prevailed against Greenway's motion to dismiss at the conclusion of its case-in-chief. RP (6/25/13) at 157. But the parties never reached any agreement that leaving the water meter and waterlines on the TMT Property was contrary to their original intent; nor could any such agreement reasonably be implied through the parties' failed negotiations related to moving the water meter and waterlines and other utilities, which started up in 2008 with TMT's engineering proposal and continued for several years after this lawsuit was filed in 2009.

In fact, there is no evidence of any discussions related to moving the utilities onto the Greenway Property before the opening of NE 69th Street, with its the new utility line.²⁷ It was only after the opening of the new road and the new utility line that TMT had engineers develop a plan for relocating the waterlines onto Greenway's property. According to the engineer it hired, TMT's intent in 2008 in developing an engineering plan was to try not to have an easement across the TMT Property. RP (6/25/13) at 128. But those plans were not formed by TMT until it knew there would be a waterline coming in to support the school on NE 69th. RP (6/25/13) at 128.

After TMT proposed its engineering plans in 2008, the parties negotiated over the terms of those plans and whether they were acceptable to

²⁷ With the singular exception, of course, of Mr. Laster's testimony, and (as shown) that testimony plainly fails the test of clear and unequivocal proof that the parties agreed in 2001 that TMT would have the right to move the utilities onto Greenway's property.

Greenway. That evidence should not have been admitted for the reasons set forth in Section V.B of this brief, but even if considered, that evidence does not support the trial court's findings. The trial court put the most weight on Exhibit 13 when purporting to determine the intent of the parties. *See* Exh. 13; RP (6/26/13) at 259. Exhibit 13 is the February 13, 2009 letter Greenway's counsel sent after TMT declined to sign Greenway's proposed Waterline Relocation Agreement, which set forth the terms and conditions for allowing the water meter onto the Greenway Property. RP (6/25/13) at 85.

In short, Greenway proposed that the parties sign a new agreement, the Waterline Relocation Agreement (Exh. 12), to resolve the ongoing issues caused by the location of the waterlines, and TMT's refusal to sign the new agreement prompted Greenway to ask whether TMT would reconsider. RP (6/25/13) at 85; Exh. 51, at pp. 44-45; Exh. 13. Nothing in that course of conduct indicates that Greenway agreed that TMT had the right under the 2001 Agreement to proceed with its engineering plans. If anything, Exhibit 13 supports the exact opposite conclusion: that the parties *did not* agree that TMT already had the contractual right under the original agreement to relocate the utilities onto the Greenway Property, which is why Greenway was negotiating the terms and conditions of a new agreement with TMT.

The evidence in the record thus actually shows that Greenway and TMT were trying to form a "new agreement" to allow TMT to work on the Greenway Property, and thereby resolve the ongoing issues between the parties related to the utilities. RP (6/25/13) at 62; RP (6/26/13) at 198-99; Exh. 51, at pp. 45-48. TMT and Greenway, however, *disagreed* about the

need for a new agreement. RP (6/25/13) at 85-87; RP (6/26/13) at 199. At no point did they resolve their differences -- much less agree that TMT had the right to relocate the utilities onto Greenway Property under the 2001 Agreement. RP (6/26/13) at 202. There is no evidence in the record, including in the disputed exhibits, that Greenway ever agreed that TMT had the right under the 2001 Agreement to relocate the utilities onto the Greenway Property. That Greenway was willing to negotiate a *new* agreement to allow that does not logically constitute evidence -- and certainly not *clear and unequivocal* evidence -- that the parties agreed as part of their original contract that TMT was entitled to move the utilities onto Greenway's property.

3. The Trial Court's Findings Do Not Support Its Conclusion that TMT had the Contractual Right to Move the Utilities onto Greenway's Property.

The Findings of Fact do not support Conclusion of Law No. 1 that TMT met its burden of proving, by clear and unequivocal evidence, that it had a contractual right to relocate the utilities onto Greenway's Property. For the same reasons, the Findings of Fact do not support the statement in Conclusion of Law No. 2 that TMT had a "contractual right to move the Utilities off of the TMT Property and onto the Greenway Property." CP 383. In fact, the trial court found there was an absence of the evidence needed to conclude that TMT had a clear and unequivocal right to move the utilities onto Greenway's Property. The court found that "[n]o location for movement of the Utilities was specified in the Agreement." CP 382 (FoF 14). That finding is supported by a plain reading of the 2001

Agreement, which, with regard to the utility easement over the TMT Property, states that the owner of the burdened estate may relocate the utilities which are located in the 6.25 acre parcel. *See* Exhs. 1 & 2. As the trial court found, that clause *does not* specify where the owner of the burdened estate may relocate the utilities. Without such direction in the 2001 Agreement, there is no basis to conclude that TMT had a clear and unequivocal right to move the utilities onto the Greenway Property.²⁸

Finding of Fact 15's statement that the "parties have evidenced mutual agreement that leaving the Utilities on the TMT property . . . is contrary to the original intent of the parties" is the only finding that would have supported the conclusion that TMT had a right to specific performance under the Agreement. But that finding is not supported by substantial evidence. The parties never agreed that TMT had the right to relocate the waterlines onto the Greenway Property under the 2001 Agreement. Whether Greenway would have allowed the relocation to occur on its property under a new agreement quite simply cannot determine TMT's rights under the 2001 Agreement.

None of the other findings support a conclusion that TMT proved by clear and unequivocal evidence that it had a contractual right to move the

²⁸ The trial court fundamentally misapprehended the issues, as shown by its statement at the summary judgment hearing that the issue remaining for trial was whether "the plaintiff [TMT] is able to show that what they are requesting is the only practical and reasonable interpretation of their right to relocate the utilities[.]" RP (6/7/13) at 29-30. In actuality, TMT bore the burden of proving by clear and unequivocal evidence the existence of a contract term that entitled it to move the water meter and waterline onto the Greenway Property. TMT failed to meet that burden, which in turn forecloses any need to determine the reasonability of any of its proposed options for relocation.

water meter and waterlines onto the Greenway Property. Greenway's request that all the utilities be moved onto its property if the waterlines and water meter were moved does not prove TMT had a contractual right to move the waterlines and water meter. *See* CP 382 (FOF 11). Instead, that was a condition of Greenway reaching a new agreement with TMT to allow such a move to resolve the ongoing issues related to the waterlines. *See* Exh. 13. That the parties had a common goal for resolving this matter does not suffice as evidence that the 2001 Agreement provided TMT with that right. In any event, the finding is not sufficient to support Conclusion of Law No. 1 because it does not establish that Greenway agreed that TMT was allowed to proceed with its proposed plans under the 2001 Agreement.

The finding that facilitating future development was the purpose behind the clause allowing utility relocation likewise does not support a conclusion that TMT had the right to relocate the waterlines and water meter onto the Greenway Property, because there is no evidence that the purpose of the 2001 Agreement would have been frustrated by allowing TMT to move the utilities somewhere else on its 6.25 acres. The 2001 Agreement does not give TMT the right to take, for example, actions that would otherwise constitute a trespass so long as those actions are consistent with the unwritten purpose of the agreement.

Similarly, it does not matter whether moving the utilities would in some general sense be better for the parties than leaving them at loggerheads. TMT has no right to specific performance of a contract unless it can prove by clear and unequivocal evidence the existence of a

contractual right for the court to enforce. The trial court did not have the discretion or authority to order Greenway to perform an obligation it had not incurred under the terms of the parties' 2001 Agreement, just because the court believed that doing so would be best for both sides.

B. The Trial Court Erred Under ER 408 by Admitting Evidence of Settlement Communications.

The trial court erred by denying the Walkers' motion *in limine* and overruling its continued objections to the admission of evidence covered by ER 408.²⁹ The purpose of the rule is to promote compromise and settlement by eliminating the potentially corrosive effect that settlement evidence could have on the trier of fact. *Northington v. Sivo*, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000). ER 408 is based on a belief that "(1) the evidence has little probative value because an offer to settle may be motivated solely by a desire to buy peace, and (2) it is sound public policy to encourage the settlement of disputes by creating at least a limited privilege for settlement negotiations." 5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 408.1 (5th ed. 2013); *see also Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 675, 15 P.3d 115 (2000) (offers of compromise are irrelevant "because an offer to settle may be motivated solely by a desire to buy peace...." (quoting from

²⁹ That rule provides that "[i]n a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 408.1, at 48 (4th ed. 1999)).

“The time of filing the lawsuit is not necessarily the point after which Rule 408 operates, but pre-filing statements are excluded by Rule 408 only if there was an actual dispute at the time and at least some hint of possible litigation.” 5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 408.5 (5th ed. 2013). The standard is whether, at the time of the statement, a dispute had occurred with the potential for litigation. *Finley v. Curley*, 54 Wn. App. 548, 557-58, 774 P.2d 542 (1989). In *Finley*, a corporate officer’s offer to exchange his stock in a joint venture for a consultant’s share in a corporation was inadmissible because at the time the offer was made a dispute had already arisen over the consultant’s status as a shareholder. 54 Wn. App. at 557-58. The exclusion of the statement was affirmed because the trial court could have believed that the offer was made to buy peace. *Id.* (quotation and citation omitted).

Other Washington cases have held that pre-suit offers to compromise are inadmissible. In *Laue v. Estate of Elder*, a lawyer for a defendant responded to a letter from the lawyer for the plaintiff by contesting the facts set forth there and offering to make an arrangement and to meet “to negotiate a resolution to this matter without undue cost to either of the parties” 106 Wn. App. 699, 708-09, 25 P.3d 1032 (2001). The Court of Appeals held that the letter was inadmissible because it was a settlement offer, notwithstanding the fact that the lawsuit

had not been filed when it was written. 106 Wn. App. at 710. In *Duckworth v. Langland*, the defendant wrote a pre-lawsuit letter offering to make a payment to the plaintiff to purchase the plaintiff's half of a disputed partnership. 95 Wn. App. 1, 5-6, 988 P.2d 967 (1998). Based on the plaintiff's testimony that the letter was an attempt to resolve a disputed matter, the trial court did not err by ruling the pre-lawsuit letter was inadmissible under ER 408 as an offer of settlement. *Id.*

An exhibit may convey a settlement offer without any language or recital announcing the attempt to settle the dispute. *Knapp v. Hoerner*, 22 Wn. App. 925, 930, 591 P.2d 1276 (1979). In *Knapp*, the trial court admitted an exhibit which appeared to be an arms-length business agreement without any language or recital in the letter indicating that it was an attempt to compromise or settle a disputed claim. 22 Wn. App. at 930. The judgment from the trial court did not vary much from the offer contained in the exhibit. *Id.* Because the exhibit was used to show that the party making the offer tended to show liability, the trial court erred by admitting it. *Id.* at 930-31. The rule from *Knapp* is that the claimed settlement offer is in fact an inadmissible settlement offer if the judgment grants virtually the same relief as was offered in the disputed exhibit.

Here, the trial court committed a legal error when it ruled that ER 408 did not bar the admission of pre-suit settlement communications. *See* RP (6/26/13) at 258-60 (the trial court viewed Exhibit 13 as admissible because it evidenced communications occurring before the lawsuit was

filed). That is not the rule in Washington. *See Finley v. Curley (supra)*, 54 Wn. App. at 557-58.³⁰

At the time of the statements in Exhibit 13, there was a dispute that had occurred with the potential for litigation, which makes Exhibit 13 a non-admissible settlement communication. *See Finley*, 54 Wn. App. at 557-58. The dispute involved the parties' issues relating to the waterlines. That dispute had already caused ongoing litigation and had the potential for further litigation, a possibility realized less than a year after the Exhibit 13 letter was sent. *See* CP 1 (August 2009 complaint). As TMT admitted, "the dispute had been percolating much long -- longer before that." RP (6/7/13) at 14. TMT thought it could resolve the waterlines issues simply by moving them onto the Greenway Property without a new agreement. RP (6/25/13) at 85-87. Greenway disagreed. RP (6/26/13) at 199. That actual dispute is the subject of this lawsuit. *See* Exh. 51, at p. 45. Greenway proposed a Waterline Relocation Agreement, a new agreement intended to resolve the parties' issues relating to the waterlines. Exh. 51, at pp. 45-46; RP (6/25/13) at 62.

Exhibit 13 was sent as a response to TMT's rejection of that agreement. *See* RP (6/25/25/13) at 85. Exhibit 13 resulted from

³⁰ To the extent Mr. Zipper testified that not all communications were settlement negotiations in consideration for a pending trial, that does not operate as a waiver because the standard is whether there was an actual dispute and at least some hint of possible litigation. Mr. Zipper did not testify that there was no actual dispute at the time Exhibit 13 was drafted, and in fact he testified that anything outside of the communications trying to settle the lawsuit set for trial still evidenced the parties trying to "settle matters." Exh. 51, at 29-30. In addition, Mr. Zipper made clear he was not testifying as to the actual legal standard at issue. *Id.*

Greenway's attempt to settle the parties' ongoing dispute through a new agreement between the parties, the Waterline Relocation Agreement. *See* Exh. 51, at p. 45. An examination of the substance of Exhibit 13 confirms that there was an actual dispute between the parties over the terms by which any waterline relocation would be accepted by Greenway. Thus, Greenway's lawyer wrote:

- “Moving the lines will eliminate the need for the parties to work with one another on utility issues in the future.” Exh. 13, at p. 2
- “If we share the same goal of eliminating the need for TMT and [Greenway] to deal with each other on [Greenway's]...utility issues, we should be able to figure out a way to make this happen. If we are not able to work out a solution to the utility issue, then the parties will continue to get in each other's way, which does not benefit anyone.” Exh. 13, at p. 3.
- “[a]s a result, numerous issues with utilities have arisen over the years, mainly with breaks in the waterline.” Exh. 13, at p. 2.

A communication responding to the rejection of a new agreement, which has been proposed to resolve a dispute over a subject matter that has already resulted in litigation before, is, by any reasonable measure, a settlement communication, even if there is no formal disclaimer announcing it as such. *See Knapp*, 22 Wn. App. at 930-31. The trial court

erred when it failed to exclude Exhibit 13 and instead relied on it as an evidentiary cornerstone of its decision in favor of TMT.

As for Exhibits 14 through 18 -- they should have been excluded because they come after the filing of the lawsuit and discuss how to settle the issue that was the subject of the lawsuit. Nothing in any of those exhibits could be construed as anything other than an attempt to resolve the parties' dispute over the location of the utilities, which is also the primary subject of this lawsuit. The trial court itself found as much, ruling that the communications "were more in the nature of *attempting to work to resolve issues under the contract*[".]” RP (6/26/13) at 258-60 (emphasis added). This lawsuit was about that contract and the parties' disputes over the rights provided by that contract. Attempting to resolve issues under the contract means the parties were trying to resolve the issues that were the subject of this lawsuit. Those are settlement communications.

For example, Exhibit 14 explains the concerns keeping Greenway from agreeing to TMT's engineering plans. In other words, Greenway was explaining the terms by which it would settle the dispute. Exhibit 15 contains an explanation that counsel for Greenway was seeking a meeting with all parties "in the hopes of getting a dialogue going that would allow the parties to work together to accomplish their goals without the need for further litigation.” Exh. 15. In Exhibit 16, counsel for Greenway reiterates that Greenway wants a new written agreement, among other conditions, before agreeing to the engineering plans. In return, counsel for

TMT offers to look at a draft agreement. Those are communications about what it would take to compromise the claim.

Exhibit 17 contains more communications between counsel about the concerns that were preventing the parties from resolving their dispute. *See* Exh. 17 (“[L]et’s talk about what TMT is willing to do to protect the LLC. If TMT is willing to indemnify Mike, as well as allow him to have the rights that any landowner would have when a contractor is doing work on his property, then I remain hopeful the project can move forward.”). Exhibit 18 relates to a list of items Greenway would like to see addressed in a separate agreement with TMT to allow work on the Greenway Property. Finally, Exhibit 20 contains a demand from TMT that it would file suit if Greenway did not agree to its conditions. All of these documents are clearly inadmissible under ER 408.³¹

Nowhere in the challenged exhibits is there any admission by Greenway about its understanding of the terms of the 2001 Agreement which in any way supports TMT’s claim. The exhibits only evidence the terms and conditions under which Greenway would *allow* TMT to take actions that TMT insisted it already had a *right* to take. The parties never came to terms either on a new agreement or on their interpretation of what the 2001 Agreement allowed. The steps they took to reach that point, as evidenced in these exhibits, cannot reasonably be treated as proving TMT’s

³¹ Greenway is not assigning error to the admission of Exhibit 22 because that document, on further consideration, does not appear to constitute an offer of compromise or settlement, as it is not directed to TMT. It also, however, does not in any way support TMT’s claim about what the parties agreed to in 2001.

claim -- particularly when Greenway's refusal to accept that claim is what eventually caused TMT to file this action, in order to vindicate that claim.

C. RAP 18.1 Fee Request.

The Walkers requests an award of their fees incurred in the trial court and on appeal, under the authority of the fees and costs provision of the 2001 Agreement, which was the basis for the trial court's award of fees and costs to TMT. See Exh. 2, at p. 5; CP 379; *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 56, 223 P.3d 513 (2009) (reversing a decree of specific performance, vacating the award of fees to the respondent, and awarding fees to the appellant "for the trial and the appeal under the terms of the PSA [i.e., the parties' purchase and sale agreement]").

VI. CONCLUSION

This Court should: (1) reverse and remand with directions that TMT's claim for specific performance, seeking an order compelling Greenway to allow TMT to move the utilities from its property to Greenway's property, should be dismissed with prejudice; and (2) award the Walkers the fees and costs they incurred in defending against that claim at trial and on appeal.

RESPECTFULLY SUBMITTED this 28th day of March, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Justin P. Wade, WSBA No. 41168

Attorneys for Appellants

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COURT OF APPEALS
DIVISION II
2014 MAR 20 PM 2:01
STATE OF WASHINGTON
BY CLERK

NO. 45433-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

Tom Moyer Theatres, an Oregon
Partnership,

Respondent,

vs.

Michael J. Walker, Deborah A.
Wray, and Kristin D. Stump, Co-
Trustees of the Amended and
Restated Walker Family trust
dated August 18, 2001; and
Greenway Terrace, LLC, an
Oregon limited liability company,

Appellants.

Clark County
Superior Court
No. 09-2-03671-7

DECLARATION OF
SERVICE

BY 
REINITY

STATE OF WASHINGTON

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FILED
COURT OF APPEALS
DIVISION II

I declare under penalty of perjury under the laws of the state of Washington as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. I caused to be delivered **via email and U.S. Mail** the following documents:

- *Appellant's Opening Brief;*
- *CD containing VRP transcripts dated 6/17/13, 6/25/13, 6/26/13, 8/16/13, 9/6/13 and 10/03/13; and,*
- *Declaration of Service.*

on the following parties at the last known address as stated:

J. Kurt Kraemer, WSBA 29509 McEwen Gisvold LLP 1100 SW Sixth Ave., Ste. 1600 Portland, OR 97204 kurtk@mcewengisvold.com	Steven E. Turner, WSBA No. 33840 1409 Franklin St., Suite 216 Vancouver, WA 98660 steven@steventurnerlaw.com
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of March, 2014.



Patti Saiden, Legal Assistant

APPENDIX

A

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SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

TOM MOYER THEATRES, an Oregon
partnership,

Plaintiff,

vs.

MICHAEL J. WALKER, DEBORAH A.
WRAY, and KRISTIN D. STUMP, Co-
Trustees of the Amended and Restated Walker
Family Trust dated August 18, 2001; and
GREENWAY TERRACE, LLC, an Oregon
limited liability company,

Defendants.

Case No. 09 2 03671 7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the Honorable Barbara D. Johnson for bench trial on
June 25, 2013 and June 26, 2013. Plaintiff appeared by and through its attorneys, J. Kurt
Kraemer and Katie Jo Johnson with McEwen Gisvold LLP. Defendants appeared by and
through their attorney, Margaret E. Schroeder with Black Helterline LLP.

At the conclusion of trial, after consideration of the evidence and argument of the parties,
the Court stated certain findings and conclusions on the record.

Now, therefore, the Court enters the following FINDINGS OF FACT and
CONCLUSIONS OF LAW:

FINDINGS OF FACT

- 1
2 1. Plaintiff Tom Moyer Theatres' ("TMT") predecessor-in-interest, TMT Development
3 Co., Inc., entered into the Purchase and Sale Agreement and Addendum dated
4 December 13, 2001 (the "Agreement") with the Amended and Restated Walker
5 Family Trust dated August 18, 2001 (the "Trust").
- 6 2. The Agreement is a valid and binding contract with definite and certain terms.
- 7 3. The Agreement is free from unfairness, fraud, and overreaching.
- 8 4. Pursuant to the terms of the Agreement, the Trust agreed to sell to TMT Development
9 Co., Inc. and/or its successors or assigns 6.25 acres of certain real property with
10 improvements thereon located at 7110 NE 117th Avenue, Vancouver, Washington
11 (the "TMT Property").
- 12 5. TMT Development Co., Inc. subsequently assigned all of its right, title, and interest in
13 the Agreement to TMT with the Trust's consent, pursuant to the terms of the
14 Agreement.
- 15 6. The Trust conveyed the TMT Property to TMT by Statutory Warranty Deed signed
16 on January 22, 2002 and recorded in Clark County, Washington on January 23, 2002
17 (the "TMT Deed").
- 18 7. The Trust retained ownership of the adjacent 12.23 acres of real property located at
19 11515 NE 71st Street, Vancouver, Washington (the "Greenway Property")
- 20 8. The Trust later conveyed the Greenway Property to Defendant Greenway Terrace,
21 LLC ("Greenway") by Statutory Warranty Deed signed on March 28, 2002 and
22 recorded in Clark County, Washington on May 23, 2002.
- 23 9. In the Agreement and in Exhibit C to the TMT Deed, the Trust reserved for itself a
24 nonexclusive appurtenant easement over the TMT Property (the "Easement") for
25 continuous and unrestricted access through the TMT Property to the Greenway
26 Property and for unrestricted and unlimited access to the TMT Property for any
27 necessary repairs or maintenance to the underground utilities located on the TMT
28 Property that serve the Greenway Property (the "Utilities").

0-000000381

1 10. The Easement states in part: "Buyer shall have the right to relocate or alter utilities
2 which are located in the 6.25 acres after closing but in no event shall such relocation
3 or alteration interrupt Seller's utility service without Seller's prior express written
4 consent."

5 11. Greenway specifically requested that TMT move all of the Utilities in response to
6 TMT's proposed plan to move the waterlines and water meter off of the TMT
7 Property and onto the Greenway Property.

8 12. The purpose of TMT moving the Utilities, as intended by the parties as part of the
9 Agreement, was to facilitate future development.

10 13. In the years following execution of the Agreement, the purpose of future development
11 continued to be a primary factor for both parties.

12 14. No location for movement of the Utilities was specified in the Agreement, however
13 the parties intended that the new location of the Utilities would facilitate future
14 development.

15 15. The parties have evidenced mutual agreement that leaving the Utilities on the TMT
16 Property does not make sense and is contrary to their original intent.

17 16. The evidence, common sense, and the history of the case indicates that in every way
18 the parties are benefitted by moving the Utilities off of the TMT Property and onto
19 the Greenway Property.
20

21 17. Plaintiff has proposed three alternative plans to move only Greenway's waterlines and
22 water meter off of the TMT Property and onto the Greenway Property: (1)
23 Alternative Plan No. 1 (Exhibit 3); (2) Alternative Plan No. 2 (Exhibit 4); or (3) TMT
24 pays \$40,000.00 to Greenway to be used by Greenway in the exercise of its own
25 alternative plan to move Greenway's waterlines and water meter off of the TMT
26 Property and onto the Greenway Property within six months. TMT is not proposing
27 to move the rest of the Utilities off of the TMT Property and onto the Greenway
28 Property at this time.

0-000000382

1 18. Although Greenway has been provided the opportunity to propose another (fourth)
2 alternative to relocate Greenway's waterlines and water meter off of the TMT
3 Property and onto the Greenway Property, Greenway has not done so.

4 19. With respect to the parties' reformation claims, Paragraph 3 of the Easement states as
5 follows:

6 "Maintenance and Repair. Seller shall be responsible for all costs
7 of maintenance and repair due to Seller's use of the Easement,
8 including use of the Easement by tenants of the Greenway Terrace
9 Mobile Home Park. Buyer shall be responsible for all costs of
10 maintenance and repair due to Seller's use of the Easement,
11 including use of the Easement by Lowe's customers or customers
12 of future commercial developments on Adjusted Tax Parcel
13 157492.001."

14 20. The parties intended that Paragraph 3 of the Easement apply only to the access
15 easement rather than the utility easement.

16 21. The parties further intended that Paragraph 3 of the Easement allocate the costs of
17 repair and maintenance of the access easement between the parties according to their
18 own respective uses.

19 22. The intent of the parties was that Paragraph 3 would provide that: Buyer shall be
20 responsible for all costs of maintenance and repair due to Buyer's use of the
21 Easement.

22 CONCLUSIONS OF LAW

23 1. Plaintiff has met its burden of proving by clear and unequivocal evidence its contract
24 right to move the Utilities off of the TMT Property and onto the Greenway Property,
25 which right is consistent with the parties original intention to move the Utilities in a
26 manner that would facilitate the development of each parcel of property.

27 2. Each of the three alternatives proposed by the Plaintiff for moving Greenway's
28 waterlines and water meter off of the TMT Property and onto the Greenway Property
is a fair and reasonable exercise of its contractual right to move the Utilities off of the
TMT Property and onto the Greenway Property and is consistent with the parties'
original intent to move the Utilities in a manner to facilitate future development.

0-000000383

1 3. Until all of the Utilities are moved off of the TMT Property and onto the Greenway
2 Property, Greenway will continue to have the right to enter onto the TMT Property
3 for the purpose of repairing and maintaining the remaining Utilities located on the
4 TMT Property.

5 4. Plaintiff has met its burden of proving by clear, cogent and convincing evidence that
6 Paragraph 3 of the Easement should be reformed to read as follows:

7 "Maintenance and Repair. Seller shall be responsible for all costs
8 of maintenance and repair due to Seller's use of the Easement,
9 including use of the Easement by tenants of the Greenway Terrace
10 Mobile Home Park. Buyer shall be responsible for all costs of
11 maintenance and repair due to Buyer's use of the Easement,
12 including use of the Easement by Lowe's customers or customers
13 of future commercial developments on Adjusted Tax Parcel
14 157492.001."

15 5. Defendants have failed to meet their burden that any further reformation is required
16 with respect to Paragraph 3 of the Easement.

17 6. Plaintiff is entitled to the entry of judgment in its favor consistent with these findings
18 and conclusions.

19 DATED this 20th day of August, 2013.

20 
21 _____
22 Honorable Barbara D. Johnson
23
24
25
26
27
28

APPENDIX

B

Clark County Superior Court
09-2-03671-7

Tom Moyer Theatres vs

Walker, et al

P	2	2
---	---	---

Date 6/25/13

PURCHASE AND SALE AGREEMENT
AND RECEIPT FOR EARNEST MONEY

BETWEEN: The Amended and Restated Walker Family Trust ("Seller")
w/a/d August 18, 2001
3711 NW Povey
Terrebone, OR 97760

AND: TMT Development Co, Inc. ("Buyer")
805 SW Broadway, Suite 2020
Portland, OR 97205

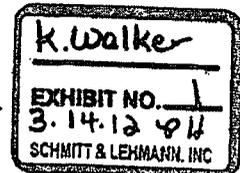
Dated: December 13, 2001

Buyer agrees to buy and Seller agrees to sell, on the following terms, the real property and all improvements thereon (the "Property") commonly known as the Greenway Terrace Mobile Estates and Mini Storage located at 7110 NE 117th Ave, just south of TMT Developments land on 117th and located in the City of Vancouver, County of Clark, Washington legally described as follows: Adjusted Tax parcel #157492.001 (see Survey recorded November 1, 2001, prepared by Dean Surveying, Inc., attached as Exhibit A hereto) (the "Survey") consisting of 6.25 acres on the eastern portion of the total site zoned R-18, Medium Density Multiple Family Residential. If no legal description is attached, Buyer and Seller will attach a legal description upon receipt and reasonable approval by both parties of the Survey.

1. Purchase Price. The total purchase price is Two Million dollars (\$2,000,000) payable as follows: cash at closing.

2. Earnest Money Receipt. Upon execution of this Agreement, Buyer shall deposit into escrow \$200,000.00 as earnest money (the "Earnest Money") in the form of cash or check: \$50,000 of the deposit shall be released by escrow to the Seller upon evidence that all liens will be removed and ten (10) of the mobile homes have been removed from the subject Property. An additional \$50,000 of the deposit shall be released by escrow to Seller once an additional ten (10) mobile homes have been removed from the subject property. Any funds released to Seller shall immediately become non-refundable and the property of Seller. However, any released funds shall immediately be returned to Buyer in the event this Agreement is terminated due to Seller's bad faith. The balance of the deposited funds shall be released to Seller upon satisfaction of conditions per section 3. The Earnest Money shall be deposited with First American Title Company at the following branch: c/o Vicki Kenman, 1014 Main Street, Vancouver, WA 98660 (the "Title Company"). The Earnest Money shall be applied to the payment of the purchase price for the Property at closing. Any interest earned on the Earnest Money shall be considered to be part of the Earnest Money. The Earnest Money shall be returned to Buyer in the event any condition to Buyer's obligation to purchase the Property shall fail to be satisfied or waived through no fault of Buyer.

3. Conditions to Purchase. Buyer's obligation to purchase the Property is conditioned on the following:



a. Seller shall provide a legal lot via lot line adjustment or subdivision of the above referenced 6.25 acres at Seller's expense prior to closing.

b. Seller shall use its best efforts through September 30, 2003 to remove all mobile homes and personal property belonging to Seller from the Property at Seller's expense. Buyer acknowledges there may be several mobile homes located on the Property after the Closing Date (defined below). Seller shall continue to use its best efforts to remove these mobile homes as quickly as possible. If any mobile homes remain on the Property after closing, Seller will provide a holdback in escrow from the purchase price for the mobile homes not removed prior to closing. The holdback amount shall be \$2,000 for a single wide and \$3,000 for a double wide mobile home. As each remaining mobile home is removed, the holdback funds applicable to that mobile home shall be released to Seller following verification of removal. At any time after September 30, 2003, upon 30 days written notice to Seller, Buyer may assume all responsibility for removing any remaining mobile homes and Buyer shall be entitled to any remaining escrowed funds and Seller shall have no further claim to such funds.

c. Buyer's approval of the results of its property inspection described in Section 5 below.

Once these conditions are satisfied, or Buyer has waived any or all of these conditions, Buyer shall provide Seller with a written waiver of these conditions, or provide written notice to Seller that these conditions have been satisfied. If through no fault of Buyer, these conditions are not satisfied by Seller by January 21, 2002, the Agreement may be terminated at Buyer's option, in which case the Earnest Money shall be promptly returned to Buyer.

4. Easement. Buyer and Seller will execute an easement at closing for the benefit of Seller's rear property to provide access to the existing mobile home park, and to provide access to utilities for normal maintenance and repair. The easement will be in the form of the attached Addendum to this Agreement, which by this reference is made a part of this Agreement. Prior to closing, Buyer will provide Seller with a copy of the engineering study commissioned by Buyer pursuant to the Addendum, and with the approval, if required, of Clark County and any other body with jurisdiction to the proposed movement of the Easement. If the survey indicates, or the requirements of Clark County or another body with jurisdiction prohibit, relocating the Easement in the manner specified in the Addendum without moving four or more mobile homes, this Agreement shall terminate. If this Agreement is terminated pursuant to this paragraph 4, Seller shall be entitled to the Earnest Money.

5. Property Inspection. Seller shall permit Buyer and its agents, at Buyer's sole expense and risk, to enter the Property, at reasonable times after reasonable prior notice to Seller and after prior notice to the tenants of the Property as required by the tenants' leases, to conduct inspections, tests, and surveys concerning the structural condition of the improvements, all mechanical, electrical and plumbing systems, hazardous materials, pest infestation, soil conditions, wetlands, Americans with Disabilities Act compliance, and other matters affecting the suitability of the Property for Buyer's intended use and/or otherwise reasonably related to the purchase of the Property. Buyer shall indemnify, hold harmless, and defend Seller from all liens, costs, and expenses, including reasonable attorneys' fees and experts' fees, arising from or

relating to Buyer's entry on and inspection of the Property. This agreement to indemnify, hold harmless, and defend Seller shall survive closing or any termination of this Agreement.

6. Seller's Documents. Within 30 days after the Closing Date, Seller shall deliver to Buyer, at Buyer's address shown below, legible and complete copies of all documents and other items relating to the ownership, operation, and maintenance of the Property, to the extent now in existence and to the extent such items are within Seller's possession or control.

7. Title Insurance. Within 10 days after the date this Agreement is executed, Seller shall deliver to Buyer a preliminary title report from the Title Company (the "Preliminary Commitment"), together with complete and legible copies of all documents shown therein as exceptions to title, showing the status of Seller's title to the Property. Buyer shall have 7 days after receipt of a copy of the Preliminary Commitment within which to give notice in writing to Seller of any objection to such title or to any liens or encumbrances affecting the Property. Within 7 days after the date of such notice from Buyer, Seller shall give Buyer written notice of whether it is willing and able to remove the objected-to exceptions. Within 7 days after the date of such notice from Seller, Buyer shall elect either to purchase the Property subject to the objected-to exceptions which Seller is not willing or able to remove or to terminate this Agreement. On or before the Closing Date (defined below), Seller shall remove all exceptions to which Buyer objects and which Seller agrees Seller is willing and able to remove. All remaining exceptions set forth in the Preliminary Commitment and agreed to by Buyer shall be "Permitted Exceptions." The title insurance policy to be delivered by Seller to Buyer at closing shall contain no exceptions other than the Permitted Exceptions and the usual preprinted exceptions in an owner's standard form title insurance policy. At Buyer's request, Seller shall be obligated (and shall provide proof to Buyer) to remove all liens, bond around the liens or provide for a holdback in escrow of an amount equal to 125% of the value of any liens remaining in order to transfer clear title to the subject property.

8. Default Remedies. If the conditions to Buyer's obligation to close this transaction are satisfied or waived by Buyer and Buyer nevertheless fails, through no fault of Seller, to close the purchase of the Property, Seller shall retain the Earnest Money paid by Buyer and shall be entitled to pursue any remedies available at law or in equity, including without limitation, the remedy of specific performance. In the event Seller fails, through no fault of Buyer, to close the sale of the Property, Buyer shall be entitled to pursue any remedies available at law or in equity, including without limitation, the remedy of specific performance.

9. Closing of Sale. The sale shall be closed as soon as Seller satisfies the conditions in Sections 3 and 7, but in no event later than January 21, 2002 ("Closing Date"). At closing, Buyer and Seller shall deposit with the Title Company all documents and funds required to close the transaction in accordance with the terms of this Agreement. At closing, Seller shall deliver a certification in a form approved by Buyer that Seller is not a "foreign person" as such term is defined in the Internal Revenue Code and the Treasury Regulations promulgated under the Internal Revenue Code. If Seller is a foreign person and this transaction is not otherwise exempt from FIRPTA regulations, the Title Company shall be instructed by the parties to withhold and pay the amount required by law to the Internal Revenue Service. At closing, Seller shall convey fee simple title to the Property to Buyer by statutory warranty deed (the "Deed"). If this Agreement provides for the conveyance by Seller of a vendee's interest in the Property by a

contract of sale, Seller shall deposit with the Title Company (or other mutually acceptable escrow) the executed and acknowledged Deed, together with written instructions to deliver such deed to Buyer upon payment in full of the purchase price. At closing, Seller shall pay for and deliver to Buyer a standard form owner's policy of title insurance in the amount of the purchase price insuring fee simple title to the Property in Buyer subject only to the Permitted Exceptions and the standard preprinted exceptions in a standard form policy.

10. Closing Costs; Prorates. Seller shall pay the premium for the title insurance policy which Seller is required to deliver pursuant to the above paragraph. Seller and Buyer shall each pay one-half of the escrow fees charged by the Title Company, any excise tax, and any transfer tax. Real property taxes for the tax year in which the transaction is closed, assessments (if a Permitted Exception), personal property taxes, rents on existing tenancies paid for the month of closing, interest on assumed obligations, and utilities shall be prorated as of the Closing Date. Prepaid rents, security deposits, and other unearned refundable deposits regarding the tenancies shall be assigned and delivered to Buyer at closing.

11. Possession. Buyer shall be entitled to exclusive possession of the Property on the Closing Date, subject to the easement and tenancies existing as of the Closing Date and use of the maintenance building as provided in Paragraph 24.

12. Condition of Property. Seller represents that, to the best of Seller's knowledge, without a duty to inquire, there are no pending or threatened notices of violation of any laws, codes, rules, or regulations applicable to the Property ("Laws"), and Seller is not aware of any such violations or any concealed material defects in the Property. Seller shall indemnify, defend, and hold harmless Buyer from and against any and all liability, claims, demands or damages arising out of or in any way related to Seller's litigation with the Washington Department of Ecology related to penalties arising out of septic system violations or other environmental claims. Risk of loss or damage to the Property shall be Seller's until the Closing Date and Buyer's at and after the Closing Date. No agent of Seller nor any agent of Buyer has made any representations regarding the Property. The real estate licensees named in this Agreement have made no representations to any party regarding the condition of the Property, the operations on or income from the Property, or whether the Property or the use thereof complies with Laws. Except for Seller's representations set forth in this Section 12, Buyer shall acquire the Property "AS IS" with all faults and Buyer shall rely on the results of its own inspection and investigation in Buyer's acquisition of the Property. It shall be a condition of Buyer's obligation to close, and of Seller's right to retain the Earnest Money as of closing, that all of the Seller's representations and warranties stated in this Agreement are materially true and correct on the Closing Date. Seller's representations and warranties stated in this Agreement shall survive closing, but any claim against Seller for a breach of its representations and warranties under this Agreement must be brought within two (2) years of the Closing Date.

13. Personal Property. This sale includes the following personal property:

a. Storage building and related documentation.

14. Agency Disclosure. Buyer used Commercial Realty Advisor Northwest, LLC as its non-exclusive agent. Seller did not employ any agents in connection with the transactions contemplated by this Agreement.

15. Notices. Unless otherwise specified, any notice required or permitted in, or related to, this Agreement must be in writing and signed by the party to be bound. Any notice or payment will be deemed given when personally delivered or delivered by facsimile transmission (with electronic confirmation of delivery), or will be deemed given on the day following delivery of the notice by reputable overnight courier or through mailing in the U.S. mails, postage prepaid, by the applicable party to the address of the other party shown in this Agreement, unless that day is a Saturday, Sunday, or legal holiday, in which event it will be deemed delivered on the next following business day. If the deadline under this Agreement for delivery of a notice or payment is a Saturday, Sunday, or legal holiday, such last day will be deemed extended to the next following business day.

16. Assignment. Buyer may not assign this Agreement or Buyer's rights under this Agreement without Seller's prior written consent. If Seller's consent is required for assignment, such consent may be withheld in Seller's sole discretion.

17. Attorneys' Fees. In the event a suit, action, arbitration, or other proceeding of any nature whatsoever, including without limitation any proceeding under the U.S. Bankruptcy Code, is instituted, or the services of an attorney are retained, to interpret or enforce any provision of this Agreement or with respect to any dispute relating to this Agreement, the prevailing party shall be entitled to recover from the losing party its attorneys', paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith. In the event of suit, action, arbitration, or other proceeding, the amount thereof shall be determined by the judge or arbitrator, shall include fees and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

18. Statutory Land Use Disclaimer. THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS, WHICH, IN FARM AND FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND WHICH LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES.

19. Miscellaneous. Time is of the essence of this Agreement. The obligations of the parties under this Agreement shall survive closing as provided in this Agreement and shall not merge into the Deed. The term Seller's knowledge as used in this Agreement shall mean the knowledge of any of the Co-Trustees of Seller. The facsimile transmission of any signed document including this Agreement shall be the same as delivery of an original. At the request of either party, the party delivering a document by facsimile will confirm facsimile transmission by signing and delivering a duplicate original document. This Agreement may be executed in two or more counterparts, each of which shall constitute an original and all of which together shall constitute one and the same Agreement. This Agreement contains the entire agreement and understanding of the parties with respect to the subject matter of this Agreement and supersedes all prior and contemporaneous agreements between them with respect thereto. Without limiting

the provisions of Section 16 of this Agreement, this Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors, beneficiaries and assigns. The person signing this Agreement on behalf of Buyer and the person signing this Agreement on behalf of Seller each represents, covenants and warrants that such person has full right and authority to enter into this Agreement and to bind the party for whom such person signs this Agreement to the terms and provisions of this Agreement. This Agreement shall not be recorded unless the parties otherwise agree.

20. Addendums; Exhibits. The following named addendums and exhibits are attached to this Agreement and incorporated within this Agreement: a tax map and survey and an Easement.

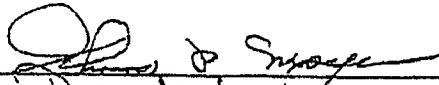
21. Brokerage Agreement. Buyer agrees to pay two and one-half percent (2 ½%) of the purchase price to Commercial Realty Advisors NW, LLC only in the event of closing. Seller shall pay any commissions contracted by Seller.

22. Governing Law. This Agreement is made and executed under, and in all respects shall be governed and construed by the laws of the State of Washington.

23. Section 1031 Tax Free Exchange. Seller may elect to exchange its ownership interest in the property for one or more properties of like kind or an interest therein, as defined in Section 1031 of the Internal Revenue Code 1986, as amended. Buyer shall not incur any cost or expense in connection with Seller's election or exchange.

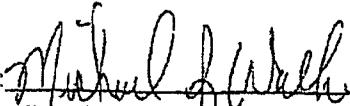
24. Maintenance Building. Buyer agrees to allow Seller use and access to the maintenance building located on Adjusted Tax Parcel 157492.001 for storage of equipment for a period of six (6) months after the Closing Date.

TMT DEVELOPMENT CO, INC.

By: 
Its: President

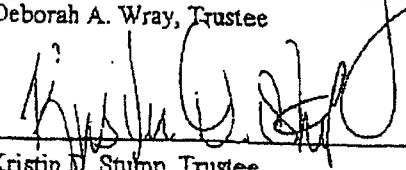
BUYER

AMENDED AND RESTATED
WALKER FAMILY TRUST

By: 
Michael J. Walker, Trustee

SIGNATURES CONTINUED ON NEXT PAGE

By: 
Deborah A. Wray, Trustee

By: 
Kristin D. Stump, Trustee

SELLER

EXHIBIT A

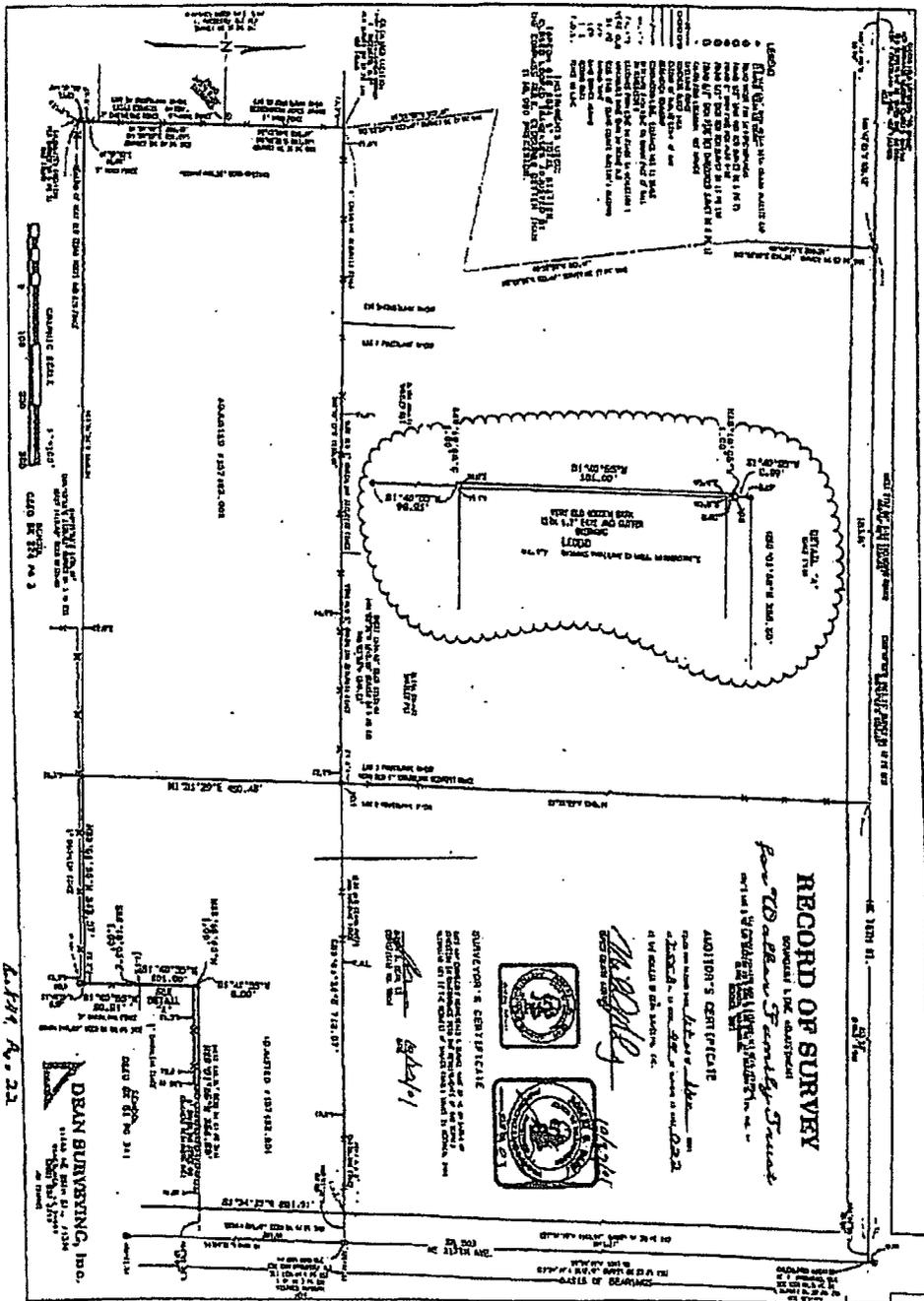


EXHIBIT A TO PURCHASE AND SALE AGREEMENT AND RECEIPT FOR EARNEST MONEY

EXHIBIT B



DEAN SURVEYING, Inc.

11 197 478 9718 01, 41150 Palmdale, Ca. 93527
(805) 972 2400

October 23, 2001

Adjusted Tax Parcel #15742.001
REVISED DESCRIPTION for BOUNDARY LINE ADJUSTMENT
EASTERLY PARCEL

A parcel of land situated in Government Lot 2 in the Northwest Quarter of Section 10, Township 2 North, Range 2 East, Willamette Meridian, Clark County, Washington, more particularly described as follows:

Beginning at the northeast corner of the Andrew Erbehold Deceased Land Claim in said Section 10, Township 2 North, Range 2 East, Willamette Meridian; thence, along the eastern line of said claim, thence, South 07°34'19" West, 1141.91 feet, to the southeast corner of said claim; thence, along the most easterly southerly line of said claim, North 89°01'36" West 762.67 feet, to a 1" iron pipe at the southeast corner of Lot 2 First Class as platted and recorded in Book A, Page 28 of Clark County Auditor's subdivision plat records, the True Point of Beginning;

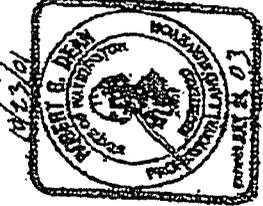
thence, along the easterly line of said Lot 2, South 89°01'36" East 712.67 feet, to a 5/8" x 10" iron rebar with yellow plastic cap stamped "LS 29959" on the westerly right of way line of State Highway 51902A; thence, along said westerly right of way line, South 01°24'15" West 251.51 feet, to a 5/8" x 30" iron rebar with yellow plastic cap stamped "LS 29959" on the northerly line of the School land described in the deed from Fred G. Nighan et ux. to School District #200 recorded July 7, 1906 in the deed Book 81 Page 341 of Clark County Auditor's deed records; thence, having said right of way line, along the southerly line of said School land, North 89°01'36" West 568.50 feet, to a 5/8" x 30" iron rebar with yellow plastic cap stamped "LS 29959" at the southwest corner of said School land; thence, along the westerly line of said School land, South 07°06'55" West 2.00 feet; thence, having said westerly line, North 88°19'05" West 1.00 feet; thence, South 07°06'55" West 101.00 feet; thence, South 88°19'05" East 1.00 feet, to the westerly line of said School land; thence, along the westerly line of said School land, South 07°06'55" West 79.71 feet, to a 5/8" x 30" iron rebar with yellow plastic cap stamped "LS 29959" on the northerly line of the Keller land described in the deed from A.C. Miller et al. to John Keller, Sr. recorded August 18, 1923 in the deed Book 224 Page 3 of Clark County Auditor's deed records; thence, along the northerly line of said Keller land, North 89°01'36" West 342.57 feet, to a 5/8" x 30" iron rebar with yellow plastic cap stamped "LS 29959"; thence, North 07°31'28" East 490.65 feet, to the True Point of Beginning.

Containing 6.25 acres (271,292 square feet) of land, more or less.

Beginning into the grantor a non-exclusive easement for ingress, egress, utilities, and ordinary services over, under, and across the westerly portion, to be described separately, of the above described property, appurtenant to the abutting property to the West owned by the grantor.

Subject to the rights of the public in county roads.

Together with, and subject to, covenants and restrictions of record.



ADDENDUM TO THE PURCHASE & SALE AGREEMENT

Amended and Restated
Walker Family Trust u/a/d August 18, 2001

"Seller"

and

TMT Development Co., Inc.

"Buyer"

1. Easement. For good and valuable consideration, Seller hereby reserves the following easement (the "Easement"):

A nonexclusive Easement appurtenant benefitting Adjusted Tax Parcel 157492.000 and burdening Adjusted Tax Parcel 157492.001. The Easement shall be for continuous and unrestricted access through the 6.25 acre property, Adjusted Tax Parcel 157492.001, to the 12.23 acre rear/western site, Adjusted Tax Parcel 157492.000. This access Easement shall be located along the existing roadway indicated on the attached map attached as Exhibit A, which is by this reference made a part hereof. The Easement shall also be for the purpose of providing unrestricted and unlimited access to the 6.25 acres, Adjusted Tax Parcel 157492.001, for any necessary repairs or maintenance to the underground utilities. Buyer shall have the right to relocate or alter utilities which are located in the 6.25 acres after closing, but in no event shall such relocation or alteration interrupt Seller's utility service without Seller's prior express written consent. The cost for such alterations or relocation shall be the responsibility of Buyer. The Easement shall also allow Seller to place reasonable signage for the Greenway Terrace Mobile Home Park along NE 117th Avenue near the Southeast corner of Adjusted Tax Parcel 157492.001.

2. Movement of Easement. After ninety (90) days notice to Seller, Buyer may move the Easement for access from the existing roadway to the portion of the property that runs 60 feet south from the northern border of the property running east to west. Prior to moving the Easement and before closing, Buyer, at Buyer's expense, shall commission an engineering study which will locate the Easement in a manner that only results in one mobile home pad located on Adjusted Tax Parcel 157492.000 being required to be moved in order to build a new road that will allow the passage of mobile homes to the existing roadway located on Adjusted Tax Parcel 157492.000. If the Easement cannot be relocated in this manner without removing another one or two mobile home pads, either because the engineering study indicates the mobile home pads must be removed to build the road to allow passage of mobile homes or because Clark County or any other administrative body with jurisdiction over the construction of the new road across Adjusted Tax Parcel 157492.001 and 157492.000 requires they be moved, Buyer will compensate Seller in the amount of \$40,000 for each mobile home pad that must be removed up to two. Seller shall be responsible for any costs or expenses of moving the mobile home pads and constructing the new roadway connecting the Easement across Adjusted Tax Parcel

157492.001 to the existing roadway in Adjusted Tax Parcel 157492.000. Buyer shall be responsible for any and all costs and expenses associated with relocating the access Easement and shall at no time during the relocation interrupt Seller's access to Adjusted Tax Parcel 157492.000 without the prior written consent of Seller, which consent shall not be unreasonably withheld.

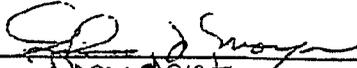
With the exception of the above, the Easement shall not be relocated without the prior written consent of both Seller and Buyer.

3. Maintenance and Repair. Seller shall be responsible for all costs of maintenance and repair due to Seller's use of the Easement, including use of the Easement by tenants of the Greenway Terrace Mobile Home Park. Buyer shall be responsible for all costs of maintenance and repair due to Seller's use of the Easement, including use of the Easement by Lowe's customers or customers of future commercial developments on Adjusted Tax Parcel 157492.001.
4. Binding Effect. This Agreement shall be binding on and inure to the benefit of the parties and their respective heirs, personal representatives and successors.
5. Amendment. This Agreement may be amended only by an instrument in writing executed by all the parties and referencing this Agreement.
6. Time of Essence. Time is of the essence with respect to all dates and time periods set forth or referred to in this Agreement.
7. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington, without regard to conflict-of-laws principles.
8. Attorney Fees. If any arbitration, suit, or action is instituted to interpret or enforce the provisions of this Agreement, to rescind this Agreement, or otherwise with respect to the subject matter of this Agreement, the party prevailing on an issue shall be entitled to recover with respect to such issue, in addition to costs, reasonable attorney fees incurred in preparation or in prosecution or defense of such arbitration, suit, or action as determined by the arbitrator or trial court, and if any appeal is taken from such decision, reasonable attorney fees as determined on appeal.
9. Entire Agreement. This Agreement constitutes the entire agreement and understanding of the parties with respect to the subject matter of this Agreement and supersedes all prior understandings and agreements, whether written or oral, among the parties with respect to such subject matter.

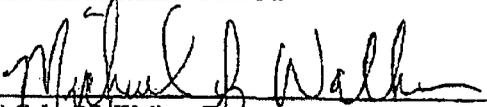
Effective as of the date first written above.

Dated 12-13-01

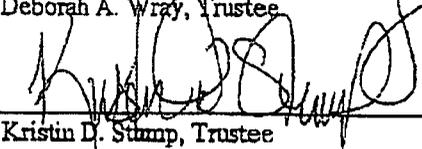
TMT DEVELOPMENT CO, INC.

By: 
Its: President
BUYER

AMENDED AND RESTATED
WALKER FAMILY TRUST

By: 
Michael J. Walker, Trustee

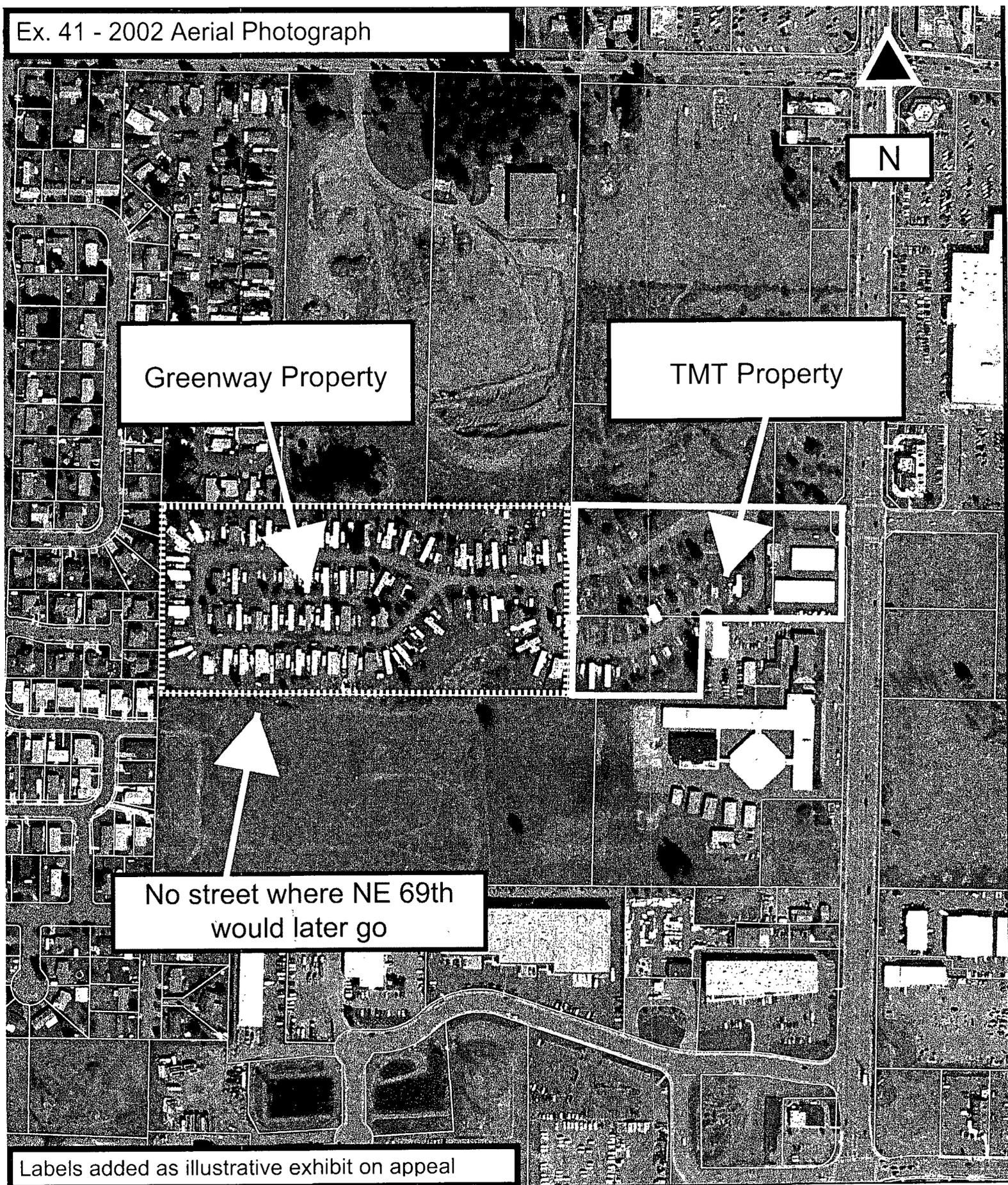
By: 
Deborah A. Wray, Trustee

By: 
Kristin D. Stump, Trustee
SELLER

APPENDIX

C

Ex. 41 - 2002 Aerial Photograph



Greenway Property

TMT Property

No street where NE 69th
would later go

Labels added as illustrative exhibit on appeal

APPENDIX

D

Ex. 44 - 2007 Aerial Photograph



Greenway Property

TMT Property

NE 69th Street

Orchard Elementary School

Labels added as illustrative exhibit on appeal

