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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
No. 33910-2-II

BY _____
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COURT OF APPEALS - DIVISION II
OF THE STATE OF WASHINGTON

Charles C. Haselwood, et ux., *Respondent*

v.

RV Associates, Inc., *Petitioner*

and

City Of Bremerton, *Respondent*

Kitsap County Superior Court
Cause No. 03-2-02825-0

BRIEF OF PETITIONER

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in holding that contractor cannot foreclose on a leasehold interest and leasehold improvements constructed on public property.

2. The trial court erred in determining that the contractor's lien was subordinate to the lenders' Deed of Trust and then deciding that the contractor's removal of its improvements was barred because of the lender's priority.

3. The trial court erred in denying the contractor's motion to amend its Answer, Counterclaims and Cross-Claims to add claims that the lender had provided a letter of guarantee relied on by the contractor in performance of its work and further adding claims that the City of Bremerton should have required a payment bond and retainage on the project.

Issues Pertaining to Assignments of Error

Does a lien attach to private improvements authorized by the public property owner and lessee to the extent of the interest of the lessee and the lessee's lender? (Assignment of Error 1)

May a lien attach to public property held in a proprietary capacity? (Assignment of Error 1)

Does the contractor's lien have priority? (Assignment of Error 2)

Are contractor removal rights subject to a lien priority analysis? (Assignment of Error 2)

B. STATEMENT OF CASE

In 2002, the City of Bremerton entered into a somewhat unusual “concession agreement” with Bremerton Ice Arena, Inc. *CP 132-137* This “concession agreement” effectively leased city property to Bremerton Ice Arena, Inc. for a period of 50 years. *CP 132-137*

The purpose of the concession agreement was to allow for an ice arena to be constructed on public property. *CP 132-137* Bremerton Ice Arena, Inc was privately financed by plaintiffs Charles and Joanne Haselwood who will be referred to from time to time in this brief as “lender.” *CP 17*

The City of Bremerton receives no monetary payment under this concession agreement but is given free ice time as consideration for its lease. *CP 265* Bremerton also becomes the owner of the real property improvements at the expiration of the 50 year lease term. *CP 364, 371*

The lender secured its financing of this project through a Deed of Trust and security agreement. *CP 38-69* The lender also demanded and received assurances from the City of Bremerton that its security would be protected throughout the lease term. *CP 366*

RV Associates, Inc. was hired by Bremerton Ice Arena to perform labor, provide services, supply material and/or equipment beginning in September, 2002. *CP 138* Commencing on or about the 6th day of September, 2002 and ending on the 27th day of May, 2003, RV performed labor, furnished material and/or rented, leased or otherwise supplied equipment generally consisting of construction of structures in accordance with the Plans, Specifications, and Requirements as indicated by the Private Works Contract between RV and Bremerton Ice Arena and Meakin, dated August 17, 2002. *CP 138*

RV delivered equipment to the Bremerton Ice Arena as follows:

Equipment Delivered	Date Delivered
1. 330 John Deere Excavator	September 6, 2002
2. Scraper & Bulldozer	September 9, 2002

In addition, employees were on site starting up the process for the clearing and grubbing which continued on September 10 – 12 of 2002.

CP 185-191

RV recorded a Claim of Lien against the property described as Bremerton Ice Arena on July 16, 2003. A copy of RV's Claim of Lien is attached as Appendix A-1.

Lender recorded a Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing on September 13, 2002 and re-recorded its Deed of Trust on November 12, 2002. *CP 38-69*

Haselwoods filed Plaintiffs' Verified Complaint for Foreclosure on November 6, 2003. *CP 1-13* Haselwoods' Complaint asserts that on September 5, 2002, Bremerton Ice Arena executed and delivered to Haselwood a Promissory Note in the amount of \$3,775,000.00 (hereinafter \$3,775,000.00 Note). Haselwoods further claim that the \$3,775,000.00 Note was secured by a Commercial Security Agreement, Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing, all applicable to the interest of Bremerton Ice Arena. *CP 38-69*

C. PROCEDURAL HISTORY

RV initially moved for summary judgment seeking to have the court determine its priority vis-à-vis the lenders' Deed of Trust and other liens filed by various other contractors and subcontractors. *CP 156-196* RV also sought to have the court determine its entitlement to prejudgment interest and attorneys fees. *CP 159*

The court initially determined that the contractor had a valid lien. *CP 609* In a further hearing, the trial court opined that because the leasehold improvements were being constructed on public property, RV's

lien did not attach to the real property and further did not attach to the leasehold improvements. *CP 775-780*

The contractor then made a motion for removal, citing RCW 60.04.051 which provides that where a contractor is prohibited from foreclosing on its lien, it has the ability to remove its improvements. *CP 348* Lender filed its own motion for summary judgment arguing that because the lien of the contractor did not attach to the real property, the contractor's priority date was not when it began work but rather when it recorded its lien. Thus, the lender argued that it had priority over the contractor which extinguished its removal rights. *CP 615-738*

Bremerton intervened and objected to removal. It requested a fact finding hearing to determine whether the removal would cause damage to the underlying real property and its improvements. *CP 440-443*

Before a fact finding hearing was held, the trial court agreed with the lender that the lien of the contractor was not prior to the Deed of Trust recorded on the improvements by the lender. The court ruled that because the lien of the contractor did not have priority, it was not entitled to removal of its improvements.¹

¹ Parenthetically, it should be noted that the lender has yet to foreclose its lien by foreclosure sale. The property continues to be operated by a receiver appointed by the court early on.

The contractor then sought to amend its Answer, Counterclaim and Cross-Claim to add additional claims against the City of Bremerton and the lender. The proposed Amended Answer is attached at Appendix A-3. *CP 784-786* The trial court denied the motion to amend finding that the proposed counterclaims did not state a cause of action on their face. *CP 819-820*

D. SUMMARY OF ARGUMENT

RCW 60.04.021 authorizes a contractor to have a lien upon improvements furnished at the instance of the owner or the agent of the owner. RCW 60.04.051 subjects the improvements to a mechanics lien to the extent of the interest of the owner at whose instance the improvements were furnished.

The trial court erred in holding that the improvements which were authorized by the tenant and approved by the lender and public landlord pursuant to the concession agreement were not subject to a mechanics lien. The court opined that because the improvements were made on public property, the improvements and leasehold interest could not be subject to a lien.

Paradoxically, the trial court later determined (in a ruling on priority) that the lender had a valid Deed of Trust on the leasehold interest

and improvements of Bremerton Ice Arena. The court went on to decide that the Deed of Trust was prior to the lien of RV Associates and could be foreclosed, ruling that the “relation back” provisions of RCW 60.04.061 were inapplicable since the contractor’s lien did not attach to public real property. This issue will be discussed more fully later on in this brief. However, it is mentioned here to demonstrate the inconsistent rulings of the trial court, i.e. that a Deed of Trust does attach to the leasehold interest and improvements of the lessee but a mechanics lien does not.

The court further held that the prohibition on a lien attaching to publicly owned real property was applicable despite the fact that the City of Bremerton was acting in a proprietary capacity as a landlord for this parcel of real property on which private improvements were constructed.

The court also ruled that the contractor could not remove its improvements pursuant to RCW 60.040.051. The court accepted the arguments of the lender that removal of improvements is subject to a priority determination. The lender further argued that the provisions of RCW 60.04.061 which allow a lien priority back to when the contractor starts work were inapplicable because that the lien did not attach to the real property.

This holding by the trial court is also incorrect. Removal is specifically authorized by RCW 60.04.051 regardless of priority.

The trial court's final error occurred in denying the contractor's motion to amend its cross-claims and counterclaims to add additional claims against the lender and City of Bremerton. CR 15 governs the amendment of pleadings. Requests to amend should be viewed liberally and leave to amend should be freely given. Instead, the trial court determined that the claims failed to state a cause of action on their face and denied the motion to amend.

E. ARGUMENT

ASSIGNMENT OF ERROR 1.

The trial court erred in holding that a contractor cannot foreclose on a leasehold interest and leasehold improvements constructed when on public property.

ISSUE (a): Does a lien attach to private improvements authorized by the public property owner and lessee to the extent of the interest of the lessee and the lessee's lender?

The statutory scheme for mechanics and materialmens liens is set forth in RCW 60.04.021 which states, in pertinent part, as follows:

Lien authorized. Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the **improvement** for the contract price of labor, professional services, materials or equipment furnished at the instance of the owner, or the agent or construction agent of the owner. (emphasis added)

The lien is established by the claimant's recording a claim of lien in the county auditor's office where the land is located. The claimant has 90 days after the last furnishing of labor, services, materials, or equipment to record the claim. RCW 60.04.091. When properly recorded, the priority of the lien relates back to the first date upon which labor, services, materials, or equipment were furnished. RCW 60.04.061

In this case, RV commenced work on September 6, 2002. RV's Claim of Lien was duly executed, acknowledged and recorded pursuant to RCW 60.04.060. It was recorded on July 16, 2003 with the Kitsap County Auditor. See Appendix A-1. RV thereby claimed a lien on the real property and improvements for performing labor, furnishing material and/or renting, leasing or otherwise supplying equipment in the amount of \$101,905.30.

In the case *sub judice*, the City of Bremerton authorized Bremerton Ice Arena to construct an ice arena on City property and allowed Bremerton Ice Arena to operate the ice arena privately for a 50 year concession term. The lender, (who was specifically identified and protected in the concession agreement) initially advanced several million dollars for the construction of the improvements.

RCW 60.04.51 states as follows:

Property subject to lien. The lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law or construction agent, the labor, professional services, equipment, or materials were furnished, if the court deems appropriate for the satisfaction of the lien. If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien. (emphasis added)

The current mechanics lien statute is similar to the statutory scheme which has existed in the State of Washington for over a century. During this time, there has been little dispute that a mechanics lien attaches to improvements constructed by a lessee.

For example in *Stetson—Post Mill Co. v. Brown*, 21 Wash. 619, 59 P. 507 (1899), the lessee contracted for improvements to real property and then failed to pay the contractor. Several lien claimants sought to enforce their liens against the interest of the lessee in premises. The issue became whether the lessor's real property was also subject to the lien. The court, after examining the statute, determined that if the person who contracted for the improvements had less than a fee simple ownership in the real property, only his interest in the real property would be subject to the lien. *Id at 623.*

In *Baker v. Sinclair*, 22 Wash. 462, 61 P. 170 (1890) the Washington Supreme Court again confirmed that a leasehold interest and

tenant improvements are subject to a mechanics lien. Witness the following language:

The court has uniformly held that when a person causes the erection of a building upon lands in which he holds less than fee simple title, only his interest in the lands can be subjected to the liens of persons performing labor upon, or furnishing materials to be used in the construction of such building. (citations omitted) *Id at 463*.

The rule in Washington is consistent with similar case law in other jurisdictions. See *Diversified Mortgage Investors v. Blailoch*, 576 SW 2nd 794 (Tex. 1978); *Archibald v. Iacopi*, 120 Cal.App 2d 666 (1953).

Thus, it is clear in this case that the trial court erred in ruling that the validly recorded lien of the contractor did not attach to the leasehold interest and improvements of the lessee. RCW 60.04 and Washington case law clearly establishes the right of a contractor to lien leasehold interests and improvements. This rule is followed consistently in almost every jurisdiction in the United States.

ISSUE (b): May a lien attach to public property held in a proprietary capacity?

The State of Washington follows the prevalent rule in all jurisdictions in the United States that governmental property held in a proprietary capacity is subject to a mechanics lien. The following language is found in *McQuillin* on municipal corporations:

The view has also been taken that a municipality is not exempt from mechanics liens where the municipality acts as an absent landlord, in trusting the management and control of its premises to its tenant, who constructed and paid for the building, and the municipality in owning the building discharges as a proprietary and quasi-private, rather than a governmental function. *McQuillin, Municipal Corporations*, Vol 10, §28.58 (3d. Ed.)

Here it is clear that the City of Bremerton is acting as a landlord in a proprietary capacity. Attached as Appendix A-2 is a copy of the Concession Agreement between the City of Bremerton and the Bremerton Ice Arena. The court will note that the Concession Agreement is for five 10 year periods. The management and control of the premises is entrusted to the Bremerton Inc Arena. The Bremerton Ice Arena constructed and paid for the building. Payment to the City is made by providing free ice time, which is valued at \$42,000 annually.

In a similar arrangement, the Supreme Court of Pennsylvania determined that where a municipality acts as an absentee landlord, improvement on municipal land paid for privately provides an exception to the general rule that municipal property is exempt from liens. *American Seating Company v. City of Philadelphia*, 256 A2d 599, (1969). In that case, (virtually identical to the one at bar) the City of Philadelphia allowed for the construction of the Spectrum sports Arena by its tenant on property owned by the City. The agreement between the City and its tenant

included provisions similar to those found in Appendix A-2, prohibiting the tenant from allowing any liens on the leased premises. The court determined that a mechanics lien was proper on this public property.

The fact that the City of Bremerton recognized that this property was subject to lien is confirmed by reference to the Concession Agreement which required that the lessee keep the property free and clear of all liens. See Appendix A-2, at page 13, para 5.9

The fact that this property is subject to lien is further reinforced by the lender's Deed of Trust. As the court will note from the Deed of Trust, it purports to grant a security interest to Lenders Haselwood in the realty as well as the improvements.

Reference to Washington cases further confirms that this property is being held by the City of Bremerton in its proprietary capacity and is subject to both lien and mortgage. In *Kesinger v. Logan*, 51 Wn.App.914, 756 P2d 752 (1988) the court confirmed that where land is owned by the county but is never devoted to any use, whether public or otherwise, the land is held in a proprietary capacity and is subject to adverse possession.

In *Sisson v. Koelle*, 10 Wn. App. 746, 520 P.2d 1380 (1974), the Court held that a public way which had never been improved was held by Clallam County in a proprietary capacity.

In conclusion, it is clear that the City of Bremerton holds the property involved in this dispute as a quasi-landlord in a proprietary capacity. As such, the property is subject to a mechanics lien. Foreclosure is appropriate on the improvements and leasehold interest of Bremerton Ice Arena. This is true for both the contractor and the lender.

ASSIGNMENT OF ERROR 2:

The trial court erred in determining that the contractor's lien was subordinate to the lenders' Deed of Trust and then deciding that the contractor's removal of its improvements was barred because of the lenders' priority.

After the trial court ruled that the contractor's lien did not attach to the leasehold interest and improvements constructed on public property by the tenant, the contractor sought to remove its improvements pursuant to RCW 60.04.051. *CP 348* The initial defense raised by the lender and intervenor City of Bremerton was that removal of the improvements might cause damage to the underlying realty. *CP 364* The court then directed that a fact finding hearing be held on this issue. *CP 434*

Before the fact finding occurred the lender moved for summary judgment on both priority and removal. The Court held the lender had priority which precluded removal. *CP 775*

ISSUE (a) Does the contractor's lien have priority?

A mechanic's lien arises and attaches upon the performing of labor or furnishing of materials. RCW 60.04

In order to perfect and eventually enforce such a lien, a claimant must follow a series of detailed statutory requirements, including the recording of a claim of lien with the auditor of the county in which the property is located within 90 days of the cessation of labor. See *John Morgan Const. Co., Inc. v. McDowell*, 62 Wn.App. 79, 813 P.2d 138 (1991).

RV's Claim of Lien, Appendix A-1, was recorded within fifty (50) days from the last day on which RV performed labor, furnished material and/or rented, leased or otherwise supplied equipment for use on the real property. Therefore, RV met its statutory obligation under RCW 60.04.091.

The date of recording the mechanics' or materialmen's liens is not dispositive of the effective date of the lien. Mechanics' or materialmen's liens are a statutory exception to the general rule of first in time, first in right priority between creditors. RCW 60.04.061

Mechanics' or materialmen's liens

[A]re a class of "off-the-record" interests that may be senior to interests actually recorded prior to the recording of the mechanics' or materialmen's lien but after

commencement of work on the project. *See A.A.R. Testing Laboratory, Inc.*, 112 Wn.App. 422 quoting *Homann v. Huber*, 38 Wn.2d 190, 197-98, 228 P.2d 466 (1951).

During the period of time between commencement of work and actual recording of the claim of lien, a mechanics' or materialmen's lien has an "off-record" priority.

The trial court determined that the relation back provisions of RCW 60.04.061 were inapplicable because the mechanics lien did not attach to the real property or the leasehold interest or improvements of the tenant. *CP 775* However, the court then ruled that the lender's Deed of Trust (which apparently did attach to the leasehold interest and improvements) was superior to the mechanics lien of the contractor. *CP 775* This ruling should be reversed.

ISSUE (b): Are contractor removal rights subject to a lien priority analysis?

The trial court also determined that removal of the improvements was not an option available to the contractor because the lender's Deed of Trust had priority. *CP 769* This holding is clearly erroneous. The removal remedy found in RCW 60.04.061 has nothing to do with priority. In fact, removal only applies where no lien attaches. RCW 60.04.051

In *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 685 P.2d 1062 (1984), the Supreme Court held that where improvements are made on public property, the removal statute [RCW 60.04.051] is available to protect the claimant who improved the property.

There, a subcontractor installed sidewalks within a road right-of-way dedicated to King County at the time a developer's residential plat was approved. The sidewalk subcontractor contracted with the developer, who later became insolvent and failed to pay for the sidewalk improvements. Because the sidewalk contractor's construction lien was ineffective against the public property, the Supreme Court held that the removal statute was applicable and the contractor could remove his improvements provided he first offered to sell them to the county. *Hewson at 824.*

The removal process is relatively straightforward. The court may order the sale and/or removal of improvements when the underlying land cannot be subjected to a mechanic's lien provided the claimants prove that the improvements are removable without injury to the freehold. *Pioneer Sand & Gravel Co. v. Hedlund*, 178 Wn. 273, 277, 34 P.2d 878 (1934); *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn.App. 190, 653 P.2d 1331 (1982).

The right of removal upheld in *Hewson v. Reintree Corp.*, *supra*, under RCW 60.04.051 was also followed in these cases under the former removal statute, Rem. Rev. Stat. § 1146 (now codified as RCW 60.04.051):

1. *Bell v. Groves*, 20 Wash. 602, 56 P. 401 (1899)(court held that building was removable);
2. *Bell v. Swalwell Land, L. & T. Co.*, 20 Wash. 602, 56 P. 401 (1899)(court held that 2 Ballinger's Ann. Codes & St. § 5916, RCW 60.04.170, allows the sale and removal of property from land to satisfy a mechanic's lien, when the land is not subject thereto; statute "clearly intended to apply to cases in which the work was performed or materials furnished at the instance of a person owning less than the fee in the real estate");
3. *Gile Investment Co. v. Fisher*, 104 Wash. 613, 177 P. 710 (1919)(court held that Rem. Code 1915, § 1146, RCW 60.04.170, providing for removal and sale from the land of property subject to a mechanic's lien, in case the title to the land cannot be subjected thereto, applies only to cases where the work or material was furnished at the instance of a party owning less than the fee...);
4. *Brown v. Hunt & Mottet Co.*, 111 Wash. 564, 191 P. 860 (1920)(statute construed as applying to structures erected in the streets of a municipality; sale of the buildings erected on certain streets of the city were removed therefrom by purchasers at sale by the receiver under order of court);
5. *Blossom Provine Lumber Co. v. Schumacher*, 147 Wash. 369, 266 P. 167 (1928)(Supreme Court held that materialmen entitled to foreclose on and remove house erected on land not belonging to house owner pursuant to RCW 60.04.030 and 60.04.170; court affirmed a judgment foreclosing the lien of a materialmen and authorizing the removal of the building from the land);
6. *Columbia Lumber Co. v. Bothell Dairy Farm*, 174 Wash. 662, 25 P.2d 1037 (1933)(holding that clubhouse, erected by lessee golf club not required to do so by lease of land providing that all improvements belonged to lessor upon its

termination, held chargeable with lien and removable from land by materialmen, though it gave lessor no notice that it had furnished materials under RCW 60.04.010 to 60.04.030, and 60.04.170).

Clearly, removal only applies where a lien cannot attach. If the trial court was correct that a lien did not attach to the leasehold and improvements, removal applies regardless of priority. *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 P. 727 (1909)

ASSIGNMENT OF ERROR 3:

The trial court erred in denying the contractor's motion to amend its Answer, Counterclaims and Cross-Claims to add claims that the lender had provided a letter of guarantee relied on by contractor in performance of its work and further adding claims that the City of Bremerton should have required a payment bond and retainage on the project.

The trial court further erred in denying the contractor's motion to amend its cross-claims and counterclaims to add additional claims against the lender and City of Bremerton. The proposed amendment sought to add claims alleging that the lender had provided a guarantee of payment to RV Associates, which it relied upon in the course of performing its work. *CP 784* The cross-claim sought against the City of Bremerton asserted the City was responsible for delinquent payments to the contractor *CP 784* The proposed cross-claim alleges that the City did not require a payment bond or retainage to protect contractors working on the site. The City also

failed and refused to enforce the provisions of its concession agreement requiring the lender to satisfy any outstanding liens on the property, making it liable to the contractor as a third party beneficiary of the concession agreement.

This court reviews the trial court's denial of a motion to amend for an abuse of discretion. *Wilson v. Horsely*, 137 Wn2d. 500, 505, 974 P2d 316 (1999) CR 15 governs a motion to amend and provides that "leave shall be freely given when justice so requires." CR 15(a).

The trial court denied the contractor's motion to amend solely because it determined that the allegations contained in the proposed amended pleading failed to state a cause of action. It ruled as a matter of law that because the contractor had started work before the Lender's guarantee of payment was received, it could not have relied upon the payment guarantee to assure payment. This determination was made despite an offer of proof that the contractor would provide testimony that it did rely on the guarantee of payment in performing its work after the letter guaranteeing payment was received.

The court also determined that the claims made by the contractor against the City were without merit. It determined that the project at issue was not "a public work" and that the City had no responsibility to ensure that the contractors on the project were protected. The court also

determined that the City had no duty or obligation to enforce the provisions of the Concession Agreement keeping the property free from liens on the lender.

Unfortunately, because the trial court made these determinations by denying the contractor's motion to Amend, it did not have the benefit of declarations and briefing which would have been available to it pursuant to a summary judgment determination. There is very little Washington law addressing this issue. Most decisions reviewing denials of a motion to amend focus on prejudice to the non-moving party. *Wilson v. Horsely*, supra. No prejudice is alleged here and no prejudice was found to exist by the trial court.

Rather, the trial court determined that the allegations of the proposed amended pleading were futile. This determination was made despite the fact that all of the allegations to the proposed amendment were presumed true.

The trial court's denial of the contractor's motion to Amend was in clear violation of CR 15 which allows for liberal amendment of pleadings. No trial date was scheduled in the matter at the time of the proposed amendment. No discovery of any consequence had been attempted. There was no prejudice to the remaining parties.

The trial of the motion to amend effectively required the contractor at the time of the motion to amend to argue the motion as if it were a summary judgment motion. Such a requirement by the trial court constitutes an abuse of discretion. The trial court's decision on the amendment should be reversed.

F. CONCLUSION

RV's judgment awarded against Bremerton Ice Arena, Inc. includes the principle sum of \$101,905.30 plus interest at the rate of twelve percent per annum (12%) and the moneys paid for recording the claim of lien, costs of title report, and attorneys' fees and necessary expenses incurred by Broughton & Singleton, Inc. P.S. as counsel for RV in this matter.

Respectfully submitted this 7 day of March, 2006.

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A-1

RV Claim of Lien

RV ASSOCIATES, INC.
1333 LLOYD PARKWAY
PORT ORCHARD, WA. 98366



STEPHEN DRVIS

LIEN 528.08 Kitsap Co, WA

200307160120

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CLAIM OF LIEN

Claimant: RV Associates, Inc.
1333 Lloyd Parkway
Port Orchard, WA. 98366

Vs.

Debtor: Bremerton Ice Arena, Inc.
P.O. Box 1044
Bremerton, WA. 98337

Notice is hereby given that the company named as Claimant claims a lien pursuant to chapter 60.04 RCW. In support of this lien the following information is submitted:

1. Name of Claimant: RV Associates, Inc.
2. Date on which the Claimant began to perform labor, provides services, supply material or equipment or the date on which employee benefit contributions became due: September 2002
3. Name of person or company indebted to the claimant:
Bremerton Ice Arena, Inc.
P.O. Box 1044
Bremerton, WA. 98337
4. Description of the property against which a lien is claimed:
Bremerton Ice Arena, Inc.
SE SW 12-24N - 01E
Parcel # N/A
5. Name of the Owner or reputed Owner of property: Unknown
6. The last date on which labor was performed, services provided, contributions to an employee benefit plan were due, or material, or equipment was furnished: May 27, 2003

- 7. Principal amount for which the lien is claimed is: **\$101,905.30**
+ Interest
- 8. If the Claimant is the assignee of this claim so sign here:

[Signature]

STATE OF WASHINGTON)
)
 COUNTY OF KITSAP)

Stephen E. Davis, Vice President & General Manager of RV Associates, Inc., being sworn says: I am the claimant above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

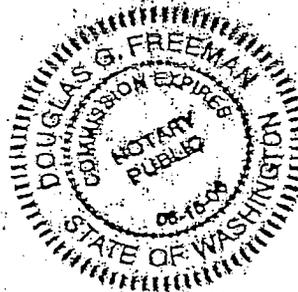
[Signature]
 RV Associates, Inc.

SUBSCRIBED AND SWORN to before me on this 14 day of July, 2003

[Signature]
 Notary Signature

Residing at Port Orchard, WA 98367

My commission expires: 8-15-06



APPENDIX A-2

Concession Agreement

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Exhibit A – Legal Description of Premises

Exhibit B – Preliminary Building and Site Plans

Exhibit C – Appraisal and Compensation Information

Exhibit D – Quit Claim Deed from United States of America to the City of Bremerton

CONCESSION AGREEMENT

THIS CONCESSION AGREEMENT ("Agreement") is entered into effective the 9th day of August, 2002 (hereinafter referred to as the "EFFECTIVE DATE"), by and between the CITY OF BREMERTON, a Washington municipal corporation (hereinafter referred to as the "CITY"), and BREMERTON ICE ARENA, INC. a Washington corporation (hereinafter referred to as the "CONCESSIONAIRE"), referred to collectively as the "Parties."

RECITALS

WHEREAS, the CITY is owner of the property commonly known as Eastpark; and

WHEREAS, the CITY owns undeveloped land within the confines of the Eastpark available for development of an indoor ice arena facility; and

WHEREAS, the CONCESSIONAIRE has the experience, ability, and resources to develop and operate an indoor ice arena facility; and

WHEREAS, the Parties intend this Agreement to be a ground and use concession allowing the CONCESSIONAIRE to develop, construct, and operate an indoor ice arena facility, for profit, on certain undeveloped land within the confines of Eastpark and which said land will remain property of the CITY; and

WHEREAS, the Parties agree that no joint venture or partnership is formed as a result of this Agreement; and

WHEREAS, the CONCESSIONAIRE will be responsible for the design and construction of an indoor ice arena facility, adequate parking and exterior landscaping on the CITY's real property, which visually blend with the setting, which are to be constructed within the confines of Eastpark, and all improvements to the real property will become property of the CITY at the termination of this Agreement; and

WHEREAS, the CITY shall have the right to approve the final design of the improvements and shall have a continuing right to approve the exterior color of any structure on the property; and

WHEREAS, the CONCESSIONAIRE will be responsible for obtaining all necessary financing for the development and operation of the indoor ice arena facility; and

WHEREAS, it is mutually understood by the Parties that any lender who provides the CONCESSIONAIRE, or successor or assign approved by the CITY, financing, re-financing, credit lines or equipment leases, for the development and ongoing operations of the improvements and business operations will require this

Agreement as protection and security for lender ("lender") The term "lender" shall also mean the successors and assigns of the lender; and

WHEREAS, the CITY will acknowledge and consent to lender taking a first position security interest in this Agreement and the Improvements, lender taking an assignment of the right, title, claim and interest of CONCESSIONAIRE in this Agreement, lender obtaining the right of substitution for CONCESSIONAIRE, lender taking possession of the concession and improvements, lender operating the indoor ice arena facility pursuant to the terms of this Agreement, and/or lender selling, assigning and/or transferring CONCESSIONAIRE'S interest in this Agreement, the term "CONCESSIONAIRE" shall also mean successors or assigns of CONCESSIONAIRE as approved by the CITY;

WITNESSETH:

NOW, THEREFORE, in consideration of the promises, covenants, and provisions set forth in this Agreement, the Parties agree as follows:

ARTICLE 1. GROUND AND USE CONCESSION

1.1 Concession of Premises

CITY hereby grants a ground and use concession to CONCESSIONAIRE of approximately one hundred forty-four thousand four hundred fifty-six square feet (144,456 sq. ft.) of undeveloped land located within the confines of Eastpark (hereinafter referred to as "Concession") on real property legally described in Exhibit A attached hereto and incorporated by reference for development, construction, maintenance, and operation, for profit, of an indoor ice arena facility including building(s), fixtures, appurtenances, parking and exterior landscaping (hereinafter referred to as "Improvements"), and generally shown in the preliminary building and site plan in Exhibit B attached hereto and incorporated by reference. (Collectively referred to as "Premises") (Premises does not include the fee ownership or leasehold interest of the real property upon which the Improvements are located). The CITY represents and warrants that the Premises are currently zoned for the uses contemplated hereunder and no further proceedings are required therefor. CONCESSIONAIRE hereby agrees to the terms and conditions of this Agreement. The Parties agree that the Premises are currently undeveloped with no permanent structures, and that any and all development and construction of improvements to the Premises are owned by CONCESSIONAIRE during the term of this Agreement, subject to any security interest of lender, if any. Upon the expiration of the term(s) of this Agreement pursuant to Article 2, or upon the termination of this Agreement, other than as a result of condemnation proceedings, the then existing improvements on the Premises will become the property of and owned by the CITY subject to lenders rights as set forth in Article 6. The common address of the Premises is 1950 Homer Jones Bremerton WA, 98310.

If in the future, during the term of this concession, a piece of property of comparable worth to the real property described in Exhibit A and the concession

consideration described in Exhibit C and considered a valuable addition to the Bremerton Parks and Recreation inventory becomes available, the CITY would consider a property trade with the CONCESSIONAIRE assuming all the requirements of the Department of Interior and the Quitclaim Deed conveying the property to the CITY and related CITY ordinances are met. The CITY, at its sole discretion, may accept or reject any proposal for such property trade.

1.2 Possession, Quiet Enjoyment & Covenants Real

Except as provided in Articles 3 & 4.3 herein, the CONCESSIONAIRE shall be entitled to exclusive possession of the Premises, except the parking areas, upon commencement of the development and construction of the Improvements as set forth by Article 5.4 herein. Upon taking possession of the Premises, and on performing all the covenants and conditions herein, the CONCESSIONAIRE shall peaceably and quietly have, hold, and enjoy the Premises at all times during the full term of this Agreement. Every covenant in this Agreement shall be deemed and treated to be a covenant running with the Premises during the full term of the Agreement, and shall extend to the heirs, legal representatives, successors, and assigns of the Parties. No change in CITY's ownership of the Premises, or rights to the payments hereunder, however accomplished, shall operate to enlarge the obligations or reduce the rights of CONCESSIONAIRE. No change in CITY's ownership of the Premises shall be binding upon CONCESSIONAIRE for any purpose until CONCESSIONAIRE shall have been given written notice thereof.

1.3 CITY Payment to CONCESSIONAIRE

In addition to the concession granted herein and as an incentive to CONCESSIONAIRE to locate an indoor ice arena facility within the City of Bremerton and to help defray the costs of relocating the facility from the initially proposed site in Kitsap County and in consideration of additional future use of the Premises by the CITY as set forth in Article 3, the CITY shall pay CONCESSIONAIRE \$175,000 as follows: \$100,000 upon issuance of a building permit for the ice arena structure, and \$75,000 upon completion of the roof of the structure.

ARTICLE 2. TERM OF AGREEMENT

2.1 Term

The term of this Agreement shall be 10 years, commencing upon the EFFECTIVE DATE of this Agreement.

2.2 Option to Renew

The CITY agrees to offer the CONCESSIONAIRE four (4) successive ten (10) year options to renew this Agreement, contingent upon CONCESSIONAIRE remaining in full compliance with the terms and conditions of this Agreement and further contingent on the CITY accepting the level of insurance coverage required in Section 8.5.2 for the new 10 year term exercised by CONCESSIONAIRE, which acceptance will not be unreasonably denied. To execute an option for renewal, the CONCESSIONAIRE, not more than 180 days and not less than 60 days prior to the expiration of the term, shall give written notice to the CITY that the CONCESSIONAIRE is exercising the

CONCESSIONAIRE's option for an additional ten (10) year term. The CONCESSIONAIRE's written notice shall include a sworn affidavit that the CONCESSIONAIRE is currently in full compliance with the terms and conditions of this Agreement. The option will become effective upon receipt by the CITY of CONCESSIONAIRE's written notice and sworn affidavit and no further process or documentation will be required, provided, however upon CONCESSIONAIRE's request, the CITY shall provide a written acknowledgement that such option has been exercised and is in effect. If the option(s) to renew are not exercised, then the Agreement shall expire at the conclusion of the expiring term.

ARTICLE 3. CONSIDERATION

3.1. Consideration for Concession.

3.1.1 Premises Use in Lieu of Cash

As consideration for the ground and use concession granted by the CITY to the CONCESSIONAIRE and the payment of \$175,000 by the CITY to CONCESSIONAIRE pursuant to Article 1.3, the CONCESSIONAIRE shall provide fair and equitable compensation to the CITY based upon an appraisal of the Premises at the effective date of this Agreement conducted on behalf of the CITY by a certified appraiser pursuant to the Appraisal and Compensation Information described in Exhibit C attached hereto and incorporated by reference. In lieu of cash payments, the annual compensation provided by the CONCESSIONAIRE to the CITY shall be in the form of hours of use of the Premises as established in Exhibit C. Premises use by the CITY shall be governed by Article 3.3 herein. Said kinds of use to be determined at the sole discretion of the CITY, so long as such use is not incompatible with the facility's design purpose(s).

3.1.2 Leasehold Excise Tax

Pursuant to RCW 82.29A.020(1), concessions fall within the definition of leasehold interest, therefore, even though this agreement is not for a lease, it is still subject to the leasehold tax set forth in Chapter 82.29A RCW. Accordingly, CONCESSIONAIRE agrees to pay, in addition to other taxes and fees pursuant to Article 8.4.2, the leasehold excise tax pursuant to Chapter 82.29A RCW. The tax will be based on the current appraised value of use of the property through this concession agreement (concession rate value) as set forth in Exhibit C in the amount of \$23,112 per year. Since consideration to the City for this property use consists of hours of ice time at the Premises established through a formula based upon the current hourly value of ice time, no adjustments will be made for the property use or value of ice time during the term(s) of this agreement. Therefore, for purposes of assessment and payment of the leasehold tax only, the appraised value of the use of the property (\$23,112) will be adjusted every five years during the term(s) of this agreement based upon the prior five years' Consumer Price Index (CPI) for all urban consumers as published by the United States Department of Labor for Seattle-Tacoma-Bremerton, all items (1982-84-100) For purposes of the CPI adjustment, the base shall be the June 2002 CPI index with adjustments made June to June every five years (ie. June 2002- June 2007). In addition, CONCESSIONAIRE agrees to pay when due, the leasehold excise tax, or any additional assessments thereto,

with respect to any payment or obligation hereunder, which is deemed by the State of Washington to be taxable rent under said chapter and to indemnify and hold the City harmless from the same.

CONCESSIONAIRE shall pay quarterly to the City by the fifteenth day of the month following the end of each quarter, or as otherwise required by the State of Washington, the amount of the leasehold tax owing. The leasehold tax will begin accruing on the beginning of the first full month of issuance of the building permit for the ice arena structure.

3.2 Ice arena Equipment/Personal Property Use

Premises use by the CITY received as consideration for this Agreement does not include the use by the CITY of any of the CONCESSIONAIRE's ice arena equipment or other personal property. Use by the CITY of any of the CONCESSIONAIRE's ice arena equipment or other personal property will be negotiated separately between the CITY and the CONCESSIONAIRE and is outside the scope of this Agreement.

3.3 Timing of Consideration Payment

The consideration paid by the CONCESSIONAIRE in the form of Premises use by the CITY shall commence accruing from the date the Occupancy Permit is issued. It is mutually understood and agreed that the CITY can receive its full annual compensation of hours of Premises use at any time during the 12 month period beginning with the date CONCESSIONAIRE receives the occupancy permit for use and every 12 month period thereafter. It is mutually understood and agreed to that any CITY hours which are unused in a given year do not accrue or transfer over into a new year unless mutually agreed.

3.4 Premises Use by CITY

3.4.1. Types of Use

The hours of Premises use provided by the CONCESSIONAIRE to the CITY in consideration for this Agreement are intended to provide recreational opportunities of a suitable and compatible nature for the residents of the CITY as part of the Parks and Recreation programs. Such Premises use by the CITY shall be without cost to the CITY to the extent of the annual hours of use of the Premises, pursuant to Articles 3.1, 3.2 and 3.3 herein. This will exclude the use of proprietary or sub-concessioned spaces within the facility, including but not limited to management offices, refrigeration and maintenance areas, and fitness club. It is mutually understood that the CITY will, under all reasonable conditions, have the use of the ice surface (CONCESSIONAIRE will provide a clean surface prior to CITY use), party (multi-use) and team rooms, first aid room, lobby and restrooms.

3.4.2 Maintenance & Utility Costs/Clean-Up After Use

The CONCESSIONAIRE shall be responsible for all overhead costs, including the utilities and general maintenance, of the Premises during the use of the Premises by the CITY. The CITY agrees to clean-up the Premises after each CITY use.

3.4.3 Damage, Claims, & Liability

The CITY shall be responsible for all damage or claims that may arise out of the Premises use by any of the CITY's employees, agents, guests, or invitees. The CITY, during such periods of use, shall supervise or cause the CITY's employees, agents, guests, or invitees to be supervised. The provisions for mutual indemnity, hold harmless, and liability insurance pursuant to Articles 8.5 & 8.6 herein apply during Premises use by the CITY.

3.5 Scheduling Premises Use by CITY

The CITY and the CONCESSIONAIRE shall meet at least quarterly and other times as necessary, to determine how such Premises use hours shall be allocated to the CITY in the upcoming quarter in accordance with the following provisions. The CITY's use shall be during normal operating hours of the facility, unless otherwise agreed.

3.5.1 Summer Quarter

The CITY shall have the full discretion to determine which hours of Premises use the CITY intends to use during the Summer quarter (June, July, and August) of each year. At the CITY'S discretion, the CITY has the right to schedule its full annual compensation of hours of premises use during the summer quarter, however, it is mutually understood and agreed to that, unless CONCESSIONAIRE agrees otherwise in advance, the maximum hours the CITY may schedule in a single calendar month is 70 hours.

3.5.2 Fall, Winter, and Spring Quarters

The CONCESSIONAIRE shall have the full discretion to determine which hours of Premises use the CONCESSIONAIRE may use the Premises during the Fall quarter (September, October, and November), Winter quarter (December, January, and February), and Spring quarter (March, April, and May) of each year. The CONCESSIONAIRE has the right to schedule the CITY'S remaining compensation, if any, of Premises use not previously scheduled by the CITY during the Summer quarter. The CONCESSIONAIRE's discretion to schedule CITY use under this Article is limited to scheduling CITY use during normal business hours.

3.6 CITY's Increased Premises Use

The CITY may increase its hours of Premises use beyond its annual compensation by paying to the CONCESSIONAIRE an hourly rate not to exceed the rate then in effect by the CONCESSIONAIRE for general public use and with scheduling at the discretion of the CONCESSIONAIRE.

ARTICLE 4. USE & OPERATION OF PREMISES

4.1 Use of Premises

4.1.1 Indoor Ice Arena and Recreational Uses

The CONCESSIONAIRE will use and occupy the Premises throughout the full term of this Agreement for the purpose of providing indoor ice sports, fitness, recreation, and community activities directly related to the operation of an indoor ice arena.

4.1.2 Incidental Uses

The CONCESSIONAIRE may provide incidental uses in the form of coaching and training services, food and beverage services, and the sale or rental of incidental items directly related to the use of the ice arena facility including, but not limited to, ice sports, fitness and athletic equipment, soap, shampoo, and similar shower supplies, and clothing related to ice arena and fitness pursuits. This includes hiring vendors and/or sub-concessions of interior space of the indoor ice arena facility. CONCESSIONAIRE agrees that no alcohol will be sold or consumed on the premises.

4.1.3 Sub-Concessions

All sub-concessions will require the prior written consent of the Mayor or designee, which consent will not be unreasonably withheld, and comply with any requirements of the U.S. Secretary of Interior for the granting of concessions on the subject property pursuant to the quitclaim deed, attached hereto as Exhibit D and incorporated by reference, transferring title to the CITY to the real property upon which this concession is granted. THE U.S. SECRETARY OF THE INTERIOR, THROUGH THE NATIONAL PARK SERVICE, CONSENTING TO THIS AGREEMENT, WAIVES ANY RIGHT TO REVIEW AND APPROVE SUB-CONCESSIONS WHICH DO NOT REQUIRE THE APPROVAL OF THE CITY COUNCIL.

4.1.4 Security and Nuisance During Use

The CONCESSIONAIRE shall take reasonable precautions in securing the Premises during the full term of this Agreement. The CONCESSIONAIRE shall use the Premises for no unlawful purposes and shall not use or occupy the Premises in any manner, which would constitute a public nuisance or violate State or CITY laws.

4.2 Operating Hours

The availability of recreational opportunities for CITY residents is a material consideration for this Agreement. Accordingly and during the full term of this Agreement, the CONCESSIONAIRE shall continuously conduct and carry on the CONCESSIONAIRE'S permitted uses and shall keep the Premises open for business and cause the CONCESSIONAIRE'S business to be conducted therein during the usual business hours of each and every business day as mutually agreed upon. This provision shall not apply if the Premises should be closed and the business of CONCESSIONAIRE is temporarily suspended on account of weather conditions, power outages, labor strikes, lockouts, or similar causes beyond the reasonable control of CONCESSIONAIRE, or for maintenance, remodeling, repair, or renovation as approved by the CITY in writing (including approvals of any construction schedules.) The CONCESSIONAIRE covenants and agrees to provide sufficient personnel, and to keep the Premises adequately stocked with merchandise, recreational equipment, fixtures, and facilities so as to conduct its business in accordance with sound business practice. The CONCESSIONAIRE, in order to keep its business commitments, shall be in operation in accordance with sound business practice.

4.3 Entry by CITY

CITY may enter the Premises at all reasonable times during normal hours of business operations to inspect; provide services required hereunder; post notices of CONCESSIONAIRE's noncompliance with the provisions of this concession, all without being deemed a constructive eviction. Any person or persons who may have an interest in the purpose of CITY's visit may accompany CITY. CITY has the right to use any and all means that CITY deems proper to open doors and gates in an emergency in order to obtain entry to the Premises. Except in an emergency, 24 hours notice shall be given by the CITY before entry by the CITY into proprietary areas of the facility.

4.4 Health Inspections

CONCESSIONAIRE shall not knowingly commit or willfully permit to be committed any act or thing contrary to the rules and regulations prescribed by the local board of health, or which shall be contrary to the laws, rules or regulations of any federal, state or municipal authority. CONCESSIONAIRE shall allow the Bremerton-Kitsap County Health Department to make regular and ordinary inspections of the Premises as said health department may deem proper.

4.5 Maintenance, Repair, & Improvements

4.5.1 Maintenance

CONCESSIONAIRE shall, at its sole cost and expense, clean and maintain the Premises, and make repairs, restorations, and replacements to all improvements to the Premises, including without limitation the heating, ventilating, air conditioning, mechanical, electrical, and plumbing systems, structural roof, walls, and foundations, roof coverings, sprinkling and irrigation systems, playing surfaces and the fixtures and appurtenances to the Premises as and when needed to preserve them in "first class" condition and repair (less normal wear from use) throughout the full term. CONCESSIONAIRE shall further keep in repair and maintain as necessary all machinery, equipment and facilities necessary for the playing of sports and the comfort of players. CONCESSIONAIRE shall paint the exterior of the buildings (except the metal) with such frequency as may be required to maintain their good, clean appearance. All such repairs, restorations, and replacements will be in quality and workmanship at least equal to the original work or installations. If CONCESSIONAIRE fails to make such repairs, restorations, or replacements, following a notice of default and opportunity to cure as provided for in Articles 6 and 7, CITY may make them at the expense of CONCESSIONAIRE and such expense will be paid by CONCESSIONAIRE within fifteen (15) days after delivery of a statement for such expense.

4.5.2 Sidewalks and Parking Maintenance

At its sole cost and expense, CONCESSIONAIRE shall maintain all sidewalks and parking lots on the Premises in good and presentable condition during the full term of this Agreement, shall be responsible for correcting any unsafe conditions, and shall be responsible for the removal of ice and snow from the sidewalks and parking lots as necessary for safe operation of the Premises.

4.5.3 Janitorial and Landscaping Services

At its sole cost and expense, CONCESSIONAIRE shall keep the Premises clean, and shall provide sufficient janitorial services to maintain a tidy appearance on and about the Premises. CONCESSIONAIRE shall provide landscaping maintenance services such that landscaping on the Premises remains healthy, attractive, and well maintained.

4.5.4 Repair of Damage

Except that which may be caused by the actions, activities or negligence of the CITY or its agents, representatives, employees, guests or invitees, in the event any damage or injury shall occur to the Premises of any kind or nature whatsoever, CONCESSIONAIRE shall promptly cause said damage or injury to be fully repaired at CONCESSIONAIRE'S own cost and expense. In the event CONCESSIONAIRE fails to accomplish such repairs within fifteen (15) days of receipt of written notice by the CITY, then in that event CITY may, but is not required to, enter the Premises and accomplish such repairs and bill CONCESSIONAIRE who will pay the bill within fifteen (15) days after delivery of a statement for such expense. Any such damage or injury to the Premises caused by the actions, activities or negligence of the CITY or its agents, representatives, employees, guests or invitees shall be promptly repaired by the CITY at its cost and expense.

4.5.6 Improvements

The CONCESSIONAIRE shall be solely responsible for providing adequate funding for any alterations or improvements as provided in this Agreement and such alterations or improvements shall be made without cost to the CITY.

4.5.7 Alterations of Improvements after Construction

After such time as the Improvements have been completed and accepted as defined above, the CONCESSIONAIRE shall not make any material alteration to the Premises including any changes to the landscaping, without the CITY'S prior written consent, which consent will not be unreasonably withheld.

4.6 Signs

CONCESSIONAIRE may place and maintain signs upon the Premises in accordance with the sign ordinance of the CITY.

4.7 Utilities

4.7.1 Utility Services and Expense

The CONCESSIONAIRE will pay for all water, gas, garbage, sewage, electricity, telephone, and other utilities and communications services used by CONCESSIONAIRE on the Premises, whether or not such services are billed directly to CONCESSIONAIRE. CONCESSIONAIRE will also procure, or cause to be procured, without cost to the CITY, any and all necessary permits, licenses, or other authorizations required for the lawful and proper installation and maintenance upon the Premises of utility appurtenances and appliances for use in supplying such utilities and services to and upon the Premises. The CITY, upon request of CONCESSIONAIRE, and at the sole expense

and liability of the CONCESSIONAIRE, will join with CONCESSIONAIRE in any application required for obtaining or continuing any such services, provided that such services do not violate any other applicable provision of this Agreement. The CITY shall not be held liable for any injury, loss, or damage caused by or resulting from any interruption or failure of utility services due to any cause whatsoever, except the CITY's sole negligence. CONCESSIONAIRE shall not be entitled to any offset, reduction, or return of consideration as a result of any interruption or failure of services.

4.7.2 Trash & Garbage

The CONCESSIONAIRE shall place all trash and garbage into such areas and containers as are designed and intended to accommodate the trash and garbage generated within or on the Premises. The CONCESSIONAIRE shall not allow trash and/or garbage to accumulate such that a nuisance or health hazard results.

4.8 Parking

The CONCESSIONAIRE shall develop parking on the real property described in Exhibit A providing a minimum of 155 vehicle parking spaces for CONCESSIONAIRE's non-exclusive use in connection with the Premises, as identified more particularly described in Exhibit B. CITY may use this parking lot for activities of the CITY or its assigns at Eastpark in a manner not inconsistent or interfering with CONCESSIONAIRE's use of the parking lot.

4.9 Hazardous Substances

4.9.1 Definition

As used herein, the term "Hazardous Substance" means any hazardous, toxic, or dangerous substance, waste, or material, which is or becomes regulated under any federal, state, or local statute, ordinance, rule, regulation, or other law now or hereafter in effect pertaining to environmental protection, contamination, or cleanup.

4.9.2 Information

CONCESSIONAIRE shall keep upon the Premises, in a location accessible to CITY, on request during normal business hours, copies of all reports regarding hazardous or toxic materials in the Premises that CONCESSIONAIRE has provided to any governmental agency in the previous quarter. CONCESSIONAIRE shall, upon request and at CONCESSIONAIRE'S expense, provide CITY with a copy of any such report as to which CITY request a copy. In the event of any accident, spill, or other incident involving hazardous or toxic matter that CONCESSIONAIRE is required to report to any governmental agency, CONCESSIONAIRE shall immediately report the same to the CITY and supply CITY with all information and reports with respect to the same, together with CONCESSIONAIRE'S clean-up or remediation plan and schedule. If such clean-up or remediation plan is not acceptable to CITY in CITY'S sole discretion, CITY may so notify CONCESSIONAIRE and, upon 48 hours prior written notice (or without notice if so required by an emergency) may enter on the Premises to conduct the cleanup and/or remediation and charge CONCESSIONAIRE the costs thereof. For non-emergency cleanup and/or remediation, prior to the CITY exercising its right to cleanup

and/or remediation on the Premises, the parties will mutually agree upon a consultant for determining the method of cleanup and/or remediation. All information described herein shall be provided to CITY regardless of any claim by CONCESSIONAIRE that it is confidential or privileged, provided that the CITY shall not publish or disclose the information to any third party except as pursuant to Chapter 42.17 RCW.

4.9.3 Indemnification

CONCESSIONAIRE agrees to hold harmless, protect, indemnify, and defend CITY from and against any damage, loss, claim, or liability, INCLUDING Attorney's fees and costs, resulting from CONCESSIONAIRE'S use, disposal, transportation, generation, and/or sale of any Hazardous Substances. The CITY agrees to hold harmless, protect, indemnify, and defend CONCESSIONAIRE from and against any damage, loss, claim, or liability, including attorney's fees and costs, resulting from (a) Hazardous Substances existing on the Premises as of the EFFECTIVE DATE of this Agreement; or (b) Hazardous Substances thereafter used, disposed of, or generated on the Premises by the CITY. These indemnities will survive the termination of this Agreement, whether by expiration of the Term or otherwise.

4.10 Risk of Loss

All personal property of any kind or description whatsoever in the Premises shall be at the CONCESSIONAIRE's sole risk, and CITY shall not be liable for any damage done to, or loss of, such personal property. However, CONCESSIONAIRE is not responsible for losses or claims of damaged or stolen property under the care and control of the CITY during the CITY'S use periods.

ARTICLE 5. DESIGN & CONSTRUCTION OF PREMISES

5.1 Design

The CONCESSIONAIRE shall retain a licensed architect or licensed professional engineer, registered in the State of Washington, who shall design the indoor ice arena facility and exterior landscaping, which shall visually blend with the setting. The CITY shall have the right to approve the final design of the Improvements and shall have a continuing right to approve the exterior color of any structure on the Premises, which approval shall not be unreasonably withheld. CONCESSIONAIRE shall comply with the Americans with Disabilities Act of 1990 (ADA) in the design, construction, and operation of the Premises.

5.2 Building & Site Plans

The CONCESSIONAIRE shall retain a licensed architect or licensed professional engineer, registered in the State of Washington, to prepare building and site plans for the Premises, which shall reference the structure, utilities generally, and landscape plan. The CITY shall have the right to approve the final building and site plans, which approval shall not be unreasonably withheld.

5.3 Construction/Site Work/Fencing

The CONCESSIONAIRE shall be solely responsible for all development and construction of the Premises and hold the CITY harmless from any and all claims arising out of the development and construction of the Premises pursuant to Article 8.6 herein, except as may be caused by the sole acts or negligence of the CITY or its agents, representatives or employees. CONCESSIONAIRE shall be responsible for the site work, all required permits and grading. CONCESSIONAIRE shall properly barricade the work area and install signage directing unauthorized person not to enter onto the building site during any phase of development or construction. Unless otherwise agreed fencing shall be placed around the work area. In addition, the building site shall be kept in a clean and organized condition during development periods. CONCESSIONAIRE shall be responsible for site security, traffic and pedestrian warnings at the site during the development and construction phases.

5.4 Construction Deadlines

CONCESSIONAIRE shall be required to commence development and construction of the Premises within nine months of the EFFECTIVE DATE of this Agreement. Commencement of development and construction of the Premises is defined as that date upon which there is physical movement or grading of the soil in preparation for construction of any structure on the Premises. CONCESSIONAIRE shall be required to complete the development and construction of the Premises within eighteen (18) months of the EFFECTIVE DATE of this Agreement. Completion of the development and construction of the Premises is defined as that date upon which all final occupancy permits are obtained by the CONCESSIONAIRE for all structures on the Premises.

5.5 Failure to Meet Construction Deadlines/Time of Essence

Except as provided in Article 8.15 herein, it is mutually understood and agreed that failure by the CONCESSIONAIRE to meet the development and construction deadlines shall constitute a material breach of this Agreement by the CONCESSIONAIRE and the CITY, at its option, can terminate this Agreement for cause pursuant to Article 7, subject, however, to the provisions of Article 6 below. Time is of the essence with this Agreement.

5.6 Stormwater Drainage, Sewer, & Water Lines

The CONCESSIONAIRE will be responsible for relocating storm drains, sewers, and water lines to the Premises, as required to complete development and construction of the Improvements. The CITY shall provide CONCESSIONAIRE with all pertinent information concerning the location of such existing lines.

5.7 Development and Construction Fees & Expenses

The CONCESSIONAIRE shall be responsible for obtaining and paying for necessary permits, fees, and expenses associated with the development and construction of the Improvements. In addition, CONCESSIONAIRE shall be responsible for any additional costs for inspections billed to the CITY by any government agency, including but not limited to the City of Bremerton, Kitsap County, or the State of Washington.

5.8 CONCESSIONAIRE's Development Project

The development and construction of Improvements on the Premises is CONCESSIONAIRE's development project and is not a CITY public works project. CONCESSIONAIRE is the developer and the CITY is not an owner, partner, joint venturer, nor maintains any other business relationship with the CONCESSIONAIRE regarding the indoor ice arena facility other than as grantor of a concession and user of the Premises. The CITY is not involved with, nor has any responsibilities for, the bidding, contracting or operations of the Premises and will occupy no space in the Premises. The project signage and all literature, advertising by either the CITY or CONCESSIONAIRE shall not indicate in any manner that this is a CITY project, contract, or other misleading statement indicating that this project is a CITY public work project directly or indirectly.

5.9 No Liens

Except liens and encumbrances of any lender pursuant to Article 6 herein, it is mutually understood and agreed that the CONCESSIONAIRE shall have no authority, express or implied, to create or place any lien or encumbrance of any kind or nature whatsoever upon, or in any manner to bind, the interest of the CITY in the Premises or to charge the rentals payable hereunder for any claim in favor of any person dealing with CONCESSIONAIRE, including those who may furnish materials or perform labor for any construction or repairs, and each such claim shall affect and each such lien shall attach to, if at all, only the right and interest granted to CONCESSIONAIRE by this Agreement. If any such liens are filed, CITY may, without waiving its rights and remedies for breach, and without releasing CONCESSIONAIRE from its obligations hereunder, require CONCESSIONAIRE to post security in form and amount reasonably satisfactory to CITY or cause such liens to be released by any means CITY deems proper, including payment in satisfaction of the claim giving rise to the lien. CONCESSIONAIRE shall pay to CITY upon demand any sum paid by CITY to remove the liens. Further, CONCESSIONAIRE agrees that it will save and hold the CITY harmless from any and all loss, cost, or expenses based on or arising out of the asserted claims or liens, except those of the lender pursuant to the provisions of this Agreement, against this Agreement or against the right, title, and interest of the CITY in the Premises or under the terms of this Agreement, including reasonable attorney's fees and costs incurred by CITY in removing such liens, and in enforcing this paragraph. Additionally, it is mutually understood and agreed that this paragraph is intended to be a continuing provision applicable to future repairs and improvements after the initial construction phase.

ARTICLE 6. FINANCING & SECURITY INTERESTS

6.1 Financing - No CITY Obligation

CONCESSIONAIRE shall be solely responsible for all financing requirements for all construction, maintenance, repairs, or subsequent improvements to the Premises. The CITY shall be under no obligation directly or indirectly to pay for any labor, material, or improvement associated with the facility except as provided herein or mutually agreed upon. The CONCESSIONAIRE shall, in applying and obtaining financing, inform any

lender that the CITY has no financial obligations associated with the construction, maintenance, repairs or subsequent improvements to the Premises.

6.2 Security Interest in Premises & Agreement/Consent

The CITY consents to the grant, transfer, pledge and assignment of any and all right, title, claim, interest of CONCESSIONAIRE in and to this Agreement and in the Premises, including improvements and personal property on the Premises ("Collateral") to lender for financing purposes, including the re-financing of any loans and leasing of equipment. The CITY shall recognize lender's first priority security interest in the Collateral and the CITY hereby subordinates any and all interest of the CITY in said Collateral to lender. CONCESSIONAIRE acknowledges that the CITY will not grant any security interest to any lender in CITY real property nor will the CITY allow any encumbrance of any kind or nature whatsoever upon, or in any manner on its title to CITY real property. In the event of default by CONCESSIONAIRE to lender, in addition to all its rights and remedies available at law and equity, lender may enforce and/or foreclose its security interest/interests in the Collateral. CITY agrees that in connection with any such default, and all without further consent of CITY, lender may:

- a. Acquire CONCESSIONAIRE'S interest in the Collateral either by a deed in lieu of foreclosure or actual foreclosure;
- b. Rent and/or grant a ground and use concession of the Premises subject to this Agreement pending foreclosure of the Collateral by lender;
- c. Assign, sell and/or transfer the Collateral in whole or in part to any person or entity;
- d. Take possession of any or all of the Collateral, obtain right of substitution for CONCESSIONAIRE and operate said Collateral; and/or
- e. Appoint a receiver.
- f. All other rights and remedies at law or in equity.

Any assignment or transfer under Article 6.2 is subject to Article 8.7. Lender shall have no interest in improvements located on the Premises at the time of expiration of the term or terms of this Agreement pursuant to Article 2, at which time, all improvements shall become the property of the CITY.

6.3 LENDER'S Reliance on Term and Renewal Options

The City acknowledges that the CONCESSIONAIRE, in making application for financing, may be required to have an assurance that the terms of this Agreement will extend beyond the term of the financing term. By its signature to this Agreement, the CITY confirms its authority to provide the ten-year Agreement term with four options to extend the ten-year Agreement for a total of fifty years with the renewal options conditioned solely upon the CONCESSIONAIRE maintaining current payments and remaining in full compliance with the terms and conditions of this Agreement. Lender may, but is not obligated to exercise CONCESSIONAIRE's right to renew and extend the terms of this Agreement. Additionally, the CITY acknowledges that, after any original financing commitments by the CONCESSIONAIRE have been satisfied, these financing provisions shall be applicable to all future advances or financing required by the

CONCESSIONAIRE and used solely for the improvements and repairs of the Premises or re-financing such obligations periodically thereafter.

6.4 Surrender of the Collateral

No surrender of Collateral or the Premises to lender subject to this Agreement or any other act of CONCESSIONAIRE shall be deemed to terminate this Agreement. CITY will not terminate this Agreement voluntarily by agreement with CONCESSIONAIRE unless lender has been previously notified in writing and has consented to the termination in writing. This Agreement shall not be amended or modified unless lender has been previously notified in writing and has consented to such amendment or modification in writing.

6.5 Notice of Default and Lender's Rights

6.5.1 Notice of Default

If CONCESSIONAIRE defaults under this Agreement or if any event occurs which would give CITY the right to terminate, modify, amend or shorten the term of this Agreement, CITY shall take no steps to exercise any right it may have under this Agreement without first giving lender written notice of such default in accordance with Article 6.11 below. A copy of each and every notice of default served or sent by CITY or its agent to or upon CONCESSIONAIRE pursuant to this Agreement shall be sent contemporaneously to lender in accordance with Article 6.11 below. Such notice of default shall specify the event or events of default then outstanding and the time period at the end of which the indicated action would become effective.

6.5.2 Termination for Monetary Default

If the notice of default given by CITY to lender relates to a monetary default and CONCESSIONAIRE has not cured such monetary default within 30 days after lender receives the notice and CONCESSIONAIRE'S failure to cure results in CITY desiring to terminate this Agreement, CITY may terminate this Agreement pursuant to Article 7 if such monetary default is not cured by either CONCESSIONAIRE or lender within forty-five (45) days after lender receives the notice of default.

6.5.3 Termination for Non-Monetary Default

If the notice of default given by CITY to lender relates to a non-monetary default and CONCESSIONAIRE has not cured, or diligently pursued curing, such non-monetary default within thirty (30) days after lender receives the notice, CITY may terminate this Agreement pursuant to Article 7 if such non-monetary default is not cured by either CONCESSIONAIRE or lender within sixty (60) days after lender receives notice of default.

6.5.4 Termination due to Bankruptcy

CITY shall not terminate this Agreement because of CONCESSIONAIRE'S breach of any terms of this Agreement relating to the solvency of CONCESSIONAIRE or the institution of any bankruptcy, insolvency, receivership or related action by or

against CONCESSIONAIRE as long as lender cures any default under this Agreement by CONCESSIONAIRE as provided herein, except that lender shall not be required to cure any defaults relating to solvency of CONCESSIONAIRE.

6.6 Right to Assign

Lender shall have the right to assign its interest in the Collateral. Upon the purchaser's, assignee's or transferee's assumption of lenders assigned interest and agreement to perform and be bound by all of the terms of this Agreement, lender shall be relieved from further liability under this Agreement. If a lender finances the purchaser, assignee or transferee, said lender shall be subject to all obligations as set forth in this Agreement. Any successor lender shall be bound by the terms and conditions of this Agreement.

6.7 Disposition of Insurance

Should the Collateral suffer any loss which is covered by casualty insurance, and the insurance proceeds are used to restore any improvements made by CONCESSIONAIRE, CITY agrees that CONCESSIONAIRE and lender shall have the right to such proceeds so long as none of CITY'S property, utilities or other services therein are damaged or such damages are repaired. In the event the CITY'S land is substantially damaged and CONCESSIONAIRE'S improvements have been repaired, CITY shall only participate in the insurance proceeds to the extent necessary to repair and restore CITY'S land and any of CITY'S improvements on or in the ground to the same condition the land was at the commencement of this Agreement, or in the same condition at the time of the casualty. Other than as described herein, CITY shall have no claim to insurance proceeds that are attributable to CONCESSIONAIRE'S interest in the Collateral.

6.8 Right to Participate in Litigation

Lender shall have the right to participate in any litigation, arbitration or dispute directly affecting the Collateral or interest of CONCESSIONAIRE or lender therein, including, without limitation, any suit, action, arbitration proceeding, condemnation proceeding or insurance claim. CITY, upon instituting or receiving notice of any such litigation, arbitration or dispute will promptly notify lender of the same.

6.9 Incorporation of Lender's Protection Provisions

Lender shall be a beneficiary of all rights of CONCESSIONAIRE herein including but not limited to the warranty, indemnity, hold harmless, choice of law and venue, costs and attorney's fees as provided herein.

6.10 Right to Remove Collateral

In the event lender exercises its rights under its Collateral and realizes upon the Collateral, CITY agrees that lender is entitled to remove the Improvements on the Premises, including but not limited to building facility, furniture, movable trade fixtures and equipment, from the Premises at any reasonable time and that the Collateral shall remain personal property even though the trade fixtures may be affixed to or placed upon

the Premises. In the event lender so realizes on its Collateral, CITY waives any right, title, claim, lien or interest in the Collateral.

6.11 Notices

All notices, copies of notices, consents or other communications to lender given under this Agreement to lender must be in writing and shall be effective when received. Such communications shall be given in person to an officer of lender, addressed to lender at an address as provided by lender. CONCESSIONAIRE shall keep the CITY informed of the name, address, and telephone number of any current lender or lenders for the purpose of the CITY providing notice to the same under this Agreement.

6.12 Lenders Change in Loan Terms

It is understood that current or future lenders may require terms or conditions on loans for future or additional financing needs of CONCESSIONAIRE, which may require changes to the terms or conditions of this Agreement. In such case, the CITY will give reasonable consideration to such changes to this Agreement, and may, at its sole discretion, accept or reject the same. Any modifications to this Agreement are subject to approval of the U.S. Secretary of Interior pursuant to Article 8.21.

ARTICLE 7. TERMINATION

7.1 Failure to Perform

7.1.1 Obligation to Perform

Nothing herein shall imply any duty upon CITY to do any work, which under any provision of this concession CONCESSIONAIRE may be required to perform, and the performance thereof by CITY shall not constitute a waiver of CONCESSIONAIRE's default. CITY shall not in any event be liable for inconvenience, annoyance, and disturbance in its activities in Eastpark.

7.1.2 Payments to Other Parties

Except as otherwise expressly provided hereunder, all obligations of the CONCESSIONAIRE under this Agreement will be performed by CONCESSIONAIRE at CONCESSIONAIRE's sole cost and expense. If CONCESSIONAIRE fails to pay any sum of money owed to any party other than CITY for which CONCESSIONAIRE is liable hereunder, or if CONCESSIONAIRE fails to perform any other act on its part to be performed hereunder, and such failure continues for ten days after notice thereof by CITY, CITY may, without waiving or releasing CONCESSIONAIRE from its obligations, make any such payment or perform any such other act to be made or performed by CONCESSIONAIRE. CONCESSIONAIRE shall pay CITY, on demand, all sums so paid by CITY and all necessary incidental costs, together with interest thereon at the lesser of 1½ percent per month or the maximum rate permissible by law, from the date of such payment by CITY, provided, however, CONCESSIONAIRE shall have the right to contest any such obligation, upon such terms and conditions as the CITY may reasonably insist, in order to protect its interests herein.

7.2 Default and Termination.

This Agreement and the concession granted herein may be terminated for default as follows:

7.2.1 CITY's Default

CITY will not be in default unless CITY fails to perform an obligation within thirty (30) days after notice by CONCESSIONAIRE, which notice must specify the alleged breach; provided that if the nature of CITY's obligation is such that more than thirty (30) days are reasonably required for cure, then CITY will not be in default if CITY commences to cure within thirty (30) days of CONCESSIONAIRE's notice and thereafter diligently pursues completion and completes performance within a reasonable time.

7.2.2 CONCESSIONAIRE's Default

The occurrence of any one or more of the following events constitutes a default under this Agreement by CONCESSIONAIRE: (1) CONCESSIONAIRE shall be in default of the performance of any covenants, conditions, or provisions of this Agreement, other than the covenants for the payment of consideration required by this Agreement, where such failure continues for a period of thirty (30) days after written notice is given by CITY provided that if the nature of CONCESSIONAIRE's obligations is such that more than thirty (30) days are reasonably required for cure, CONCESSIONAIRE will not be in default if CONCESSIONAIRE commences to cure within thirty (30) days of CITY's notice and thereafter diligently pursues completion and completes performance within a reasonable time; or (2) CONCESSIONAIRE shall be adjudged a bankrupt, make a general assignment for the benefit of creditors, or take the benefit of any insolvency act, or if a permanent receiver and trustee in bankruptcy shall be appointed for CONCESSIONAIRE's estate and such appointment is not vacated within thirty (30) days; or (3) Premises become vacant or deserted for a period of thirty (30) days; or (4) if this Agreement shall be assigned or the Premises concessioned other than in accordance with the terms of this AGREEMENT and such default is not cured within twenty (20) days after written notice to CONCESSIONAIRE; or (5) CONCESSIONAIRE shall fail to make any payment when due, or fail to make any other payment required hereunder when due, when that failure is not cured within thirty (30) days after mailing of written notice thereof by CITY; or (6) CONCESSIONAIRE shall fail to comply with the same concession agreement term or covenant on three occasions during any 10 year term, even if such breach is cured within the applicable cure period. The CITY's right to terminate pursuant to this Article for failure of CONCESSIONAIRE to cure a default is subject to the lender's right to cure pursuant to Articles 6.5.2 and 6.5.3.

7.2.3 Default for Other Cause

Subject to lender's interest(s) as provided in Article 6, this Agreement may be immediately terminated for other cause by a party if the other party substantially fails to perform its obligations under this Agreement, through no fault of the terminating party, and the non-performing party does not commence correction of the failure of performance within thirty (30) days of the terminating party's sending notice to the non-performing party.

7.2.4 Bankruptcy

Subject to lender's interest(s) as provided in Article 6, the Parties agree that if the CONCESSIONAIRE is adjudged bankrupt, either voluntarily or involuntarily, then this AGREEMENT, at the option of the CITY, may be terminated effective on the day and at the time the bankruptcy petition is filed.

7.3 Remedies Are Cumulative

Remedies under this Agreement are cumulative; the failure to exercise on any occasion any right shall not operate to forfeit such remedy.

7.4 Destruction of Premises & Use of Insurance Proceeds

Unless otherwise mutually agreed by the Parties, in the event the Improvements on the Premises are destroyed or injured by fire, earthquake, or other casualty, then CONCESSIONAIRE shall proceed to rebuild and restore the Improvements, or such part thereof as may be injured as aforesaid. In the event of any loss covered by the insurance policies described and required pursuant to Article 8.5.1 herein, unless this Agreement shall be terminated as provided herein, the proceeds of such insurance policies shall be used by CONCESSIONAIRE first to rebuild and restore the Premises and replace the improvements which may be damaged or destroyed by such casualty.

7.5 Duties upon Termination

Upon termination of this agreement, and unless otherwise arranged, CONCESSIONAIRE shall remove from the Eastpark all its personal property, goods, and effects. In the event that the CONCESSIONAIRE fails to perform this duty at termination, the CITY may cause such removal to be made and said personal property, goods, and effects to be stored, the cost and expense to be paid by the CONCESSIONAIRE. It is mutually understood and agreed that the real property constituting the Premises of this Agreement is the real property of the CITY and that all improvements to said real property shall revert to the CITY at the termination of this Agreement, subject to the rights of lender as provided in this Agreement in the event of termination for default.

7.6 Eminent Domain

The following rules shall govern the rights and duties of the Parties in the event of interference with the possession of the Premises by CONCESSIONAIRE by right of eminent domain or private purchase in lieu thereof.

7.6.1 Rights of Termination

If the whole of the Premises shall be taken for any public or quasi-public use under any statute or by right of eminent domain, or by private purchase in lieu thereof, then this Agreement shall automatically terminate as of the date that title shall be taken. If more than twenty-five percent (25%) of the Premises shall be so taken and if the taking renders the remainder thereof unusable for the purposes for which the Premises were concessioned, then CITY and CONCESSIONAIRE shall each have the right to terminate this Agreement on thirty (30) days notice to the other given within ninety (90) days after the date of such taking. Provided, however, that if the CITY is exercising its rights of

eminent domain, a fair value shall be placed on this Agreement as if it had not been terminated and the Premises with the compensation thereof awarded solely to CONCESSIONAIRE, or lender pursuant to its security interest, if any.

7.6.2 Non-Termination

If any part of the Premises shall be so taken and this Agreement is not terminated, then, if the CITY is exercising its right to eminent domain, the CITY shall, at its own cost and expense, restore the remaining portion of the Premises to the extent necessary to render it reasonably suitable for the purposes for which it was concessioned. Otherwise, the Parties shall resort and share in the compensation on the basis of their interests and losses.

7.6.3 Compensation

The compensation awarded or paid upon such a total or partial taking of the Premises and/or this Agreement shall belong to and be apportioned between the CITY and CONCESSIONAIRE in accordance with their respective interests as determined by a court of competent jurisdiction. Additionally, CONCESSIONAIRE may prosecute any claim directly against the condemning authority for the costs of removal of the goodwill, stock, trade fixtures, furniture and other personal property belonging to CONCESSIONAIRE. CITY shall have no claim to condemnation proceeds that are attributable to CONCESSIONAIRE's interest in the Collateral, nor shall CONCESSIONAIRE or lender have any interest in CITY's condemnation proceeds, if any.

ARTICLE 8. GENERAL CONDITIONS

8.1 Relationship of Parties

8.1.1 CONCESSIONAIRE Independent Contractor Status

The Parties intend that an independent relationship shall be created by this Agreement. Nothing contained herein shall create the relationship of principal and agent or of partnership or of joint venture between the parties hereto, and neither the method of computation of consideration nor any other provision contained herein shall be deemed to create any relationship between the parties hereto other than the relationship of CITY as granting a ground and use concession to the CONCESSIONAIRE. CONCESSIONAIRE has the experience, ability, and resources to develop and operate an indoor ice arena facility and is performing independent functions and responsibilities within its field of expertise. CONCESSIONAIRE and its personnel are independent contractors and not employees of the CITY. No agent, employee, servant, or representative of the CONCESSIONAIRE shall be deemed to be an employee, agent, servant or representative of the CITY. CONCESSIONAIRE and its personnel have no authority to bind the CITY or to control the CITY's employees. As an independent contractor, CONCESSIONAIRE is responsible for its own management. The CITY's administration and enforcement of this Agreement shall not be deemed an exercise of managerial control over CONCESSIONAIRE or its personnel.

8.1.2 No Third Party Rights Created

It is mutually understood and agreed that this Agreement is solely for the benefit of the Parties hereto and gives no right to any other party except as provided by Article 6 herein.

8.1.3 No Joint Venture/Partnership

It is mutually understood and agreed that no joint venture or partnership formed as a result of this Agreement.

8.1.4 City Administration of Agreement

This agreement shall be administered, on behalf of the City, by the Director of Parks and Recreation or other person designated by the Mayor.

8.2 Notices

Except as provided in Article 6 herein, any notice required or permitted hereunder must be in writing and will be effective upon the earlier of personal delivery or three days after being mailed by certified mail, return receipt requested, addressed to CONCESSIONAIRE or to CITY at the address for that party designated herein. Either party may specify a different address for notice purposes by written notice to the other, except that CITY may in any event use the Premises as CONCESSIONAIRE's address for notice purposes. Each of the below noted addressees shall be responsible for notifying the other addressees of any changes of address and all notices will be effective when delivered to the last known address provided by said addressee. All notices shall be delivered to the following addresses:

CITY

City of Bremerton
Attn: Director of Parks and Recreation
680 Lebo Boulevard
Bremerton, WA 98310

CONCESSIONAIRE

Bremerton Ice Arena, Inc.
Attn: Greg Meakin, President
P.O. Box 1044
Bremerton, WA 98337

LENDER

Charles C. Haselwood
Joanne L. Haselwood
P.O. Box 4999
Bremerton, WA 98312

With a copy to:
Gary T. Chrey
Shiers Chrey Cox Digiovanni & Zak, LLP
600 Kitsap Street, Suite 202
Port Orchard, WA 98366

8.3 Reports & Information

When requested by the CITY, CONCESSIONAIRE shall furnish periodic reports and documents on matters related to CONCESSIONAIRE's performance under this Agreement. The reports and documents shall be furnished in the time and form requested. CONCESSIONAIRE shall maintain accounting records in accordance with Generally Accepted Accounting Principles (GAAP).

8.4 Permits, Licenses, Taxes, & Fees

8.4.1 Permits, Licenses, & Other Documents

The CONCESSIONAIRE shall possess a current Bremerton Business License and shall obtain all regulatory licenses and permits, including all construction and building permits, necessary to fulfill CONCESSIONAIRE's obligations under this Agreement at CONCESSIONAIRE's sole expense. Each party agrees to execute such additional or other documents as may be required to fully implement the intent of this Agreement.

8.4.2 Taxes & Fees

As an independent contractor, the CONCESSIONAIRE shall be solely responsible for all taxes, fees and charges incurred, including but not limited to license fees, business and occupation taxes, workers' compensation and unemployment benefits, all federal, state, regional, county and local taxes and fees, including leasehold excise tax pursuant Chapter 82.29A RCW, ad valorem taxes, taxes imposed on personal property, all other assessments for improvements or benefits which are assessed on the Premises, income taxes, property taxes, permit fees, operating fees, surcharges of any kind that apply to any and all persons, facilities, property, income, equipment, materials, supplies or activities related to the CONCESSIONAIRE's use of the Premises and obligations under this Agreement.

8.5 Insurance

8.5.1 Fire, Earthquake, & Casualty Insurance

The CONCESSIONAIRE agrees that, at all times during the full term of this Agreement and at its own expense, CONCESSIONAIRE shall, at its sole cost and expense, maintain in full force and effect adequate fire, earthquake, and other casualty coverage covering the Premises and its contents, including all personal property and improvements. Such policy shall include a replacement cost endorsement. CONCESSIONAIRE will shall obtain and file with the CITY's Risk Manager a Certificate of Insurance evidencing such coverage. All such insurance coverage shall include a ten-day cancellation notice to CONCESSIONAIRE and the CITY. Adequacy of coverage is defined as insurance sufficient to restore the Premises to its pre-casualty condition.

8.5.2 Liability Insurance

Prior to the commencement date of this Agreement, CONCESSIONAIRE, at its own expense shall obtain and file with the CITY's Risk Manager a Certificate of Insurance evidencing general comprehensive liability insurance coverage ("CGL")

providing coverage of at least \$2,000,000 per occurrence for bodily injury and \$1,000,000 per occurrence for property damage. This Certificate of Insurance shall be subject to approval by the CITY's Risk Manager as to company, terms and coverage, and said approval shall not be unreasonably withheld. The CGL shall name the CITY as an additional insured and must fully protect the CITY from any and all claims and risks and losses in connection with any activities or omissions by the CONCESSIONAIRE by virtue of this Agreement. The CGL policy shall remain in full force and effect at the CONCESSIONAIRE's sole expense for liability for property damage or personal injury that may occur in connection with activities or omissions by the CONCESSIONAIRE, and provide coverage for the full term of this Agreement. CONCESSIONAIRE shall insure that the CITY's Risk Manager is given thirty-calendar days prior written notice, by certified mail, of any cancellation, lapse, reduction or modification of such insurance.

8.5.3 Release and Waiver of Subrogation

Any policy of insurance carried by either CITY or CONCESSIONAIRE pursuant to any obligation under this Agreement, shall, to the extent available, contain a waiver of subrogation clause on the part of the insurer. Such waiver shall apply to damages to adjacent property. Notwithstanding any other provision of this Agreement, neither CITY nor CONCESSIONAIRE shall be liable to the other party or to any insurance company (by subrogation or otherwise) insuring the other party for any loss or damage to any building, structure or tangible personal property of the other occurring in or about the Premises or Eastpark, even though such loss or damage might have been occasioned by the negligence of such party, its agents or employees, if such loss or damage is covered by insurance issued by an insurance carrier authorized or licensed by the Insurance Commissioner of the State of Washington to issue lines of insurance, benefiting the party suffering such loss or damage or was required under the terms of this Agreement to be covered by insurance by the party covering the loss.

8.6 Hold Harmless, Indemnification, & Industrial Insurance

8.6.1 Hold Harmless & Indemnification

Each party hereto agrees to be responsible and assumes liability for its own wrongful or negligent acts or omissions, or those of its officers, agents, or employees to the fullest extent required by law. Each party agrees to save, indemnify, defend, or hold the other party harmless against all liability, loss, damages, and expenses, including costs and attorney's fees, resulting from actions, claims and lawsuits arising or alleged to have arisen, in whole or in part, out of or in consequence of the acts or failures to act of the other party, its employees, its subcontractors, its agents, or its assigns, which arise in any way out of the performance of this Agreement. In the case of negligence of both the CITY and the CONCESSIONAIRE, any damages allowed shall be levied in proportion to the percentage of negligence attributable to each party, and each party shall have the right to seek contribution from the other party in proportion to the percentage of negligence attributable to the other party.

8.6.2 Industrial Insurance

The Parties have specifically negotiated CONCESSIONAIRE's waiver of its immunity under Title 51 RCW, which is hereby waived for purposes of CONCESSIONAIRE's indemnification and hold harmless of the CITY, including the duty to defend. This provision shall be inapplicable to the extent such action, claim, or lawsuit is judicially found to arise solely from the acts or failures to act of the CITY.

8.7 Successors & Assigns

The CITY and CONCESSIONAIRE each agree to be bound to the other party in respect to all covenants, agreements, and obligations contained in this contract. Except as provided in Article 6 herein, neither party shall assign the contract in part or as a whole, without the written consent of the other, which consent shall not be unreasonably withheld. Except as provided in Article 6 herein, the CONCESSIONAIRE shall not subcontract any of the Premises, services, facilities, or equipment, or delegate any of its duties under this Agreement without the prior written approval of the CITY, which approval shall not be unreasonably withheld. The CITY acknowledges that the CONCESSIONAIRE shall be authorized to sub-concession areas within the Premises to food and beverage purveyors, equipment sales, and similar supporting concessions as set forth in Article 4.1.3. When requested, approval by the CITY of a subcontract or assignment shall not be unreasonably withheld. In the event of an assignment, subcontracting, or delegation of duties, the CONCESSIONAIRE shall remain responsible for the full and faithful performance of this Agreement and the assignee, subcontractor, or other obligor shall also become responsible to the CITY for the satisfactory performance of the services, facilities, or equipment assumed. The CITY may condition approval upon the delivery by the assignee, subcontractor, or other obligor of its covenant to the CITY to fully and faithfully complete the requirements or responsibility undertaken under this Agreement. Notwithstanding the foregoing, provided CONCESSIONAIRE is not in default, the CONCESSIONAIRE may assign its interest in this Agreement without seeking CITY's consent to a parent or subsidiary. Except as otherwise provided herein, all of the covenants, conditions, and provisions of this Agreement are binding upon and inure to the benefit of the Parties and their respective heirs, personal representatives, successors, and assigns. IN THE EVENT THE CONCESSIONAIRE SEEKS CONSENT OF THE CITY OF AN ASSIGNMENT OF THIS AGREEMENT IN ITS ENTIRETY, SUCH ASSIGNMENT SHALL REQUIRE THE PRIOR NOTIFICATION AND REVIEW, APPROVAL OR WAIVER OF THE U.S. SECRETARY THROUGH THE NATIONAL PARK SERVICE, WHO, BY CONSENTING TO THIS AGREEMENT WAIVES THE RIGHT TO REVIEW AND CONSENT TO AN ASSIGNMENT OF THIS AGREEMENT WHICH IS LESS THAN AN ASSIGNMENT IN ITS ENTIRETY.

8.8 Compliance with Laws

The CONCESSIONAIRE, its officers, employees, and agents shall comply with applicable federal, state, county, and local laws, statutes, rules, regulations, and ordinances, in performing its obligations under this Agreement. Such compliance shall include abiding by all applicable federal, state and local policies to ensure equal employment opportunity based on ability and fitness to all persons regardless of race,

creed, color, national origin, religion, sex, physical handicaps or age. The CONCESSIONAIRE shall comply with applicable laws pertaining to employment practices and employee treatment. Conditions of the Federal Occupational Safety and Health Act of 1970 (OSHA), the Washington Industrial Safety and Health Act of 1973 (WISHA), and standards and regulations issued under these Acts must be complied with. The CONCESSIONAIRE agrees to indemnify and hold harmless the City from all damages assessed for the CONCESSIONAIRE's failure to comply with the Acts and Standards issued thereunder. The CONCESSIONAIRE is also responsible for meeting all pertinent local, state and federal health and environmental regulations and standards applying to any operation in the performance of this Agreement.

8.9 Nondiscrimination

Parties shall not discriminate in employment or services to the public on the basis of race, color, national origin, sex, religion, age, marital status, or disability, except for employment actions based on bona fide occupational qualification.

8.10 Choice of Law & Venue

This Agreement shall be interpreted according to the laws of the State of Washington. Any judicial action to resolve disputes arising out of this Agreement shall be brought in Kitsap County Superior Court.

8.11 Costs & Attorneys' Fees

In any action brought to enforce any provision of this Agreement, including actions to recover sums due or for the breach of any covenant or condition of this Agreement, or for the restitution of the Premises to the CITY or eviction of the CONCESSIONAIRE during the term or after expiration thereof, the substantially prevailing party shall be entitled to recover from the other party all reasonable costs and reasonable attorney's fees incurred, including the fees of accountants, appraisers, and other professionals, at trial or on appeal, and without resort to suit.

8.12 Modification

This Agreement may only be modified by written instrument signed by both Parties. The Director of Parks and Recreation has the authority to interpret and make minor modifications to this agreement, relative to the use or operation of the Premises, consistent with its purpose and intent. Any major modifications or modifications having a financial impact on the City shall require City Council approval. All modifications to this Agreement are subject to approval of the U.S. Secretary of Interior pursuant to Article 8.21.

8.13 Change in Law/Renegotiation

The Parties agree that changes in federal, state or local laws or regulations that materially modify the terms and conditions of the Agreement and result in a detrimental change in circumstances or a material hardship for either party in performing this Agreement may be the subject of a request by a requesting party to renegotiate this Agreement or negotiate Agreement amendments and the responding party agrees to renegotiate fairly with the requesting party.

8.14 Force Majeure

Provided that all other requirements of this Agreement are met, any party shall not be deemed to be in default and shall not be liable for failure to perform under this Agreement if that party's performance is prevented or delayed by acts of God including landslides, lightning, forest fires, storms, floods, freezing and earthquakes, civil disturbances, acts of the public enemy, wars, blockades, public riots, breakage, explosions, accident to machinery, equipment or materials, unavailability of required materials, governmental restraint or other causes, whether of the kind enumerated or otherwise, which are not reasonably within the control of that obligated party ("Force Majeure"). If as a result of a Force Majeure event, an obligated party is unable wholly or partially to meet its obligations under this Agreement, it shall give the other party promptly written notice of the Force Majeure event, describing it in reasonable detail. The obligated party's obligations under this Agreement shall be suspended, but only with respect to the particular component of obligations affected by the Force Majeure and only for the period during which the Force Majeure exists.

8.15 Waiver

Failure to enforce any provision of this Agreement shall not be deemed a waiver of that provision. No waiver of any right or obligation of either party hereto shall be effective unless in writing, specifying such waiver, executed by the party against whom such waiver is sought to be enforced. Waiver of any right or power arising out of this Agreement shall not be deemed waiver of any other right or power.

8.16 Illegal Provisions - Severability

Should any part of this Agreement be found void, illegal, or unenforceable, the balance of the Agreement shall remain in full force and effect.

8.17 Article Headings, Gender, & Number

Article paragraph headings are not to be construed as binding provisions of this concession; they are for the convenience of the Parties only. The masculine, feminine, singular and plural of any word or words shall be deemed to include and refer to the gender and number appropriate in the context.

8.18 Entire Agreement

This Agreement and its Exhibits constitutes the entire agreement between the Parties, and the Parties acknowledge that there are no other agreements, written or oral, that have not been set forth in the text of this Agreement.

8.19 Counterparts

This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

8.20 Recording

Upon the execution of this Agreement the CITY will cause a memorandum of this Agreement to be recorded with the land use records of Kitsap County, Washington.

8.21 Approval of Agreement

This Agreement is subject to the approval of the U.S. Secretary of the Interior pursuant to the Quitclaim Deed transferring title to the CITY to the real property upon which this concession is granted.

8.22 Duplicate Originals

This document is executed in duplicate original.

IN WITNESS WHEREOF, this Agreement has been entered into between the City of Bremerton and Bremerton Ice Arena, Inc. as of the 9th day of August, 2002.

BREMERTON ICE ARENA, INC.

a Washington Corporation

By: _____

Greg Meakin, President

CITY OF BREMERTON

a Washington municipal corporation

By: _____

Cary Bozeman, Mayor

APPROVED AS TO FORM:

Rogers Lubovich, City Attorney

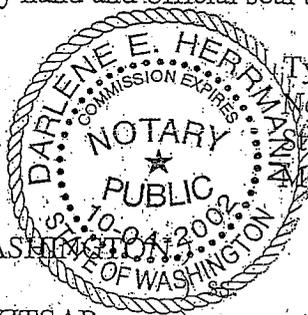
LIST OF EXHIBITS

- Exhibit A – Legal Description of Premises
- Exhibit B – Preliminary Building and Site Plans
- Exhibit C – Appraisal and Compensation Information
- Exhibit D – Quit Claim Deed from United States of America to the City of Bremerton

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I certify that I know or have satisfactory evidence that Cary Bozeman is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Mayor of the CITY OF BREMERTON to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Given under my hand and official seal this 9th day of August, 2002.

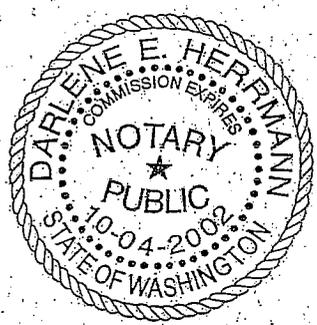


Type/Print Name Darlene E Herrmann
Notary Public in and for the
State of Washington residing at Bremerton
My Commission expires 10/4/02

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

On this 9th day of August, 2002, before me personally appeared Greg Meakin, to me known to be the President of BREMERTON ICE ARENA, INC. a Washington corporation, that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute and in fact executed said instrument on behalf of the corporation.

Given under my hand and official seal this 9th day of August, 2002.



Type/Print Name Darlene E Herrmann
Notary Public in and for the
State of Washington residing at Bremerton
My Commission expires 10/04/02

APPENDIX A-3

RV Associates, Inc. Amended Answer, Counterclaim and Cross-Claim

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5
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 FOR KITSAP COUNTY

8 **CHARLES C. HASELWOOD and JOANNE L.**
9 **HASELWOOD**, husband and wife;

10 Plaintiffs,

11 vs.

12 **BREMERTON ICE ARENA, INC.**, a
13 Washington corporation; **GREGORY S. MEAKIN**
14 and **DEBORAH A. MEAKIN**, husband and wife;
15 **RV ASSOCIATES, INC.**, a Washington
16 corporation; **STIRNCO STEEL STRUCTURES,**
17 **INC.**, a Washington corporation, **CITY OF**
18 **BREMERTON**, a Municipal Corporation
19 Defendants.

NO. 03-2-02825-0

(PROPOSED)

DEFENDANT RV ASSOCIATES,
INC. AMENDED ANSWER,
COUNTERCLAIM AND CROSS-
CLAIM

20 **FOR THEIR ANSWER** to Plaintiffs' Complaint, Defendant RV ASSOCIATES,
21 INC. (hereinafter "RV") alleges as follows:

- 22 1. RV admits the allegations contained in paragraphs 1.4 of Plaintiffs' complaint.
- 23 2. As to paragraphs 1.1, 1.2, 1.3, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13,
24 1.14, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17, 3.18,
25 4.1, 4.2, 4.4, 4.5, 4.6, 4.8, RV has insufficient knowledge and information upon which to
26 form an answer and therefore, denies the same.
- 27

1 1.6 Commencing on the 1st day of September, 2002 and ending on the 27th day
2 of May, 2003, Defendant RV Associates, Inc., at the request of the Defendants Bremerton Ice
3 Arena and Meakin, performed labor, furnished material and/or rented, leased or otherwise
4 supplied equipment generally consisting of construction of structures in accordance with the
5 Plans, Specifications, and Requirements as indicated on the attached Private Works Contract
6 between Plaintiff RV Associates, Inc. and Defendants Bremerton Ice Arena and Meakin,
7 dated August 17, 2002. A copy of the Private Works Contract is attached as **Exhibit "B"**
8 incorporated herein by reference.
9

10 1.7 Pursuant to said contract, provided in part that, "Owner shall secure financing
11 for this project through a reputable financial institution for the total cost of the project and
12 provide RV Associates, Inc. with a bank guarantee covering work covered by this contract."
13 Defendants Bremerton Ice Arena and Meakin obtained financing through Plaintiffs.
14

15 1.8 As a result of obtaining financing from Plaintiffs, Defendants Bremerton Ice
16 Arena and Meakin received a letter dated October 14, 2002, signed by Chuck Haselwood and
17 Joanne Haselwood and entitled "Strictly Confidential". (Exhibit "C"). Said letter, either in
18 good faith or fraudulently, caused RV Associates, Inc. to begin construction and perform its
19 obligations under the terms of the contract with Bremerton Ice Arena, Inc.
20

21 1.9 As a direct and proximate result of receipt of a copy of Exhibit C, RV
22 Associates, Inc. began and completed its obligation under the contract with Bremerton Ice
23 Arena relying upon the assurance by Plaintiffs that RV Associates would be paid for its
24 materials and services provided.
25

26 1.10 Plaintiffs promised RV that "the construction/funding draw process is being
27 audited and monitored by Mr. Miles Yanick, AIA certified architect, Miles Yanick and

1 Company, Bainbridge Island, Washington". In fact, information provided to RV Associates,
2 Inc. is that Miles Yanick was never requested to, and never provided any auditing of the
3 construction funding draw process during construction and provided no monitoring thereof.

4 1.11 Upon the assurances and representations contained in Exhibit C, Defendant
5 RV Associates, Inc., in good faith, relied to its detriment to undertake its obligations under
6 the contract in assurances that payment would be forthcoming.

7
8 1.12 Defendants Bremerton Ice Arena and Meakin promised and agreed to pay RV
9 Associates, Inc. pursuant to the Private Works Contract (Exhibit "B"). Plaintiff RV
10 Associates, Inc. was to be paid Four Hundred Forty One Thousand, Seven Hundred Sixteen
11 & 00/100 Dollars (\$441,716.00) as the base bid in conformity with the bid schedule for the
12 total amount bid, as particularly provided in said agreement (Exhibit "B"). Bremerton Ice
13 Arena and Meakin have failed to pay in accordance with the Private Works Contract.
14

15 1.13 There is due and unpaid on the Private Works Contract as of the date of this
16 Answer the principal balance of One Hundred One Thousand Nine Hundred Five & 30/100
17 (\$101,905.30), plus interest accrued thereon at the rate of eighteen percent interest (18%) as
18 provided in the Private Works Contract, from May 27, 2003.

19
20 1.14 The terms of the Private Works Contract provide that "[i]n the event of non-
21 payment the owner shall bare [sp] the expense for collection costs." See Exhibit "B." There
22 shall be included in collection costs in the judgment a reasonable sum for attorney's fees,
23 together with the costs.

24
25 1.15 Plaintiffs claim some right, title or interest in the property described on
26 **Exhibit "A"** incorporated herein by reference, as a result of certain instruments identified in
27 Plaintiffs' Complaint for Foreclosure in paragraphs 3.1, 3.2, 3.3, and 3.4.

1 1.16 As a consequence of failure of Bremerton Ice Arena to pay the balance owing,
2 RV was required to record a Claim of Lien against the Property described on Exhibit "C."
3 Said Claim of Lien was recorded under Auditor's File No. 200307160120 on 07/16/2003. A
4 copy of RV's Claim of Lien is attached as **Exhibit "D"** incorporated herein by reference.

5
6 1.17 Defendant RV's Claim of Lien is superior to all other claims and liens on the
7 Property legally described on Exhibit "A."

8 1.18 Pursuant to RCW 60.04.061, RV's Claim of Lien "shall be prior to any lien,
9 mortgage, deed of trust, or other encumbrance which attached to the land after or was
10 unrecorded at the time of commencement of labor or professional services or first delivery of
11 materials or equipment by the lien claimant." RCW 60.04.061. RV's Claim of Lien relates
12 back to the first day work was performed by RV or September 1, 2002. Therefore,
13 Haselwoods claim as a result of those instruments identified in Paragraph 2.4 of this Answer
14 are dated and effective subsequent to the effective date of RV's Claim of Lien. Said claim of
15 Plaintiffs Haselwood are junior and inferior to that of RV's Claim which is first and
16 paramount.
17

18
19 1.19 Defendant RV Associates, Inc. has performed and completed the labor,
20 furnished the material and/or leased or otherwise supplied the equipment as required by said
21 agreement, but there still remains One Hundred One Thousand Nine Hundred Five & 30/100
22 (\$101,905.30) due and unpaid to RV Associates, Inc., for which Defendants Bremerton Ice
23 Arena and Meakin are liable to RV, together with interest accruing thereon from May 27,
24 2002 until fully paid at the rate of twelve percent (12%) per annum.
25
26
27

1 1.20 Although Defendant RV Associates, Inc. has demanded payment from
2 Defendant Bremerton Ice Arena, Inc., Meakin and from Plaintiff Haselwood for payment of
3 the same, payment has been refused and is not forthcoming.

4 1.21 On the 14th day of July, 2003, Defendant RV's Claim of Lien was duly
5 executed and acknowledged pursuant to RCW 60.04.060 and filed on July 16, 2003 with the
6 Kitsap County Auditor, which was and is now duly recorded under Auditor's File No.
7 200307160120. RV thereby claimed a lien on the real property for performing labor,
8 furnishing material and/or renting, leasing or otherwise supplying equipment as hereinbefore
9 alleged in the amount of One Hundred One Thousand Nine Hundred Five & 30/100
10 (\$101,905.30) plus attorneys fees and interest..

11 1.22 Said Claim of Lien, a copy of which is attached hereto as Exhibit "D," was
12 filed within fifty (50) days from the last day on which Plaintiff performed labor, furnished
13 material and/or rented, leased or otherwise supplied equipment for use on the real property.
14

15 1.23 RV thereby acquired and has a lien for One Hundred One Thousand Nine
16 Hundred Five & 30/100 (\$101,905.30) together with interest accrued thereon and attorneys
17 fees pursuant to Chapter 60.04 RCW on the real property and on all the improvements
18 thereon. Said lien is the first and paramount lien on the real property, and the interest, liens
19 and encumbrances of all of the other defendants and plaintiffs herein to the real property are
20 secondary and inferior thereto.
21

22 1.24 Plaintiffs Haselwood claim some right, title or interest in the property
23 described on **Exhibit "A"** incorporated herein by reference, as a result of certain instruments
24 identified in Plaintiffs' Complaint for Foreclosure in paragraphs 3.1, 3.2, 3.3, and 3.4. Said
25 claims of Haselwood are junior and inferior to that of RV, which is first and paramount.
26
27

1 1.25 Defendant RV has and will incur attorney fees in connection with the
2 enforcement of its lien, for which it is entitled to recover herein pursuant to RCW 60.04.130.

3 2. CLAIMS AGAINST PLAINTIFFS

4 2.1 **Breach of Contract & Promissory Estoppel.** The actions of the
5 Plaintiffs, by executing and causing to be delivered the letter (Exhibit "C") created a contract
6 and promise which Haselwood knew or reasonably expect would induce action on the part of
7 RV to perform its obligations under the terms of the Contract, and said promise and
8 inducement did, in fact, cause RV to act to its detriment in completing its obligations under
9 the terms of the contract, and injustice can only be avoided by enforcement of the promise
10 provided therein under contract law and the equitable theory of Promissory Estoppel.
11

12 2.2 **Negligence.** The Plaintiffs, by their failure to provide oversight to their loan
13 to Bremerton Ice Arena, Inc., for the construction of the said building, and their failure to
14 ensure that the construction/funding draw process was, in fact, being audited and monitored
15 by Miles Yanick, and AIA Certified Architect, as provided for in their letter (Exhibit 1),
16 constitutes negligence on the part of the Plaintiffs, resulting in the direct and proximate cause
17 of the damages owed to RV.
18

19 2.3 **Unjust Enrichment.** The actions of the Plaintiffs, as set forth hereinabove,
20 will result in their being unjustly enriched should they succeed in their foreclosure action
21 against Bremerton Ice Arena, Inc., as RV provided, at the inducement of Haselwoods, the
22 building which houses the Bremerton Ice Arena, and for which RV has not been paid.
23

24 2.4 **Fraudulent Inducement.** Haselwoods contend that they never intended to
25 be responsible for, or see to the fact that RV would be paid for its materials and labor
26 provided under contract with Bremerton Ice Arena, Inc., then the act of creating and allowing
27

1 Exhibit 1 to be delivered to RV would constitute a fraudulent act by the plaintiffs Haselwood,
2 and which proximately caused damages to RV as set forth hereinabove.

3 2.5 Lien Foreclosure The court should determine that the interests of Plaintiffs
4 Haselwood and Defendants are junior and subordinate to the interest of RV Associates, Inc.
5 in the property and award RV its interest and attorneys fees as part of its lien.
6

7 **3. CROSS-CLAIM AGAINST DEFENDANT STIRNCO STRUCTURES**

8 3.1 Lien Priority By way of cross claim as to Defendant; STIRNCO STEEL
9 STRUCTURES, INC., a Washington corporation; the court should determine that the
10 interests of RV Associates, Inc. in the property is senior to the interests of Plaintiffs and
11 Defendant Stirnco in this matter.
12

13 **4. CROSS-CLAIM AGAINST DEFENDANT, CITY OF BREMERTON**

14 **4.1 FIRST CAUSE OF ACTION**

15 4.1.1 Defendant City of Bremerton, ("City") entered into an agreement with
16 Bremerton Ice Arena and Haselwoods for construction of an ice arena on property owned by
17 the City of Bremerton. In consideration for construction of the ice arena, the City required
18 that the improvements to be constructed become the property of the City.
19

20 4.1.2 The City violated RCW 60.28 (Public Works Retainage Statute) and RCW
21 39.08 when it failed to require Bremerton Ice Arena and Haselwoods to provide a bond and
22 other sufficient surety guarantying payment to RV. The City also violated the retaining
23 statute by failing to require that Bremerton Ice Arena and Haselwoods maintain a retainage
24 account for the benefit of RV Associates, Inc. and others.
25

26 4.1.3 Bremerton Ice Arena is insolvent and has defaulted on its loan with Plaintiffs
27 Haselwood. Because the City violated the above referenced statutes by not requiring

1 Bremerton Ice Arena to provide adequate surety to ensure that RV Associates, Inc. and other
2 contractors were paid, RV Associates, Inc. is without a remedy. RV Associates, Inc. has
3 been unable to foreclose on its lien as this property is owned by the City of Bremerton. The
4 purpose of the Public Works Retainage Statute and the Public Works Bonding Statute is to
5 provide a payment mechanism for contractors doing work on public property.
6

7 4.1.4 RV Associates, Inc. is owed monies for work performed on this project which
8 monies are liquidated. In addition, RV Associates, Inc. is entitled to prejudgment interest
9 and attorneys' fees.

10 4.2 SECOND CAUSE OF ACTION

11 4.2.1 The City and Haselwoods entered into an agreement allowing Bremerton Ice
12 Arena and Haselwoods to occupy public property for a period of years in return for building
13 improvements that ultimately would become the property of the City of Bremerton.
14

15 4.2.2 In its franchise agreement, the City required Plaintiffs and Bremerton Ice
16 Arena to keep the property free and clear of all liens. Defendant RV Associates, Inc. was a
17 third party beneficiary of this contractual provision.
18

19 4.2.3 As a result of non-payment, RV Associates, Inc. caused a lien to be filed on
20 this property. The presence of this lien and others were known to the City.
21

22 4.2.4 The City has refused to enforce its contractual provisions with Bremerton Ice
23 Arena and Haselwoods requiring that the liens be satisfied.

24 4.2.5 As a result of the City's breach of its franchise agreement for which RV
25 Associates, Inc. is a third party beneficiary, RV Associates, Inc. has not been paid for work
26 performed on the project.
27

WHEREFORE, Defendant RV Associates requests the following relief:

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1. For dismissal of Plaintiffs' complaint with prejudice.

2. For judgment on the counterclaim of RV Associates, Inc. against Plaintiffs in the amount of its lien as well as prejudgment interest and attorneys' fees.

3. For judgment against Defendant Stirnco in its cross-claim that the lien of RV Associates, Inc. is paramount and superior to that claim by Stirnco.

4. For judgment against the City based upon the City's failure to comply with the public works statutes and its failure to enforce its agreement with Plaintiffs for which RV Associates, Inc. is a third party beneficiary

5. For such other relief as the Court deems appropriate.

DATED this _____ day of March 2, 2006.

BROUGHTON & SINGLETON, INC. P.S.

WILLIAM H. BROUGHTON, WSBA #8858
Attorneys for Defendant RV Assoc., Inc. P.S.

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Co-counsel for Plaintiffs

David Horton
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Silverdale, WA 98383
Attorney for Defendant Intervenor
/City of Bremerton

DATED this 2nd day of March, 2006



Maureen E. Ahern