

No. 70663-2

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

CITY OF WOODINVILLE, a municipal corporation of the
State of Washington,

Appellant,

v.

WOODINVILLE VILLAGE PARTNERS, L.L.C., a
Washington Corporation; WOODINVILLE VILLAGE
ASSOCIATES, L.L.C., a Washington Corporation; and
THE LANZ FIRM, P.S., a Washington Corporation,

Respondents.

OPENING BRIEF

Greg A. Rubstello, WSBA #6271
Michael G. Wickstead, WSBA #5402
Kristin N. Eick, WSBA #40794
Attorneys for Appellant
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Tel: 206.447.7000/Fax: 206.447.0215

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A. INTRODUCTION

This case presents the court with opportunity to consider development agreements under Chapter 36.70B RCW.¹ This litigation arises out of the Developer's breach of the mitigation requirements of a statutory development agreement and the threatened foreclosure by the successor in interest to the deed of trust ("FBDOT") securing the interest of the Developer's original construction lender, Frontier Bank. The Developer is Woodinville Village Associates, L.L.C., referenced herein as "WVA." Following the breach, the successor in interest to the Developer's lender, Woodinville Village Partners, L.L.C., referenced herein as "WVP," has refused to recognize the priority of the City's lien to enforce the mitigation obligation over the lender's lien to enforce its deed of trust. The City seeks through this appeal to have this court recognize that the traffic mitigation obligation included in a statutory Development Agreement has priority as a lien over the lender's deed of trust and survives foreclosure of the lender's deed of trust. The Development Agreement was recorded prior to the recording of the FBDOT, and made complete by a subsequent written document, the TRIP Agreement,

¹ The absence of case law interpreting and applying the statutory Development Agreement was recently recognized by the Washington Supreme Court in *Cedar River Water & Sewer Dist. v. King County*, No. 86293-1, 2013 WL 5760654 (Wash. Ct. App. Oct. 24, 2013), *Slip Opinion* at 17.
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required as mitigation in the Development Agreement. The purpose and design of the TRIP Agreement was only to make the transportation mitigation provision of the Development Agreement specific and to implement the transportation mitigation requirement.

The agreement on TRIP Agreement terms was reached between the City and WVA (same parties to the Development Agreement) at approximately the same time as the recording of the Development Agreement, and relates to the same subject matter as the Development Agreement. By explicit reference to the TRIP Agreement in the Development Agreement, the TRIP Agreement was incorporated by its reference into the Development Agreement. Just as in the case recently decided by the state's highest court, *Cedar River Water & Sewer Dist. v. King County*, supra (F.N. 1), the parties to the Development Agreement for the Woodinville Village property intended the Development Agreement and the TRIP Agreement to be integrated as one enforceable development agreement. By statute and well developed case-law, the lender had constructive notice of the transportation mitigation obligation in the Development Agreement when lending money to WVA and recording the FBDOT. The FBDOT was recorded after the time of recording the Development Agreement and prior to agreement between the City and WVA on the language of the TRIP Agreement.

By entering into a statutory Development Agreement in accordance with Chapter 36.70B RCW, WVA obligated itself and its successors in interest in the Woodinville Village Property to mitigate transportation impacts of the proposed Woodinville Village property development by entering into a traffic mitigation agreement coordinating the City's TRIP roadway project with WVA's statutory and municipal code requirements for street and frontage improvement obligations. The TRIP Agreement was then reached between the City and WVA as soon as missing information concerning state grant funding applied for by the City and WVA for the TRIP project, unavailable at the time the Development Agreement was approved by the City and WVA.

Frontier Bank, the original lender, after making its loan, signed off on the 1st and 2nd Amended Binding Site Plans ("the BSPs") for the Woodinville Village property. The BSPs were specifically made subject to the Development Agreement. By doing so, the lender acknowledged the priority of the Development Agreement obligations and of the BSP conditions. The lender failed to exercise its due diligence and did not care to review the Development Agreement before agreeing to the construction loan to WVA and before signing the BSPs. However, whether or not the bank official approving the loan and signing the BSPs read them or not is

not significant to the fact of the lender's constructive knowledge in this *race notice* state.

A purchaser at a non-judicial foreclosure sale is a successor in interest to the property owner under Washington case law. Such purchaser takes the property subject to the obligations of the debtor and all real property encumbrances existing at the time the deed of trust being foreclosed is entered into by the debtor and recorded. Washington statutes require the obligations set forth in a development agreement and binding site plan to pass to successors in interest.

The obligations created by the Development Agreement are covenants running with the land as stated in the Development Agreement. The construction of the TRIP roundabouts benefited the land by making it developable and attractive to retailers. WVP also acknowledged the benefit to the land in the deposition testimony of its representative Walter Scott, who testified that the TRIP improvements were considered in determining the value of the property prior to the making of the WVP purchase offer for the FBDOT from Union Bank (successor to the original lender, Frontier Bank). WVP or other successor in interest would be unjustly enriched if it were to have lien priority over WVA's transportation mitigation obligation and thereby avoid payment for the frontage improvements for the Woodinville Village property constructed

by the City. The TRIP project and construction by the City of frontage improvements that were the obligation of the developer have added value to the Woodinville Village property. If the FBDOT lien is deemed junior to the TRIP funding obligation, there is no prejudice to WVP, who purchased the FBDOT with full knowledge of the City's claims and paid a purchase price in consideration of the existence of those claims. However, for WVP or other successor in interest to the FBDOT or to the Woodinville Village property to retain the benefits of the completed traffic mitigation improvements, without payment to the City for the construction costs of those frontage improvements that were the responsibility of the Developer, would be unjust.

WVP also made a deliberate choice to release MJR and WVA owner Michael Raskin from his personal guarantee of payment of the WVA loan (secured by the FBDOT), thereby prejudicing the City's right of subrogation as a subsequent owner of portions of the Woodinville Village property, or as if it were the junior lien holder. Washington law strictly protects the subrogation rights of subsequent property owners and of junior lien holders and, as a result, the FBDOT should be subordinated to the City's judgment lien secured in King Co. Case No. 10-2-13306, if indeed the City's lien is junior to the FBDOT.

Additionally, there are two parcels included in the Woodinville Village property BSP to which the City's judgment lien has priority over the FBOT for additional reasons. The FBDOT did not include the Pisani parcel (by later amendment of the FBDOT) until well after the property was included under the 1st Amended Development Agreement and the recorded TRIP Funding Agreement. The City's judgment lien is clearly senior to the FBDOT as to the Pisani property for that reason alone. Secondly, Frontier Bank failed to include a description of Track X (of the present Woodinville Village property) into the FBDOT. The lender had no rights to that tract to assign by assignment of the FBDOT to WVP. WVP cannot assert a lien interest in that Tract as it was never included in property described in the FBDOT.

B. ASSIGNMENTS OF ERROR

Assignments of Error

Woodinville assigns error to the trial court's:

1. Order granting WVP's motion for summary judgment for dismissal of the City's Complaint. CP 1196.
2. Orders denying Woodinville's motion for summary judgment (except as provided in paragraph 3. of the trial court's orders)

and dismissing with prejudice Woodinville's complaint for declaratory, injunctive and other equitable relief. CP 1196.

Issues Pertaining to Assignments of Error

3. Whether or not material issues of fact concerning the intent of the parties in the language of the transportation mitigation requirement in the Development Agreement, subsequently clarified and implemented by the TRIP Agreement, prevented the trial court as a matter of law from granting WVP's motion for summary judgment (CP 605) and from dismissing with prejudice the City's complaint (CP 1).

4. Whether or not the trial court was required as a matter of law to grant the City's motion for summary judgment (CP 377).

a. Whether or not the TRIP Agreement is integrated into and a part of the Development Agreement as a single agreement.

b. Whether or not the transportation improvement mitigation requirement included in the Development Agreement and clarified in the TRIP Agreement is a covenant running with land having priority over the FBDOT.

c. Whether or not WVP or any successor in interest to the Woodinville Village property by foreclosure of the FBDOT would be unjustly enriched if allowed to acquire the property without payment to the City for the costs of the frontage improvements the responsibility of

WVA by city code, but fully constructed by the City at a cost quantified in the judgment awarded the City in King County Case No. 10-2-13306.

d. Whether or not the release by WVP of WVA owner Michael Raskin from his personal guarantee of payment of the loan secured by the FBDOT, prejudiced the City and requires subordination of the FBDOT lien to the City’s judgment lien as a matter of equity.

e. Whether or not the City’s Judgment lien has priority over the FBDOT with respect to the Pisani parcel and free of that lien as to the Tract X parcel regardless of the merits of the City’s claim as to lien priority on the remainder of the Woodinville Village property.

C. STATEMENT OF THE CASE

A timeline supported by the references to the record made below is included in the following chart:

December 22, 2005	Dev. Agreement and Initial BSP Recorded
December 29, 2005	Frontier Bank Records Initial Construction Deed of Trust (“FBDOT”)
February, 2006	Approval of the final terms of the TRIP Agreement by WVA and the City
July 27, 2006	City issues Permit No. SDL05021 for Site Development of Woodinville Village Property (additional permits for site development, right-of-way; and building issued in 2007, 2008 and 2009)
March 7, 2007	1st Amended BSP Recorded, signed by Raskin for WVA and Mary Jobe on behalf of Frontier Bank
September 21, 2007	Modification of Deed of Trust recorded by Bank, representing increase of \$4,000,000 in loan amount

	to \$19,700,000.
October 4, 2007	Recording of TRIP Agreement and 1st Amendment of Dev. Agreement adding Pisani Property, Redwood Apts. and Former Tract X.
February 28, 2008	Modification of Deed of Trust Recorded, adding Pisani Property, (but not the Redwood Apts. or Former Tract X)
November 11, 2008	Recording of 2nd Amended BSP signed by McClure for WVA and David Dorsey on behalf of Frontier Bank
2009	City begins construction of TRIP Project after billing WVA for its share of the costs based on the bid award from the project contractor.
2010	City completes TRIP construction; WVA unsuccessfully sues over amount of frontage improvement billing; City sues WVA and obtains judgment for amount of frontage improvement billing; and subsequently the Trustee of FBDOT gives notice of intention to non-judicially foreclose the FBDOT for benefit of Union Bank
2011	City files this action
2012	In Sept. Union Bank enters into a Loan Purchase and Sale Agreement to sell its interest in FBDOT and Note to TAE Real Estate Holdings, LLC (TAE). On Oct. 2nd, TAE executes Release of Raskin's Guaranty of that Note. On Oct. 4, TAE assigned its interest under the Loan PSA to WVP. On Oct. 10, Union Bank executed an Endorsement of the Note, assigning it to TAE and executed an Assignment of Deed of Trust, assigning the Bank's interest in the FBDOT to WVP.

Introductory Facts

1. Michael J. Raskin is the member/owner of Michael J. Raskin Development, LLC, doing business as MJR Development ("MJR").(CP 415)

2. In 2004 MJR approached the City with interest in developing an 18 acre site in the City's Tourist District with a mixed use village with retail, wineries, tasting rooms, hotel, and residential development ("Woodinville Village"). **(CP 415)**

3. The proposed development would not be possible without amendment of the City's zoning code to allow the residential development in the Tourist District and without a traffic fix at the intersection of Highway 202 and Northeast 145th street to accommodate the projected increase in traffic from the project and make the development attractive to commercial and residential purchasers following site development by MJR **(CP 417, 419)**; and testimony of Michael Raskin's Partner Mike McClure at August 6, 2005 Public Hearing before the Woodinville City Council set forth in the Transcription **(CP 505-506)**.

4. The City Council, on Dec. 14, 2005, approved a zoning amendment allowing for residential development in the Tourist District, provided there was a development agreement between the city and any developer wanting to develop the site. **(CP 417)**

5. The traffic fix at the intersection of Highway 202 and Northeast 145th street identified by MJR and the City's Director of Public Works was a three roundabout system consisting of a central roundabout at the intersection and two smaller roundabouts at the proposed street entrances

to the Woodinville Village (“the TRIP”, which is short for Tourist District Roundabout Improvement Project). (CP 419-420)

TRIP Funding Partnership Between Woodinville and MJR

6. The City and MJR entered into a mutually beneficial working “partnership” for the funding of the design and construction of the TRIP in 2005. (CP 420-421 and CP 18-114)

7. The City and MJR sought a major funding contribution for the TRIP from the Washington State Transportation Improvement Board (“the TIB”) through its’ transportation partnership program. MJR provided a funding commitment letter which was included in the grant application in March, 2005. (CP 421-422 and CP 207-216)

8. While MJR and the City worked in partnership to secure the necessary funding and approval by the Washington State Department of Transportation (“the WSDOT) of a design for the TRIP, MJR and the City also worked to negotiate a Development Agreement that would require and reference a supplemental agreement that would coordinate the timing of the TRIP project with required frontage improvements by the developer. (CP 423)

Development Agreement

9. The Woodinville City Council considered the Development Agreement at its meetings on August 8 and August 29, 2005.

Transcriptions of the audio recordings of those meetings are attached to the Declaration of Rubstello. **(CP 404-604)** At the August 8 council meeting, Woodinville Public Works Director Monken discussed the traffic issues and the partnership with MJR to fund the TRIP. He testified that because it was still unknown what traffic solution (roundabout design) the WSDOT would approve and whether or not the TIB grant application would be approved for funding, subsection 9.1 of the draft development agreement provided that a supplemental funding agreement would be entered into at a later time. See pages 6-11 of the August 8, 2005 City Council meeting Transcription **(CP 494-499)**

10. Michael Raskin and his “partner” Mike McClure testified at the August 8 public hearing on behalf of MJR. McClure addressed the 3 roundabout traffic solution in his testimony. He described the necessity to improve a traffic situation that he described as “a challenge” to selling the Woodinville Village to retailers and of MJR’s participation in the TIB grant application with the City. **(CP 505-506)**

11. At the meeting on August 29, 2005, the funding of the TRIP was a major concern of the City Council, especially if the TIB grant was not approved. The council expected that MJR and not just the City be “on the hook” for the funding. During a hearing recess new language for subsection 9.1.2 of the draft development agreement was negotiated

changing the language from an agreement to “agree” to an agreement to “execute an agreement”. With this amendment, the City Council approved Resolution No. 302, a resolution approving the Development Agreement. (CP 513-527)

The Development Agreement and TRIP

12. The transportation mitigation provision of the Development Agreement (CP 18-114) between the City and MJR specifically states the Developer’s transportation mitigation obligations in relationship to the City’s TRIP project:

9.1.2 TRIP. The City and the Developer **shall execute** an agreement to coordinate their work on TRIP, City roads (NE 142nd Street), and interior streets (primary and secondary access roads within the Project) connected to WSDOT facilities in order to assure the timely completion of the improvements needed to serve the Project and to mitigate its traffic impacts. (bold emphasis added)

13. The following provisions of the Development Agreement relate to successors in interest, and the parties’ intention that all obligations therein be covenants running with the land:

5.3 Binding Agreement. The Developer and the City, and their successors and assigns, shall be bound by and shall comply

with the terms and conditions of this Development Agreement.

17.1 Authority to Transfer. Developer's right to sell, transfer, **mortgage**, hypothecate, convey or take similar action regarding the title to or financing for the Property shall not be infringed by the Agreement, **but any such transfer shall be subject to the terms and conditions, rights and obligations of this Development Agreement and all attachments thereto.** (bold emphasis added)

17.2 Obligation of Successors. This Development Agreement together with all attachments thereto, shall be binding on all subsequent purchasers, lessees, or lessors, and transferors of every nature.

22.6 Covenant Running with Land. This Development Agreement and its component elements shall be covenants running with the land, and shall be binding on the parties and their successors and assigns, and on all subsequent purchasers, lessees or lessors, and transferors of every nature as set forth herein.

14. After execution by the City and MJR, the Development Agreement was recorded along with the Binding Site Plan ("BSP") (signed by property owners and the City) for the Woodinville Village Property on December 22, 2005. See Declaration of Rubstello. (CP 18-114)

Binding Site Plan ("BSP")

15. The BSP (Exhibit B to the Complaint at CP 1-301) was signed by the then property owners Frimuth and Waterman (just prior to the sale of the property to WVA). Note 25 on the face of the BSP provides for the dedication of property by the developer to the City to accommodate construction of the roundabouts.

16. As referenced in the BSP (“Authorization”), the Director’s Decision Approving Binding Site Plan, (CP 52-86), at condition no. 20 on CP 55, contains the following language :

The City and the Developer shall execute an agreement to coordinate their work on the Tourist District Roundabout Improvement Project (TRIP, ... in order to assure the timely completion of the improvements needed to serve the Project and to mitigate its traffic impacts.

17. The BSP further provided in Note 27 that the BSP was subject to the conditions and agreements in the Woodinville Village Master Plan (CP 87-114). The Master Plan provides numerous references to the TRIP as a featured and desired element of the Woodinville Village contributing to its design and theme.

Frontier Bank Loan Approval

18. After the City Council approved the Development Agreement MJR’s Michael Raskin sought approval of a construction (site

development) loan from Frontier Bank. He submitted a loan proposal and started having “extensive conversations with the bank” in the fall of 2005. His contact at Frontier Bank was loan officer Mary Jobe. Raskin recalls that he talked with her about the overall scope of what was going on, showed her pictures and a proposed site plan, including where the roundabouts would go. Raskin does not recall whether or not he provided Jobe with a copy of the Development Agreement during this time. Raskin states:

But I doubt that I gave her copies of the development agreement along the way. And, you know, it might have been something where she was ready to fund and she said, okay, great, you get the development being recorded. And then I think she closed the loan a week later after the recording of the development agreement.

(CP 423)

19. Raskin does acknowledge that both the BSP and Development Agreement were recorded prior to the closing of the Frontier Bank loan.

(CP 424)

20. Mary Jobe (“Jobe”) was the only bank employee who looked at the Development Agreement and BSP prior to loan approval. **(CP 452)** She did not do a technical review of those documents but looked at them

to be satisfied that zoning was vested on the property and the city had signed the Agreement. **(CP 453)**

21. Despite the references in the Development Agreement to the roundabouts and TRIP, Jobe did not discuss the roundabouts with Raskin or any other representative of Woodinville Village Associates (“WVA”) prior to the closing of the Frontier Bank loan. **(CP 455)**

22. Jobe did acknowledge that if a promise was made in the Development Agreement obligating WVA to execute a TRIP Funding Agreement the bank would expect that WVA would follow through with it. **(CP 457)**

23. The FBDOT was recorded on December 29, 2005 one week after the December 22, 2005 recording of the Development Agreement and BSP. **(CP 196-205 and CP 452).**

24. The FBDOT was signed by WVA not MJR due to the assignment by MJR to WVA of MJR’s rights to purchase the Woodinville Village Property. **(CP 419)**

TRIP Funding Agreement

25. In November 2005, after approval of the Development Agreement and prior to recording the FBDOT, the TIB approved the “Partnership” category grant for \$2.1 million dollars of match grant dollars for the TRIP.

A TRIP Funding Agreement was prepared by City Staff and WVA

incorporating WVA's obligations under the city regulations to which they were vested by the Development Agreement and coordinated the timing of the construction of the WVA frontage improvement obligations with the TRIP construction. **(CP 528-578)**

26. The City Council voted to approve the TRIP Funding Agreement at its meeting of February 6, 2006. **(CP 404-406 and CP 529-537)**

27. However, for some unexplained reason, although Raskin believes he signed the TRIP Agreement on behalf of WVA in February 2006, the recorded copy did not get signed by Raskin or the City Manager and recorded until October 2007. **(CP 404-406 and CP 420).**

28. The TRIP Funding Agreement allowed WVA to construct its required frontage improvements ahead of the TRIP construction by the City, and if not, it provided that the City would construct those improvements as part of the TRIP and WVA would pay the City directly for the cost of construction of the frontage improvements. The TRIP Funding Agreement is Exhibit E to the Complaint. **(CP 438-439)** and attached hereto as Exhibit A. Specifically, the TRIP Agreement includes the following provisions:

WHEREAS, Pursuant to the Development Agreement between the Parties dated August 29, 2005 (via Resolution No. 302) and approved by the Woodinville City

Council on February 6, 2006, the City and MJR Development agreed to enter into an additional agreement regarding infrastructure and other improvements related to and adjacent to the Project which is the subject of the Development Agreement.

...

WHEREAS, the Developer has agreed to support the roundabout project, which support includes assisting in coordination with adjacent property owners, development of the private project design, coordination with the public road design, and a financial contribution; and

WHEREAS, the City has been successful in being awarded a \$2.1 million dollar Washington State Transportation Improvement Board grant for the construction of the TRIP project; and

WHEREAS, the City and developer wish to **implement a formal agreement to affirm each other's commitment** with regard to the intersection improvements. (emphasis added)

...

1.1 This TRIP Funding Agreement is made this 6th day of February, 2006 ...

...

5.0 Developer contributions and commitments.

...

5.1.2. Frontage Improvement Costs. No later than from receipt by Developer of an invoice from the City in relation to one or more specific frontage improvements, Developer shall remit to the City payment sufficient to complete such frontage improvements along SR202, including but not limited to any curb, gutter, sidewalk, landscaping and street lighting improvements required by the this TRIP Funding Agreement, the Development Agreement or applicable City regulations. The actual payment for said frontage improvement costs shall reflect actual costs for such frontage improvements, PROVIDED, that In lieu of remitting payment to the City under this subsection, Developer may in its discretion complete all required frontage improvements in accordance with the construction of any particular portion of the Project or TRIP.

...

29. WVA did not complete the required frontage improvements prior to the commencement of the TRIP Project Work by the City in 2009. **(CP 438)**

30. The City completed the TRIP improvements in the Spring of 2010. The amount owed the City by WVA for the frontage improvements was disputed by WVA, and following an administrative appeal process upholding the amount of the City's billing, WVA sought judicial review in King County Superior Court under Case No. 09-2-18636-7 SEA. The

lawsuit was dismissed and subsequent appeals by WVA were unsuccessful. (CP 406)

31. Subsequent to the dismissal of the above described lawsuit, the City commenced its own lawsuit against WVA seeking judgment for the invoiced frontage improvement costs, accrued interest, costs of suit and attorney fees as allowed by the TRIP Funding Agreement. The King County Superior Court in Case No. 10-2-13306 SEA entered judgment in favor of the City in the amounts request by the City. These judgments were then recorded on October 15, 2010. (CP 406)

32. WVA did however, pursuant to its obligations under the Development Agreement and BSP (as amended), convey to the City a number of temporary construction easements for the TRIP Project and dedicated by statutory warranty deed to the City, real property within the BSP as amended, for the TRIP as well as conveyed to the City easements for public sidewalks and other public spaces required by the Development Agreement. (CP 438-458)

1st and 2nd Amended Binding Site Plans Signed by Bank

33. As was anticipated and required by the initial BSP, a 1st Amended BSP was recorded March 7, 2007 after signature by Raskin on behalf of WVA and by Jobe for Frontier Bank. It was made explicitly subject to the conditions contained within City of Woodinville Planning Director's Final {GAR1128214.DOCX;1/00046.050047/ }

Decision Dated August 4th, 2005 (see 2.16 above). "Restrictions" listed on the BSP included:

42. SUBJECT TO RESTRICTIONS, CONDITIONS, DEDICATIONS, NOTES, EASEMENTS, AND PROVISIONS, IF ANY, AS CONTAINED AND/OR DELINEATED ON THE FACE OF THE BINDING SITE PLAN RECORDED UNDER RECORDING NUMBER 20051222002236.

44. SUBJECT TO A RESOLUTION OF THE CITY OF WOODINVILLE, WASHINGTON, APPROVING A DEVELOPMENT AGREEMENT THAT AUTHORIZES AND PERMITS THE DEVELOPMENT AND CONSTRUCTION OF THE MIXED-USE WOODINVILLE VILLAGE PROJECT, RECORDED UNDER RECORDING NUMBER 2005122202238.

The 1st Amended BSP was inadvertently omitted as an exhibit to the Complaint and is included as Exhibit A to the Declaration of Rubstello. **(CP 407-411)**

34. The 1st Amended BSP is exhibit 6 to the Deposition of Jobe. **(CP 408-411)** Jobe does not remember signing it. She signed it without reviewing it. "We rely on the customer to make sure it's accurate. Because if I'm absent, any officer of the bank can sign a plat." **(CP 458)**

35. A 2nd Amendment to the BSP was recorded November 20, 2008 incorporating all previous binding site plan conditions. **(CP 223-229)**

36. The 2nd Amended BSP added property commonly known as the “Pisani” property and to incorporate Tract X, a driveway easement, into the BSP. See Legal Description and Note 1 on page 2 of the 2nd Amendment to the BSP. **(CP 224)**

37. The 2nd Amendment was signed by a David Dorsey on behalf of Frontier Bank as well as by Michael McClure of WVA. **(CP 223)**

38. The 2nd Amended BSP states among other things that it is subject to the conditions contained within the City of Woodinville Planning Director’s Final Decision dated August 4th 2005. **(CP 223)**

39. The 2nd Amended BSP signed by Frontier Bank includes the following “Special Exception”:

29. SUBJECT TO A RESOLUTION OF THE CITY OF WOODINVILLE APPROVING A DEVELOPMENT AGREEMENT THAT AUTHORIZES AND PERMITS THE DEVELOPMENT AND CONSTRUCTION OF THE MIXED-USE WOODINVILLE VILLAGE PROJECT, RECORDED UNDER RECORDING NUMBER 2005122202238. NOT PLOTTED HEREON.

40. The 2nd Amended BSP includes notes providing for public easements and that the use and development of the property is governed

by the conditions of approval for original binding site plan. (CP 223) See Notes on page 2 of the 2nd Amendment to the BSP (CP 224)

1st Addendum to the Development Agreement

41. The Development Agreement was amended by the addition of Pisani Property and Tract X and recorded on October 4, 2007 with the TRIP Agreement. (CP 122-194)

Amended FBDOT

42. Frontier Bank recorded its MODIFICATION OF DEED OF TRUST on February 27, 2008, incorporating the Pisani Property within the legal description of the real property secured by the FBDOT. (CP 217-221)

Release of Raskin as Guarantor

43. Thomas A. Ellison is the owner of multiple corporations, including TAE Real Estate Holdings, LLC (“TAE”) and defendant Woodinville Village Partners, LLC (“WVP”). (CP 482)

44. TAE entered into a Loan Purchase and Sale Agreement with Union Bank, N.A. to acquire the bank’s interest in the FBDOT (as successor to Frontier Bank) and associated loan documents (“Sale Agreement”) (CP 257-259)

45. Prior to the closing of the sale agreement on October 10, 2012 TAE signed a “Release of Commercial Guaranty” (“Release”) dated {GAR1128214.DOCX;1/00046.050047/ }

October 4, 2012 irrevocably and unconditionally releasing Michael J. Raskin and his marital community from his personal Commercial Guaranty (“Guaranty 7935”) in which Raskin agreed to an unlimited, unconditional, and continuing guarantee of payment and performance of borrower WVA’s obligations to Frontier Bank in connection with loan secured by the FBDOT. The Release was subject only to the closing of the loan purchase by TAE. **(CP 472-473)**

46. At the time of the Release, this lawsuit was ongoing and Ellison and his representative Walter Scott were aware of the lawsuit and the claims being made by the City, including the claims that judgments due the City by WVA were prior to the Union Bank security interest under the FBDOT and that transfers of rights-of-way deeded to the City by WVA were free of the FBDOT lien. These claims were disputed by WVA and Union Bank in their Answers to the City’s Complaint. Scott stated that the City’s claims were considered in determining the amount to offer for the purchase of the Bank’s interest and FBDOT lien. **(CP 474)**

47. WVP has been substituted for Union Bank as a defendant based upon the assignment as set out in the Sale Agreement. Court records.

48. The City was unaware of the Release until after the assignment of the FBDOT was complete and recorded. The Release of Raskin by TAE/WVP from personal liability under his guaranty of the note secured

by the FBDOT was made without the City's knowledge or consent. (CP 406)

D. ARGUMENT

1. Summary Judgment.

Plaintiff City of Woodinville believes that its requested motion for summary judgment and request for declaratory relief should have been granted as there are no legally material issues of fact and the City is entitled to judgment as a matter of law. *MGIC Financial Corporation v. Briggs*, 24 Wn. App. 1, 4, 600 P.2d 573 (1979). The trial court erred in granting WVP's motion for summary judgment dismissing the City's Complaint and denying the City the relief it requested in its motion.

2. Scope of Appellate Review.

In review of an order on summary judgment this court reviews the record before the trial court de novo. As succinctly stated in *Kenney v. Read*, 100 Wn. App. 467, 997 P.2d 455 (2000):

When reviewing an order on summary judgment, this court engages in the same inquiry as the trial court. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999). 'Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, if any, show that no genuine issue of material fact exists and the moving party is

entitled to judgment as a matter of law.’ *Hollis*, 137 Wn.2d at 690; CR 56(c). The facts and all reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo.’ *Hollis*, 137 Wn.2d at 690. The moving party has the burden of establishing the absence of an issue of material fact. *SAS Am., Inc. v. Inada*, 71 Wn. App. 261, 263, 857 P.2d 1047 (1993).

3. The Development Agreement and TRIP Agreements should be read as a single agreement having the priority granted to the Development Agreement.

The TRIP Agreement was incorporated by reference into the Development Agreement at subsection 9.1.2. of the Development Agreement. Incorporation by reference does not require specific words, but only a clear reference to another document that is intended to explain the term of the original document. *Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494-495, 7 P.3d 861 (2000). By the incorporation by reference, the TRIP Agreement is to be read as part of the Development Agreement. *Cedar River Water & Sewer Dist. v. King County*, No. 86293-1, 2013 WL 5760654 (Wash. Ct. App. Oct. 24, 2013), *Slip Op.* at 20 - 21. The Supreme Court also cited with approval well established case law in Washington State for the integration of documents made part of the same transaction. See *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877, *review denied*, 86 Wn.2d {GAR1128214.DOCX;1/00046.050047/ } - 27 -

1004 (1975), also cited in *Kenney v. Read*, 100 Wn. App. 467, 475, 997 P.2d 455 (2000) where the court stated:

Neither party has placed a separately drafted suretyship agreement in the record. the only documents in the record are the letter of credit and the TBA. When several instruments are made as part of one transaction, they will be read together and construed with reference to each other. *Boyd v. Davis*, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995). This is true even when the instruments do not refer to each other and when the instruments are not executed by the same parties. *Id*; *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877, review denied, 86 Wn.2d 1004 (1975). Thus, we will look to these two documents to gain an understanding of the underlying suretyship agreement.

See also, *Miller v. Citizens Savings & Loan*, 248 Cal. App. 2d 655 (1967), where a First deed of trust on property contained subordination clause stating it would be subordinate to one or more deeds of trust to be executed in the future for the purpose of constructing improvements on lots. Several days later, developer arranged to borrow an additional sum from another group, evidenced by 18 separate promissory notes secured by a separate deed of trust on each of the 18 lots. The developer then asked the holder of the first deed of trust to execute 18 subordination agreements. Court determined that the 18 subordination agreements were

construed together with the original subordination agreement in first deed of trust and that the latter 18 documents were “treated as designed only to make the original provision specific and to implement it.” The original subordination agreement failed to specify the amount of the loans to be procured or their terms, thus the 18 agreements served the purpose of making specific what the original agreement had omitted.

Here, the recorded Development Agreement could not specify the detail of agreement in the TRIP Agreement because the parties did not know whether the TIB Grant monies would be available and in what amount. When they did, they promptly came to agreement on the language of the TRIP Agreement barely a month after recordation of the Development Agreement. The conduct of WVA and the City in reaching agreement on the TRIP Agreement in such short time and including in the TRIP Agreement language that it was made “*Pursuant to the Development Agreement*” and “*constitutes the entire understanding between the Parties regarding the subject matter*” of the TRIP Agreement, “*and no prior oral or written agreement shall be valid,*” is demonstrative of the parties intent that the TRIP Agreement be read with the Development Agreement as a single document. The language of the TRIP Agreement replaced the language of mitigation requirement 9.1.2 of the Development Agreement, which required the parties to enter into the TRIP Agreement.

Finding the intent of the parties is the key purpose of contract interpretation. As stated in *Western Washington Corporation of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. at 495:

A court's purpose in interpreting a contract is to ascertain the parties' intent. *U.S. Life Ins. Co. v. Williams*, 129 Wash.2d 565, 569, 919 P.2d 594 (1996). Washington courts use the "context rule" of interpretation. *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990). Under this rule, extrinsic evidence may be admissible to give meaning to the contract language. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695-96, 974 P.2d 836, reconsideration denied (1999) (citing *Nation-wide Mut. Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 189, 840 P.2d 851 (1992) (extrinsic evidence illuminates what was written, not what was intended to be written)). Thus, we determine intent "not only from the actual language of the agreement, but also from viewing the contract as a whole, the subject matter and objective of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. ... (citations omitted)

Here, when the extrinsic evidence presented by the City is examined, it is clear that the TRIP Agreement was intended to clarify the transportation mitigation requirement in the Development Agreement and to implement the parties' intent that the TRIP project be constructed as

soon as possible, and clarifying the obligations of the parties with respect thereto.

4. The transportation mitigation obligation created in the Development Agreement running as a covenant with the land, as clarified by the TRIP Agreement, has priority over the FBDOT and should be declared to survive a judicial or non-judicial foreclosure sale by WVP.
 - a. The obligation of WVA to pay the City for the cost of constructed frontage improvements is explicitly set forth in the Development Agreement and TRIP Agreement, to be read together as one complete document. The payment obligation, the amount of which was quantified in the superior court judgment secured by the City against WVA, is a covenant running with the land, recorded prior in time to the FBDOT, which would survive any foreclosure of the FBDOT.
 - (1) Terms of the Development Agreement are binding on successors.

As set forth above, the Development Agreement between the City and WVA specifically provided that the terms and conditions contained in that Agreement would be binding upon their successors and assigns, and constitute covenants running with the land. RCW 36.70B.190 also provides that development agreements bind all successors:

A development agreement shall be recorded with the real property records of the county in which the property is located. **During the term of the development agreement, the agreement is binding on the parties and their successors, including a city that**

assumes jurisdiction through incorporation or annexation of the area covering the property covered by the development agreement.

(Emphasis added).

The Development Agreement was specifically referenced in the BSP and the 1st and 2nd Amendments to BSP (which were each signed by Frontier Bank). RCW 58.17.035 relating to binding site plans provides, in pertinent part:

All provisions, conditions, and requirements of the binding site plan shall be legally enforceable on the purchaser or any other person acquiring a lease or other ownership interest of any lot, parcel, or tract created pursuant to the binding site plan.

Both the Development Agreement and the BSP were filed of record prior to recording of the FBDOT.

- (2) Prior recorded covenants running with the land are not extinguished by foreclosure.

Whether a lien-foreclosure sale extinguishes a servitude is normally determined by the priority of the interests, which, with a few exceptions, is established by priority in time of creation and the applicable recording act. *Restatement (Third) of Property: Servitudes* § 7.9, cmt. a, (2000). The Washington legislature by statutory enactments and the Washington courts in numerous decisions have adhered to the rule that

foreclosures do not extinguish servitudes, such as covenants, easements, or profits,² when they are recorded prior in time to a lien. For example, in *In re Foreclosure of Liens*, 117 Wn.2d 77, 91-92, 811 P.2d 945 (1991) (citing RCW 84.64.460), the Washington Supreme Court held that an easement and restrictive and affirmative covenants contained in condominium declarations are not affected by tax foreclosure sales and that the property continues to be subject to the easements and covenants. Similarly, in *Lake Arrowhead Community Club v. Looney*, 112 Wn.2d 288, 290, 770 P.2d 1046 (1989), the Washington Supreme Court held that restrictive covenants requiring landowners to pay a share of maintenance costs for neighborhood facilities survived a tax foreclosure sale, requiring the purchasers to pay for assessments that had accrued well after the tax lien was imposed. Though not in the context of foreclosure, in *Lake Limerick a Declaration of Protective Covenants and Conditions, Covenants and Restrictions* recorded by a homeowners' association requiring property owners to pay dues and assessments were considered covenants running with the land such that a subsequent purchaser was required to pay all dues assessed *prior* to his acquisition of the property. *Lake Limerick*, 120 Wn. App. at 260. Thus, it is well recognized as a

² *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004) (covenants running with the land, easements, and profits constitute types of servitudes).

corollary to the rule that a sale through nonjudicial foreclosure conveys to the purchaser the rights, title, and interests possessed by the borrower when the borrower originally executed the trustee's deed to the lender, that a purchaser at a nonjudicial foreclosure takes subject to covenants and other servitudes recorded prior in time to the deed of trust. *See Udall v. T.D. Escrow Services, Inc.*, 159 Wash.2d 903, 910, 154 P.3d 882 (2007) (citing RCW 61.24.050).

Like the covenants surviving foreclosure in the homeowners' association and condominium cases, which created ongoing obligations to pay dues benefitting the property, certain provisions of the Woodinville Village Development Agreement recorded prior in time to the FBDOT constitute covenants running with the land creating an obligation to pay for frontage improvements benefitting the WVA property. The Development Agreement together with the TRIP Agreement establish the specific obligations for timing of construction of the frontage improvements obligations of WVA and for payment by WVA to the City should the City construct the frontage improvements for the Woodinville Village property, which obligations constitute a covenant running with the land that was recorded prior in time to the FBDOT.

- (3) A purchaser at a foreclosure sale is a successor in interest to the mortgagor.

It is also of note that a purchaser at a foreclosure sale is a successor in interest. *Fidelity Mutual Savings Bank v. Mark*, 112 Wn.2d 47, 52, 767 P.2d 1382 (1989) and footnote 2: “A successor in interest may be a grantee, a trustee under the trust deed, the purchaser of the mortgagor’s interest at a receiver sale, or the purchaser at an execution sale acquiring title. 2 *Washington State Bar Ass’n, Real Property Deskbook*, Sec. 48.79, at 48-53 (2d ed. 1986).

- b. WVA’s obligation under the Development Agreement to enter into the TRIP Agreement constituted an enforceable covenant running with the land.

In *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wash. App. 66, 248 P.3d 1067 (2011), the Washington State Court of Appeals reviewed an award of damages to a developer suing for breach of a development option agreement (DOA) with the City of Kennewick. Noting that the DOA was a contract to negotiate a more specific agreement for development of a recreational vehicle park and other shoreline improvements, the court cited the decision by the Washington Supreme Court in *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wash.2d 171, 94 P.3d 945 (2004), which stated, in part:

“[o]ur holding in *Badgett [v. Sec. State Bank*, 116 Wash.2d 563, 807 P.2d 356 (1991)] supports a conclusion that, under Washington contract law, a specific course of conduct agreed upon for future negotiations is enforceable when it is contained in an existing substantive contract.” *Keystone*, 152 Wash.2d at 177, 94 P.3d 945”. See *Columbia Park Golf Course, supra.*, 106 Wn. App. at 83, FN 1.

The Court of Appeals in *Columbia Park Golf Course, id.*, concluded that the DOA had been breached and that the developer could recover damages measured by the final agreement contemplated by the parties. Here, the final agreement contemplated by the City and WVA was the TRIP Funding Agreement, which required WVA to contribute toward the cost of the planned TRIP project. The judgment later obtained by the City against WVA sets out the amount of that contribution. That obligation was in existence when the FBDOT was signed and recorded.

Thus, the obligation to enter into the TRIP Funding Agreement, as set forth and described in the Development Agreement, was a covenant running with the land recorded prior to the lien of the FBDOT. As such, that obligation, as quantified by the City’s judgment against WVA, would survive foreclosure of the FBDOT and be binding upon any purchaser at the foreclosure sale, or be binding upon WVP if it accepts a deed of the Project from WVA in lieu of foreclosure.

Having established that the Development Agreement itself is a covenant running with the land such that its obligations bind successors to a foreclosure sale, the Court should likewise conclude that WVA's TRIP obligations, including funding of frontage improvement costs, recognized in the Development Agreement and city code, clarified in the TRIP Funding Agreement and quantified in the superior court judgment, is one complete agreement, have priority over the FBDOT and would survive foreclosure by the holder of the FBDOT. RCW 61.24.050 (concerning deed of trust non-judicial foreclosure sales provides:

When delivered to the purchaser, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired. (Emphasis added).

Thus, the obligation of WVA for transportation mitigation created in the Development Agreement, required by city code, and clarified in the TRIP Agreement, is a covenant running with the land, senior to the FBDOT, and would survive foreclosure of the FBDOT and be binding upon successor property owners.

5. By signing off on the 1st and 2nd Amended BSPs, Frontier Bank recognized the priority of the obligations of WVA set forth in the Development Agreement, Conditions of

Approval and the BSP (as amended) over the FBDOT and authorized WVA to fulfill its obligations, including dedications of right-of-way and public easements to the City free of the lien from the FBDOT.

The following language is included on the face of the 1st and 2nd Amended BSPs for the Woodinville Village Property above the signatures of bank officials Mary Jobe and David Dorsey.

“DEDICATION:

KNOW ALL MEN BY THESE PRESENTS THAT WE, THE UNDERSIGNED, OWNERS OF INTEREST OF THE LAND HEREIN DESCRIBED DO HEREBY MAKE A BINDING SITE PLAN THEREOF PURSUANT TO WOODINVILLE TITLE 20A AND R.C.W. 58.17.035 AND DECLARE THIS BINDING SITE PLAN TO BE THE GRAPHIC REPRESENTATION OF SAME.

THIS BINDING SITE PLAN IS MADE WITH THE FREE CONSENT AND IN ACCORDANCE WITH THE DESIRE OF THE OWNERS OF INTEREST.”

The signatures of Jobe and Dorsey effected an amendment to the FBDOT interests taken when the FBDOT was recorded.

6. Unjust Enrichment. If as a matter of law, the FBOT lien has priority over the obligation of WVA to pay the amount of the judgment secured in King County Case No. 10-2-13306-2, equity requires that the FBDOT be subordinated, giving priority to the City’s judgment lien to avoid unjust enrichment from the value added to the Woodinville Village Property by the TRIP project improvements,

including the developer's frontage improvement responsibilities constructed by the City.

The construction of the frontage improvements, were a development obligation of WVA under City development regulations and the Development Agreement. The frontage improvements were constructed by the City however, by written agreement with WVA in the TRIP Agreement as part of the TRIP construction. It would be unjust for WVA or any successor in interest to the Woodinville Village property to keep the benefit without paying the City for the improvements. Without the traffic fix resulting from the TRIP project, no development of the Woodinville Village property could occur. The improvements made the property attractive to potential retailers and benefited the property by construction of improvements required under the City's development code for any development. Since it would be unjust to allow WVA and successors to retain these benefits without paying the City, the doctrine of unjust enrichment should be applied if the FBDOT has priority as a matter of law.

In *Town Concrete Pipe v. Redford*, 43 Wn. App. 493, 500, 717 P.2d 1384 (1986), the court held that after foreclosure a lender would be unjustly enriched if it was allowed to retain the benefits of completed construction on the property foreclosed without payment to the contractor.

In addressing the doctrine of unjust enrichment and the factual bases for determining an enrichment to be unjust, the court stated:

Irwin Concrete emphasizes that to succeed in a claim of unjust enrichment there must be facts sufficient to support a conclusion that restitution is necessary to avoid injustice. **The facts necessary to support this conclusion will necessarily vary depending upon the circumstances of each case.** (emphasis added)

If a lender forecloses on a completed project the courts are more inclined to invoke the doctrine of unjust enrichment. In *Twin City Constr. Co. v. Itt Indus. Credit Co.*, 358 N.W.2d 716 (Minn. Ct. App. 1984), after completion of the entire project, the lender refused to make final payment under a construction contract claiming that the borrower was in default. The court allowed an unpaid contractor to collect from the lender on the basis of unjust enrichment. *Twin City*, at 719; see also *Gee v. Eberle*, 279 Pa. Super. 101, 420 A.2d 1050 (1980). The underlying rationale is that in obtaining title to the completed property, the lender obtained the entire security for which he bargained. To enable him to retain this benefit without payment would, therefore, be unjust. *Morgen-oswood & Assocs. v. Continental Mortgage Investors*, 323 So. 2d 684 (Fla. Dist. Ct. App. 1975).

Here, should WVP, the lender's successor in interest, foreclose, it will obtain title to the complete property with all the security for which it bargained in making its purchase of the deed of trust. To enable WVP to

retain this benefit without payment of the judgment it was fully aware of when making its purchase would, therefore, be unjust.

In *Irwin Concrete v. Sun Coast Properties*, 33 Wn. App. 190,194, 653 P.2d 1331 (1982) where the doctrine of unjust enrichment was applied on different facts, damages were awarded to an unpaid contractor based upon contract prices:

Continental asserts that the trial court erred in awarding damages measured by contract prices, arguing that the correct measure is the value conferred. The argument is correct as far as it goes but that is not far enough, because it simply does not follow that a contract price cannot represent that value. *Bill v. Gattavarra*, 34 Wn.2d 645, 209 P.2d 457 (1949). Quantum meruit—"a reasonable amount for the work done" is the measure of recovery. *Heaton v. Imus*, 93 Wn.2d 249, 252-53, 608 P.2d 631 (1980). The only evidence presented was that of the various contract prices. It was not error, therefore, for the trial court to conclude, as it did, that the contract prices represented the value of the work in making a quantum meruit award. See *Losli v. Foster*, 37 Wn.2d 220, 222 P.2d 824 (1950).

Irwin Concrete at 195.

Here, we have a final judgment quantifying the amount owed the City by WVA for the work based upon contract prices paid by the City. The judgment represents a reasonable amount for the work done. The

judgments secured by the City in the prior litigation should have priority by application of these equitable principles if necessary to have priority over the FBDOT.

7. WVP, by releasing Michael J. Raskin's personal guarantee of the promissory note secured by the FBDOT, prejudiced the City's right of subrogation, justifying equitable relief to (i) discharge the FBDOT lien from the parcels deeded to the City, and (ii) subordinate the FBDOT lien to the City's judgment lien (if that judgment is determined to be junior to the FBDOT).

- a. Analysis.

In *MGIC Financial Corporation v. H. A. Briggs Company*, supra., the Court of Appeals reviewed the appeal by the beneficiary of a deed of trust from summary judgment in favor of property purchasers. The Court concluded that, where the former property owner (mortgagor) sold a portion of the property mortgaged to purchasers who did not assume obligations under the mortgage, those purchasers had a right to pay off the deed of trust note and be subrogated to whatever rights the senior lienor had against the mortgagor (and a guarantor). But, when the mortgagee, with notice of the purchaser's interests, released the mortgagor and guarantor from personal liability, without consent of the purchasers, there was sufficient prejudice to equitable rights of the purchasers (loss of subrogation rights) to justify ordering discharge of the lien against their property. The Court further determined such relief was warranted even in

face of the fact that such purchasers would have been subrogated to nothing more than the dubious right to seek personal judgments against a bankrupt mortgagor and bankrupt guarantor.

The Court in *MGIC* stated:

[I]n simplest terms the principle is that courts must protect subrogation rights of junior interest holders against prejudicial acts by senior interest holders. (numerous case citations from other jurisdictions omitted) (*supra*, 600 P.2d, at 576).

The Court in *MGIC* further stated:

Subrogation is an equity extending to parties who, although not personally bound to pay a debt, are compelled to do so in order to protect their property interest. (citations omitted) Subrogation entitles the party paying the debt to all of the rights, priorities, liens and securities which the senior mortgagee had against the mortgagor. (*supra*, 600 P.2d, at 576).

The Court went on to conclude that, where the subsequent purchasers of a portion of the subject property were deprived of their right to pay off the senior debt and to pursue the senior creditor's rights of action against the mortgagor and guarantor, personally, because the senior creditor had released those rights without the purchasers' consent, that situation caused sufficient prejudice to the purchasers' rights to order

complete discharge of the senior lien against the purchasers' property.
(*supra*, 600 P.2d, at 576 - 577)

In a subsequent case, where loss of a right of subrogation was claimed, the Washington State Supreme Court cited *MGIC* (though it distinguished the facts of the case at bar from those in *MGIC*), as follows:

MGIC Financial Corp. v. H.A. Briggs Co., supra, is relevant to this argument. At issue in that case was the protection of the security interest of a holder of a second deed of trust. The court stated that the junior lienor had the right to (1) pay off the debt secured by the senior mortgage, and (2) then stand in the shoes of the senior lienor and assert that party's rights, which could include personally suing the mortgagor. (citation omitted) *Fluke Capital & Management Services Company v. Richmond*, 106 Wash.2d 614, 622, 724 P.2d 356, (1986)

The decision in *MGIC, supra.*, was also cited by the Court of Appeals in *Alabet v. Monroe Methodist Church*, (54 Wash. App. 695, 777 P.2d 544, (1989)), describing the *MGIC* decision as follows, at page 700:

“The court [in *MGIC*] relied on the rule found in *Coyle v. Davis*, 20 Wis. 564 (1866): “Where a mortgagee has notice of a later purchaser of part of the mortgaged premises, the mortgagee's release of the mortgagor's personal liability diminishes the subrogation rights of the later purchaser and thereby operates to discharge the lien

against that part of the premises sold to the later purchaser.” (citations omitted). The court also adopted the rule that “a release of the mortgagor’s personal liability will subordinate or even release the lien of the mortgage as to a subsequent mortgage holder.” (citations omitted). The rationale for the rule is that the subrogation rights of junior lienholders, which entitle a junior lienholder paying the debt to all of the rights which the senior mortgagee had against the mortgagor, must be protected against prejudicial acts by the senior lienholder.” (*Alabet*, supra, at 700 - 701)

While, in *MGIC*, the Court of Appeals primarily referred to loss of subrogation rights against the mortgagor, in *Fluke Capital & Management Services Company*, supra., the Washington State Supreme Court described the holding in *MGIC* as referring to the subrogation rights of junior lienor as including “*stand(ing) in the shoes of the senior lienor and assert(ing) that party’s rights, which could include personally suing the mortgagor.*”

“Since a person entitled to subrogation stands in the shoes of the creditor, he is ordinarily entitled to all the remedies of the creditor, and he may use all the means which the creditor could employ to enforce payment. (case citation omitted) This means that a subrogee can enforce the obligation of a guarantor of the debtor.” *Bachmann v. Glazer & Glazer, Inc.*, 316 Md. 405, 413, 559 A.2d 365, 369 (1989).

Here, until its release by WVP, the “senior lienor” rights had included the right to enforce Raskin’s guarantee of the Promissory Note. As stated in *MGIC, supra.*, “[I]n simplest terms the principle is that courts must protect subrogation rights of junior interest holders against prejudicial acts by senior interest holders.” If the City’s judgment lien is determined to be junior to the FBDOT, it is a “junior interest holder” having subrogation rights which should be protected. When WVP released the Raskin guarantee, it took away the City’s right to pay off the senior debt and, by subrogation, take over WVP’s right of action on that guarantee.

b. Conclusion.

Based upon the principles of the *MGIC* case, when WVP released Raskin from his guaranty of the Note, it damaged the City’s subrogation rights -- rights which the Court should protect. The discharge of the FBDOT lien against the small parcels deeded the City, and subordination of that lien to the City’s judgment lien, is consistent with the relief granted in the *MGIC* case, but would leave WVP with what it originally wanted -- ability to gain title to the majority of the Property through foreclosure or a deed-in-lieu (subject to satisfaction of the City’s judgment lien).

8. The WVP lien on the Pisani property is junior to the City’s lien because it was added to the FBDOT after recordation

of the 1st Addendum Development Agreement and TRIP
Funding Agreement

The Addendum to the Development Agreement adding the Pisani property and the TRIP Funding Agreement were recorded in October of 2007, four months prior to the modified FBDOT being recorded in February 2008 ; (which added the Pisani property to the FBDOT). The obligation of WVA to pay the City for its construction of the TRIP frontage improvements is prior to the FBDOT lien, now asserted to be held by WVP.

9. Tract X having never been included in the legal description of the FBDOT (as modified) is not included in the FBDOT asserted to be held by WVP.

At best, WVP is the holder of the FBDOT lien held by former defendant Union Bank, N.A. WVP holds no lien rights greater than that held by Union Bank. Tract X, incorporated into the 1st Addendum to the Development Agreement and into the 2nd Amended BSP, was not incorporated into the legal description of the last modified FBDOT when the Pisani parcel was added. As such, WVP has no lien rights against the former Tract X in opposition to the City's lien.

E. CONCLUSION

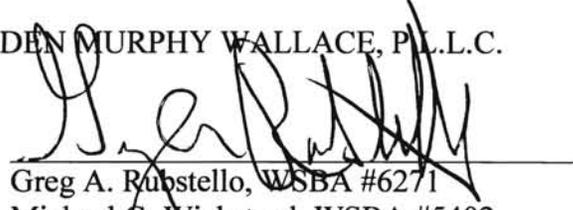
This court should reverse the trial court and grant the City the relief requested in its Motion for Summary Judgment (CP 377-378).

RESPECTFULLY SUBMITTED this 16th day of December,
2013.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By



Greg A. Rubstello, WSBA #6271
Michael G. Wickstead, WSBA #5402
Kristin N. Eick, WSBA #40794
Attorneys for Appellant

EXHIBIT A

TRIP FUNDING AGREEMENT

CONFORMED COPY

TRIP AGREEMENT

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**Woodinville Village Associates, LLC & City of Woodinville
TRIP Funding Agreement**

Public Transportation Improvement

WHEREAS, Pursuant to the Development Agreement between the Parties dated August 29, 2005 (via Resolution No. 302) and approved by the Woodinville City Council on February 6, 2006, the City and MJR Development agreed to enter into an additional agreement regarding infrastructure and other improvements related to and adjacent to the Project which is the subject of the Development Agreement.

WHEREAS, the SR 202/148th Avenue NE intersection is one of the City's highest congestion intersections; and

WHEREAS, the intersection has been identified in the City's first Comprehensive Plan to need improvements for traffic circulation and vehicle and pedestrian safety; and

WHEREAS, the project has been listed in the top scoring transportation priority projects since the City first adopted its Capital Improvement Plan; and,

WHEREAS, in 2001 the City performed a study of this intersection and determined that a roundabout intersection was the most effective design layout for operations and cost benefits; and

WHEREAS, the City has not previously developed a design that both: meets State's approval and is acceptable to the adjacent property owners; and

WHEREAS, Developer has already contracted with David Evans and Associates for design of system improvements and frontage improvements related to and adjacent to the Project; and

WHEREAS, In 2004 MJR Development proposed the development of "Woodinville Village", an 18 acre project on a site in the immediate vicinity of the intersection project ("the Project"); and

WHEREAS, in 2004 the City and MJR Development agreed to a joint effort towards development of a concept intersection improvement, which resulted in a three roundabout design; and

WHEREAS, traffic flow modeling shows the three roundabout design will improve operations over a single roundabout design and required less take of right-

Exhibit A

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of-way from the existing businesses; and

WHEREAS, on ~~November~~^{September} 8, 2005, MJR Development, Inc. assigned its interest in the Project to Woodinville Village Associates, LLC; and

WHEREAS, the Developer has agreed to support the roundabout project, which support includes assisting in coordination with adjacent property owners, development of the private project design, coordination with the public road design, and a financial contribution; and

WHEREAS, the City has been successful in being awarded a \$2.1 million dollar Washington State Transportation Improvement Board grant for the construction of the TRIP project; and

WHEREAS, the City and Developer wish to implement a formal agreement to affirm each other's commitment with regard to the intersection improvements.

1.0 Parties

1.1 This TRIP Funding Agreement is made this 6th day of February, 2006 by and between the City of Woodinville, a Washington municipal corporation, and Woodinville Village Associates, a Washington limited liability company.

2.0 Definitions

2.1.1 Capitalized terms used in this TRIP Funding Agreement shall have the meaning set forth in the Development Agreement, unless otherwise states herein.

2.1.2 "Developer" shall mean Woodinville Village Associates, LLC, a Washington limited liability company, as successor in interest to MJR Development, Inc.

2.1.3 "City" shall mean the City of Woodinville.

2.1.4 "Final Project Close Out" shall mean the point at which all outstanding costs against the project have been made and the City Council has formally accepted the construction portion of the TRIP project.

2.1.5 TRIP is the acronym used to identify the proposed system of three roundabouts located at the SR 202/148th Avenue NE intersection (together with associated road improvements), as derived from Tourist-District Roundabout Improvement Project.

3.0 Public & Private Partnership. The Parties anticipate that the general public and all properties in the area including those related to the Project will benefit from the successful completion of the roundabout project. The City has identified this intersection as needing improvements for traffic safety and capacity. Developer has proposed a development project that requires frontage

improvements, right-of-way dedication, and traffic mitigation. The City has sought a partnership from private development for funding contributions, to assist in gaining support from the adjacent property owners, and for securing State grant funds. Developer has been working cooperatively as a partner with the City since the public introduction of its proposed site development in late 2004.

4.0 Scope of Project.

4.1 As currently proposed, the roundabout project would remove the current traffic signal-controlled intersection and replace it with a two-lane roundabout. On the SR 202 approach legs, two single-lane roundabouts are planned. These roundabouts will be located at the main access location to Woodinville Village and across from existing access points to the Ball Fields and The Farm plat development east of SR 202.

4.2 Sidewalks will be located along both sides of the roadway with pedestrian crossings at the intersections. Street lighting will be included in the initial project with some level of landscaping to be agreed by the Parties.

4.3 Storm drainage will be collected in catch basins and inlets within the curb and gutter edges of the roadway. This collected runoff will be conveyed through a system located possibly within the right-of-way or upon private property owned by Developer. The planned outlet to the Sammamish River will be on private property owned by Developer.

5.0 Developer contributions and commitments.

5.1 Costs. Developer shall be solely responsible for the following:

5.1.1 Traffic Impact Fees. No later than the date of permit issuance for each respective Project structure, Developer shall remit to the City all Traffic Impact Fees associated with or otherwise required in connection with such Project structure in accordance with Chapter 3.39 WMC. Developer shall be entitled to a credit against the otherwise applicable Traffic Impact Fee amount for any contributions, improvements or dedications Developer makes toward System Improvements as defined by WMC 3.39.030(4).

5.1.2 Frontage Improvement Costs. No later than from receipt by Developer of an invoice from the City in relation to one or more specific frontage improvements, Developer shall remit to the City payment sufficient to complete such frontage improvements along SR-202, including but not limited to any curb, gutter, sidewalk, landscaping and street lighting improvements required by the this TRIP Funding Agreement, the Development Agreement or applicable City regulations. The actual payment for said frontage improvement costs shall reflect actual costs for such frontage improvements. PROVIDED, that In lieu of remitting payment to the City under this subsection, Developer may in its discretion complete all

required frontage improvements in accordance with applicable City standards. The parties agree that any particular frontage improvement, including but not limited to sidewalk, landscaping and lighting, may be delayed, as appropriate in the City's discretion, in accordance with the construction of any particular portion of the Project or TRIP.

5.1.3 Frontage Right-of-Way. No later than 1 June 2006, Developer shall dedicate to the City all additional right-of-way and/or easements associated with the Project that are necessary for completion of the street frontage improvements specified in Section 5.1.2, including but not limited to intersection access points.

5.1.4 NE 143rd Street. Consistent with the Development Agreement, Developer shall improve NE 143rd Street to and in accordance with applicable City standards.

5.2 Developer Credits. To the extent authorized by Chapter 3.39 WMC and applicable state and local regulations, Developer shall receive a credit toward its contribution costs as follows.

5.2.1 Developer shall receive a credit against the Developer's Traffic Impact Fee obligation for the fair market value of any property described in Exhibit A and dedicated to the City. PROVIDED, that no credit shall apply with respect to any site development frontage improvements or right-of-way dedication(s) required by the Development Agreement or any condition of permit approval.

5.2.2 Developer shall receive a credit against the Developer's Traffic Impact Fee obligation for frontage improvement dedications exceeding Developer's dedication requirements for as set forth in the Woodinville Municipal Code, provided and to the extent that the land so dedicated is utilized by the City for a System Improvement as defined by WMC 3.39.030(4).

5.2.3 Developer shall receive a credit against the Developers Traffic Impact Fee obligation for oversizing of storm drain facilities as directed by the City to allow for the additional storm flow necessary to accommodate the surface water runoff from the public right-of-way, provided and to the extent that the underlying facility is utilized by the City for a System Improvement as defined by WMC 3.39.030(4).

5.2.4 Developer shall receive a credit against the Developer's Traffic Impact Fee obligation for oversizing water quality filtration facilities as directed by the City to allow for the additional storm water flow volume necessary to accommodate the surface water runoff from the public right-of-way, provided and to the extent that the underlying facility is utilized by the City for a System Improvement as defined by WMC 3.39.330(4).

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5.2.5 Developer shall receive a credit against the Developer's Traffic Impact Fee obligation for engineering design services for public street design, provided and to the extent that the underlying facility is utilized by the City for a System Improvement as defined by WMC 3.39.030(4)

6.0 Woodinville Commitments.

6.1 Except as otherwise indicated hereunder, the funding and construction of the TRIP improvements shall be the sole responsibility of the City. The timing of such improvements and the source of the City's revenue shall be at the City's sole discretion, PROVIDED, that the City shall (1) earmark toward the TRIP improvements all or part of the Traffic Impact Fees remitted by Developer and collected prior to completion of the TRIP improvements with respect to the Project, and (2) the City shall also earmark toward the TRIP improvements all funds acquired through the Washington State Transportation Improvement Board grant for the construction of the TRIP Project. PROVIDED FURTHER, that nothing herein shall be construed as limiting or otherwise abridging the City of Woodinville's discretion with respect to, *inter alia*, financial and personnel resource expenditure, capital budgeting priorities and construction timeframes.

6.2 The City shall be responsible for the following costs:

6.2.1 Securing match construction funds to address costs associated with the construction of the TRIP project to the extent not provided for by Developer's total contributions.

6.2.2 Frontage right-of-way acquisitions from third parties, including all additional right-of-way or easements of private property necessary for street improvements unassociated with the Project.

6.2.3 Design costs to include the cost for engineering services provided by David Evans and Associates in direction connection to the design of the TRIP project.

6.2.4 Project Management for the TRIP project, including all City staff costs for services necessary to manage the design, grant funding, project coordination with other agencies, and construction management.

6.3 The Parties acknowledge that improvement of the SR 202/ 148th Avenue N.E. intersection represents a longstanding and highly prioritized capital project for the City. In accordance with (1) the City's Comprehensive Plan, (2) the City's Capital Improvement Plan, and (3) the terms of the 2005 Washington State Transportation Improvement Board grant awarded to the City for purposes of effectuating the TRIP improvements, the City reaffirms its good faith intent to complete installation of the TRIP improvements in a time and manner consistent with Developer's construction of the Project.

7.0 Project withdrawal. In the event that Developer withdraws the Project from permitting consideration by the City of Woodinville prior to building permit issuance for the Project, Developer shall not be obligated to pay any Traffic Impact Fees or Frontage Improvement Costs until such time as a complete building permit application is received, processed and approved by the City of Woodinville.

8.0 Refund. Any refund of Traffic Impact Fees remitted with respect to the Project shall be governed by WMC 3.39.120.

9.0 Default. If either Party reasonably believes that the other Party has breached any material obligation under this Agreement, then such party shall, promptly upon receipt of written notice from the non-defaulting Party, diligently proceed to cure or remedy such default, such default shall be cured within thirty (30) days after receipt of such notice, or, if such default is of a nature that is not capable of being cured within thirty (30) days after the cure shall be commenced within such period and diligently pursued to completion within ninety (90) days following receipt of such notice of default. The Parties may in their joint discretion mutually agree to extend the period for cure. The non-defaulting Party shall not exercise any legal remedies until and unless the applicable cure period described herein has expired and the default remains materially uncured at such time. PROVIDED, that nothing in this section shall limit in any manner the City's regulatory or legislative authority, which the City may in its discretion exercise independent of the process set forth in this section.

10.0 Dispute Resolution.

10.1 In the event of a dispute between the Parties regarding the interpretation of this TRIP Funding Agreement, the Developer may appeal to the City Manager, whose decision shall be the City's final decision unless the parties agree to submit the dispute to mediation within ten days of the City Manager's decision. Appeals of the City's decision shall otherwise be taken to the Superior Court for King County.

10.2 City interpretations and decisions regarding the calculation, imposition and collection of Traffic Impact Fees shall be governed by Chapter 3.39 WMC.

11.0 Authority to Approve Agreement.

11.1 By Developer. By executing this TRIP Funding Agreement, the Developer represents and warrants that it has taken all necessary steps under its corporate authorities to authorize such act, and that its execution of this TRIP Funding Agreement is valid and binding for all purposes.

11.2 By City. By executing this TRIP Funding Agreement, the City represents and warrants that it has taken all necessary steps under its corporate authorities to authorize such act, and that its execution of this TRIP Funding Agreement is valid and binding for all purposes except as otherwise provided herein or by law.

12.0 General Terms.

12.1 Integration. This TRIP Funding Agreement and its component elements constitute the entire understanding between the Parties regarding the subject matter hereof, and no prior oral or written agreement shall be valid.

12.2 Headings. The headings used in this TRIP Funding Agreement are for convenience only and shall not be used to interpret the terms of this Agreement.

12.3 Obligation to Abide By Law. Developer acknowledges its obligation abide by County, State and Federal laws and regulations which may be applicable to this TRIP Funding Agreement.

12.4 Venue. Venue for all judicial litigation arising under or connected with this TRIP Funding Agreement shall be in the Superior Court for King County. This TRIP Funding Agreement shall be governed and interpreted in accordance with the laws of the State of Washington.

12.5 Reservation of Authority. By executing this TRIP Funding Agreement the City does not in any manner waive its police power, legislative or condemnation authority.

12.6 Developer's Responsibility. Any act or omission required of or permitted by the Developer hereunder may be taken by the Developer or by its agents, contractors or employees; provided that the Developer shall not thereby be relieved of its direct responsibility or liability to the City under this TRIP Funding Agreement.

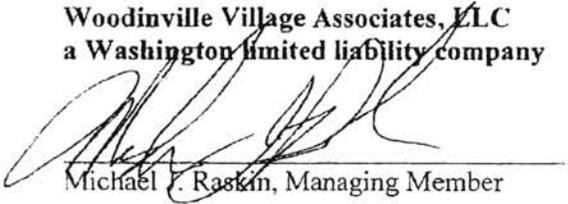
12.7 Attorneys Fees. In any action arising under or related to this TRIP Funding Agreement, the prevailing party shall be entitled to be paid its reasonable attorneys fees, expenses and costs by the non-prevailing party.

12.8 Severability. If any section, sentence, clause or portion of this TRIP Funding Agreement is declared unlawful or unconstitutional for any reason, the remainder of this TRIP Funding Agreement shall continue in full force and effect.

City of Woodinville:

Developer:

Woodinville Village Associates, LLC
a Washington limited liability company


Michael J. Raskin, Managing Member

ATTEST:

Jennifer I. Kuhn, City Clerk 10/03/2007
Sandra Parker, City Clerk

APPROVED AS TO FORM:

APPROVED AS TO FORM:

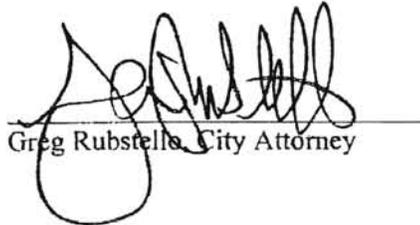
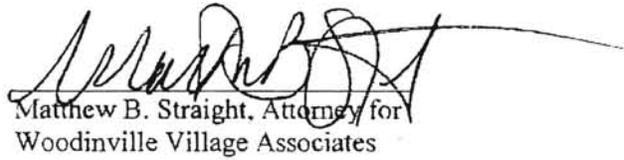

Greg Rubstelle, City Attorney
Matthew B. Straight, Attorney for
Woodinville Village Associates

EXHIBIT A

That portion of land as depicted by the following drawing as indicated by the hatched area. This excludes any ROW needed for frontage improvements associated with the Woodinville Village development.

