THE CORPORATION OF THE CITY OF PORT COQUITLAM

COMMITTEE MEETING AGENDA

March 16th, 1992

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THE CORPORATION OF THE
CITY OF PORT COQUITLAM

COMMITTEE

MAR 1 6 1992

MEMORANDUM

TO: B.R. Kirk
City Administrator

DATE: March 10, 1992

FROM: C.F. (Kip) Gaudry, P. Eng.
Deputy City Engineer

SUBJECT: **GVRD Compost - Demonstration Garden**
(Environmental Protection Committee - March 4, 1992)

Recommendation:

For information.

Background & Comments:

The GVRD has opened their Compost Demonstration Gardens at Still Creek in Burnaby for the 1992 year. Members of the Environmental Committee would like to hear from staff or Aldermen who are interested in coordinating a tour of the site on a Saturday morning in April or May.

Please contact Andrew de Boer in the Engineering Department if you are interested in attending the tour. The current suggested dates are April 25 and May 16.

C.F. (Kip) Gaudry, P. Eng.
Deputy City Engineer

CFG:gc

cc: I.R. Zahynacz, P. Eng., City Engineer
Alderman M. Gates
Alderman M. Gordon

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THE CORPORATION OF THE
CITY OF PORT COQUITLAM

MEMORANDUM

COMMITTEE
MAR 16 1992

TO: B.R. Kirk
City Administrator

March 10th, 1992

FROM: R.A. Freeman
City Clerk/Deputy Administrator

SUBJECT: Elgin Avenue West of Shaughnessy Street

RESOLUTION:

That the City Clerk be instructed to engage the services of a Land Surveyor in order that the south 33 feet of City property on the north side of Elgin Avenue west of Shaughnessy Street may be dedicated as "Road".

BACKGROUND AND COMMENTS:

Approval of the above resolution will authorize the widening of the present legal width of Elgin Avenue in this location from 33 feet to 66 feet. There will not actually be any work done or change made to the physical appearance of Elgin Avenue since it is presently already constructed as if there was a 66 foot right-of-way. The dedication was not done at the time Elgin Avenue was rebuilt due to complications with the former Urban Renewal Area restrictions that have now expired.

The matter comes to the surface at this time as B.C. Telephone have asked that an easement be granted for its works in the northern half of the road. It is much better for the actual road dedication to be done now and the situation will be cleaned up once and for all. If the easement was granted we would then be in the position of requiring B.C. Telephone's consent when road dedication was proposed.

If this matter is approved in Committee we will have the survey plan prepared for consideration by Council in open meeting.

A memorandum and plan from the City Engineer follow.

R.A. Freeman
City Clerk
Deputy Administrator

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THE CORPORATION OF THE
CITY OF PORT COQUITLAM

MEMORANDUM

TO: Ron Freeman
City Clerk

DATE: March 4, 1992

FROM: I.R. Zahynacz, P. Eng.
City Engineer

SUBJECT: **Road Dedication, City Owned Property, Part of the Remainder of Lot 54, Plan 24661 & Lot 10, Block 1, Plan 1213 (Elgin Avenue)**

The Public Works Committee at the March 3, 1992 Committee Meeting directed that staff initiate the processs for creating a 33 foot road right-of-way over Lot 10, Block 1, Plan 1213 & the southern portion of the remainder of Lot 54, Plan 24661 as shown on the attached Plan.

With this additional 33 feet of road right-of-way there will be a total road width of 66 feet on Elgin Avenue between Maple Street and Shaughnessy Street.

I.R. Zahynacz, P. Eng.
City Engineer

IRZ:gc
Attachment

cc: Alderman J. Keryluk, Chairman, Public Works Committee
Alderman R. Talbot, Co-Chairman, Public Works Committee

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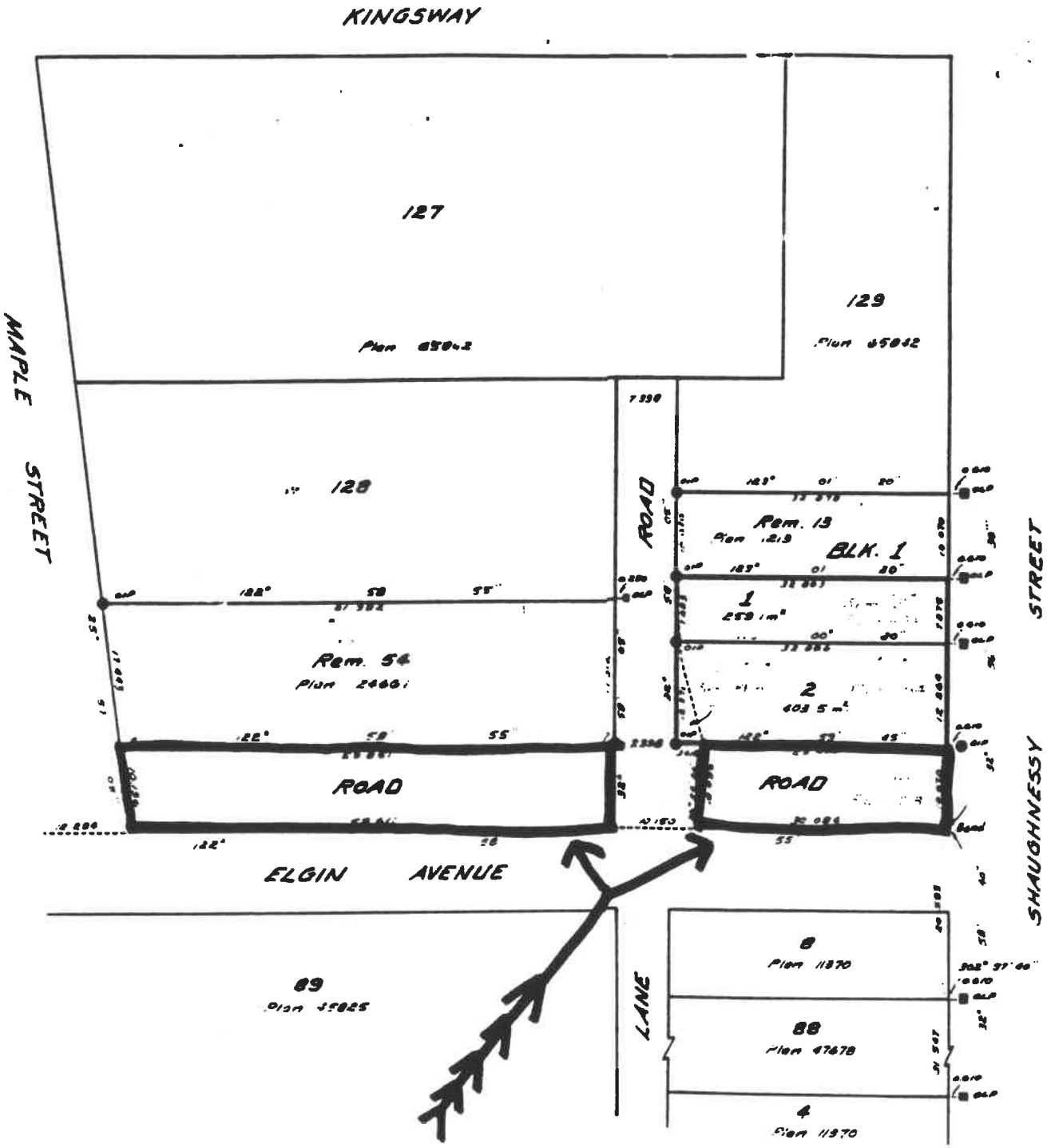
KINGSWAY
MAPLE STREET
SHAUGHNESSY STREET
ELGIN AVENUE
LANE
ROAD
ROAD
ROAD
127
Plan 65842
129
Plan 65842
128
Rem. 13
Plan 1213
BLK. 1
1
259 m²
2
403.5 m²
Rem. 54
Plan 24661
89
Plan 45825
8
Plan 11870
88
Plan 47678
4
Plan 11870

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THE CORPORATION OF THE
CITY OF PORT COQUITLAM

COMMITTEE
MAR 16 1992

MEMORANDUM

TO: B.R. Kirk
City Administrator

March 11th, 1992

FROM: R.A. Freeman
City Clerk/Deputy Administrator

SUBJECT: Leigh Square Holdings Ltd.

RESOLUTION:

That the City Solicitor be instructed to proceed with an appeal to the British Columbia Court of Appeal regarding the Decision rendered on March 6th, 1992.

BACKGROUND AND COMMENTS:

The full text of the Decision accompanies our Solicitor's letter which follows. Mr. Murdy feels that as the cost of an appeal will be relatively low (about $3,000.00 if we win and $10,000.00 if we lose) it may be worthwhile. Although there are of course no guarantees, he does feel that the City may be at least partially successful.

R.A. Freeman
City Clerk
Deputy Administrator

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MacKenzie Murdy & McAllister

BARRISTERS & SOLICITORS

FAX (604) 689-9029
TELEPHONE (604) 689-5263

31ST FLOOR FOUR BENTALL CENTRE
1055 DUNSMUIR STREET
P. O. BOX 49059
VANCOUVER, CANADA V7X 1C4

March 9, 1992

VIA FAX

Bryan R. Kirk
City Administrator
City Hall
Port Coquitlam, B.C.
V3C 2A8

Dear Bryan:

Re: Leigh Square Holdings Ltd. v.
City of Port Coquitlam
Our File No. 2284

This confirms our telephone advice to Deputy Administrator, Ron Freeman that on March 6, 1992 the Honourable Mr. Justice Sheppard of the Supreme Court of British Columbia, after having reserved his judgment for over 3 months, handed down Reasons for Judgment in which the City was ordered to pay Leigh Square Holdings $74,060.87.

I. THE DECISION

The Court's decision was based on an interpretation of Clause 9 of the July 25, 1988 Offer to Purchase, which provided that the: "(City) is to arrange and pay all services with respect to a subdivision of the said Lot 2 to create the lands".

The Court concluded that the correct interpretation of the word "services" included all of the costs that were in dispute in this action.

The Court on page 11 accepted our argument that the proper construction of the Agreement was that the City was to pay all subdivision servicing costs, as opposed to building servicing costs and so the key issue was whether the amounts in dispute were payment of services for a subdivision to create the land.

The Court held that this matter was conclusively resolved by the City's Subdivision Servicing Bylaw No. 2241, 1987, which requires services to be constructed or secured at the time of subdivision.

Accordingly, the Court accepted the City's interpretation that in entering into the contract, the City was only agreeing to pay those costs associated with the subdivision. However, the Court concluded that, on the basis of the City's Bylaws, these costs were to have been imposed at the time of

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subdivision, notwithstanding the evidence of the City's Approving Officer that same could not in reality have been done.

Having reached a conclusion on the foregoing basis, the Court did not have to consider the Plaintiff's alternative argument that the City's development cost charge bylaws were invalid.

II. APPEAL PROSPECTS

The Judge's reasoning is, with respect, open to challenge on the basis that it:

1. ignores the evidence of the City's Approving Office and City Engineer that connection charges can not be imposed at the time of subdivision; and

2. is inconsistent with at least two of the development cost charge bylaws (2363 and 2376) that clearly indicate that development cost charges are not imposed at the time of subdivision in the commercial context.

With respect to the connection charges, although an appeal might be successful, it may well be difficult to convince the Court of Appeal to reverse the finding of the Trial Judge on that point.

Certainly the term "services" is capable of being interpreted to include connection charges and the City's subdivision bylaw is worded such that there is no discretion on the part of the Approving Officer.

However, with respect to development cost charges, the chances of success on an Appeal are reasonably high.

With respect, the Judge's reasoning can be attacked in that as he found that the only costs payable were those with respect to subdivision and there is nothing in the subdivision bylaw that indicated that development cost charges were to have been paid at that stage. In fact, quite to the contrary, in at least two of the three development cost charge bylaws, it is clear that the amounts are not chargeable until the building permit stage.

One potential concern, is that even if the Court of Appeal accepted the City's position that development cost charges were outside the scope of the Contract, the doctors might still succeed on their argument as to the validity of the development cost charge bylaws.

We discussed the merits of an Appeal briefly with Mr. Freeman and confirmed that the costs involved in an Appeal would not be that extensive, in that the case was heard on the basis of Affidavit evidence and so there would be no need to pay a Court Reporter to prepare Transcripts of evidence for the Appeal Books. The City has 30 days to decide whether to appeal this decision.

Yours truly

MacKENZIE MURDY & McALLISTER

Christopher S. Murdy

CSM/jg/2270/CSM247
Enclosure

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NO. C912173
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: LEIGH SQUARE HOLDINGS LTD. PLAINTIFF AND: THE CORPORATION OF THE CITY OF PORT COQUITLAM DEFENDANT	**REASONS FOR JUDGMENT** **OF THE HONOURABLE** **MR. JUSTICE SHEPPARD**

Counsel for the plaintiff: Michael C. Woodward

Counsel for the defendant: Christopher S. Murdy

Date and place of hearing: November 22, 1991, at New Westminster, B.C.

This is a summary trial under ***Rule 18A*** involving a land exchange agreement made between the plaintiff ("the doctors") and the defendant ("the city").

The Facts

Prior to July, 1988, the doctors owned certain property adjacent to the city's city hall on which there was a building used by the doctors as a medical clinic. I will refer to that property as the "Leigh Square Property". The city was interested in acquiring the Leigh Square Property for the future expansion of the

city hall. The doctors were interested in acquiring a new building for their medical clinic and other related activities. Representatives of the city and the doctors negotiated with respect to the possibility of the city buying the Leigh Square Property and selling to the doctors another piece of city-owned property on which the doctors could construct their new medical clinic, associated pharmacy and medical laboratory. The property for purchase by the doctors was part of a larger parcel of city-owned property and therefore this larger parcel would have to be subdivided to create the smaller parcel suitable for the doctors' needs and which could be purchased by them. This new parcel of land was to front on Wilson Avenue, so I will refer to it as the "Wilson Property".

The negotiating parties neared agreement and eventually the doctors made an offer to the city to purchase the Wilson Property together with an offer to sell to the city the Le h Square Property. Both offers were accepted by the city. There appears to be no dispute arising out of the offer to sell the Leigh Square Property to the city. As this litigation arises out of the offer by the doctors to purchase the Wilson Property I shall set out this offer, underlining those portions emphasized by counsel during their submissions;

> Leigh Square Holdings Ltd. (hereinafter called the "Purchaser") of 2275 Leigh Square, Port Coquitlam, British Columbia, having inspected the property hereinafter described, offers to purchase from the City of Port Coquitlam, British Columbia, (hereinafter called the

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"Vendor") 33,720 square feet as shown outlined in red in Schedule "A" attached hereto of those lands in the 2100 Block, Wilson Avenue, Port Coquitlam, British Columbia, and more particularly known and described as:
A PART OF: Parcel Identifier: 001-372-807 Lot 2, District Lot 463, Group 1 New Westminster District, Plan 69169 (hereinafter called "the lands") for the purchase price of $7.50 per square foot, making a total of $252,900.00 of lawful money of Canada payable on the date set for completion (as hereinafter described) subject to all adjustments computed as at that date for taxes, rates, local improvements, assessments and other charges from, and all adjustments both incoming and outgoing of whatsoever nature.

1. The Purchase price is for bare land.

2. Provided that the Title is good and free from all encumbrances, except restrictive covenants, reservations and exceptions in the original grant from the Crown easements in favour of utilities and public authorities.

3. The Purchaser is not to call for the production of any Title, Deed, survey or other evidence of Title except as may be in possession of the Vendor.

4. The Purchaser is to be allowed three days from the date of acceptance to examine the Title, and if within that time any valid objection to the Title is made in writing which the Vendor shall be unwilling or unable to remove and which the Purchaser will not waive, the Agreement arising from the acceptance of this Offer shall be null and void, not withstanding (sic) any intermediate acts of negotiation in respect of such objection.

5. The sale shall be completed within fourteen days of rezoning approval (as hereinafter described) or on the 9th day of September, 1988, whichever date is later.

6. Vacant possession of the lands shall be given to the Purchaser on the date of completion unless otherwise provided herein.

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7. Until the completion of sale, the lands shall be and remain at the risk of the Vendor.

8. Any Agreement arising from the acceptance of this Offer is subject to:

(a) rezoning the lands for commercial purposes to allow conduct of medical, pharmaceutical, x-ray and like businesses;

(b) the Purchaser selling the lands and premises it owns at 2247 Wilson Avenue and 2275 Leigh Square, both in the City of Port Coquitlam, in the Province of British Columbia.

Each of these conditions is for the sole benefit of the Purchaser; unless each condition is waived or declared fulfil d by written notice given by the Purchaser the Vendor on or before the completion date, any Agreement arising from the acceptance of this offer will be thereupon terminated.

9. The Vendor is to arrange and pay all services with respect to a sub-division of the said Lot 2 to create the lands.

10. It is agreed that there are no representations, warranties, collateral agreements or conditions affecting this Agreement or the lands except as expressed herein.

11. A Deed or Transfer shall be prepared by the solicitors for the Purchaser.

12. Tender of documents or money may be made on the solicitors for either party and money may be tendered by certified cheque, banker's cheque or solicitor's trust cheque.

13. Time shall be of the essence hereof, and unless payment is made on or before the date for completion, the Vendor, may, at its option, cancel any Agreement arising from the acceptance of this offer.

14. This offer shall be irrevocable until mid-night on the 28th day of July, A.D. 1988, and if not accepted by that time, this offer shall be null and void.

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The Offer was signed on behalf of the doctors and accepted on behalf of the city on July 25, 1988.

In order for the doctors to develop the Wilson Property to house their new clinic the following steps were required:

1. rezoning;
2. development permit approval;
3. subdivision approval and registration in the Land Title Office;
4. the issue of a development permit and registration in the Land Title Office;
5. the issue of a building permit; and
6. construction and completion of the building.

As the parties moved through these various steps, and in particular as the doctors sought subdivision approval, the development permit and a building permit, a dispute arose between the parties as to the meaning of Clause 9 of the Offer to Purchase. After lengthy discussions the city ultimately took the position that the doctors were liable to pay for:;

(a) development cost charges (DCCs);
(b) bringing municipal utilities to the lot line from outside the Wilson property (municipal connection charges); and

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(c) bringing third party utilities to the lot line and undergrounding those utilities along the off-site frontage of the Wilson Property.

As a condition of subdivision approval the city required execution of a Subdivision Servicing Agreement and a Latecomer Waiver Agreement by the doctors and the payment of the DDCs and municipal connection charges to the city. The doctors signed and delivered those documents and paid those fees "under protest" and without prejudice to the doctors' position that they were not liable to make these payments by reason of Clause 9 in the offer to purchase and that condition of payment was accepted by the city.

In order to get on with the construction the doctors were required to pay for the cost of bringing the telephone and hydro lines underground to the lot site and also to pay B.C. Hydro for an off-site transformer and primary feed. The doctors allege that these accounts should likewise have been paid by the city.

The total claim by the doctors against the city is calculated as follows;

Paid to the city for DCCs	$33,733.00
Paid to the city for municipal connection charges	14,928.00
Paid as the cost of bringing third party utilities to the site	13,926.26

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Paid to B.C. Hydro for off-site transformer and primary feed	11,473.61
Total	$74,060.87

INTERPRETATION OF THE OFFER TO PURCHASE AND IN PARTICULAR THE SCOPE OF CLAUSE 9

Counsel for the doctors put great emphasis on the meaning of the word "services" in Clause 9 of the Offer to Purchase, pointing out that the clause called for the Vendor "to arrange and pay all services". I was asked to consider the breadth of scope apparently assigned to the word "services" in s. 989 and similar sections of the ***Municipal Act***, R.S.B.C. Chap. 290. I was also referred to several dictionary definitions of the word "services". Two of these illustrate the breadth of the meanings assigned to the word. The third edition of the ***Shorter Oxford English Dictionary*** includes in its lengthy definition of "Service";

> V.3. The supply or laying-on of gas, water, etc., through pipes from a reservoir, the apparatus of pipes, etc. by which this is done.

The ***Dictionary of Canadian Law*** published by Carswell in 1991 contains the following as part of its definition of "Service";

> 4.(i) Street lighting....(iv) the collection and disposal of sewage and land drainage... 5.(ii) the conveyance or transmission for compensation by a public utility of telephone messages; (iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light

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> and power, (iv) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of gas for purposes of heat, light or power; (v) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of water;....

On this point I was also referred to the city's Bylaw No. 2241 (the Subdivision Bylaw) and particularly Part IV, entitled Servicing Requirements. A perusal of sections 404 to 408 inclusive of this Bylaw lead me to the conclusion that, at least in this bylaw, the word services includes sidewalks, street lighting, underground electric and telephone wiring, and connections to the city water, sanitary sewer and drainage systems.

From those authorities I conclude that the word "services" as used in Clause 9 of the Offer to Purchase includes the provision of underground electric and telephone wiring to the edge of the Wilson Property, connections to the city water, sanitary sewer and drainage systems and generally includes providing those items for which the city is entitled to charge Development Cost Charges. I note the doctors also claimed an amount paid to B.C. Hydro for an off-site transformer and primary feed. I believe this item would also fall within the broad definition of "services" as used in Clause 9.

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Counsel for the city submitted that the city relied upon two "fundamental and trite principles of contract law"; *contra preferentem* and *caveat emptor*.

Dealing with *contra preferentem*, counsel cited the definition of this principle as found in ***Black's Law Dictionary***, fifth edition, as;

> Used in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language.

I have no quarrel with that definition or with the fact that the Offer to Purchase was drafted by or on behalf of the doctors. Consequently I would agree that any ambiguity in Clause 9 of that Offer might make the principle applicable. However I have not found any ambiguity in Clause 9.

Dealing with *caveat emptor*, counsel cited ***Anson's Law of Contract***, twenty-sixth edition, at page 262;

> Normally, because of the principle caveat emptor, the buyer must be held to have taken the risk that the property sold might prove defective or might in some way be different from that which the parties believed it to be; alternatively this risk will have been assumed by the seller if there was an express or implied warranty as to quality or description in the contract of sale. There is little room in most cases for the operation of the doctrine of mutual mistake.

Again I have no quarrel with the definition of the doctrine, but again I question its application to the case at bar. I do not see how, on the facts as I have received them in the affidavits filed, the "property sold" can be described as "defective" or "different from that which the parties believed it to be". I have seen no complaint by the doctors that they did not get what they bargained for or that what they got was in some way less or different than what they believed it to be when they made the offer. The quarrel here is over the payment of certain costs, not some defect in the land purchased. Therefore, with respect, I do not see how the doctrine of *caveat emptor* is applicable here.

At one point in the negotiations between the parties the city, which had previously been demanding that the doctors pay another amount of money to cover the construction of sidewalks, curbs and street lights adjacent to the Wilson Property, withdrew that demand and agreed to pay those costs itself. Counsel for the doctors has argued that this payment by the city is an admission that under Clause 9 it is responsible for the payment of all the monies claimed by the doctors. Counsel for the city has submitted that it supports the position now taken by the city; that it should pay only those subdivision costs, as opposed to building costs, that any subdivider other than the city would be required to pay to the city under similar circumstances. With respect to both counsel I do not take either inference from these facts. The parties were negotiating in good faith during this period and the admission that

the city should pay those particular costs was made. I do not see how those facts are in any way decisive of the issues facing me with respect to the items at issue now.

I agree with the submission made by counsel on behalf of the city that the proper construction of Clause 9 is that the city agreed to pay all subdivision costs, as opposed to building costs. I also agree with his submission that the clause clearly focuses on subdivision costs because it refers to all services with respect to a subdivision....to create the lands.

Therefore the finding that these items come within the meaning of the word "services" in Clause 9 of the Offer to Purchase does not end the matter. I must also decide whether these services were "with respect to a subdivision to create the land" or were with respect to the construction of the building on the land.

In my view this question is settled by the terms of the city's Subdivision Servicing Bylaw, 1987, No. 2241. S.406 commences with the words:

> Every lot created by a subdivision shall be connected to a suitable point on the City water system ....

Sections 407 and 408 begin with the same wording. This wording indicates to me that these items are a function of the

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subdividing, not a function of the construction of a building on the subdivision.

This conclusion is supported, in my opinion, by the wording of s.413;

> All works and services herein required to be constructed and installed at the expense of the applicant in connection with the subdivision of any lands shall be constructed and installed prior to approval of the subdivision by the Approving Officer, unless the Applicant
> (a) deposits with the City, the amount in cash estimated by the Approving Officer as the cost of installing and paying for all works and services required by the Subdivision Bylaw, and enters into an agreement with the City to have the City do the work; or
> (b) deposits with the City cash or an irrevocable letter of credit from a bank or other financial institution in the amount of 115% of the cost estimated by the Approving Officer of installing and paying for all works and services required by this Subdivision Bylaw, and enters into an agreement with the City to do the work by a specified date in accordance with this bylaw or forfeit the amount secured by the deposit to the City.

In my opinion all the services under review in this litigation were services required with respect to a subdivision to create the parcel of land to be sold to the doctors and were not part of the cost of the construction of a building on that land. Accordingly I grant judgment to the plaintiff for $74,060.87 and costs.

D. Sheppard

New Westminster, B.C.
March 6, 1992.

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