

2003

West Valley City, a Utah municipal corporation v.
Douglas W. Martin, d.b.a. Fantastic Sam's; and Does
1 through 10 : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,
A Utah municipal corporation,

Plaintiff/Appellant,

v.

DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S; and
DOES 1 THROUGH 10,

Defendant/Appellee.

DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S

Counterclaim Plaintiff,

v.

WEST VALLEY CITY,
A Utah municipal corporation,

Counterclaim Defendant.

Case No. 20030299-CA

BRIEF OF APPELLEE

Appeal from a ruling of the Honorable Joseph C. Fratto, Jr.
Judge of the Third District Court

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF ISSUES	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
Nature of the Case	3
Course of Proceedings and Disposition in the Trial Court	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENTS	7
ARGUMENT	10
FIRST ISSUE ON APPEAL: DID THE TRIAL COURT CORRECTLY INTERPRET THE EMINENT DOMAIN PROVISIONS IN THE MARTIN LEASE AGREEMENT?	10
A: The Court correctly interpreted the provisions of the Martin Lease: the lease terminated as a matter of law when the City condemned Mr. Martin's leasehold.	10
B. The City Must Pay Mr. Martin for his Leasehold.	12
1. The City did not acquire Mr. Martin's leasehold in a way that triggered the condemnation provisions of the lease.	14
2. The no tenant compensation provision does not apply to this situation	16
3. According to the City, no condemnation award is owed to anyone	17

C.	The City’s argument about the definition of “premises” is misguided.	18
D.	The City wants to rely on the lease provisions after condemnation but does not want Mr. Martin to have the same privilege. . . .	19
E.	The <i>Fiberglas</i> case does not apply here.	20
SECOND ISSUE ON APPEAL: DID THE TRIAL COURT CORRECTLY HOLD THAT THE CITY’S PURCHASE OF THE BUILDING WAS NOT THE EQUIVALENT OF CONDEMNING THE PROPERTY?		21
A:	The City’s tortured interpretation of section 19.01 is wrong. . .	22
B.	Public Policy is not served by the City’s egregious treatment of Mr. Martin.	25
CONCLUSION		27
CERTIFICATE OF SERVICE		29
ADDENDUM		
	Affidavit of Douglas W. Martin	Exhibit A
	Assignment of Leases	Exhibit B
	Real Estate Purchase Agreement	Exhibit C
	Amendment to Real Estate Purchase Agreement	Exhibit D
	Memorandum Decision	Exhibit E

TABLE OF AUTHORITIES

Cases:

<i>Fiberglas Fabricators, Inc. v. Kylberg</i> , 799 P.2d 371 (Colo. 1990) . . .	8, 13, 14, 20, 21
<i>Jones, Waldo, Holbrook & McDonough v. Dawson</i> , 923 P.2d 1366 (Utah 1996) . . .	23
<i>Redevelopment Agency of Salt Lake City v. Daskalas</i> , 785 P.2d 1112, (Ut. Ct. App. 1989)	12, 24

Statutes:

Utah Const. art. I, § 22	1, 8, 13, 25
Utah Code Ann. § 63-30-4(1)(b)	2, 15
Utah Code Ann. § 63-30-5(1)	2, 15
Utah Code Ann. § 63-30-10.5	1, 13
Utah Code Ann. § 78-2-2(3)(j)	1
Utah Code Ann. § 78-34-9(5)(a)	18
Utah Code Annotated § 78-34-10(1)	2, 13

Other Authorities:

51C C.J.S. <i>Landlord & Tenant</i> § 98 (1968)	12
BLACK’S LAW DICTIONARY (6 th ed. 1990)	25
DAVID A. THOMAS, THOMAS AND BACKMAN ON UTAH REAL PROPERTY LAW, § 10.03(a)(4) (1999)	18

JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES

Mr. Martin accepts the City's statement of issues as set forth in the City's opening brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The City states in its opening brief that, "This case is a matter of contract interpretation and there are no relevant constitutional provisions, statutes, ordinances or rules." (Appellant's brief, at 2.) This is not true. There are several constitutional and statutory provisions that are determinative of the appeal or of central importance to the appeal. Those provisions are as follows:

1. **Utah Const. art. I, § 22:** "Private property shall not be taken or damaged for public use without just compensation."

2. **Utah Code Ann. § 63-30-10.5 Waiver of immunity for taking private property without compensation.**

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property

for public uses without just compensation.(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

3. Utah Code Annotated § 78-34-10(1): Compensation and damages -- How assessed.

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: (1) the value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

4. Utah Code Ann. § 63-30-4(1)(b): Act provisions not construed as admission or denial of liability -- Effect of waiver of immunity -- Exclusive remedy -- Joinder of employee -- Limitations on personal liability.

“If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.”

5. Utah Code Ann. § 63-30-5(1) Waiver of immunity as to contractual obligations.

“Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to

the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.”

STATEMENT OF THE CASE

Nature of the Case

Mr. Martin does not dispute the City’s statement of the nature of this case.

Course of Proceedings and Disposition in the Trial Court

Similarly, Mr. Martin does not dispute the City’s statements on the course of proceedings and disposition in the trial court, such as they are. However, the City left some gaps in the City’s representations. Specifically, the City glosses over the details of the transaction through which it purchased the Heartland Building in its description of the course of proceedings. Those details are necessary to understand why the lower court ruled the way it did.

The City omits to tell the Court that in direct connection with the City’s purchase of the building in September, 2001, Heartland West Valley Commercial Limited Partners (the original landlord) assigned each of the leases for the tenants in the Building to the City by virtue of an Assignment of Leases executed by Heartland and the City. (Record, 309-312) Pursuant to the Assignment of Leases, the City, as Assignee, “accept[ed] the assignment of the Leases on the terms described [there]in and agree[d] to be bound by the terms thereof.” (*Id.*, at 310.) Hence, the City stepped into the shoes of Heartland as the commercial landlord of the building and became obligated to abide by the terms of those

leases, including, but not limited to providing Mr. Martin and the other tenants the quiet use and enjoyment of the building. When Mr. Martin refused to simply walk away from the lease, the City sued him in the lower court for unlawful detainer and eminent domain. (Record, 1-58.) Mr. Martin counterclaimed against the City alleging, among other things, that the City had breached the covenant of quiet use and enjoyment and owed just compensation to him. (Record, 68-81.)

The lower court dismissed all of the parties causes of action save the City's eminent domain cause of action and Mr. Martin's cause of action for just compensation. (Record, at 356-361.)

STATEMENT OF FACTS

Mr. Martin does not dispute any of the facts set forth in either of the City's memoranda. However, those facts are incomplete. In weighing the issues presented by the parties the Court should consider all of the following facts, none of which are disputed:

1. In June, 1996, Mr. Martin purchased a Fantastic Sam's franchise operating at 3575 South Market Street, West Valley City, Utah (the "Leased Premises"). (Record, 96. *See also* Addendum Exhibit A.)

2. In June 1998, the lease for the Leased Premises came up for renewal. On June 8, 1998, Mr. Martin executed a new lease for the Leased Premises with the Landlord, Heartland West Valley Commercial Limited Partners ("Heartland"), for the lease of 1,500

square feet of space for 10 years (the “Lease”). (*Id.* See also Appellant’s Addendum Exhibit B.)

3. On or about July 27, 2001, Barlow Nielsen (“Mr. Nielsen”) of Heartland called Mr. Martin and said Heartland was thinking of selling the building where Mr. Martin’s Leased Premises were located. He then asked whether Mr. Martin wanted to close his Fantastic Sam’s store. Mr. Martin replied that he did not want to close the store but would look around and estimate the costs and possibility of relocating. (*Id.*)

4. On September 18, 2001, Heartland assigned each of the leases for the tenants in the Building to the City by virtue of the Assignment of Leases executed by Heartland and the City. Pursuant to the Assignment of Leases, the City, as Assignee, “accept[ed] the assignment of the Leases on the terms described [there]in and agree[d] to be bound by the terms thereof.” (Record, 309-312. See also Addendum Exhibit B.)

5. As part of the original agreement between Heartland and the City, Heartland was obligated to cause all first floor tenants to vacate the building no later than March 1, 2002. (Record, 298-307. See also Addendum Exhibit C.)

6. Mr. Martin received a letter from Mr. Nielsen dated September 21, 2001, stating that the building had been sold, that the Lease had been assigned to West Valley City and that Heartland was no longer the landlord. The letter directed Mr. Martin to call West Valley City as his new landlord with any questions. (Record, 96. See also Addendum Exhibit A.)

7. After receiving the letter described in paragraph 6 above, Mr. Martin called Jake Arslanian at West Valley City to tell him that neither Mr. Neilsen nor Heartland had informed him that the building had been sold or that his lease had been assigned to West Valley City prior to the transaction occurring. Mr. Arslanian was surprised to learn Mr. Martin had not received prior notice of the sale of the building and assignment of his lease. (Record, 97. *See also* Addendum Exhibit A.)

8. In October, 2001 Mr. Martin spoke with Richard Catten, the city attorney for West Valley City. Mr. Catten told Mr. Martin that if the City had to condemn him Mr. Martin would find the City to be “generous” and “fair” and “equitable.” Nevertheless Mr. Martin has never received an offer of compensation from West Valley City. Mr. Martin has not spoken with Mr. Catten since October, 2001. (*Id.*)

9. On November 12, 2001, the City and Heartland entered into an Amendment of Real Estate Purchase Contract, whereby Heartland paid \$60,000 to the City in order to release Heartland from any further obligation to remove Mr. Martin from the leased premises. (Record, 210. *See also* Addendum Exhibit D.)

10. Mr. Neilsen of Heartland came to Orem to speak to Mr. Martin in November, 2001. He stated that Heartland had paid additional funds to West Valley City to have West Valley City remove Mr. Martin from the Leased Premises. Nevertheless, neither Heartland nor the City offered to compensate Mr. Martin for the loss of his

business in return for the removal of his business from the Leased Premises. (Record, 97. *See also* Addendum Exhibit A.)

11. As of February, 2002, Mr. Martin was current on his lease payments for the Leased Premises and Mr. Martin had observed all of his covenants and obligations under that lease. (*Id.*)

12. Mr. Martin has searched the surrounding area in West Valley City and there is no comparable space to the Leased Premises in the immediate area. (Record, 98. *See also* Addendum Exhibit A.)

13. Mr. Martin will experience damages in the following areas:

a. Loss of investment over the last five and one-half years in an amount exceeding \$200,000.

b. Loss of income over the remaining term of the Lease in an amount exceeding \$300,000. (*Id.*)

14. The above-captioned court granted West Valley City's motion for immediate occupancy on February 25, 2002. (Record, 221-223; *see also* Addendum Exhibit E.)

SUMMARY OF ARGUMENTS

I. The lower court correctly ruled that the issue of just compensation must go to trial.

The City's argument that the Court misapplied the condemnation provisions of the Martin Lease is based on the false premise that those provisions were actually triggered by the City's exercise of its eminent domain power. The lease terminated as a matter of

law when the City condemned his leasehold interest because the City could not condemn its own interest in the building, which is necessary to trigger the condemnation clauses in the lease. The issue therefore shifts from contract construction into constitutional rights. Under Article I, § 22 of the Utah Constitution, a condemning authority must pay for property it takes. The City cannot get around this obligation in this case. Nor can the City take Mr. Martin's leasehold and pay the condemnation award to itself.

In addition, the City's argument about the definition of "premises" in § 19.01 of the lease is misguided. Judge Fratto ruled that the lease terminated as a matter of law when the City condemned Mr. Martin's leasehold, not because of any provision in § 19.01. Hence, whether the word "premises" in § 19.01 refers to the building and underlying fee or whether it refers exclusively to the 1,500 square feet of the building leased by Mr. Martin is irrelevant and the City's argument on this point should be disregarded.

Finally, the case of *Fiberglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371 (Colo. 1990) is completely distinguishable from Mr. Martin's situation. The holding in *Fiberglas* presumes that the landlord and the condemning authority will be two different entities. That is not the case here. There is no landlord whose fee has been taken in this case. The fee was purchased by the City. The only person left with any interest is Mr. Martin by virtue of his leasehold, who, under the circumstances, has become the functional equivalent of the landlord for the purposes of *Fiberglas*.

II. Mr. Martin's leasehold could not have terminated upon the City's purchase of the building and the City's agreement to be bound by the terms of the lease.

The City's tortured reading of § 19.01 (i.e., that under § 19.01 the lease terminated when the City purchased the building in 2001) is incorrect. The lease could not have terminated when the City purchased the building in September 2001 because the City agreed to be bound by the terms of the lease at that time.

In addition, the City's argument over the word "or" in § 19.01 is a red herring as none of the events required to trigger § 19.01 occurred when the City purchased the building. But even if the idea of acquiring the building is separated out from the concept of condemning the building by eminent domain, it is clear in the context of Article XIX of the lease (titled "Eminent Domain") that the word "acquired" is nothing more than a euphemism for taking the property. In either case, whether the City takes the Property or condemns it, the City must pay Mr. Martin for his leasehold interest.

Finally, it cannot be in the public's best interest to allow the City to take private property without paying for it. The trial court correctly ruled that the issue of just compensation should go to trial.

ARGUMENT

FIRST ISSUE ON APPEAL: DID THE TRIAL COURT CORRECTLY INTERPRET THE EMINENT DOMAIN PROVISIONS IN THE MARTIN LEASE AGREEMENT?

In September 2001, the City purchased the Heartland Building and assumed Mr. Martin's lease, which provided the landlord would guaranty him the quiet use and enjoyment of the premises for the term of the lease. (Addendum Exhibits B and C.) Approximately one month later, the City told Mr. Martin that if it had to condemn his leasehold, the City would be "generous," "fair," and equitable. (Addendum Exhibit A, ¶ 9.) The City did, in fact, condemn Mr. Martin's leasehold but has been anything but generous, fair or equitable. The City now refuses to compensate Mr. Martin for the value of his leasehold even though it is clearly required to do so under Utah law. For the reasons that follow, this Court should uphold the lower court's ruling and allow the issue of just compensation to go to trial.

A: The Court correctly interpreted the provisions of the Martin Lease: the lease terminated as a matter of law when the City condemned Mr. Martin's leasehold.

The first issue raised by the City is whether the Court incorrectly interpreted the tenant condemnation compensation provisions of the Martin Lease (§ 19.01 in particular) in ruling that the issue of just compensation should go to trial. The underlying premise of the City's argument is that Judge Fratto actually relied on and interpreted § 19.01 of the lease when he ruled that the lease terminated as a result of the City's condemnation of the leasehold. This premise is false. Judge Fratto did not say anything about condemnation

triggering section 19.01 of the lease in his opinion, nor did he mean to. What the judge said was,

The effect of condemning the leasehold interest is that the lease is terminated, and termination of the lease leaves no contract upon which there can be a claim of breach. In other words, the City cannot both have the ability to terminate the lease through condemnation of the leasehold interest and then be in breach of the lease for doing so. Thus, *all claims arising from or based on the agreement cannot be maintained.*” (Emphasis added.)

(Record, 358. *See also* Addendum Exhibit E.)

Notwithstanding the clear language of the order (i.e., that no claims based on the agreement can be maintained by either party) the City argues that Judge Fratto took inconsistent positions by ruling that the condemnation of Mr. Martin’s leasehold triggered the termination provisions of § 19.01 but did *not* trigger the no-tenant compensation provision. The City has misconstrued the lower court’s holding. Judge Fratto ruled that *neither* provision was triggered because the lease terminated as a matter of law when the City condemned Mr. Martin’s leasehold interest, irrespective of any provisions in § 19.01. Hence, the lower court has not taken inconsistent positions and the City’s argument that the condemnation of Mr. Martin’s leasehold triggered the lease termination clause in § 19.01 is misplaced.

The real issue before this Court is whether the lower court correctly held that condemnation of Mr. Martin’s leasehold terminated the lease as a matter of law, independent of any of the lease provisions. The answer is yes. Since the lessee does not own land, the condemnation of a leasehold interest condemns the lease itself. It was

therefore impossible for the City to take Mr. Martin's leasehold without taking, and destroying, the lease itself. In *Redevelopment Agency of Salt Lake City v. Daskalas*, 785 P.2d 1112, 1121 (Ut. Ct. App. 1989), the Utah Court of Appeals acknowledged, "'The generally accepted rule is that if the condemning authority takes an estate in fee simple absolute in all of the real property covered by the lease, the lease thereupon terminates.'" Citing 51C C.J.S. *Landlord & Tenant* § 98 (1968). Once the City acquired Mr. Martin's leasehold, the City held all the "sticks" of property ownership. Mr. Martin's leasehold, and the lease that gave rise to it, merged into the City's fee interest. Thus, the lease terminated without any of its condemnation provisions being triggered, just as Judge Fratto said.¹

B. The City Must Pay Mr. Martin for his Leasehold.

Because the lease terminated with the condemnation of Mr. Martin's leasehold, the issue shifts from contract construction to constitutional rights; the parties are left with the provisions of the Utah Constitution and the Eminent Domain Statute to govern whether Mr. Martin should be compensated for his leasehold interest. Here again the answer is an emphatic yes.

¹Judge Fratto acknowledged in his opinion that had the City just condemned the building without purchasing it and assuming Mr. Martin's lease first, then the condemnation provisions in Article XIX would have been triggered. (Addendum Exhibit E.) As it is, the City must live with the consequences of the manner in which it chose to acquire the building and Mr. Martin's leasehold.

A condemning authority *must pay* for property it takes. Article I, § 22 of the Utah Constitution says, “Private property shall not be taken or damaged for public use without just compensation.”² In addition, not only is the City under a constitutional mandate to pay for property it condemns, the general common law rule is that everyone with an interest in the property taken is entitled to share in the condemnation award. As the City observes in its memorandum, “The basic common law rule is that a lessee may share, with the lessor, eminent domain compensation to the extent of the lessee’s interest.” (Appellant’s Brief, at 9.) Hence, in a generic condemnation of leased premises, the general rule is that both the landlord and the tenant share in the award. However, as the City goes on to observe, “the parties may agree otherwise in their lease.” (*Id.* See also *Fiberglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 377 (Colo. 1990).³

²See also, Utah Code Ann. § 63-30-10.5: (1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation. (2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

See also, Utah Code Annotated § 78-34-10(1): The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: (1) the value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

³Specifically, the *Fiberglas* court said: “While it is true that the common-law rule permits the lessee to share in condemnation proceeds to the extent of his or her leasehold interest, . . . the parties to a lease agreement may properly agree that the lease agreement shall terminate upon condemnation, and that as a result the lessee shall

The City wants the Court to believe that the no-tenant-compensation provisions in §§ 19.01 and 19.04 of the lease constitute an absolute bar to Mr. Martin's share in any condemnation award in this case. The City's position is fundamentally flawed for three reasons: 1) the City did not acquire Mr. Martin's leasehold in a way that triggered the condemnation provisions; 2) the lease does not contemplate what happens when only the tenant's interest is condemned while the Landlord's underlying fee is not; and 3) there *is* no condemnation award to be paid to anybody, except the City. Each of these points will be treated in turn.

1. The City did not acquire Mr. Martin's leasehold in a way that triggered the condemnation provisions of the lease.

The City's argument that Mr. Martin is cut off from sharing in the condemnation award might have merit if the City had condemned the entire building. But the City did not condemn the entire building. Rather, the City entered into a Real Estate Purchase Agreement with Heartland, the original landlord, to purchase the building. (Addendum Exhibit C.) In connection with the purchase of the building, the City executed an Assignment of Leases, pursuant to which the City agreed, twice, to be bound by the terms of the leases of the respective tenants in the building, including Mr. Martin.⁴ (Addendum

not be entitled to share in the condemnation proceeds." *Fiberglass*, at 377.

⁴In the Assignment of Leases signed by the City, Heartland assigned to the City "its entire interest as lessor under the leases. . . ." The Assignment then says, "[the City] hereby accepts such assignment and *assumes all obligations and liabilities of [Heartland] thereunder.*" (Emphasis Added.) (Addendum Exhibit B.) Four paragraphs

Exhibit B.) Judge Fratto held that the City's purchase of the building in this manner did not rise to the level of condemnation or the exercise of eminent domain required to trigger § 19.01 and § 19.04 of the lease, and rightly so. Stepping into the shoes of the landlord and agreeing to be bound by the terms of the leases is inconsistent with the City's argument that it purchased the building "for a public purpose." It is also contrary to Utah law.

The City became a commercial landlord when it assumed Mr. Martin's lease and agreed to be bound by its terms. Utah's governmental immunity statute states that governmental entities are not immune for breach of contractual obligations such as those in Mr. Martin's lease. Specifically, Utah Code Ann. § 63-30-5(1) states, "Immunity from suit of all governmental entities is waived as to any contractual obligation. . . ." In addition, Utah Code Ann. § 63-30-4(1)(b) says, "If immunity from suit is waived by this chapter, consent to be sued is granted, *and liability of the entity shall be determined as if the entity were a private person.*" (Emphasis added.) In other words, if a governmental entity enters into a contract, it is bound by the provisions of that contract just like anybody else. By stepping into the shoes of the landlord and assuming Mr. Martin's lease, the City

later, as if to make sure there is no misunderstanding, the Assignment again says, "[The City] hereby accepts the assignment of the Leases on the terms described herein and *agrees to be bound by the terms thereof.*" (Emphasis added.) (*Id.*) Clearly the City stepped into the shoes of Heartland as the landlord of the Leased Premises and obligated itself to abide by the terms of Mr. Martin's Lease as any other commercial landlord.

bound itself to abide by the terms of the Lease and became liable for the breach of that lease just as a regular commercial landlord would be. Judge Fratto was therefore correct to hold that the City's purchase of the building in this manner did not rise to the level of condemnation or eminent domain that would trigger §§ 19.01 and 19.04 of the lease.

2. The no tenant compensation provision does not apply to this situation.

Furthermore, the no-tenant-compensation provision in the lease does not apply in any case. The only interest left standing after the City's acquisition of the building was Mr. Martin's leasehold. The City owned everything else. Sections 19.01 and 19.04 presume that *both* the landlord and Mr. Martin will have an interest in the property at the time of condemnation, and that both of those interests will be condemned. Under those circumstances, provisions 19.01 and 19.04 provide that Mr. Martin "shall not be entitled to any part of the award paid for such condemnation. . . ." (Appellant's Addendum Exhibit B, § 19.04.)

Here, the City did not condemn the landlord's interest. The City already owned that interest by virtue of its purchase of the building and its execution of the Assumption Agreement, whereby the City literally stepped into the shoes of the landlord. It is a legal impossibility for a condemning authority to take property it already owns. The only interest the City condemned was Mr. Martin's leasehold. The Lease does not address this situation at all. Judge Fratto correctly filled the gap by ruling that the lease terminated as

a matter of law, that neither party had any claim against the other under the lease and that the issue of just compensation must go to trial.

3. According to the City, no condemnation award is owed to anyone.

At this point it is important to note the City argues exclusively that Mr. Martin is not entitled to a portion of the condemnation award. Nowhere in the City's brief does the City say who *is* entitled to the award. Again, under the Utah constitution, the eminent domain statute and common law, the condemning authority must pay *someone* for the value of the property taken. The City never says who that is in this case. This is because the answer, according to the City's reasoning, is no one, except, perhaps, the City itself.

The only entity with an interest in the premises, besides Mr. Martin, is the City. If the provisions of section 19.04 are to be strictly construed, the City, as condemnor, must pay the entire condemnation award *to itself* as landlord. This is a very clever thing for the City to do. Through the magic combination of condemnation and contract law the City has devised a way to condemn property without having to pay a penny of just compensation. According to the City all it has to do is buy out the original landlord's interest, step into the landlord's shoes, condemn the tenants out of their property, pay *itself* the condemnation awards and, abracadabra, the City acquires a building for far less than the fair market value of the property. This result is unacceptable, not to mention unconstitutional. The City *must* pay just compensation for property it takes to the owner

whose property it has taken.⁵ Payment of that compensation cannot be waived, and the City cannot pay that compensation to itself. Just compensation must therefore be paid to Martin, the tenant, whose leasehold and business the City condemned, and the only party besides the City with an interest in the leasehold.

C. The City’s argument about the definition of “premises” is misguided.

Nevertheless, in furtherance of its position that Judge Fratto made the wrong decision, the City makes much ado over whether the court correctly interpreted the word “premises” in § 19.01 to refer to the building and underlying fee or whether “premises” refers exclusively to Mr. Martin’s leasehold interest.⁶ This whole argument is misguided.

⁵See DAVID A. THOMAS, THOMAS AND BACKMAN ON UTAH REAL PROPERTY LAW, § 10.03(a)(4) (1999) (“[T]he valid exercise of the power to condemn property is conditioned upon payment of just compensation to the owner.”). See also Utah Code Ann. § 78-34-9(5)(a) (“The rights of just compensation for the land taken as authorized by this section or damaged as a result of that taking vests in the parties entitled to it.”).

⁶Judge Fratto made a distinction in his ruling between Mr. Martin’s leasehold and the underlying fee of the property. Said the judge, “Article XIX of the lease, taken as a whole, must be interpreted to mean that defendant has no claim for damages if the property is taken by eminent domain. The City purchased the property and it is by that commercial transaction plaintiff owns the *property and building in fee*.” (Emphasis added.) (Addendum Exhibit E.) The judge went on to say, “[The City] could not then, and in fact has not, taken the property (i.e., the property and building in fee) by eminent domain.” (*Id.*) The Court then shifts gears to talk about Mr. Martin’s leasehold and says, “The City has the authority to condemn defendant’s leasehold interest. That authority is not negated or precluded because the City is also the landlord obligated under the lease. The effect of condemning the leasehold interest is that the lease is terminated. . . .” (*Id.*) The fact that the Court distinguished between the underlying fee and Mr. Martin’s leasehold is irrelevant to whether § 19.01 applies in this case.

Judge Fratto never said in his memorandum decision whether the word “premises” means the 1,500 square feet leased by Mr. Martin or the entire building. (*See* Addendum Exhibit E.) Instead, the Judge considered the whole of Article XIX in the lease and found that because the City did not condemn the building and underlying fee, neither the automatic termination clause nor the no-tenant-compensation clauses were triggered. (*See id.*) Judge Fratto ruled that the lease terminated as a matter of law when the City condemned Mr. Martin’s leasehold, not because of any provision in § 19.01. Hence, whether the word “premises” in § 19.01 refers to the building and underlying fee or whether it refers exclusively to the 1,500 square feet of the building leased by Mr. Martin is irrelevant and the City’s argument on this point should be disregarded.

D. The City wants to rely on the lease provisions after condemnation but does not want Mr. Martin to have the same privilege.

On a related point, it is important to note that the City argues that the Judge cannot say the lease is dead on one hand and then interpret the lease in favor of Mr. Martin. Ironically, this is exactly what the City wants the Court to do for it. The City wants the Court to give the City both the benefit of terminating Mr. Martin’s lease through condemnation and then allow it to rely on the terminated lease provisions where Mr. Martin waives his right to a portion of the condemnation award. If the City is free to rely on the lease provisions post-condemnation, then Mr. Martin should be able to as well, and he should be allowed to sue the City, as the landlord, for breach of the covenant of quiet use and enjoyment.

E. The *Fiberglas* case does not apply here.

Finally, the City argues that because the lease contains an automatic termination clause, Mr. Martin is not entitled to share in any condemnation award under the common law in any case. The City relies on a Colorado case called *Fiberglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371 (Colo. 1990), to support this argument. Like the City's previous arguments, this one, too, is flawed.

First, as Judge Fratto observed in his memorandum, none of the condemnation provisions of the lease were "triggered" by the City's condemnation of Mr. Martin's leasehold interest. Hence, the issue of whether the lease contains an automatic termination clause is a red herring.

Second, the *Fiberglas* case is completely distinguishable from Mr. Martin's situation. In *Fiberglas*, a commercial tenant entered into a lease with a commercial landlord. The lease did not expressly say whether the tenant was entitled to share in any condemnation award if the premises were taken by eminent domain. However, the lease did say that, "[if, during the term of the lease agreement] the entire Leased Premises shall be taken as a result of the exercise of the power of eminent domain . . . this Lease Agreement shall terminate and the rent shall be apportioned as of the date the governmental authority takes possession." *Fiberglas*, at 375. Of course, the premises were condemned and the landlord and tenant sued each other over whether the tenant was entitled to share in the condemnation award. *See Id.*

Fiberglas is distinguishable because at no point in the condemnation proceedings did the condemning authority purchase the underlying fee from the landlord and step into the landlord's shoes as the City did in this case. The holding in *Fiberglas* presumes that the landlord and the condemning authority will be two different entities. The *Fiberglas* court ultimately ruled that the entire condemnation award should go to Kylberg, the landlord, and the entity with the primary interest in the property. There is no landlord whose fee has been taken in this case. The fee was purchased by the City. (Addendum Exhibits B and C.) The *only* person left with any interest is Mr. Martin by virtue of his leasehold, who, under the circumstances, has become the functional equivalent of the landlord for the purposes of *Fiberglas*. Under the holding in *Fiberglas* (that the condemning authority must pay the award to the primary interest holder) the City must pay the entire condemnation award to Mr. Martin, who is not only the primary interest holder in his leasehold, he is the only interest holder.

For these reasons, Judge Fratto correctly ruled that the issue of just compensation must go to trial.

SECOND ISSUE ON APPEAL: DID THE TRIAL COURT CORRECTLY HOLD THAT THE CITY'S PURCHASE OF THE BUILDING WAS NOT THE EQUIVALENT OF CONDEMNING THE PROPERTY?

The second issue raised by the City is whether the lower court correctly held that the City's purchase of the building in 2001 did not trigger the condemnation and no-lessee compensation clauses (§§ 19.01 and 19.04) in the lease. The City argues that the Court

incorrectly interpreted §§ 19.01 and 19.04 in arriving at its conclusion. The City is wrong.

A: The City's tortured interpretation of section 19.01 is wrong.

Section 19.01 reads as follows:

If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, then the Lease Term shall cease and terminate as of the day possession of the premises is taken by the condemning authority and all rentals shall be paid up to that date and Tenant shall have no claim against Landlord nor the condemning authority for the value of any unexpired Lease Term of this Lease.

(Appellant's Addendum Exhibit B, § 19.01.) The City wants this paragraph to mean that the City's purchase of the building and assumption of the leases as Landlord in 2001 has the same effect as condemning the property. Judge Fratto refused to buy this argument because, as explained above, the City did not purchase the building in its capacity as a condemning authority in 2001; the City purchased the building as a commercial landlord.

Nevertheless, the City argues that the word "acquired" in the opening phrase of § 19.01 means that if the City purchases the building, then the lease term ends and Mr. Martin must walk away empty-handed. Specifically, the City complains that the word "or" must be read in the disjunctive, or the opening phrase in § 19.01 is redundant.⁷ The

⁷There is no law against redundancy. Indeed, lawyers are famous for their multiplication of words. Section 19.01 makes perfect sense if it is read to mean that Mr. Martin has no claim against the landlord or the condemning authority if the premises are "acquired or condemned by *eminent domain*." The phrase is redundant, but it is not devoid meaning, as the City implies.

City argues that the word “or” must be given its full meaning and effect so that the opening phrase of § 19.01 means that if the premises are *either* “acquired” *or* “condemned by eminent domain” then “the Lease Term shall cease and terminate . . . and tenant (Mr. Martin) shall have no claim against [the City] for the value of any unexpired Lease Term of this Lease.”⁸ This reading ignores the operative provisions of section 19.01 itself.

Even if the City were correct in its assertion that § 19.01 should not be read as saying the Lease terminates if the premises should be “acquired or condemned *by eminent domain* . . .,” the City still cannot get past the phrase in § 19.01 that “the Lease Term shall cease and terminate *as of the day possession of the premises is taken by the condemning authority*. . . .” (Emphasis added.) By its own admission the City did not take possession of Mr. Martin’s premises until March 4, 2002, pursuant to the City’s *condemnation* of Mr. Martin’s leasehold, which was almost six months after it purchased the building and stepped into the landlord’s shoes. (*See* Record, 281, ¶ 3.) For this reason Judge Fratto correctly ruled that “the contractual triggering event (i.e., possession of the premises by the condemning authority) has not occurred.” (Addendum Exhibit E.)

⁸Section 19.01 is ambiguous as it is subject to more than one interpretation. In *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996), the Utah Supreme Court observed that in cases such as this, “The general rule of contract interpretation is that ambiguous language is to be construed against the drafter. In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.” Although the Lease was drafted by Heartland, the City’s predecessor in interest, the Lease should still be construed against the City.

Finally, the City wants the word “acquired” to mean “purchased.” These two words do not mean the same thing. A purchase requires the exchange of money, while an acquisition does not. Section 19.01 does not say anything about a condemning authority purchasing the premises. Rather, it is clear, when looking at the context of Article XIX as a whole, and considering all of the surrounding circumstances, the word “acquired” is nothing more than a euphemism for the word “taken.”⁹ The City acknowledges as much in its opening brief. In arguing the court ignored other similar passages, the City points to § 19.04,¹⁰ which describes the rights of the parties “In the event of any condemnation *or taking as aforesaid*, whether in whole or in part. . . .” The point the City makes in drawing this comparison is that “the Martin Lease envisions that condemnation is not the only way that a public entity can acquire property.” (Appellant’s Brief, 18.) This is true, but what the City fails to recognize is that in the context of Article XIX, the only other method the City can “acquire” property is through a taking, which does not necessarily

⁹*See Redevelopment Agency v. Daskalas, supra*, at 1118 (“We note that [i]t is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. To ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view.”) (citations omitted).

¹⁰The City actually ascribes this language to § 19.05 of the lease on page 18 of its opening brief. However, there is no such language in § 19.05. The language quoted by the City comes from the first line of § 19.04. (*See* Appellant’s Addendum Exhibit B.)

have to occur through condemnation.¹¹ In either case, whether the City acquires property through a taking or through its use of eminent domain, the Utah Constitution requires the City to pay for the property taken. (*See* Utah Const., Article I, sec. 22.) Hence, the City's insistence that the word "or" must be read in the disjunctive condemns the City, rather than helps it.

B. Public Policy is not served by the City's egregious treatment of Mr. Martin.

As a parting shot in its opening brief, the City states it would be against public policy for this Court to hold that the City's purchase of the building and express assumption of Mr. Martin's lease did not trigger the condemnation clause in that lease. The City says, "Such a holding, which would promote the use of eminent domain at the expense of negotiated purchase, is clearly not in the public interest." (Appellant's Brief, 19.) If taking Mr. Martin's property under these circumstances without just compensation

¹¹By way of example, *Black's Law Dictionary* defines "taking," in relevant part, as follows: "There is a 'taking' of property when government action *directly interferes with or substantially disturbs the owner's use and enjoyment of the property*. To constitute a 'taking', within constitutional limitation, it is not essential that there be physical seizure or appropriation, and any actual or material interference with private property constitutes a taking. For example, the noise of jet aircraft in process of landing or taking off can amount to a 'taking' or 'damaging' of property for which the constitution requires that compensation be made." (Emphasis added.) BLACK'S LAW DICTIONARY 1014 (6th ed. 1990). On the other hand, *Black's* defines "condemnation" as: "Process of taking private property for public use through the power of eminent domain. 'Just compensation' must be paid to owner for taking of such." (*Id.*, 201.) Hence, there can be a taking without condemnation, but there can be no condemnation without a taking. For the purposes of §19.01 of the Martin Lease, the City did not "take" Mr. Martin's leasehold. Instead, the City assumed Mr. Martin's lease and agreed to be bound by its terms.

is good public policy, then there is a serious problem with our constitution, because it says the City must do otherwise.

Furthermore, the Court should not overlook the circumstances surrounding this transaction. When the City bought the building the purchase agreement required Heartland, the original landlord, to “cause all first floor tenants to vacate the Building no later than March 1, 2002” at its sole expense. (Addendum Exhibit C, ¶ 20.) When it became apparent that Mr. Martin had no intention of moving out Heartland and the City entered into an Amendment to Real Estate Purchase Contract which provided that Heartland would pay \$60,000 to the City in exchange for the release of Heartland’s responsibility to cause Fantastic Sam’s to vacate the Building.” (Addendum Exhibit D.) In short, the City made \$60,000 because of Mr. Martin’s refusal to move out.¹² It cannot be in the public’s best interest to allow condemning authorities to actually make a profit through the exercise of eminent domain.

The trial court interpreted Article XIX of the lease correctly and rightly ruled that the issue of just compensation should go to trial.

¹²The City’s proposed condemnation award to Mr. Martin, which the City does not want to disgorge in any case, is only half the amount Heartland paid to it.

CONCLUSION

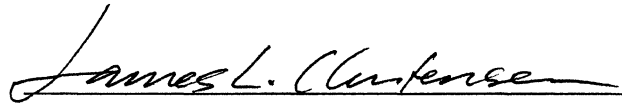
Mr. Martin signed a lease in 1998 expecting to run a Fantastic Sam's business in the Heartland Building for the next ten years. Those plans came crashing down in the Fall of 2001, when West Valley City purchased the building and informed Mr. Martin he would have to move out or be condemned. The problem with the City's position is that it assumed all of the landlord's obligations under Mr. Martin's lease when it purchased the building, which included giving Mr. Martin the quiet use and enjoyment for the term of the lease. That obligation notwithstanding, the City condemned Mr. Martin out of his premises on March 4, 2002. Now the City refuses to pay Mr. Martin the value of his leasehold.

The City cannot get something for nothing. The City cannot expect, and this Court should not allow the City to take the only remaining interest in the building for free, especially where the City made \$60,000 because of Mr. Martin's refusal to walk quietly away from his lease and his business. The City had obligations to Mr. Martin as his landlord. The City exercised its superpower of eminent domain to get out of those obligations. The Utah Constitution and Utah's eminent domain statute require the City to now pay Mr. Martin the value of his leasehold.

Because the City must pay just compensation for property it condemns, and because the lower court's findings and order are in harmony with Utah law, this court should deny the City's appeal and allow the issue of just compensation to go to trial.

DATED this 12th day of December, 2003.

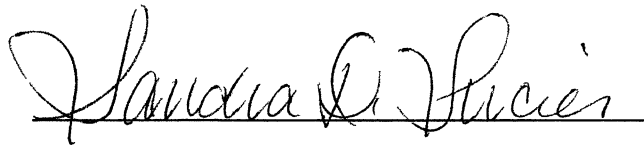
CORBRIDGE BAIRD & CHRISTENSEN
Attorneys for Appellee Mr. Martin


James L. Christensen
Christopher G. Jessop

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of December, 2003, he/she mailed two true and correct copies of the foregoing brief to:

J. Richard Catten
West Valley City
3600 Constitution Boulevard
West Valley City, Utah 84119



ADDENDUM

Exhibit A

James L. Christensen, USB No. A0639
Christopher G Jessop, USB No. 8542
CORBRIDGE BAIRD & CHRISTENSEN
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111-2705
Telephone: 801/534-0909
Fax: 801/534-1948

Attorneys for Defendant and Counterclaim Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH - WEST VALLEY DEPARTMENT

WEST VALLEY CITY, a Utah municipal
corporation,

Plaintiff,

v.

DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S; and DOES 1
THROUGH 10,

Defendants.

DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S,

Counterclaim Plaintiff

v.

WEST VALLEY CITY, a Utah Municipal
corporation,

Counterclaim Defendant.

AFFIDAVIT OF DOUGLAS W.
MARTIN IN SUPPORT OF
DEFENDANT'S MOTION FOR
CHANGE OF VENUE

Civil No. 020101233

Judge Pat B. Brian

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

I, Douglas W. Martin, being first duly sworn, do depose and say:

1. I am over the age of 18.
2. I currently reside in Utah County, Utah.
3. Unless otherwise expressly stated, all facts and statements are based upon my own personal knowledge.

BACKGROUND FACTS

4. In June, 1996, I purchased a Fantastic Sam's franchise operating at 3573 South Market Street, West Valley City, Utah (the "Leased Premises").

5. In June, 1998, the lease for the Leased Premises came up for renewal. On June 8, 1999, I executed a new lease for the Leased Premises with the Landlord, Heartland West Valley Commercial Limited Partners ("Heartland"), for the lease of 1,500 square feet of space for 10 years (the "Lease").

6. On or about July 27, 2001, Barlow Nielsen ("Mr. Nielsen") of Heartland called me and said Heartland was thinking of selling the building where my Leased Premises were located. He then asked whether I wanted to close my Fantastic Sam's store. I replied that I did not want to close the store but I would look around and estimate the costs and possibility of relocating.

7. I received a letter from Mr. Nielsen dated September 21, 2001, stating that the building had been sold, that the Lease had been assigned to West Valley City and that Heartland

was no longer the landlord. The letter directed me to call West Valley City as my new landlord with any questions. A true and correct copy of the letter is attached hereto as Exhibit A.

8. After receiving the letter described in paragraph 7 above, I called Jake Arslanian at West Valley City to tell him that neither Mr. Neilsen nor Heartland had informed me that the building had been sold or that my lease had been assigned to West Valley City prior to the transaction occurring. Mr. Arslanian was surprised to learn I had not received prior notice of the sale of the building and assignment of my lease.

9. In October, 2001 I spoke with Richard Catten, the city attorney for West Valley City. Mr. Catten told me that if the City had to condemn me I would find the City to be "generous" and "fair" and "equitable." Nevertheless I have never received an offer of compensation from West Valley City. I have not spoken with Mr. Catten since October, 2001.

10. Mr. Neilsen of Heartland came to Orem to speak to me in November, 2001. He stated that Heartland had paid additional funds to West Valley City to have West Valley City remove me from the Leased Premises. Nevertheless, neither Heartland nor the City offered to compensate me for the loss of my business in return for the removal of my business from the Leased Premises.

PERFORMANCE

11. I am current on my lease payments for the Leased Premises and I have observed all of my covenants and obligations under that lease.

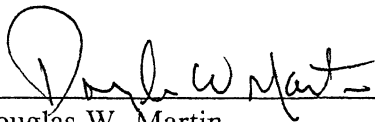
12. I have searched the surrounding area in West Valley City and there is no comparable space to the Leased Premises in the immediate area.

13. I will experience damages in the following areas:

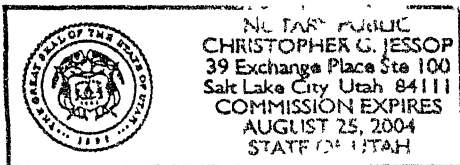
a. Loss of investment over the last five and one-half years in an amount exceeding \$200,000.

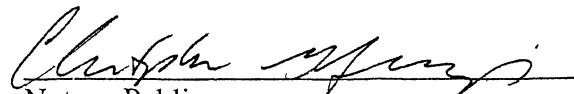
b. Loss of income over the remaining term of the Lease in an amount exceeding \$300,000.

DATED this 7 day of February, 2002.


Douglas W. Martin

Subscribed, sworn to, and acknowledged before me this 7 day of February, 2002 by Douglas W. Martin, signer of the above instrument, who duly acknowledged to me that he executed the same.



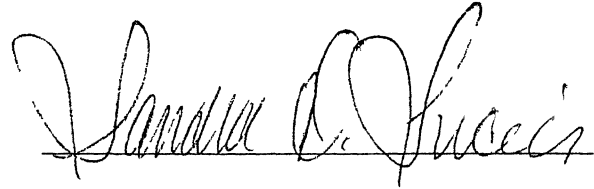

Notary Public

I:\3420\2\Affidavit of Doug Martin - revised wpd

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed, postage prepaid,
to the following at the address(es) indicated on February 8, 2002.

J. Richard Catten
John Huber
WEST VALLEY CITY
3600 Constitution Boulevard
West Valley City, Utah 84119

A handwritten signature in cursive script, reading "Sandra D. Hucceis", written over a horizontal line.



September 21, 2001

Mr. Doug Martin
The Martin Group
1595 South State Street
Orem, Utah 84058

Re: Lease Between Heartland West Valley Commercial Limited Partners ("Landlord")
and Douglas W. Martin, d.b.a Fantastic Sams, dated June 8, 84097
Market Street Center, West Valley City, Utah

Dear Doug:

This is to notify you that effective September 19, 2001, Heartland West Valley Commercial Limited Partners sold the subject property to West Valley City Corporation, a Utah municipal corporation.

West Valley City has been assigned your lease, and is now the Landlord of that property.

Your contact at West Valley City is Jake Arslanian, Public Facilities Manager. His address is 3600 South Constitution Blvd., West Valley City, Utah 84119-3720. His phone number is (801) 963-3270. All future questions and issues relating to the building should be directed to him.

Very truly yours,

O. Richard Flack, CSM, Vice President-Property Management
BARLOW • NIELSEN ASSOCIATES, INC.

EXHIBIT "A"

Exhibit B

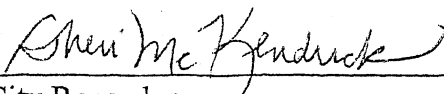


WEST VALLEY CITY
Unity · Pride · Progress

CERTIFICATION

I, Sheri C. McKendrick, duly appointed City Recorder for West Valley City, do hereby certify the attached Real Estate Purchase Agreement, Assignment of Leases, and Special Warranty Deed to be true and correct copies of said documents as recorded and on file in the West Valley City Recorder's Office.

Dated this 22nd day of August, 2002.



City Recorder



Ordin. # _____

Resol. # 01-154

Item # 10221

ASSIGNMENT OF LEASES

THIS ASSIGNMENT OF LEASES (this "Assignment") is made and ~~Other~~ entered into as of September 18th, 2001, by and between HEARTLAND WEST VALLEY COMMERCIAL LIMITED PARTNERS II, a Utah limited partnership ("Assignor") and WEST VALLEY CITY, a Utah municipal corporation ("Assignee"), who agree as follows:

For good and valuable consideration received, Assignor hereby assigns to Assignee its entire interest as lessor under the leases described on Exhibit A (the "Leases"), and Assignee hereby accepts such assignment and assumes all obligations and liabilities of Assignor thereunder.

Assignor represents and warrants that to the best of its knowledge there are no currently outstanding defaults or failures in performance under any of the Leases, no breach thereof is currently existing, the Leases are in full force and effect, no rent has been prepaid more than one month in advance under any of the Leases, neither Assignor nor any lessee is entitled to any credit, off-set, or deduction under any Lease, and that there have been no prior assignments, pledges or hypothecations of the Leases except as otherwise disclosed to Assignee.

Assignor hereby agrees that it shall, at its sole cost and expense, negotiate amendments to any leases described in Exhibit A occupying first floor space, such that said lessees shall vacate first floor space no later than March 1, 2001. If prior to December 31, 2001, the Assignor fails or refuses to negotiate such amendments, in a form acceptable to the Assignee, then the Assignee may take such action as it deems necessary, including the use of eminent domain, to ensure that all first floor lessees vacate the first floor by March 1, 2001. If the Assignee takes such action pursuant to the terms of this paragraph, then the Assignor shall be liable for all related costs and expenses of the Assignee, including, but not limited to appraisal and attorneys fees. This paragraph shall survive both the closing of the Real Estate Purchase Agreement related to the property and the assignment of all leases.

Assignor hereby authorizes an amount equivalent to any security deposits being held by the Assignor, pursuant to the terms of the leases described in Exhibit A, to be withheld by the Assignor from the purchase price of the real property at the closing of the real estate purchase.

Assignee hereby accepts the assignment of the Leases on the terms described herein and agrees to be bound by the terms thereof. Assignee agrees to indemnify and hold Assignor harmless from any and all damages, costs, or expenses which arise with respect to the Leases after the date hereof which are not the result of acts or omissions of Assignor.

This Assignment contains the entire agreement of the parties with regard to the subject matter hereof. If any provision of this Assignment or the application thereof to any extent is invalid or unenforceable, the remainder of this Assignment, or the application of such provision other circumstances, will not be affected thereby, and each provision hereof will remain valid

and be enforced to the fullest extent permitted by law. No alleged or contended change or modification of this Assignment, or waiver of any of the provisions hereof, will be valid or effective unless the same is in writing and signed by the parties hereto.

In the event of any breach of this Assignment, the breaching party agrees to pay all costs of enforcement, including reasonable attorneys fees.

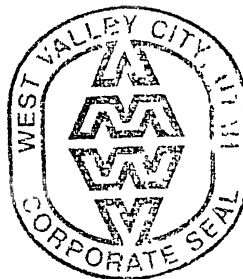
IN WITNESS WHEREOF, the parties to this Agreement have executed this Agreement as of the day and year first above written.

ASSIGNOR:

WEST VALLEY CITY

By: Gearld L. Wright
Gearld L. Wright, Mayor

ATTEST. Sheri McKendrick
Sheri McKendrick, City Recorder



ASSIGNEE

**HEARTLAND WEST VALLEY COMMERCIAL
LIMITED PARTNERS II**, a Utah limited partnership,
By West Valley Management Corporation, a Utah
Corporation, its General Partner

By: Michael L. Nielsen
Michael L. Nielsen, President

EXHIBIT A

Quick Loss Weight Centers	Suite 100
Consumer Programs Incorporated (Sears Portrait Studio)	Suite 110
SOS Staffing Services Inc	Suite 120
Douglas W. Martin dba Fantastic Sams	Suite 125
Valley Mental Health	Suite 140
Allstate Insurance	Suite 200
Valley West Chamber of Commerce	Suite 205
Valley Mental Health	Suite 211
Valley Mental Health	Suite 300

Exhibit C

File # 01-154

Ordin. # _____

REAL ESTATE PURCHASE AGREEMENT

Resol. # 01-154

Item # 10221

THIS REAL ESTATE PURCHASE AGREEMENT ("Agreement") is made and entered into as June 26, 2001, by and between HEARTLAND WEST VALLEY COMMERCIAL LIMITED PARTNERS II, a Utah limited partnership ("Seller") and WEST VALLEY CITY, a Utah municipal corporation ("Buyer").

R E C I T A L S :

A. The Seller owns approximately 1.26 acres of improved land, on which is located an approximately 36,000 square foot office building (the "**Building**"). Said property and improvements are located at 3575 South Market Street in West Valley City, Salt Lake County, State of Utah, and are referred to herein as the "**Property**." The Property is more particularly described on the attached **Exhibit A**, which is incorporated herein. For purposes of this Agreement, the term "Property" shall also include all of the Seller's right, title, and interest in and to all leases, privileges, rights-of-way, easements, and appurtenances relating to the Property, and all other rights appurtenant to or connected with the beneficial use or enjoyment of the Property, including, without limitation, all of the Seller's right, title, and interest in and to immediately adjacent public streets, roads, alleys, or rights-of-way relating to the Property; all of Seller's mineral rights relating to the Property; all surveys in the Seller's possession or control relating to the Property; and all soils and other geological or environmental studies, investigations, and reports, engineering studies and reports, building plans, and landscaping plans and specifications in the Seller's possession or control relating to the Property.

B. The Seller desires to sell the Property to the Buyer, and the Buyer desires to purchase the Property from the Seller, upon the terms and conditions contained in this Agreement.

NOW, THEREFORE, in consideration of the covenants and promises contained in this Agreement, the Buyer and the Seller agree as follows:

A G R E E M E N T :

1. **Purchase of Property.** Subject to the terms and conditions of this Agreement, the Seller agrees to sell the Property to the Buyer, and the Buyer agrees to purchase the Property from the Seller. The Seller hereby agrees to effect this purchase and sale transaction (the "**Transaction**") through the use of a Special Warranty Deed (the "**Deed**"), subject only to non-delinquent taxes and assessments and title and survey matters deemed approved by Buyer as provided below. The Deed shall convey the Property to Buyer in fee simple.

2. **Consideration.**

(a) **Purchase Price.** The Purchase Price of the Property (the "Purchase Price") shall be Three Million Seven Hundred Thirty Five Thousand Dollars (\$3,735,000.00).

(b) **Earnest Money.** Buyer shall deposit Ten Thousand Dollars (\$10,000.00) into an escrow account immediately upon the execution of this Agreement as earnest money hereunder (the "**Earnest Money**"). The Earnest Money shall be non-refundable to the Buyer, except in the case of the Seller's failure to perform, or Buyer's termination of this Agreement as permitted herein.

(c) Balance of Purchase Price. The Buyer shall pay the entire Purchase Price, subject to credit for the Earnest Money, in cash at the Closing.

3. **Opening Escrow Account.** Upon execution of this Agreement, the Seller and the Buyer shall promptly open an account with First American Title Insurance Company (the “**Title Company**”) and deposit the Earnest Money into the same.

4. **Conditions to Closing.** Buyer’s obligation to close the Transaction shall be subject to the satisfaction, deemed satisfaction as provided herein, or waiver by Buyer of each of the following conditions:

(a) Title Insurance/Approval of Title. Within ten (10) days after the execution of this Agreement, the Buyer shall cause the Title Company to prepare and deliver to the Buyer a title commitment covering the Property (the “**Title Commitment**”), committing to issue a standard coverage owner’s policy of title insurance in the amount of the Purchase Price and insuring the Buyer’s fee simple ownership of the Property at Closing, subject only to non-delinquent taxes, standard exceptions contained in a standard owner’s policy of title insurance, and such other title matters not expressly disapproved by the Buyer in the manner set forth in this Agreement, along with copies of each of the exception documents appearing in the Title Commitment. Upon receipt, the Buyer shall have ten (10) days to review the Title Commitment and the exception documents. On or before the end of such ten (10) day period, the Buyer shall give the Title Company and the Seller written notice of its disapproval of any matters appearing in the Title Commitment which Buyer finds unsatisfactory. All title matters not disapproved in accordance with the terms of this Agreement shall be deemed approved as “**Permitted Exceptions.**” If the Buyer disapproves specific title matters as provided above, the Seller shall then have thirty (30) days to eliminate or cure the disapproved matters. The thirty (30) day time period may be extended by written agreement of the parties. If the Seller is unable or unwilling to eliminate such disapproved matters, and the Buyer elects to not waive its disapproval of such title matters, this Agreement shall terminate.

(b) Inspections. An inspection period of sixty (60) days (the “**Inspection Period**”) shall commence on the date both parties have executed this Agreement. During the Inspection Period, the Buyer and/or its agents shall have the right, at the Buyer’s sole cost, to physically survey, inspect, and map the Property; to conduct non-invasive engineering, geological, and other tests; to examine leases and easements upon or relating to the Property; to examine the Building roof, structure and systems, and to detect any defects or other problems in the Property. The Buyer shall have the right, in its sole and absolute discretion, to approve or disapprove the condition of the Property and its usefulness for the Buyer’s intended use on or before the end of the Inspection Period. If the Buyer fails to disapprove the condition of the Property in writing on or before the end of the Inspection Period, the condition of the Property shall be deemed approved. If the Buyer so disapproves the condition or usefulness of the Property in writing, the Seller shall have the option either to terminate this Agreement or have thirty (30) days to remedy, if possible, any disapproved item to the Buyer’s satisfaction. The thirty (30) day period may be extended by written agreement of the parties. If the Buyer disapproves the condition of the Property in writing, and the Seller fails to timely and adequately remedy the disapproved item or exercises its right to terminate this Agreement, the same shall terminate. The Buyer will indemnify the Seller for any damage caused as the result of the due diligence inspections. The Buyer will reasonably repair and restore the Property following completion of the due diligence inspections. If the Buyer has not terminated this Agreement within the sixty (60) day due diligence period (which due diligence period shall

include environmental review under subparagraph 4(e)), the Buyer shall be deemed to have waived all due diligence objections and shall accept the Property in its then "AS IS" condition.

() No Adverse Developments or Change. For the period from the Buyer's approval of the condition of the Property through the Closing, the Property and the condition of the title thereto shall not have been adversely affected in any way as a result of fire, explosion, flood, drought, windstorm, earthquake, accident, casualty, riot, civil commotion, condemnation, requisition, embargo, order of abatement to clean up hazardous waste, act of God or war, or any other change outside of the control of Buyer that would, in the Buyer's reasonable discretion, adversely change or affect the Property or the condition of the title thereto, unless such adverse change is insured against. Should such an adverse change to the Property or to the condition of the title to the Property occur before the Closing, the Buyer may elect to permit the Seller, if the Seller is willing and able, to remedy the adverse change, or the Buyer or the Seller may elect to terminate this Agreement. If the Buyer elects to permit the Seller to remedy the adverse change, the Seller shall have sixty (60) days, or such other time as may be agreed to by the parties, to remedy such adverse change to the Buyer's satisfaction. If the Seller fails to timely and adequately remedy such adverse change or elects not to do so, this Agreement shall terminate.

(d) Representations and Warranties. The representations and warranties made by the Seller under this Agreement shall be deemed to have been made again and shall be true and correct at and as of the Closing.

(e) Financing. The purchase of the Property is contingent upon Buyer obtaining adequate financing, in a form and at rates acceptable to Buyer, prior to the Closing Date, as it may be extended as provided in Section 6 below. If Buyer is unable to secure financing which it deems to be acceptable by the Closing Date (as it may be so extended), then Buyer may terminate this Agreement by providing Seller written notice thereof within the following ten (10) days.

5. **Failure of Conditions.** If Buyer terminates this Agreement for any reason permitted hereunder, the Earnest Money shall be returned to the Buyer and each party shall bear its own respective costs and expenses, the parties shall split evenly any fees charged by the Title Company, and the parties shall be relieved of any further obligation to each other under this Agreement, except as may otherwise provided herein.

6. **Closing.** The term "Closing" is used in this Agreement to mean the time at which the Deed is recorded in the office of the Salt Lake County Recorder. Subject to the extension rights provided herein, the Closing shall occur on or before August 1, 2001 (the "Closing Date"), unless the Buyer and the Seller mutually agree in writing to close the Transaction on a later date; provided, however, that the Buyer, at its option, may extend the Closing Date by one (1) week without additional consideration, and may extend the time for Closing for one (1) month by depositing with the Title Company an additional Ten Thousand Dollars (\$10,000.00) added to the Earnest Money, at which time all Earnest Money shall become non-refundable.

(a) Buyer Deliveries. On or before the Closing Date, the Buyer shall deliver the following:

- (i) Payment of the balance of the cash Purchase Price.
- (ii) A duly executed settlement statement.

(b) Seller Deliveries. On or before the Closing Date, the Seller shall deliver the following:

(i) The duly executed and acknowledged Deed in favor of the Buyer, conveying fee title to the Property, free and clear of all liens and encumbrances, except for the Permitted Exceptions.

(ii) Such authority documents as the Buyer and the Title Company shall reasonably request to evidence the authority of each of the persons executing the Deed and other Closing documents in behalf of the Seller.

(iii) A duly executed settlement statement.

(iv) Original copies, as available, of all leases, subleases, contracts and easements relating to the Property.

(c) Prorations. The following items shall be prorated as of the Closing Date:

(i) All water, sewer, and utility charges for the Property.

(ii) All non-delinquent real property taxes related to the Property.

(iii) All levied or pending assessments affecting the Property.

The Seller shall furnish to the Buyer sufficient information to enable the Buyer and the Seller to make the prorations required hereunder.

(d) Buyer's Costs. The Buyer shall pay the following items at or before the Closing:

(i) Half of all escrow and closing fees, and all recording costs.

(ii) The cost of any extended coverage to be added, at the discretion of the Buyer, to the standard ALTA title policy.

(e) Seller's Costs. The Seller shall pay the following items at or before the Closing:

(i) Half of all escrow and closing fees.

(ii) The cost of a standard ALTA title policy.

(f) Failure to Deliver or Perform.

(i) If the Buyer fails or refuses to perform at Closing, the Seller shall be entitled to retain all Earnest Money deposited by the Buyer, as liquidated damages. The Buyer shall be responsible for any escrow fees incurred. All other costs shall be borne by the party incurring the cost. The Seller expressly agrees that the liquidated damages collected by the Seller pursuant to this Section shall be the Seller's sole remedy for the Buyer's failure to perform or deliver at the Closing.

(ii) If the Seller fails or refuses to deliver a valid and acceptable Deed or such other documents as may be necessary for the Seller to perform at the Closing, the Buyer may, at the Buyer's option, extend the time for the Closing, or may, in writing, after ten (10) days written notice and opportunity to cure, unless cured within said ten (10) days, terminate this Agreement. The Buyer may take any legal action necessary to enforce the Buyer's rights, be made whole for damages caused by the Seller's default, and/or compel specific performance by the Seller. The prevailing party shall be entitled to court costs and attorney fees.

7. Seller's Representations and Warranties. The parties expressly understand that each of the following representations and warranties and each of any others made herein is material, and that the Buyer is relying upon each of such representations and warranties as true and correct as of the date on which the parties executed this Agreement and as of the Closing Date, as though such representations and warranties had been made on each of such dates. As a condition to the Closing, the Seller hereby makes the following representations and warranties, in addition to any others made in this Agreement:

(a) At the Closing, the Seller will be the sole owner of the Property and will hold title to the Property in fee simple, free and clear of all encumbrances, except the Permitted Encumbrances.

(b) Except as disclosed to Buyer in writing, the Seller has no knowledge of and has received no notice regarding any violation or other non-compliance involving the Property with any laws, regulations, ordinances, and building and fire codes of any local, state, and federal agencies that have jurisdiction over the Property.

(c) The Seller warrants that to the best of its knowledge, there is no pending claim, suit, or litigation that involves the Property.

(d) The Seller has no knowledge of any condemnation proceedings having been instituted or threatened against all or any portion of the Property by any governmental entity other than the Buyer.

(e) Except for items to be prorated hereunder at the Closing, there will be no unpaid bills or claims in connection with the Property.

(f) Except as approved by Buyer, no portion of the Property shall be subject at the Closing to any management, listing, or service agreement or arrangement respecting the Property, so that the Buyer shall receive all of the Property free and clear of any such management agreement or other contracts and shall be free to manage and service the Property with representatives of its own choice.

(g) The Seller shall not negotiate or execute any maintenance or other agreements that affect the Property, without the Buyer's prior written approval.

(h) Each individual executing this Agreement in behalf of the Seller represents and warrants that he/she is duly authorized to execute and deliver this Agreement on the Seller's behalf.

(i) This Agreement and the consummation of this transaction do not and will not contravene any provision of any judgment, order, decree, writ, or injunction, and will not result in a breach of, constitute a default under, or require consent pursuant to any credit agreement, lease, indenture, mortgage, deed of trust, purchase agreement, guaranty, or other instrument to which any of the persons or entities comprising the Seller is presently a party or by which any of the same or their respective assets are presently bound or affected.

(j) All documents delivered to the Buyer by the Seller pursuant to this Agreement are true, correct, and complete originals or accurate copies of originals.

(k) Between the date of this Agreement and the Closing Date, the Seller, without the Buyer's prior written consent, shall not subject any right, title, or interest in the Property to any mortgage, pledge, lien, or other encumbrance, except as may be approved by the Buyer in writing.

(l) From the date of this Agreement through the Closing Date, the Seller, without the Buyer's prior written consent, shall not transfer, convey, lease, or assign any right, title, or interest in or to all or any portion of the Property; nor shall the Seller enter into any contracts, agreements, or arrangements that would or could remain binding upon the Buyer after the Closing Date; nor shall the Seller amend, terminate, or accept the surrender of any existing rights under any instruments affecting the Property.

(m) To the best of the Seller's knowledge, no hazardous waste or toxic substances have been stored on, released into, generated on, or deposited upon the Property or into any water systems on or below the surface of the Property, and the Property complies with all local, state, and federal hazardous waste laws, rules, and regulations.

(n) To the best of the Seller's knowledge, the Building's roof is structurally sound and free from leaks and the building systems, including but not limited to the HVAC, electrical, plumbing and elevator systems, have received appropriate periodic maintenance, are in good repair for systems of their age and type, and are fully functional.

8. **Brokerage Commissions.** Neither the Buyer, nor the Seller is represented by a real estate agent or broker in this transaction. The Seller hereby indemnifies the Buyer from and against all claims, actions, damages, or costs, including reasonable attorney's fees and court costs, in connection with any claimed brokerage or real estate commissions with respect to the transaction contemplated by this Agreement that arise from or through any agent or broker consulted or used by the Seller. The Buyer hereby indemnify the Seller from and against all claims, actions, damages, or costs, including reasonable attorney's fees and court costs, in connection with any claimed brokerage or real estate commissions with respect to the transaction contemplated by this Agreement that arise from or through any agent or broker employed by the Buyer.

9. **Additional Documents.** Both the Buyer and the Seller agree to execute all other documents and to do such other acts as may be reasonably necessary or proper in order to consummate the transaction contemplated by this Agreement. At Closing, Buyer and Seller will enter into a Reciprocal Easement Agreement in the form attached hereto as **Exhibit B**.

10. **Notices.** All notices, requests, demands, and other communications required under this Agreement, except for normal, daily business communications, shall be in writing. Such written communication shall be effective upon personal delivery to any party or upon being sent by

overnight mail service; by telecopy (with verbal confirmation of receipt); or by certified mail, return receipt requested, postage prepaid, and addressed to the respective parties as follows:

If to the Seller: Heartland West Valley Commercial Limited Partners II
 c/o Barlow-Nielsen Associates
 Attn.: Michael L. Nielsen
 358 South Rio Grande, Suite 250
 Salt Lake City, UT 84101
 Telephone: 801-539-1914
 Facsimile: 801-532-5371

If to the Buyer: West Valley City
 Attn: Bob Buchanan
 3600 Constitution Boulevard
 West Valley City, Utah 84119
 Telephone: 801-963-3322
 Facsimile: 801-966-8544

Either party may change its address for purposes of this Agreement by giving written notice to the other party.

11. **Modification.** Neither party to this Agreement may amend or modify this Agreement, except in a writing executed by the parties hereto.

12. **Entire Agreement.** The parties expressly agree that this Agreement and the exhibits attached hereto constitute the full and complete understanding and agreement of the parties, and that this Agreement supersedes all prior understandings, agreements, and conversations between the parties, whether oral or written. Any prior negotiations, correspondence, inducements, or understandings related to the subject matter of this Agreement shall be deemed to be merged into this Agreement and the attached exhibits.

13. **Severability.** If any term or provision of this Agreement is invalid or unenforceable for any reason whatever, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Agreement.

14. **Captions and Headings.** The Section headings or captions appearing in this Agreement are for convenience only, are not a part of this Agreement, and are not to be considered in interpreting this Agreement.

15. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be an original for all purposes, but all of which shall constitute but one and the same instrument.

16. **Governing Law.** This Agreement shall be construed in accordance with the laws of the State of Utah.

17. **Assignability.** This Agreement shall bind and inure to the benefit of the assignees, heirs, and successors-in-interest of the Buyer and the Seller. Neither the Buyer nor the Seller shall

assign its rights or delegate its obligations hereunder without the prior written consent of the other, except Buyer agrees to cooperate with Seller with respect to a 1031 tax free exchange or exchanges.

18. **Time of the Essence.** Time is of the essence with respect to the performance of the parties under this Agreement.

19. **Waiver.** A waiver by either party of any provision of this Agreement shall not operate or be construed as a waiver of any other subsequent breach.

20. **Tenancies.** Notwithstanding any other provision hereof to the contrary, Buyer shall accept the Property subject to all tenancies now in effect, provided that Seller shall, at its sole expense, cause all first floor tenants to vacate the Building no later than March 1, 2002.

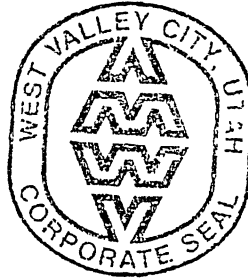
IN WITNESS WHEREOF, the parties to this Agreement have executed this Agreement as of the day and year first above written.

BUYER:

WEST VALLEY CITY

By: Gearld L. Wright
Gearld L. Wright, Mayor 7-3-01

ATTEST: Sheri McKendrick
Sheri McKendrick, City Recorder



SELLER:

**HEARTLAND WEST VALLEY COMMERCIAL
LIMITED PARTNERS II, a Utah limited partnership**

By: West Valley Management Corporation, a Utah
Corporation, its General Partner

By: Michael L. Nielsen
Michael L. Nielsen, President

EXHIBIT A

A part of the Northwest Quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, U.S. Survey:

Beginning at a point which is 815.125 feet South $0^{\circ}00'44''$ West along the East line of said Northwest Quarter and 200.00 feet South $89^{\circ}56'30''$ West from the Northeast Corner of the Northwest Quarter of Section 33; and running thence South $89^{\circ}56'30''$ West 331.90 feet to the East line of Market Street; thence North $0^{\circ}00'20''$ East 95.50 feet along said Easterly line of Market Street; thence leaving said Easterly line North $89^{\circ}56'30''$ East 130.00 feet; thence North $0^{\circ}00'44''$ East 113.92 feet; thence North $89^{\circ}56'30''$ East 201.91 feet; thence South $0^{\circ}00'44''$ West 209.42 feet to the point of beginning. Parcel Contains 1.256 acres.

Exhibit D

AMENDMENT TO REAL ESTATE PURCHASE AGREEMENT

THIS AMENDMENT TO REAL ESTATE PURCHASE AGREEMENT ("Amendment") is made and entered into as of November 12, 2001, by and between HEARTLAND WEST VALLEY COMMERCIAL LIMITED PARTNERS II, a Utah limited partnership ("Seller") and WEST VALLEY CITY, a Utah municipal corporation ("Buyer").

RECITALS:

Seller and Buyer entered into that certain Real Estate Purchase Agreement dated June 26, 2001 (the "Agreement") regarding approximately 1.26 acres of improved land located at 3575 South Market Street in West Valley City, Salt Lake County, State of Utah (the "Property").

The Property has now been conveyed to Buyer.

The Agreement currently provides, in relevant part, that Seller shall, at its sole expense, cause all first floor tenants to vacate the Building (as defined in the Agreement) no later than March 1, 2002.

AGREEMENT:

In exchange for the payment of Sixty Thousand Dollars (\$60,000.00), to be paid by Seller to Buyer upon execution hereof by both parties hereto, Seller shall be released of all obligation to cause Fantastic Sam's to vacate the Building, and from all claims of any nature related thereto. Seller shall remain responsible, however, for causing all other first floor tenants to vacate the Building no later than March 1, 2002.

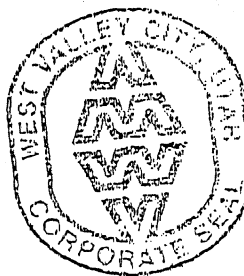
WITNESS OUR SIGNATURES as of the date first above written.

BUYER:

WEST VALLEY CITY

By: Gerard L. Wright
Gerard L. Wright, Mayor

ATTEST: Sheri McKendrick
Sheri McKendrick, City Recorder



SELLER:

HEARTLAND WEST VALLEY COMMERCIAL
LIMITED PARTNERS II, a Utah limited partnership

By: West Valley Management Corporation, a Utah
Corporation, its General Partner

By: Michael L. Nielsen
Michael L. Nielsen, President

Exhibit E

FILED
Third Judicial District

MAR 19 2003

SALT LAKE COUNTY

By

Deputy Clerk

In The Third Judicial District Court Of Salt Lake County
State of Utah

WEST VALLEY CITY,

Plaintiff,

vs.

DOUGLAS W MARTIN, d.b.a.
FANTASTIC SAM'S

Defendant.

NOTICE OF DECISION

Judge: Joseph C Fratto, Jr

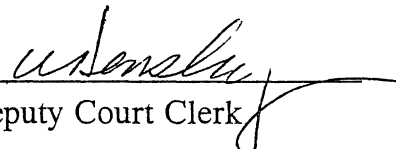
Case No.020201239

RE: Cross Motions for Summary Judgment.

Having been submitted for decision without oral argument pursuant to rule 4-501,
Rules of Practice, and the Court being now fully advised in the premises.

Please see attached decision.

Dated this 19 day of March, 2003.


Deputy Court Clerk

WEST VALLEY CITY
V.
DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S

MEMORANDUM DECISION
Case No. 020201239
Judge Fratto

The matter is before the court to consider cross-motions for summary judgment.

Defendant was a tenant of Heartland West Valley Commercial Limited Partners , in a property located at 3575 South Market Street, West Valley City. The City purchased the property from "Heartland" to locate court facilities.

On January 24, 2002 the City delivered a letter to defendant, citing provisions of the lease as authority for their action, demanding defendant vacate the premises within five days. This not occurring, on January 30, 2002 plaintiff filed a complaint with two causes of action: unlawful detainer and eminent domain. The City sought immediate occupancy of defendant's leased premises, obtained an order on March 5, 2002, and posted a bond of \$60,000.

Defendant counterclaimed, alleging: breach of contract; violation of implied covenant of good faith and fair dealing; abuse of process; attorney fees; just compensation and punitive damages.

Defendant seeks summary judgment on his First Cause of Action: Breach of Contract, requesting that the court determine which facts are not in dispute or "issues" controverted, and enter judgment accordingly. Plaintiff, citing four bases, request a summary judgment.

The material facts are not in dispute. The motions are resolved by an interpretation of the

lease agreement and application of law.

Article XIX of the lease, taken as a whole, must be interpreted to mean that defendant has no claim for damages if the property is taken by eminent domain. The City purchased the property and it is by that commercial transaction plaintiff owns the property and building in fee. It could not then, and in fact has not, taken the property by eminent domain.

The lease further provides that defendant's leasehold interest will , ".... terminate as of the day possession of the premises is taken by the condemning authority...." That date represents both termination of the lease and the time beyond which defendant would be in unlawful detainer. However, because the City has not condemned the property, this contractual triggering event has not occurred. The court is not persuaded that purchase of the property by the City for a "public purpose" is the equivalent of condemning the property.

The City has the authority to condemn defendant's leasehold interest. That authority is not negated or precluded because the City is also the landlord obligated under the lease. The effect of condemning the leasehold interest is that the lease is terminated, and termination of the lease leaves no contract upon which there can be a claim of breach. In other words, the City cannot both have the ability to terminate a lease through condemnation of the leasehold interest and then be in breach of the lease for doing so. Thus, all claims arising from or based on the agreement cannot be maintained.

This having been said, the court considers each cause of action.

Plaintiff's first cause, unlawful detainer, cannot be maintained. The notice to quit is insufficient as a matter of law. The first opportunity for the City to be able to serve an effective legal notice to quit would be March 5, 2002, the entry of the Order of Immediate Occupancy.

There was no timely notice, and in any event there is no evidence defendant remained in the premises after this date.

Defendant's claims for breach of contract, violation of the implied covenant of good faith and fair dealing, and attorney's fees based on the contract cannot be maintained because the lease was terminated, as discussed above.

Defendant's third cause is grounded in the legal rather than factual claim that it is an abuse of process for the City to purchase and own property and then, by eminent domain, condemn the leasehold interests of others in that property. Having found that plaintiff does have that authority, the cause cannot be maintained.

Defendant's sixth cause is a demand for punitive damages based on the allegation that plaintiff has acted willfully, maliciously and recklessly. The claim appears to be based on the same proposition as defendant's abuse of process claim: procedurally, the City cannot buy the property and then condemn the lease. Having found that argument legally insufficient, it follows that punitive damages cannot be awarded, and thus the claim cannot be maintained.

This would leave plaintiff's second claim, wherein the City seeks, through eminent domain, to condemn defendant's leasehold; and defendant's fifth cause, seeking compensation pursuant to 63-30-10.5 *U.C.A.* These claims cannot be resolved through the motions before the court. The value of defendant's leasehold interest is in dispute. It will be for the trier of fact to determine its value.

Accordingly, plaintiff's First Claim for Relief: Unlawful Detainer and defendant's First, Second, Third, Fourth and Sixth causes are dismissed. The cross-motions for summary judgment, as they request dismissal of plaintiff's Second Claim: Eminent Domain and defendant's Fifth

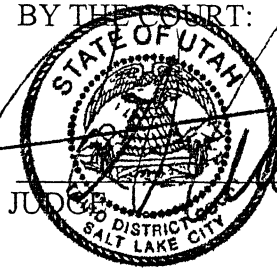
Cause of Action: Just Compensation, are denied.

This memorandum decision constitutes the order regarding the matters addressed herein.

No further order is required.

Dated this 18th day of March, 2003

BY THE COURT:

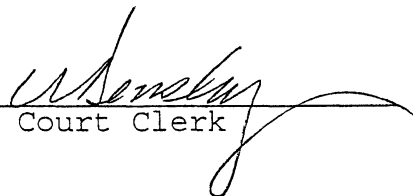


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020201239 by the method and on the date specified.

METHOD	NAME
Mail	RICHARD CATTEN ATTORNEY PLA 3600 CONSTITUTION BLVD WEST VALLEY, UT 84119-0000
Mail	JAMES L. CHRISTENSEN ATTORNEY DEF 39 EXCHANGE PLACE SUITE 100 SALT LAKE CITY UT 84111-2705
Mail	JOHN HUBER ATTORNEY PLA SUITE 414 KEARNS BUILDING 136 SOUTH MAIN SALT LAKE CITY UT 84101-0000
Mail	CHRISTOPHER G JESSOP ATTORNEY DEF 39 EXCHANGE PLACE, SUITE 100 SALT LAKE CITY UT 84111

Dated this 19 day of March, 2003.


Deputy Court Clerk