

Attachment #1

“Not Care if Owners Rip-off”

Preston Gates and River Park Square

Mr. McDevitt was sworn in as the U.S. Attorney for the Eastern District of Washington in early 2002. Prior to that he was a lawyer practicing out of the Spokane office of Preston Gates & Ellis, which now does business as K&L Gates. As the attached **Exhibit A** shows, Mr. McDevitt’s role in the RPS transaction was to work with Duane Swinton, the attorney for Cowles real estate companies, to legally “close” the transfer of funds and property in the \$26 million sale of the River Park Square garage.

In that capacity, according to memos, the deposition testimony of McDevitt’s colleague Mike Ormsby and Preston billing records, Mr. McDevitt was deeply involved in substantive discussions about the problems associated with the garage transaction. Those problems included, but were not limited to, a notice of default by a major River Park Square tenant (AMC Theatres), a revised revenue projection that showed a dramatic reduction in garage revenues (needed to pay off garage bonds), and the unsuccessful effort to persuade River Park Square developer Betsy Cowles that, because of the revised revenue forecast, she should accept considerably less than \$26 million for the garage. At the time, Mr. McDevitt and others involved in the garage transaction had access to a report by Spokane appraiser Daniel Barrett that put the market value of the garage at \$12 million. **Exhibit B.**

The \$14 million difference between the market value and the price demanded by Ms. Cowles is perhaps the most obvious evidence that Preston was engaged in illegal activity. Federal tax rules (Internal Revenue Code §141(b)) restrict private profit-taking to 10% of bond proceeds.

Within weeks after the transaction was finalized, with Mr. McDevitt’s help, the financial structure of the RPS garage transaction began to collapse, leading to a political crisis for Spokane city government and, by 2001, a default in payments on the garage bonds and a federal securities fraud lawsuit filed by Nuveen, Vanguard and other investors who’d purchased the tax-exempt bonds sold to finance the transaction. In April 2004, the City of Spokane agreed to issue up to \$39 million in debt to fund the settlement of bondholder claims in the RPS securities fraud litigation. Among the claims the City purchased with its settlement were the fraud claims against Preston, and in December 2004 Preston agreed to pay the City \$1.3 million to settle those claims. In its settlement with the City, Preston also agreed to absorb the liability for any taxes owed on bond interest payments, a liability then estimated at \$1.7 million.

Preston's Role, Responsibility, and Liability

Preston played a pivotal role in the River Park Square garage transaction because it was the general counsel and bond counsel to the Spokane Downtown Foundation (SDF). In September 1999, the SDF bought the River Park Square garage for \$26 million from the Cowles family real estate companies that own River Park Square. The purchase was made with the proceeds from the September 1998 sale of \$31,465,000 in revenue bonds sold by the SDF and marketed through Prudential Securities. As general and bond counsel to the bond issuer, there's no question Preston had primary responsibilities to ensure the accuracy of representations (the 9/15/98 official offering statement) to prospective bond buyers, and joint responsibilities for the continuing disclosure of material events, including events that affect the tax-exempt status of the bonds. Preston certified that the RPS garage transaction was in compliance with federal tax rules for the issue of tax-exempt securities. That certification was false.

Certainly one of many questions raised by Mr. McDevitt's and Preston's activities and decisions not to disclose crucial events that led to the collapse of the RPS garage financial structure, is whether he, Mr. Ormsby and other the other Preston lawyers involved violated Federal Rule 10b-5 pertaining to the "Employment of Manipulative and Deceptive Devices" in the marketing of securities. **Exhibit C.** In his December 5, 2002 deposition, Mr. Ormsby acknowledged that Preston signed a 10b-5 opinion as part of the RPS garage bond offering. **Exhibit D.** Mr. McDevitt was not deposed.

But the pattern of documented activities and alleged misconduct goes beyond questions of securities disclosure. What it shows is that Preston was deeply involved with the River Park Square developer in efforts to surreptitiously funnel literally tens of millions of dollars in bond proceeds and other public subsidies into the coffers of Cowles real estate companies. This is not just Mr. Connor's and Mrs. Rodgers's conclusion. It was also the conclusion of attorneys for garage bondholders, and investigators for the IRS's Tax Exempt Bond Unit. It obviously raises issues of potential criminal liability.

What the Evidence Shows

Unknown to Councilmember Rodgers, the people of Spokane, and RPS bond purchasers, Preston continually exhibited allegiance and dependence upon Cowles real estate companies in the River Park Square garage transaction. This was a classic conflict of interest because, of course, Preston was counsel to the Spokane Downtown Foundation and, by law, the SDF was supposed to be an independent, non-profit organization that was purchasing the RPS garage "on behalf of" the City of Spokane.

What only a select few people knew is that Preston attorney Mike Ormsby was employed by River Park Square in 1996 to advise RPS on the garage transaction. This fact was apparently first formally disclosed to the Spokane City Attorney in August of 1996 and formalized by two subsequent letters. **Exhibit E, Exhibit F.** Again, it's at least indicative of a conspiracy that Mrs. Rodgers, as a

council member, was not informed of Mr. Ormsby's prior work for Cowles companies and that these two letters, plus the August 1996 exchange of letter referenced in them, were missing from City files provided Mr. Connor in response to public records requests. It's even more indicative of a conspiracy that these documents (and the information in them) were withheld even from O. Yale Lewis, the special counsel the City of Spokane hired in 2000 to investigate the circumstances of the River Park Square transaction. The letters only emerged in discovery, once the RPS litigation commenced.

At the time of Mr. Ormsby's 10/1/96 letter, the City was in negotiations with Cowles companies to directly purchase the River Park Square garage for a reported \$29 million. But those negotiations failed in part because of the objections of city finance director Pete Fortin. As Mr. Fortin and others have testified in their depositions, in an executive session in August of 1996, Mr. Fortin strongly recommended the City pay no more than \$18 million for the River Park Square garage. After Mr. Fortin gave that advice, the City declined to purchase the garage for the near \$30 million Cowles negotiators were then seeking. In an attempt to rescue the garage transaction, the participants decided to create a non-profit organization that would buy the garage "on behalf of" the City, pursuant to federal revenue ruling 63-20.

This is where the hidden conflicts involving Mr. Ormsby and Preston Gates begin to mushroom because Mr. Ormsby's first River Park Square client, Cowles real estate companies, recruited him to represent his second client, the Spokane Downtown Foundation in the 63-20 transaction. The purpose of Mr. Ormsby's November 20, 1996 letter is to obtain the City's permission to represent the SDF. As for the SDF, it had just been formed on November 14, 1996 with none other than Cowles attorney Duane Swinton listed as its registered agent. As we'll show, Mr. Swinton, the lead attorney for the *Spokesman-Review* newspaper as well as Cowles real estate companies, exerted tremendous influence over the terms and conditions of the garage transaction.

The Preston firm not only gave in to that influence, but operated as though it were indifferent to it.

In his December 5, 2002, Mr. Ormsby was asked by Jack Lowery, an attorney representing a bond insurer, what he meant in a handwritten note found in his River Park Square file that read: "While we own, not care if owners rip off."
Exhibit G. Exhibit H.

"What does that mean?" Mr. Lowery asked.

Mike Ormsby: "I have no recollection right now."

Jack Lowery: "Does that relate to the fact that the developers were being paid \$26 million for a garage that was only worth \$18 million or less?"

Mike Ormsby: "Don't know."

Again, Mr. Ormsby and Preston were supposed to be representing a Washington non-profit corporation, the Spokane Downtown Foundation. The

most important promise the Spokane Downtown Foundation made to the state in its Articles of Incorporation, and to the federal government in committing to play the role of a 63-20 bond issuer, is that it would be independent and represent the public interest. Instead, in Preston's hands it represented the interests of Cowles real estate companies in a transaction that was clearly designed to move well over \$10 million in baseless profits to Cowles real estate companies.

This is not just Mrs. Rodgers and Mr. Connor's conclusion.

This, for example, is what the IRS reports in 15 bullets of findings on pages 13 and 14 of its June 22, 2004 report, and it well captures the sweep of the conspiracy, fraud, and money laundering. **Exhibit I.**

The issue [Spokane Downtown Foundation] engaged in activities that, more than insubstantially, benefited private parties. The issuer was:

- (1) Established by the developer [Cowles real estate companies]; and*
- (2) The developer's Attorney established the corporation and served as registered agent of the corporation, and*
- (3) The developer initially approached, engaged and essentially hired Bond Counsel [Mike Ormsby/Preston Gates]; and*
- (4) The developer initially approached and hired the Board of Directors as listed in the Amended Articles of Incorporation; and*
- (5) Via the original 501(c)(3) language in the Articles of Incorporation filed by the Developer's Attorney & the 501(c)(3) language in the Amended Articles of Incorporation did obfuscate the true nature of the corporation/issuer; and*
- (6) Developer required a revenue stream analysis, provided a number of the assumptions for the analysis, used the analysis as an appraisal with the knowledge that the analysis substantially overstated the value of the garage; and*
- (7) Allowed the parking rates in the analysis to determine revenue stream to be up to double the rate in effect, the hours of stray to be double a reasonable number, ignored the validation programs, etc...all of which have the effect of overstating the value of the property which ultimately (if the financing is to be paid) demand the garage to set rates much higher than would be necessary were this a true arms length transaction; higher parking rates is diametrically opposed to the purpose of the Issuer/corporation established by the developer, and*
- (8) The developer adjusted and set the land lease rates in opposition to the garage purchase price based on the Walker parking analysis study; and*

(9) The developer benefited excessively from the land lease since it was predicated on the parking analysis study that was overstated and the revenue stream was discounted on a tax exempt bond financing rate; and

(10) The developer put in place prior to the sale of the garage a parking oversight committee (composed of the Developer and the Developer's tenants) to set the hours of the garage, the pricing structure of the garage, and various other items that amount to special legal entitlements; and

(11) The developer sought to conceal the AMC theatre default on the garage, prior to the sale of the garage, via confidentiality agreements and payment to AMC to cover shortfalls in the garage revenue for the first year as a result of the default, thus keeping the purchase price of the garage artificially elevated; and

(12) The developer required the City to pledge parking meter revenues for fixed ground rent (payment to the developer for what appears to be an encumbrance on the property) and operating expenses, which increased the rating on the bonds and added to the overvaluation of the garage via discounting the revenue stream at the bonds interest rate; and

(13) The developer wrote the bond documents, via Bond Counsel, the 4th priority payment of administrative variable ground rent which was designed to reimburse the developer for the administrative costs incurred by the City and the Issuer to get the financing (this is why bond counsel inquires of the developer to increase his fees because any administrative fee that comes out of proceeds reduces the developer's overall take); and

(14) The developer wrote into the bond documents, via the Bond Counsel, the 5th priority payment of "variable ground rent" more appropriately known as a 50/50 split of revenue/profits; and

(15) The developer wrote and entered the ground lease prior to the sale of the garage including a provision that allows the developer to purchase the garage at the end of the lease for its then fair market value not its "investment value" based on revenue stream (sic) that the developer is selling the garage to the issuer for.

The complexity of the garage transaction conceals some of its most nefarious features. What IRS really means by item #15 is that the City's participation--the use of the City's cost of funds rate--is what really bounces the investment value of the garage to more than double its market value. But when the bonds are paid off, the Cowles companies (after pocketing the millions of dollars in bogus investment value) get the right to buy the garage back at market value from the City.

But what even the complexity of the transaction can't conceal is how corrupt it is, and how Preston allowed its lawyers, like Mr. Ormsby and Mr. McDevitt, to be used in the service of that corruption.

There was at least one lawyer at Preston who tried to object. This was attorney William Mantle who saw, early on, ways in which the transaction would violate federal tax rules.

On July 31, 1997 Mr. Mantle wrote a letter to City bond counsel Roy Koegen (copied to Mr. Ormsby and another Preston attorney) insisting that the transaction could not go forward as developer Betsy Cowles wanted it to. **Exhibit J.**

“Over the past months we have had many telephone conferences with the parties to this transaction in an attempt to craft a business deal that will comply with the tax rules described above and still meet the business requirements of the parties,” Mr. Mantle wrote. “We are aware of the importance of this project to the Spokane area, but have been blocked in all our attempts at crafting a business deal that meets tax rules.”

The tax rules Mr. Mantle was referring to were those associated with Revenue Ruling 63-20 rules that IRS later found were violated. They were violated because Mr. Mantle lost the argument and Preston signed off on the deal anyway. Why did that happen? Because Preston and the SDF didn't exert the authority they had to control the transaction.

“I have reviewed Bill Mantle's letter,” Cowles attorney Duane Swinton wrote Mr. Koegen on August 11, 1997, “and we either have to get him to change his mind immediately (which appears to be doubtful) or we need an opinion from other tax counsel on this issue. In any event, this issue must be resolved this week.” **Exhibit K**

Still the impasse dragged on and, as Mr. Connor reported at Camasmagazine.com in August 2003, documents produced in litigation discovery show Ms. Cowles understood the problem and even explored alternative financing, only to reject it because the 63-20 transaction with the Foundation bonds was more lucrative. **Exhibit L**

As Mrs. Rodgers knows from direct experience as a former member of the Spokane Parking Public Development Authority board, the unlawful private contracts (the “encumbrances” referred to in Mr. Mantle's 7/31/97 letter) regarding garage operations that Cowles companies and Nordstrom insisted upon, limited what the ostensibly public garage could do to serve public customers and programs like monthly parking. This fit a pattern in the RPS transactions generally, which is that Cowles companies collected the profits and left the public entities (the City and the parking development agency) with the risks.

Even the board members of the Spokane Downtown Foundation, in a declaration filed in federal court in October 2003, questioned the propriety and ethics of Preston attorneys who were supposed to be representing the Foundation and who assured the Foundation board that the Board could rely on the firm's expertise and performance. **(Exhibit M).**

Among the allegations in the Board members' declaration that are clearly connected to the pattern of fraudulent conduct in the garage transaction are:

1) That Preston did NOT disclose to SDF board members the firm's "services for the Developer related to financing for the River Park Square garage transaction prior to the Foundation's incorporation."

2) There was no engagement letter between Preston and the Foundation.

3) "Preston did not inform the Board that the Board had an 'independent obligation' to evaluate the terms of the garage financing plan and, as indicated, the Foundation relied on the undertaking, work and expertise of Ormsby and the Preston firm."

4) "Preston did not inform the Board members that the Foundation was not obligated to and/or should not close on the garage purchase as a result of AMC's notice of default."

5) "After AMC's notice of default, Ormsby negotiated a Reimbursement Agreement on behalf of the Foundation, and advised the Board that the Agreement resolved the AMC issue."

6) "Preston did not inform or advise the Board that the Foundation was not required to close the purchase of the garage because the Developer failed to comply with paragraph 12.1(k) of the Parking Facility Purchase Agreement, as alleged by plaintiffs [garage bondholders.]"

As noted elsewhere in this correspondence, the actions of Preston and other players in the closing of the garage transaction (in the midst of the AMC crisis, and after AMC had filed a notice of default) offers a good look into the dynamics of the garage fraud and who was really working for whom. In a motion filed in connection with the board members' declaration, the Spokane Downtown Foundation (**Exhibit N**) alleged :

"Ormsby attempted to use the AMC notice of default as 'leverage in [his] negotiations with the developers.' When his efforts to negotiate a lower price failed, Ormsby negotiated a Reimbursement Agreement to resolve the AMC matter, without discussing the Foundation's options with Board members."

This clearly raises the question, that federal investigators and a grand jury should examine in a broader corruption probe, as to why Mr. Ormsby and Preston didn't do what Mr. Ormsby conceded, in his December 2002 deposition, that they could have done. And that was to advise the Foundation to abort the transaction altogether and refund the bond proceeds. Yet, in his deposition testimony, Mr. Ormsby indicates that little if any consideration was given by Preston to advising the Foundation not to go forward with the transaction even after they knew Betsy Cowles refused to budge on her \$26 million. **Exhibit O.**

To be clear, the Reimbursement Agreement did nothing to resolve the projected \$1.2 million drop in annual parking meter revenue that the PDA's Terry Novak warned about in the August 12, 1999 letter that Mr. Ormsby forwarded to Ms. Cowles through attorney Duane Swinton. **Exhibit P.** It would only provide for compensation from Cowles companies if AMC pulled out of the RPS development altogether. It didn't cover the losses to be incurred because of the evening parking rate reductions that were enacted to try to placate AMC's complaints.

In any event, the whole controversy was covered up to prevent it from becoming known to project critics, like Mayor Talbott and Mrs. Rodgers, who could have made it a public issue and put pressure on the Foundation and the PDA (Mrs. Rodgers wasn't appointed to the PDA board until the following year) not to allow the garage transaction to close.

This secrecy was the reason for a confidentiality agreement that Mr. Ormsby and Mr. Koegen signed, obligating the Foundation and the PDA, respectively, not to disclose the existence of the Reimbursement Agreement. **Exhibit Q.** The confidentiality agreement--which requires a contract involving a public agency to be illegally withheld from a public records request--is evidence on its face of public corruption. Let's look at how Mr. Ormsby addressed it in his deposition. **Exhibit R**

Mr. Ormsby: That was a request of the developer and I believe the City agreed.

Mr. Lowery: Did you agree?

Mr. Ormsby: Yes, obviously we did.

Mr. Lowery: Why did the developer want to keep confidential the AMC dispute and the proposed resolution of it?

Mr. Ormsby: At this time I don't recall that I ever was told that, but if I was, I don't remember.

Mr. Lowery: Why would you agree to a confidentiality agreement with respect to the AMC dispute and the potential release of it?

Mr. Ormsby: I didn't see any reason not to, and it was a way to resolve the issues in a way that was acceptable to the PDA and the City to have us move forward with completing the closing.

If it was acceptable to the City, this would have been news to Councilmember Rodgers, who had no idea what was going on. And that was the point.

The minutes of a PDA board executive session on August 25, 1999 record the comments of RPS supporter and City Council member Roberta Greene:

“Roberta commented that council really wasn’t aware of all that was going on. Roberta asked whether letters between PDA & Swinton are public doc. TMK thinks they are. RJK’s concern is about things going public.”

It was also Betsy Cowles’s concern. Notes taken and they typed up by an assistant to City Bond Counsel Roy Koegen at an August 16th meeting of the Spokane Downtown Foundation record: “Ms. Cowles stated that she was upset about the letter from T. Novak now public record. Asks that all future letters come from Roy Koegen.” These notes also record that Mr. Ormsby was present and spoke at the meeting along with Ms. Cowles. **Exhibit S.**

Clearly, the most plausible explanation for the secrecy is to keep the deal on track so that Ms. Cowles got the money before the public learned more about how bad the deal was.

Given his current position as U.S. Attorney for Eastern Washington, the circumstances surrounding the closing of the garage transaction clearly beg the question of what Mr. McDevitt knew and did. He is either implicated directly in 10b-5 violations, or he’s potentially an important witness against others involved.

One of the noteworthy documents that shows how deeply Mr. McDevitt was involved is a September 3, 1999 memo from the late Tom Kingen, then a partner with Roy Koegen at Perkins Coie, to Mr. Swinton and to Mr. McDevitt. The problem Mr. Kingen was clearly addressing is how to execute the closure of the garage deal given the knowledge they all share that AMC, on August 20, 1999, sent a notice of a default to River Park Square. **Exhibit T.** This clearly indicates just how enmeshed the explosive AMC issues were in the job Mr. McDevitt had of closing the garage transaction. When Mr. Ormsby was asked during his deposition (December 4, 2002 at page 178 in the transcript) whether he’d seen a copy of the AMC lease, he said he had “and one of my partners read it in more detail.” When asked who that was, Mr. Ormsby replied, “Jim McDevitt.”

Moreover, Preston billing records reflect many hours of work by Mr. McDevitt on the issue and the AMC problem. The attached **Exhibit U** is just one portion of Preston’s billings on the project and it reflects more than 13 hours of work by Mr. McDevitt (identified as “JAM” on the bills) including, for example, this entry from August 26, 1999:

3:00 Review new documents and review lease documents with AMC; conference with M. Ormsby; to/from office of attorney for Developer; extensive meeting with attorneys for developer and City; extensive negotiations and discussions; post-meeting conference; notes and follow up suggestions as to how to close transaction and or insure around potential liabilities.

Finally, there's abundant evidence--much of it recounted in the IRS's June 2004 report, of how Preston and the SDF itself were merely instruments of Cowles real estate companies, beginning in November 1996 when Mr. Swinton and another Cowles attorney incorporated the SDF and Mr. Swinton signed on as its registered agent. The Foundation had no independent assets with which to compensate Preston attorneys. Preston could only get paid from bond proceeds if the garage transaction closed and the bond proceeds were disbursed. In other words, if they exercised the courage necessary to advise the SDF to abandon the transaction and return the escrowed bond proceeds rather than knuckle under to Ms. Cowles unrelenting demand to receive her \$26 million, they would not have gotten paid.

Moreover, Preston clearly thought that Cowles real estate companies exercised control of when and whether they got paid. Billing statements were sent **Exhibit V** to Mr. Swinton, with Mr. Swinton's law firm listed as the client. There is even this remarkable memo, **Exhibit W**, from March of 1998 from Mr. Ormsby to Bob Robideaux, the River Park Square project manager. In addition to asking Mr. Robideaux's help in getting Preston legal bills paid, item #4 in the memo discloses what many would regard as important attorney/client privileged advice on the very important and legally sensitive issue of whether the Foundation should petition the Internal Revenue Service for federal non-profit corporation status. Why, would ask, would that be any business of Mr. Robideaux's? The answer is obvious.

As the IRS reports, the bondholder filings, and the numerous source documents show conclusively, there was no arms length transaction between Cowles real estate companies and the Foundation that, after all, Cowles lawyers created. There certainly was no arms length relationship between Cowles companies and Preston Gates, who'd hired Mr. Ormsby and then recruited him to handle the affairs for the Foundation, whose board members were selected by Ms. Cowles and her associates. Preston and Mr. Ormsby knew all this. And, yet, here is the full text of the *Conflicts of Interest* disclosure in the official offering statement for the garage bonds:

“Some or all of the fees of the Underwriter, Underwriter's counsel and Bond Counsel are contingent upon the issuance and sale of the Bonds. None of the members or other officers of the Foundation or the Authority have interests in the issuance of the Bonds that are prohibited by law.” **Exhibit X**

The record shows that Mr. Swinton, the Cowles lawyer, actively sought to remove from a public document the disclosure that Cowles companies formed the Spokane Downtown Foundation. **Exhibit Y**. That information (which Preston was well aware of) is also missing from the official offering statement provided to prospective bondholders. A grand jury might reasonably conclude that this information was a material fact, and that its non-disclosure, by itself, violated the law.

Finally, and as reported in our cover letter, it has to be noted that after City Special Counsel O. Yale Lewis filed his complaint alleging a civil conspiracy

to divert public funds for private use, Mr. Ormsby signed on to be the campaign treasurer for the John Power for Mayor campaign in 2000. Mr. Powers prevailed and became Spokane's new mayor. And in short order he brought in a new special counsel for RPS litigation and amended the City's RPS legal filings to remove the civil conspiracy charges. When that change was announced, Mrs. Rodgers approached the new special counsel and inquired as to why the civil conspiracy charges had been dropped.

"Politics," she was told.

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