69445-6

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No. 69445-6

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES

Appellant,

v.

COLLIERS INTERNATIONAL REALTY ADVISORS (USA), INC., a California corporation and ARVIN VANDERVEEN and JANE DOE VANDERVEEN, and their marital community,

Respondents.

and

LEIBSOHN PROPERTY ADVISORS INCORPORATED, a Washington corporation, dba LINC PROPERTIES

Appellant,

v.

CITY OF SEATAC, a municipal corporation,

Respondents.

RESPONDENT CITY OF SEATAC'S BRIEF

Michael B. Tierney
Attorney for Respondent City of SeaTac
Tierney & Blakney, P.C.
2955 – 80th Ave. SE, Ste. 102
Mercer Island, WA 98040 * (206) 232-3074

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I. INTRODUCTION

While involving a large real estate transaction, this case is fairly simple. Plaintiff Leibsohn Property Advisors, Inc. ("Linc") is a real estate brokerage that had been trying for years to sell a commercial property (the "Property") owned by K&S Developments, LLC ("K&S"). The Property, which had been listed for over $28,500,000, went into foreclosure while listed by Linc. The City of SeaTac was interested in the Property and bought the loans of the foreclosing lenders for approximately $12,270,000. This allowed the City to step into the lenders' shoes and acquire the Property through a deed in lieu of foreclosure. The City was represented in the transaction by Defendant broker Arvin Vander Veen of Colliers International Realty Advisors, Inc. ("Vander Veen"). Vander Veen negotiated the transaction without disclosing the identity of his client, the City.

In the early stages of negotiating the sale of the loans, K&S notified Linc of the potential Vander Veen transaction. Linc then contemplated, accepted and signed an explicit agreement proposed by K&S which provided that Linc would receive no commission on the pending Vander Veen transaction, stating that it was "specifically excluded" from Linc's listing agreement. The new listing agreement created a valuable opportunity for Linc to list the Property at a drastically reduced price of $14,500,000, a sale price that still would generate some return to K & S, and would allow Linc to receive a commission from K&S. Linc decided that, even with the looming foreclosure action, the opportunity to market the Property at a lower price was adequate consideration for waiving whatever claim there was to a commission on the possible Vander Veen deal.

The trial court properly denied Linc's motion for partial summary judgment, and properly granted Defendants' summary judgment motions on multiple grounds, including Linc's inability to prove the elements of tortuous interference, Linc's waiver of its claim to a commission, and the explicit language of the listing agreement.

Linc's opening brief focuses on only one factor in the trial court's summary judgment orders -- the "deed in lieu of foreclosure" factor. However, Linc's focus is nothing more than a red herring. Whether the Vander Veen transaction is labeled a deed in lieu of foreclosure, a sale of secured loans, a short sale of the title to real property, a release of personal guarantees, or some other form of business transaction is an entirely irrelevant inquiry because the transaction in question, whatever its label, was "specifically excluded" from the K&S/Linc listing agreement.

II. STATEMENT OF FACTS

This case arises out of a real estate listing agreement for commercial property located in the City of SeaTac. The Property was the sole asset of K&S. CP 436. K&S was owned by Mr. Kingen and Mr. Switzer.

Starting in approximately 2006, the Property had been listed for sale by K&S through real estate broker Brian Leibsohn ("Leibsohn"), who is the owner of Linc. CP 457. In the early stages of the listing of the Property, the asking price was as much as $28,500,000. CP 461. In 2008, K&S and Linc executed another real estate listing agreement ("2008 Listing"). CP 464-67. The 2008 Listing set an asking price of $24,500,000 and provided for a commission to Linc of 4% of the sales price, up to a maximum of $490,000.

The Property was burdened by several debts that were secured by deeds of trust on the Property. By the end of 2009, in addition to default amounts on the debts, there were past due property taxes and mechanics liens burdening the Property. Much of the debt was also secured by personal guarantees signed by Mr. Kingen and Mr. Switzer. The following chart shows the principal amounts of the obligations on the Property, the known default amounts and the eventual payoff amounts.

The chart is derived from the Final Settlement Statement on the transaction (CP 530-31), the foreclosure pleadings (CP 478), and the Avatar Loan Purchase Agreement (CP 555-56, 558).

Lender/Obligation	Principal Amount	Principal Plus Default Amounts and Fees	Eventual Payoff
Avatar	6,500,000	7,434,837.48	7,150,000
Centrum	4,500,000	7,840,643.72	4,000,000
Velocity	560,000	560,000 plus uncertain	100,000
Kirby	560,000	560,000 plus uncertain	100,000
Back Taxes	562,623.55	562,623.55	562,623.55
Mechanics Liens	26,021.71	26,021.71	26,021.71
Total:	12,708,645.26	16,984,126.46 plus uncertain	11,938,645.26

By May 2009, K&S was in default on its debt obligations and a foreclosure proceeding was started against the Property by Centrum Financial Services, Inc. ("Centrum") one of the lenders on the Property. CP 469-82. On approximately May 4, 2008, the City was served with a complaint in the foreclosure proceedings. *Id.* The City was named as a party in the foreclosure because the City had a lien on the Property and the City's interest would be subject to foreclosure in the proceeding. *Id.* At that point, the City began working with its real estate advisors, Defendant Colliers International Reality Advisors Inc. ("Colliers") and one of Colliers' brokers, Defendant Arvin Vander Veen ("Vander Veen") to explore purchasing the debt instruments of the lien holders and then acquiring the Property through a deed in lieu of foreclosure. In pursuit of this possibility, Vander Veen contacted the lenders.

After the foreclosure proceedings had started, Linc prepared a new listing agreement, signed it, and sent it to K&S on August 18, 2009. CP 484-87. Linc's August 18th proposal would have changed the listing price on the Property, and would have extended Linc's listing to November 1, 2010. The August 18th proposal made no change in the commission structure. K&S did not accept the August 18th proposal and did not make a counter-proposal for several weeks. CP 447-48.

On September 28, 2009, K&S, Linc, and Centrum held meetings. CP 436-40. Centrum was present through its parent company. On that date, K&S discussed with Linc a proposal by Vander Veen through which Vander Veen would purchase the notes secured by the Property and then obtain a deed in lieu of foreclosure on behalf of an undisclosed principal. CP 429, 441.

On October 2, 2009, K&S made a counter-proposal ("October 2nd Counter-Proposal") to Linc regarding Linc's August 18th proposal to change the listing agreement. CP 489-92. The October 2nd Counter-Proposal lowered the asking price to $14,500,000, extended the listing to

November 1, 2010, and changed the commission structure for Linc so as to exclude the potential Vander Veen transaction. With respect to the commission, K&S added a hand-written exclusion clause ("Commission Exclusion") reading as follows:

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.

CP 490. At the time, Leibsohn believed the Commission Exclusion had been "crafted" by Vander Veen and was certain that the change in the fee structure had been prompted by Vander Veen's proposed transaction. CP 428-29, 435. Leibsohn believed that the Vander Veen proposal was the only potential transaction that was pending at the time. CP 444-46. In fact, Leibsohn was informed in writing by Switzer that the Commission Exclusion was specifically intended to eliminate any commission on the proposed Vander Veen transaction.

> Attached is your signed fee agreement. I wrote in a fee exclusion for the proposed deed in lieu of transaction proposed through Tom Hazelrigg and Arvin Vander Veen.

CP 494. According to Leibsohn, Switzer was not only an owner of K&S, but also a partner with Tom Hazelrigg in another lender, Centurion Financial Group, LLC. CP 500. Switzer thus acted in several different capacities regarding the Property. Switzer went on to explain the rationale for the exclusion.

> This in our opinion is not a sale but a loss of the property. We have hung in there with you as our broker for over 2 years. We hope that you can pull the rabbit out of the hat and sell the property as a whole and get us out clean. Short of a sale by you, we will either lose the property to our lenders or lose it to our new note holders in exchange for the deed. We lose and are in a serious negative position unless you can come through. We would gladly pay you a fee for selling the property. We will not pay a fee [to] give up our property to our lenders, no matter who they may be.

CP 494 (bracketed language added).

After receiving the October 2nd Counter-Proposal from K&S, Linc never had any conversations with K&S regarding the language of the Commission Exclusion. CP 430-31, 450-51, 456. However, Linc did communicate directly with Vander Veen, sending him an email on October 2nd alleging that the proposed transaction amounted to K&S and Vander Veen "going around" Linc without paying it a commission. CP 507.

Leibsohn did not add his initials to the October 2nd Counter-Proposal immediately. CP 432-34, 455-56. In fact, Leibsohn did not execute the October 2nd Counter-Proposal until November 23, 2009, at which point, he back-dated his initialing of the changes to October 2, 2009. *Id.* Nonetheless, Linc performed according to the agreement by sending out marketing materials advertising the newly-lowered price. CP 1449-50.

Before executing the October 2, 2009 Counter-Proposal, Leibsohn submitted a complaint to the Commercial Brokers Association ("CBA"), dated October 13, 2009, in which he alleged that Vander Veen had contacted the lenders with the intent "to purchase a Deed in Lieu of Foreclosure." CP 509-10. Notwithstanding his allegations, Leibsohn then executed the October 2nd Counter-Proposal and eventually sent it to CBA as a supplement to his complaint. CP 442, 448-49.

By December 31, 2009 the proposed Vander Veen deed-in-lieu transaction had proceeded to closing. Centrum and Avatar both executed agreements, dated November 24, 2009, to sell their loans to Vander Veen. CP 542-67. Centrum and K&S signed a "Deed in Lieu of Foreclosure Agreement" on approximately December 24, 2009 through which K&S agreed to transfer the Property to Centrum or its assigns in exchange for forgiveness of the loans to K&S. The terms of the deal also required the release of Mr. Kingen and Mr. Switzer from most, but not all, of the personal loan guarantees they had signed.CP 512-28.

The deed-in-lieu transaction closed on December 31, 2009. The City received title to the Property through a deed in lieu of foreclosure executed by K&S. CP 537-40. Kingen and Switzer received releases of the personal guarantees they had signed guaranteeing the Avatar and Centrum loans. CP 533-35. As shown on the closing statement, K&S received no proceeds from the transaction. CP 530-31. In fact, Kingen and Switzer remained obligated under personal guarantees they had made securing the Velocity loans. They are currently being sued by Velocity for over $2,100,000. CP 1604-08.

Linc did not receive a commission on the transaction. Leibsohn testified that he asked K&S for a commission but was told that none was due because the transaction was a deed in lieu of foreclosure. CP 432, 452-54. In fact, K&S gave Linc a detailed written explanation as to why no commission was due. CP 1147-48. The loss of its sole asset made K&S insolvent. CP 443.

On approximately March 1, 2011, Linc sued the City of SeaTac alleging a single cause of action for tortious interference with business expectancy. The case was eventually consolidated with Linc's previously filed lawsuit against Colliers, Vander Veen and others.

Defendants each brought motions for summary judgment to dismiss all claims, and Linc brought a motion for partial summary judgment seeking to have the transaction declared a "sale," as opposed to a "deed in lieu of foreclosure." On September 20, 2012, the Superior Court issued three orders on the motions. Two of the orders granted

Defendants' motions without explanation. CP 1660-64. The third order denied Linc's motion, finding that the transaction was a deed in lieu of foreclosure. CP 1655-57. However, the City had pointed out that, pursuant to RCW 82.32.180 and 82.45.150, jurisdiction over excise tax disputes resided exclusively with the Thurston County Superior Court. CP 1523. Consequently, in the order on Linc's motion, the Superior Court stated: "However, the court's decision takes no position on whether the transaction could be interpreted by the Department of Revenue as a "sale" for purposes of collecting excise taxes under RCW 84.45.010." CP 1657. The court also denied the City's subsequent motion for attorney fees. CP 1891-92.

III. ASSIGNMENT OF ERROR

Did the Superior Court err in not holding that the City was a third-party beneficiary of the K&S/Linc listing agreement, and therefore entitled to an award of attorney fees?

IV. ARGUMENT SUPPORTING SUMMARY JUDGMENT IN FAVOR OF THE CITY

A. Standard of Review

The Court of Appeals conducts de novo review of a trial court's grant of summary judgment. *Estep v. Hamilton*, 148 Wn.App. 246, 255-

56, 201 P.3d 331 (2008). A grant of summary judgment can be affirmed on any ground supported by the record. *Id.*

B. The Commission Exclusion eliminates Linc's claims

The most prominent fact in this case is that K&S and Linc executed the Commission Exclusion to their listing agreement as it was set forth in the October 2nd Counter-Proposal made by K&S.

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.

CP 490. The Commission Exclusion creates three alternative grounds for excluding the Vander Veen transaction from any obligation by K&S to pay Linc a commission. First, the exclusion is directed toward a "potential transaction" that had previously been discussed between K&S and Linc and which was specifically identified as the Vander Veen transaction. Second, the exclusion applies in general to any transaction in which K&S was asked to give up the Property in exchange for release of personal guarantees signed by the owners of K&S. Third, the exclusion provides that K&S would not pay a commission if the owners signed a deed in lieu of foreclosure.

Each of the three standards set forth in the handwritten exclusion independently applies to the Vander Veen transaction and excludes it from payment of a commission. Linc's opening brief challenges the application of only one of these standards – the deed in lieu of foreclosure – and does not even mention the others.

1. K&S and Linc specifically excluded the Vander Veen transaction from their listing agreement

When Scott Switzer of K&S made the October 2nd Counter-Proposal to Linc's proposed August 18 revised listing agreement, Switzer included the handwritten Commission Exclusion describing a "potential transaction" that was "specifically excluded" from the listing agreement.

> …The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.

CP 490. Mr. Switzer had explicitly identified the subject of the Commission Exclusion in his email that accompanied the October 2nd Counter-Proposal.

> I wrote in a fee exclusion for the proposed deed in lieu of transaction proposed through Tom Hazelrigg and Arvin Vander Veen.

CP 494. According to Leibsohn, Mr. Switzer previously had disclosed the pending transaction during meetings among K&S, Linc, and the lenders on September 28, 2009. CP 429, 436-41.

The Commission Exclusion is simple and direct. It states that a particular "potential transaction" has been "specifically excluded" from the listing agreement. There is no conditional language here. It does not matter whether the "potential transaction" is a deed in lieu of foreclosure, a short sale, a sale of loans, or any other form of transaction. The label or structure of the transaction is irrelevant to the exclusion. Most importantly, for purposes of Linc's arguments, nothing in the exclusion is in any way dependant on whether or not the "potential transaction" is subject to excise tax. The point being expressed in the exclusion is simply that no commission will be due to Linc on the pending transaction proposed through Arvin Vander Veen.

In response, Linc did not propose any revision to the Commission Exclusion. For instance, Linc did not propose language that would exempt only a deed in lieu of foreclosure transaction, but not a transaction in which release of personal guarantees was exchanged for the Property. Linc also made absolutely no proposal to tie the exclusion to any opinion or determination by the Washington Department of Revenue as to whether excise tax was due. In fact, according to the deposition testimony of Brian Leibsohn, Linc had absolutely no comment regarding the Commission Exclusion – it simply accepted the exclusion as written and explained by Scott Switzer. CP 430-31, 450-51, 456.

Linc cannot point to any other "potential transaction" that could have been the target of the exclusion. Linc had no buyers in sight and never came up with one, even after the listing price was slashed to \$14.5 million. The only "third party" that was interested in buying the debt on the Property was the undisclosed principal represented by Vander Veen.

The transaction that closed on December 31, 2009, is the same potential transaction that was disclosed on September 28, the same proposed transaction described in Switzer's October 2nd email, the same potential transaction that was identified in the Commission Exclusion, and the same transaction that Linc agreed to exempt from payment of commission when it signed off on the new listing contract. No matter what label is attached to it, the Vander Veen transaction is undoubtedly the one that was "specifically excluded" – there are no other possibilities.

2. The Vander Veen transaction is excluded from the listing agreement for the additional reason that it involved removal of personal guarantees

The Commission Exclusion creates an additional and more general category of exclusion that applies to transactions "in which the owners are asked to give up the property in exchange for removal of personal guarantees." CP 490. The Vander Veen transaction squarely meets this criterion.

One of the core ingredients of the transaction consisted of the releases of Mr. Kingen and Mr. Switzer, the principals of K&S, from the personal guarantees they signed securing the first and second deeds of trust. CP 533-35. The Deed in Lieu of Foreclosure Agreement executed by K&S and Centrum required Centrum or its assigns (the City) to provide Kingen and Switzer with releases of the personal guarantees they had signed securing the Avatar and Centrum loans. CP 513. In return, K&S was to provide a deed to the Property. CP 513-14. The required releases and deed were executed and delivered by the parties. CP 533-40.

No question of fact or law exists here. Entirely apart from any inquiry into excise taxes or the meaning of "deed in lieu," the transaction that closed on December 31, 2009 falls squarely within the language of the Commission Exclusion because it was a transaction in which a third party asked the owners to give up the Property in exchange for removal of personal guarantees. Leibsohn was not aware of any other proposed transaction at the time, so the Vander Veen proposal was clearly the only candidate that could possibly constitute "the potential transaction in which a third party" was asking "the owners to give up the property in exchange for removal of personal guarantees."

Linc's Opening Brief does not contain a single word about the "personal guarantees" exclusion. The void here is no accident, because there is absolutely nothing Linc can say on this point. Regardless of the application of the other terms of the Commission Exclusion, regardless of the definition of "deed in lieu," regardless of the question of excise taxes, regardless of the complexity of the documents, and regardless of the label attached to the transaction, there is no question that it involved giving up the Property in exchange for removal of personal guarantees.

Linc's silence on this point speaks volumes. There is no doubt that Linc agreed with K&S, in writing, that it would forgo a commission on a "release of personal guarantees" transaction. There is no doubt that Linc had absolutely no legitimate expectation of receiving a commission on this transaction. There is no doubt that Linc suffered zero damages when the transaction closed without paying Linc a commission. And there is no doubt that Linc consequently is unable to maintain an action for interference with its nonexistent business expectancy. The "release of personal guarantees" exclusion completely bars Linc's claim.

3. The Vander Veen transaction was a deed in lieu transaction within the meaning of the Commission Exclusion

The third category of exclusion created by the Commission Exclusion is a general exclusion for deeds in lieu of foreclosure. The handwritten language of the exclusion is quite simple. It states that no commission will be due "if the owners sign a deed in lieu of foreclosure." CP 490. It says nothing about the exclusion being contingent upon whether or not DOR takes the position that excise tax is due.

Consequently, the only question here is the following: did "the owners sign a deed in lieu of foreclosure?"

On this point, no dispute of fact exists. The deed signed by the owners specifically states that it is given in consideration of the agreement not to foreclose on the Property. CP 537. The meaning of the deed is further established by the "Deed In Lieu Of Foreclosure Agreement" which was signed by the parties and which clearly lays out the process through which K&S provided the deed in exchange for dismissal of the foreclosure proceedings. CP 513.

Familiar principles of contract interpretation apply when interpreting deeds. See, e.g., *Carr v. Burlington N., Inc.*, 23 Wn.App. 386, 390-91, 597 P.2d 409 (1979) (ambiguity in a deed is resolved in favor of grantee and against grantor); *Hoglund v. Omak Wood Prod., Inc.*, 81 Wn.App. 501, 504, 914 P.2d 1197 (1996) (parties' intent is derived from reading the deed as a whole, giving words their ordinary meaning). Interpretation of a contract is an inquiry into the intent of the parties, beginning with an examination of the language they used to express their agreement. *Berg v. Hudesman,* 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Consistent with these principles of contract interpretation, the review of a deed is a mixed question of law and fact. *Lake v. Woodcreek Homeowner's Ass'n*, 169 Wn.2d 516, 526, 243

P.3d 1283 (2010), *citing, Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 567, 571–72, 716 P.2d 855 (1986) (internal citation omitted). The factual issue is the declarant's intent, which is discerned from the face of the declaration. *Id.* The declaration's legal consequences are questions of law. *Id.* Washington courts have consistently held that "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Hartley v. State,* 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

With respect to the intention of the parties, no reasonable trier of fact could come to any conclusion other than that K&S, Centrum, and the City, as Centrum's successor to the loan, intended to execute a Deed in Lieu of Foreclosure. Examination of the plain language of the transaction documents leaves no question that the parties intended a deed in lieu of foreclosure transaction.

> This Deed in Lieu of Foreclosure Agreement (the "Agreement") is made as of 12/24/09, 2009, by and between Centrum Financial Services, Inc., its successors and assigns ("Lender"), K & S Developments, LLC, a Washington limited liability company ("Borrower") and Gerald Robert Kingen and Scott G. Switzer (collectively, "Guarantor").

CP 512.

> The parties hereto desire to resolve the default of Borrower under the Loan Documents by providing for a conveyance of the Property, the Leases (as defined below) and the

> personal property, intangible property, and contract rights associated with the Property (collectively, the "Collateral") to Lender upon the terms and conditions set forth herein.

CP 513. (emphasis added). Furthermore, the Deed in Lieu of Foreclosure Agreement sets forth the rationale behind the parties' intent, stating that the value of the Property was determined to be less than the amounts owed on the loans secured by the Property.

> The value of the Property is less than the sum of the outstanding principal and accrued interest on the Loan and that certain senior loan from Avatar Income Fund I LLC (together with its successors and assigns, "Senior Lender") in the original principal amount of $6,500,000 (the "Senior Loan").

CP 513. Thus, the parties had explicitly agreed that K&S would be permitted to walk away from the loan in exchange for its agreement to deed the property to the lender.

The interpretation of a deed depends upon the intent of the parties as expressed in the language of the deed. In the case at hand, there is no doubt as to the intent of the parties, who executed a deed in lieu of foreclosure agreement and who consummated that transaction with a deed given in exchange for the dismissal of a foreclosure action. Consequently, within the meaning of the Commission Exclusion, there is no doubt that K&S "signed a deed in lieu of foreclosure," thus making the transaction exempt from payment of a commission to Linc by K&S.

C. Linc's Claims Are Barred By Waiver and Estoppel

Waiver is the voluntary relinquishment of a known right. *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn.App. 899, 909, 247 P.3d 790 (2011).

Equitable estoppel prevents a party from changing its position after others have acted in reliance on that position. The elements of estoppel are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).

Both waiver and estoppel are triggered by Linc's acceptance of the October 2nd Counter-Proposal and the Commission Exclusion that it contained. Linc sat on the October 2nd Counter-Proposal for more than seven weeks before signing it on November 23, 2009. By that date Linc believed the exclusion had been drafted by Vander Veen and specifically exempted the Vander Veen proposal from the commission agreement. Linc also had already lodged a complaint against Vander Veen with the CBA. Consequently, Linc was fully aware that it was relinquishing a claim to a commission on the Vander Veen proposal when it signed the October 2nd Counter-Proposal. This is a classic waiver.

Estoppel exists because Linc sent the executed October 2nd Counter-Proposal to CBA, knowing CBA would provided it to Vander Veen along with the other materials related to Linc's CBA complaint. Linc alleges Vander Veen told the City about the October 2nd Counter-Proposal. CP 394. The plain language of the October 2nd Counter-Proposal tells any reader that Linc has no claim to a commission on the transaction ultimately closed by the City. The City and Vander Veen derived that assurance from the document just as any other reader would, and proceeded with the closing secure in the knowledge that no commission was due to Linc. Allowing Linc to change its position now and sue the City for a commission is precisely the sort of about-face that the doctrine of estoppel prevents. When Linc signed the October 2nd Counter-Proposal, it created a safe harbor in which the City's transaction could go forward. Estoppel prevents Linc from imposing an after-the-fact commission on the safe harbor.

D. Linc cannot prove the elements of tortious interference

The City and the Colliers defendants both presented convincing arguments to the Superior Court showing that Linc was unable to prove the elements of tortious interference and that the Defendants were therefore entitled to summary judgment. The Superior Court granted summary judgment on that basis, among others. Linc presents no argument regarding its inability to prove tortious interference. Instead, it merely refers to its arguments before the Superior Court. Opening Brief, p. 18. However, parties cannot present an argument on appeal by attempting to incorporate by reference arguments made elsewhere. *In re Guardianship of Lamb*, 173 Wn. 2d 173, 183 (2011). Linc has waived its appeal on this point by not raising it in its Opening Brief. *Ganser-Heibel v. Chavallo Complex, LLC*, __ Wn.App. __, 293 P.3d 1234, 1236-37 (2013).

Notwithstanding Linc's waiver, and without conceding that Linc has preserved this issue for appeal, the City summarizes below the arguments that support the Superior Court decision.

1. Elements of tortious interference

A plaintiff must prove five elements in order to establish a prima facie case of intentional interference with contractual relations: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the contractual relationship on the part of the defendant; (3) intentional interference inducing or causing a breach or termination of the contractual relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) resulting damage to the party whose contractual relationship has been disrupted. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn.App. 203, 242 P.3d

1, (Div. 1 2010), *review denied*, 171 Wn.2d 1014, 249 P.3d 1029 (2011) (trial court properly dismissed claim when plaintiff failed to provide sufficient facts to prove defendant had improper motive); *Roger Crane & Associates, Inc. v. Felice*, 74 Wn.App. 769, 875 P.2d 705 (1994) (affirming summary judgment – homeowner not liable to selling broker for loss of sales commission when relationship with new agent was established in good faith); *Calbom v. Knudtzon*, 65 Wn.2d 157, 162-63 (1964).

If the Plaintiff establishes these elements, the Defendant is entitled to justify the interference or show that the actions were privileged. *Calbom*, 65 Wn.2d at 163; *Sintra v. Seattle*, 119 Wn.2d 1, 28 (1992). The privileges or justifications that a defendant can assert successfully are varied. *Plumbers and Steam Fitters Local 598 v. WPPSS*, 44 Wn.App. 906, 921 (1986) (WPPSS had a right both at common law and by statute to protect its own property and thus its interference was justified as an "absolute right equal or superior to the right which was invaded"); *Topline Equipment, Inc. v. Stan Witty Land, Inc.*, 31 Wn.App. 86, 93 (1982) (interference is justified as a matter of law if it involves the exercise of an absolute or superior right).

2. Linc cannot show a valid business expectancy or the City's knowledge of one

The salient circumstances surrounding the K&S Property made it impossible for Linc to validly expect a commission.

1. Given the foreclosure lawsuit and the heavy debt on the Property, neither K&S nor Linc had any expectation of controlling the disposition of the Property. As K&S stated, "we will either lose the property to our lenders or lose it to our new note holders." CP 494.

2. Linc had no agreements with the lenders on the Property, and had no expectation of controlling their actions.

3. Given the foreclosure lawsuit, the relevant subject of any transaction was the foreclosing loan, a type of "chattel paper." Linc was not in the business of brokering chattel paper and had no expectation that the customs and practices of real property brokerage would apply to chattel paper markets, nor did it expect that its listing agreement covered chattel paper. To address the distinction between real property and chattel paper, the City and Colliers needed to execute an agreement that specifically addressed chattel paper. CP 580-81.

4. After trying for several years, Linc had still not found a buyer and had no valid expectation that one would materialize to pay off the Property's debts in full before the foreclosure lawsuit was completed.

5. The Property was the sole asset of K&S, deeply burdened by debts. K&S had informed Linc that it needed a sale price of at least $14,500,000

for it to be able to pay Linc a commission. CP 1574-76. Linc had no valid expectation of receiving a commission at a lower price.

6. The Property was the sole asset of K&S. Linc had no expectation that it would receive a commission if K&S lost the Property through foreclosure or deed in lieu because K&S then would be insolvent.

7. Parties to a foreclosure action have a right to speak to each other. Linc had no valid expectation that it could control communications between the City, K&S, the lenders and the other lien holders.

8. The law does not recognize an agreement to agree. *Keystone Land and Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176 (2004). Until K&S and Linc reached a final meeting of the minds, Linc had no valid expectation of a future listing agreement. Consequently, Linc cannot argue that it would have obtained an extended listing agreement on the same terms as the expiring agreement. The foreclosure lawsuit changed everything, requiring K&S to take the position that "we will not pay a fee [to] give up our property to our lenders, no matter who they may be." CP 494.

9. The City had possession of the foreclosure lawsuit pleadings and materials, knowledge of the debt burdens on the Property, and knowledge of the greatly reduced market value of the Property, all of which showed that a sale of the Property was extremely unlikely. Consequently, Linc cannot show that the City had awareness of any valid business expectancy

by Linc. In fact, the information possessed by the City gave it knowledge of the absence of any legitimate expectation that Linc would find a buyer and earn a commission.

10. Linc alleges the City and/or its agent Vander Veen, had possession of the October 2nd Counter-Proposal executed by Linc. CP 394. Linc thus alleges that the City had knowledge not of Linc's right to a commission on the deed in lieu transaction, but instead had knowledge of Linc's contractual agreement to abandon any claim to such a commission. In short, the City was aware that no valid expectancy existed.

At most, Linc had unrealistic hopes or wishes of obtaining a commission. It certainly had no valid expectancy of receiving one on the deed in lieu transaction.

3. Linc cannot show an improper purpose or improper means

For multiple reasons, there is nothing improper about the City attempting to purchase the loans on the Property so that it can step into the shoes of the foreclosing lenders.

There are two overriding facts here. First, the debts on the Property were much greater than any purchase price that could be obtained. Therefore, the lenders controlled the fate of the property, and it was likely to end up in the hands of the owner of one of the foreclosing loans.

Second, the owners of K&S were able to retire some substantial debts on the Property and extricate themselves from the huge liabilities created by their personal guarantees of the largest loans. Despite years of trying, Linc was unable to produce an offer that similarly benefitted the owners – the market simply did not exist. Given this situation, there is nothing improper about an investor obtaining the Property by purchasing the foreclosing loans.

The loans in this case were the property of the various lenders, and Linc had no listing agreement with the lenders. Linc's listing agreement was with K&S. The fact that Switzer was both a part-owner of K&S and a partner of one of the lenders, Tom Hazelrigg (CP 1109), did not bar potential investors from talking with Hazelrigg and Switzer about the loans. The City engaged Colliers to purchase the chattel paper, directly paid Colliers a fee for its services, and specifically recognized in its agreement with Colliers that Linc had no commission agreement covering the chattel paper. CP 580-81. Colliers likewise acted properly when it paid a lender, Hazelrigg, a fee for arranging the payoff of millions of dollars of debt. There is nothing unusual or improper about the loans changing hands during the foreclosure process. The City was a party to the foreclosure lawsuit, and nothing prevents the City from talking to the lenders who were involved in the foreclosure, or buying out their interests.

The transaction required the coordinated action of four lenders, an escrow company, a title insurer, a sophisticated seller, an experienced real estate consulting company, a large public entity, and the multiple experienced lawyers who provided advice and drafted the agreements. None of these professionals noted anything improper about the transaction.

Consequently, the City was well within the exercise of its legitimate public and economic interests when it sought to step into the shoes of the foreclosing lenders. Linc's tenuous hopes for a commission in no way trump the interests of the City or any other investor willing to buy out the lenders.

4. Linc has no proximately caused damages

Damages which are remote and speculative cannot be recovered. *Larson v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677 (1964). Damages cannot be based on speculation or conjecture. *Topline Equip, Inc. v. Stan Witty Land, Inc.*, 31 Wn.App 86, 94, 639 P.2d 825 (1982). A plaintiff "must show that future opportunities and profits are a reasonable expectation and not based merely on wishful thinking." *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 805, 699 P.2d 217 (1985). Where it is highly speculative as to whether cause in fact exists between the claimed misconduct and the alleged damages, it follows that proximate cause has not been established. *Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn.App. 610, 622, 789 P.2d 792 (1990).

Under any scenario proposed by Linc, its damage claim is extremely speculative. To the extent Linc asserts it would have earned a commission on a regular sale of the Property to someone other than the City, Linc cannot identify the buyer, the price, or the timing of the transaction, and is particularly unable to show that the transaction would have closed prior to the foreclosure. To the extent Linc claims it could have gotten a commission from the City's deed in lieu transaction, Linc cannot identify the source of the money. As a single asset entity, K&S was insolvent after the deed in lieu. As for the City, even if it had put more money into the transaction, which it refused to do, it would all have been absorbed by the millions of dollars in unpaid debts and penalties that remained. Linc's only other possible source for a commission would then be the lenders themselves, but Linc had no agreement with them and can offer no evidence of their willingness to pay Linc $490,000 while incurring huge losses. K&S explained all this to Linc in emails prior to the transaction. CP 494, 1147-48. As K&S succinctly put it, the expectation for a commission in this situation was less than speculative, it was nothing more than the "hope that you can pull the rabbit out of the hat and sell the property." CP 494.

V. REBUTTAL ARGUMENT

Linc spends almost all of its opening brief discussing deeds in lieu of foreclosure, and none of it discussing the other elements of the Commission Exclusion, which, independently of the "deed in lieu" element, bar Linc's claim completely. Linc's claim is blocked by the parties' specific intent to exclude the Vander Veen transaction, whatever its label, and the fact that the transaction involved release of personal guarantees. Nonetheless, assuming for purposes of argument that the deed in lieu issue was dispositive, for the reasons set forth below, Linc fails to show that the transaction was not a deed in lieu within the meaning of the listing agreement.

A. Linc misunderstands the relation of excise tax to deeds in lieu and short sales

Linc's entire argument rests upon a false syllogism. Linc mistakenly argues that, if real estate excise tax ("REET") is due, then the transaction is a "sale," and if REET is not due, then it is a deed in lieu. Linc is mistaken on both points.

Linc completely misunderstands the scope of REET. DOR specifically recognizes that the existence of REET liability does not change the fundamental identity of a deed in lieu transaction. In fact, through its regulations and the testimony of its employees, DOR has established that the taxability of a transaction is not determinative of the label attached to it. There are some deed in lieu of foreclosure transactions where REET is due and some where it is not. Likewise, there are some short sales where REET is due and some where it is not.

The Washington Administrative Code makes it clear that a transaction can trigger REET, yet still constitute a deed in lieu transaction. Examples contained in WAC 458-61A-208(3) (i), (ii) and (iii) specifically identify transactions that incur REET, but nonetheless remain deed in lieu transactions.

> (i) Meg sells real property to Julie on a real estate contract. The contract price is $65,000. Julie makes payments for one year and then loses her job and can't make payments on the contract. Julie feels that she has some equity in the property, but she and Meg disagree on how to resolve the issue. Eventually, they come to an agreement. Meg will pay Julie $1,500; Julie will sign a <u>deed in lieu of forfeiture</u> and transfer the property to Meg. At the time of the <u>deed in lieu of forfeiture</u>, the outstanding balance of the contract was $61,000. <u>Even though the transfer was by a deed in lieu of forfeiture</u>, there is additional consideration passing (the $1,500). The transfer is subject to tax. The taxable selling price is $62,500, which is the total of the outstanding contract balance that was canceled plus the $1,500 paid to Julie.
>
> (ii) Sally sells real property to Frank. Frank obtains a $150,000 loan from Easy Bank. The bank secures the loan with a deed of trust on the real property. Frank is unable to

> make the payments on the loan. Frank transfers the property back to Easy Bank by deed in lieu of foreclosure to satisfy the deed of trust. No real estate excise tax is due on the transfer.
>
> (iii) Mel sells real property to George. George obtains a $100,000 loan from Zephyr Bank. The bank secures the loan with a deed of trust on the real property. George is unable to make the payments on the loan. George obtains a second loan of $25,000 from Sam. Sam secures his loan with a second deed of trust on the real property. Sam's deed of trust is in junior position to Zephyr Bank's deed of trust. Later, George can't make payments to either the bank or Sam. At this time, George owes the Bank $95,000 and Sam $23,000. George transfers the real property to Sam by deed in lieu of foreclosure to satisfy Sam's junior deed of trust. The debt to Zephyr Bank (the senior position debt) remains unpaid on the property at the time of transfer. The transfer is partially exempt and partially taxable. The deed in lieu of the junior position debt is exempt. The senior position debt to the bank that remains outstanding on the property at the time of the transfer meets the definition of consideration and is subject to tax. Tax would be due on $95,000.

WAC 458-61A-208(3).

The depositions of DOR employees confirmed that DOR recognizes there is no mutually exclusive dividing line between the payment of REET and the existence of a deed in lieu transaction. The supervisor who reviewed the transaction testified that there are deed in lieu transactions in which REET is paid and deed in lieu transactions in which it is not paid. CP 1641-42.

DOR also contradicts Linc's theory by recognizing that not every "sale" triggers excise tax liability; thus the terms "excise tax" and "sale" are not coextensive. In the January 13, 2009 letter from DOR regarding the "Application of Real Estate Excise Tax on Short Sales" (CP 1508 -10), DOR admits it did not understand short sales, which Linc equates with the K&S deed in lieu transaction. Opening Brief, p. 7. DOR's confusion on the subject was so profound that it had to convene a meeting of more than 40 real estate professionals to help it understand short sales and who "walked us through how these transactions actually work." CP 1509. DOR subsequently reversed its position and began a program to refund excise taxes that it had wrongfully collected on some short sales.CP 1510.

Therefore Linc is wrong on both ends of its proposition that "short sale" means REET is imposed and "deed in lieu" means no REET is imposed.

B. Linc overstates the position of DOR

Whether REET is due on the deed in lieu transaction remains to be seen. DOR did not assert a tax warrant against K&S until October 28, 2010, ten months after the transaction closed. CP 1513-14. In succeeding months, after learning about the tax warrant, the City emphatically asserted its position that no REET was due. CP 1116-17. What seemed to be the final word on the matter was found in the letter of March 11, 2011 from the City Attorney to DOR analyzing the transaction, the applicable Washington Administrative Code provisions, and asserting that, within the meaning of the statute and the administrative regulations, no additional consideration had passed to K&S and therefore no REET had been triggered. CP 1118-19. The City closed its letter by asking DOR to inform the City immediately if it had evidence of any additional consideration passing to K&S. From that point forward, approximately 17 months passed before the City heard from DOR -- and even then only in the context of Linc's summary judgment motion -- that it intended to contest the City's position. CP 576-78.

Despite signaling its intention to contest the City's position, DOR has not taken any action move the dispute forward and trigger the City's due process rights. CP 1638-40. The necessary first step would be for DOR to lien the Property under RCW 82.45, a remedy which is available to it if it truly believed REET was due on the transaction, and one which it has not yet taken. *Id.* If and when DOR liens the property, the City will have standing to file a protest under RCW 82.32, and to proceed to the initial conference and administrative hearing that are provided for under RCW 82.32.150, .160 and .170. Once the administrative process concluded, the City would have the option of filing a protest action in Thurston County Superior Court. *Id*; RCW 82.45.150. None of this has taken place yet, and the depositions of the DOR supervisor give some indication as to why. Steve Bren, the supervisor who reviewed the case, testified that he had never seen a similar transaction, and that the issue of whether REET was due was one that he believed was "fairly debatable" on both sides of the question. CP 1625-26.

As described in Section V.A, DOR recently revised its position on the taxability of some short sales after recognizing that it did not accurately understand them. Whether it revises its position on the K&S transaction remains to be seen. Until then, the fact remains that Linc rests its argument on an opinion that DOR has not enforced, which it allowed to gather dust for more than two and a half years following the transaction in question, and which it formulated in the midst of an admitted lack of knowledge about the complicated short sale transactions that Linc believes are comparable.

C. This is not a tax case

Linc mistakenly argues that, if the transaction is subject to REET, then it is a sale for purposes of the listing agreement, thus triggering a commission owed to Linc by K&S. However, the listing agreement contains no provision incorporating the definition of "sale" or "deed in lieu" as they relate to REET. The listing agreement stands on its own without reference to any statutory definitions. Linc's arguments about this Court "construing tax statutes" are thus entirely irrelevant. Opening Brief, p. 30. The Superior Court recognized this and, in denying Linc's motion, specified that it was making no ruling on whether or not REET applied to the deed in lieu transaction. CP 1657.

Linc also misses the mark with its reference to federal income tax opinions because the Supreme Court has shown that it treats mortgage-related transactions differently than other transactions. In *Cottage Sav. Assn. v. C.I.R.*, 890 F.2d 848 (6th Cir. 1989), the 6th Circuit considered a mortgage transaction and applied the "economic substance" test that Linc relies upon. The savings and loan had traded one portfolio of mortgages for an identical portfolio, but argued that the transaction was nonetheless an opportunity to realize a loss on the first portfolio. The 6th Circuit disagreed, holding that the economic substance analysis required it to ignore the form of the transaction, finding that the financial position of the savings and loan was unchanged, and ruling that it had therefore not incurred a loss. 890 F.2d at 854. The Supreme Court reversed the Court of Appeals holding that, while the portfolios might have been identical, the transaction still created an opportunity for the savings and loan to realize a loss. *Cottage Sav. Assn. v. C.I.R.*, 499 U.S. 554, 567-68, 111 S.Ct. 1503, 113 L.Ed.2d 589 (1991).

Supreme Court precedent also shows that Linc's "substance over form" rule has no application outside of the federal income tax context. For instance, in *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S.Ct.

2297, 85 L.Ed.2d 692 (1985), the Supreme Court considered the "sale of business" rule. That rule looked to the "economic substance" of a transaction, applying to situations where an entire business was sold and the transaction could be structured either as a sale of assets or a sale of 100% of the stock of the company. Under the sale of business rule, if 100% of the stock of the company was sold, the sale would be treated as a sale of the assets of the company and the securities laws would not be applied, despite the form of the transaction. 471 U.S. at 688-90. In *Landreth,* the Supreme Court struck down the sale of business rule, held that the form of a transaction was important, and applied the securities laws to the sale of the stock. 471 U.S. at 695-97.

Notwithstanding the above, examples drawn from excise tax cases, income tax cases, or securities cases have no relevance to this situation because this is not a tax or securities case. The sole inquiry here concerns the intent of the parties in adding the Commission Exclusion to the listing agreement. On that question, there is no dispute -- K&S explicitly informed Linc that the exclusion was meant to remove the possibility of any commission on the Vander Veen deal and Linc accepted it as written.

D. Linc's alleged public policy considerations are contrary to the undisputed facts

Without any reference to facts or authority, Linc makes the absurd contention that the K&S deed in lieu of foreclosure transaction is a model for making REET "extremely easy to avoid." Opening Brief, p. 30. Linc similarly imagines that "thousands if not tens of thousands" of commercial broker's listing agreements would be threatened by the example of the K&S transaction. Opening Brief, p. 29. However, Linc has never provided evidence of any other instance where a seller and real estate broker entered into a written contract to forgo a commission on either a deed in lieu transaction or a transaction in which a property was surrendered in exchange for release of personal guarantees. Moreover, Leibsohn's own deposition testimony destroys his argument. He testified that, in 23 years of experience as a commercial real estate broker, this was the only property he had ever dealt with that went into foreclosure, that this was the only deed in lieu of foreclosure agreement he had ever encountered, and that he had never been involved in a short sale. CP 1497-99, 1501-02. Defendant Michael George, a commercial real estate broker with 22 years of experience, said the same. CP 1505-06. Steve Bren, a REET specialist with DOR, also testified that he had not encountered a similar transaction in his 20 years of experience. CP 1621-24.

Linc suggests that its client, K&S, acted wrongfully in seeking to avoid REET by structuring the transaction as a deed in lieu. However, testimony from DOR employees again negates Linc's argument. Steve Bren testified that there are many instances where businesses structure transactions in ways that minimize their taxes, and that they are usually successful in doing so. CP 1622-23. He stated there was no "policy or practice or custom" at DOR that viewed this effort as being improper. CP 1623.

Linc's arguments also ignore the contents of the publication on short sales from the Department of Licensing that Linc itself offers as evidence. Opening Brief, p. 7-8, 21. In that publication, the Department cautions that, even in the residential context, "a short sale is a very complex transaction," and advises that "all sellers" should "seek the advice of a lawyer and tax professional." CP 642. Even more telling is the Department's advice that property owners should consider a deed in lieu of foreclosure as an alternative to a short sale, after having the proposal "reviewed by legal counsel." CP 646. Clearly, the form of the transaction is important here, and the potential tax consequences are a legitimate factor in the analysis. In the transaction at hand, K&S, its attorneys, the various lenders, the attorneys for the lenders, the City, Colliers, and their attorneys, all determined that structuring the transaction as a sale of debt and a deed in lieu of foreclosure best served the financial and tax considerations for the parties involved.

Linc predicts a flood of REET avoidance and lost real estate commissions. However, at the same time, Linc takes pains to show the complicated nature of the transaction in question, with several interconnected lenders, ownership by a single-asset LLC, overlap between the lending entities and the ownership entity, personal guarantees signed by the owners of the LLC, multiple defaults, an ongoing foreclosure, and a rare buyer with the cash to purchase the loans in default. Far from a flood, this is a snowflake – a single, unique transaction assembled from unusual ingredients arising only in the worst real estate market in decades, and occurring only once in the combined 45 years of experience of two of the parties. Linc's alleged public policy concerns are illusory.

E. Linc cannot escape from its agreement to the Commission Exclusion

Linc voluntarily executed the October 2nd Counter-Proposal from K&S, including initialing the Commission Exclusion. Linc did so for reasons that served its own self interests. Linc received valuable consideration in exchange for the revised listing agreement. Linc was allowed to market the Property for an additional year and the price was lowered drastically to $14,500,000, roughly half of its original list price. Linc was fully aware of the purpose of the Commission Exclusion, protested the exclusion before the CBA, contemplated it for seven weeks, performed according to the agreement, and then signed the contract. Linc cannot now pull a "bait and switch" by arguing that the exclusion has no application because Linc believes K&S was wrongfully influenced. If Linc wanted to make that argument, it should have rejected the benefits of the contract back in 2009; it cannot have it both ways.

F. Linc accepted the Commission Exclusion

Acceptance of a contract can be manifested by multiple means, including a signature, performance, and other conduct. *DeBritz v. Sylvia*, 21 Wn.2d 317, 321, 150 P.2d 978 (1944); *Discover Bank v. Ray*, 139 Wn.App. 723, 727, 162 P.3d 1131 (2007); *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388-389, 858 P.2d 245 (1993). Linc's Opening Brief and its Complaint both admit Linc accepted the October 2nd Counter-Proposal from K&S, including the Commission Exclusion, through several of its actions. It signed the written listing agreement (CP 432-33), it sent the signed agreement to the Commercial Brokers Association ("CBA") (CP 442), it used the signed agreement as the basis of a complaint to the CBA (CP 448-50), and it performed according to the signed agreement by marketing the Property at the newly lowered price. CP 1449-50.

No issue of fact exists regarding these events. While Colliers raised the issue of the legal consequence that flowed from Linc's seven-week delay in signing the agreement, namely the lapse of the prior listing agreement, the Colliers argument addresses an issue of law, not a question of fact. Furthermore, if fact questions are involved, Linc has specifically alleged that it did accept the revised listing agreement, and its allegations should be accepted as true for purposes of summary judgment.

VI. ARGUMENT SUPPORTING CROSS-APPEAL

A. Standard of review

A decision regarding the award of attorney fees is reviewed under a two-part standard. The appellate court reviews de novo the issue of whether there is a legal basis to award fees under a contract, and reviews for abuse of discretion the reasonableness of an award. *Wash. Builders Benefits Trust v. Building Industry Assoc. of Wash.*, __ Wn.App. __, 293 P.3d 1206, 1231 (2013). The de novo standard applies here because the listing agreement specifically addresses attorney fees.

B. Linc concedes the attorney fees provision of the listing agreement applies to this dispute

The K&S/Linc listing agreement contains an attorney fees provision.

> ATTORNEY'S FEES. In the event either party employs an attorney to enforce any terms of this Agreement and is successful, the other party agrees to pay a reasonable attorney's fee. In the event of trial, the amount of the attorneys' fee shall be as fixed by the Court.

CP 397. Linc's's own complaint admits the prevailing party in this dispute is entitled to its attorney fees. *Id.*. Linc sought its attorney fees in the event it won this case and, since the attorney fees provision is a two-way street, it is liable for those fees when it loses.

C. City is a third-party beneficiary of the listing agreement and can enforce the attorney fees provision

The creation of third-party beneficiary status depends on whether the parties to a contract intend to create a benefit for a non-party. *Lonsdale v Chesterfield*, 99 Wn.2d 353, 360, 662 P.2d 385 (1983). It is not necessary that the benefitted party be identified by the parties to the contract. *Boise Cascade Corp. v Pence*, 64 Wn.2d 798, 802-03, 394 P.2d 359 (1964).

In this case, K&S, and Linc, carved out an exclusion to the listing agreement that was clearly intended to create a benefit for agent Arvin Vander Veen and his undisclosed principal, the City of SeaTac.

> No commission will be due in the event that the owners sign a deed in lieu of foreclosure. The potential transaction in which a third party may ask the owners to give up the property in exchange for removal of personal guarantees is specifically excluded as part of this sales/fee agreement.

CP 490. No doubt exists on this point because K&S explicitly described its intent in emails to Brian Leibsohn at the time the exclusion was drafted. CP 494.

The language of the exclusion itself shows the intent to create a third-party beneficiary. The exclusion describes a "third party" that might ask the owners to give up the property in exchange for a deed in lieu of foreclosure. While the parties were not certain of the identity of the third party, the correspondence between K&S and Linc clarified that they were addressing the proposal advanced by Arvin Vander Veen on behalf of an undisclosed principal. There is no doubt that the parties intended to address a third party's role, and there is no doubt that the third party was the City.

The listing agreement created a valuable benefit for the City. While much of the contract had little to do with the City, the handwritten exclusion was specifically drafted by K&S to facilitate and advance the proposed deed in lieu transaction being contemplated by an unnamed third party, the City. The exclusion was intended to eliminate any question of the third party being pulled into a dispute about whether or not a commission would be due on the transaction.

Linc argued in Superior Court that the City could not enforce the listing agreement. However, Linc chose a course of action that triggered the handwritten exclusion and attorney's fees provision of the listing agreement. If Linc believed it was due a commission from K&S on the transaction, it should have sued K&S. Instead, it chose to bring the City into the dispute. The City defended itself by enforcing the handwritten exclusion and consequently prevailed on summary judgment. The exclusion accomplished the purpose for which it was intended. It advanced the City's proposed deal for the property by giving the City a tool to use in defeating a claim by Linc for a commission.

D. The City is entitled to its attorney fees for this appeal

This Court should award the City its attorney fees and costs incurred in this appeal based upon the arguments set forth in Section VI and RAP 14.1 and 18.1.

VII. CONCLUSION

There is nothing tortious about the City or any other investor buying the loans of foreclosing lenders. Linc's listing agreement did not address a sale of the debt on the Property, even before Linc executed the Commission Exclusion for the Vander Veen proposal. The only way Linc could have earned a commission under any scenario was if it had procured a buyer at the price of $14,500,000. Linc therefore has no claim for tortious interference. The Superior Court properly denied Linc's motion for partial summary judgment and properly granted the Defendants' motions. The Superior Court's only error was in not granting the City its attorney fees.

Dated this 25th day of March, 2013.

TIERNEY & BLAKNEY, PC

By: Michael B Tierney
Michael B. Tierney
WSBA No. 13662
Attorney for City of SeaTac

DECLARATION OF SERVICE

I declare under penalty of perjury that on the 25th day of March, 2013, I caused to be served the foregoing document on counsel via e-mail and U.S. mail at the following addresses:

Paul R. Taylor
Joshua B. Selig
Byrnes Keller Cromwell LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Telephone: 206-622-2000
Facsimile: 206-62-2522
E-mail: ptaylor@byrneskeller.com
jselig@byrneskeller.com
Counsel for Respondents Colliers and Vander Veen

Roger J. Kindley
Gulliver A. Swenson
Shannon J. Lawless
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034
Telephone: 206-464-4224
Facsimile: 206-583-0359
E-mail: kindley@ryanlaw.com
Swenson@ryanlaw.com
lawless@ryanlaw.com

DATED this 25th day of March, 2013 at Mercer Island, Washington.

Ellen J. Mills
Legal Administrative Assistant

TIERNEY LAW FIRM, PC
2955 80th Avenue SE, Suite 102
Mercer Island, WA 98040
206-232-3074 (Phone)
206-232-3076 (Fax)