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DIVISION II

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No. 44942-1-II

STATE OF WASHINGTON

BY  _____

(Cowlitz County Superior Court No. 12-2-00304-2)

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

COLUMBIA RIVER CARBONATES,

Appellant,

vs.

PORT OF WOODLAND, PORT COMMISSION OF
THE PORT OF WOODLAND, and CRRVP LLC,

Respondents,

BRIEF OF RESPONDENT PORT OF WOODLAND

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INTRODUCTION

The challenged sale of property by the Port of Woodland to CRRVP, LLC, (“CRRVP”) is unique, as the property sold as surplus was encumbered by a long term lease with CRRVP, which could not be terminated without the consent of the tenant who was also the buyer of the property. The lease had been entered into March 1, 2007 for a \$50 per year rental prior to the property being surveyed, and did not expire until 2017, seven years after the time CRRVP, as tenant, offered to buy the property from the Port. The Port had entered into the lease only to stop the public from dumping garbage on the property, and to have it maintained. The property was created by a gap in legal descriptions, and its full extent was not known until a survey was done after the lease was made.

When CRRVP offered to purchase the property from the Port, it necessarily agreed to lease termination, and enabled the property to be sold. If the property were to be offered to another buyer, as tenant CRRVP could have insisted the lease stay in place, which would on a practical basis made the property very difficult to sell at all until after lease expiration. The termination of the lease and allowance of the sale

was a substantial valuable consideration given to the Port as it enabled the sale and allowed the termination of the disadvantageous lease.

The Port of Woodland stands behind its sale of property to CRRVP, and believes it negotiated a fair price for the property under the circumstances, and followed all statutory procedures.

The Port has no preference in who purchases the property, and could potentially resell the property in the future, after lease termination, if the sale is set aside, but the Port is concerned about allegations by appellant Columbia River Carbonate's ("CRC") that it negotiated a "sweetheart deal" and that surplus property sales by the Port are subject to requirements which are not set forth in state statutes, are not apparent until a Court reviews and micromanages the sale process, and subject to comparison to non-independent after-the-fact hindsight appraisals which second guess the appraisals relied upon to set the sale price. The Port of Woodland and ports in general, need to be able to rely on the written requirements of state statutes to ensure their sales are valid and not subject to challenge.

CRC is seeking to impose "fiduciary standards" in relation to the Port's property, and is citing an appraisal paid for by CRC, and done over a year after the sale, which is drastically at odds with both appraisals obtained by the Port, to establish a market value in support of its claim

that the Port illegally sold property at a price so low as to be an unconstitutional gift of Port property and contrary to statute. According to CRC, the Port is required to put all property sales out for public bids, and to never negotiate prices below the appraised value based on specific property circumstances. That approach would make a private sale to a tenant with a long term lease, in return for lease cancellation, impossible.

To impose private trustee “fiduciary standards” on ports, requiring public bidding and potentially other requirements not set forth by statute, would have a chilling effect on port sales, and make it impossible for ports to sell property with any certainty, as the ports would have no legal guidelines for determining the lawfulness of a sale of property in any particular case. If a court can review every sale, and second guess market price, or impose procedures not required by law for sales, the sale process will be made impossible.

The Port of Woodland acted squarely within its statutory and constitutional authority when it sold the strips of property that it had no use for to CRRVP. The Port properly declared the property surplus at a public hearing inside of a regular public meeting, and negotiated a sale price after having the property appraised by two appraisers.

The surplus property sold in this instance was not part of the Port’s comprehensive plan, and had never been used for a public use. The Port

justifiably determined the unused property was not needed for industrial purposes.

The property sold also contained a another narrow strip north of the CRRVP RV park, did not have sewer or water utilities to it, and was adjacent to the Columbia River which would require substantial setbacks to protect the shoreline. The property was unique and not comparable to other standard industrial properties, which are generally large properties with the size and utilities available to support industrial development.

In considering the sale during the year and one-half process from the initial offer to the date the sale was closed by deed, the Port's investigation revealed the property would likely not be approved for residential rezoning, and was approved only for heavy manufacturing industrial non-residential use. Based on that understanding the Port, using its discretion, rejected a higher residential appraisal that assumed the property could be rezoned, and based the sale price on the industrial appraisal that it had received, less credit for improvements made by CRRVP to the sold strip.

Due to the nature of the property, the Port Commission logically determined that the property south of CRRVP, LLC would be only marketable to the adjoining property owners, and directed its executive director to investigate whether the other adjoiner, appellant Columbia

River Carbonates, (“CRC”) had an interest in the property. While the Executive Director did not ask CRC directly that question, he did meet with CRC and after discussions regarding their marine terminal plan for the adjoining property that they had bought, he determined they had no interest in it, and reported they had no interest to the Commissioners.

The Commissioners acted within their statutory and constitutional power in reducing the sale price of the property from the appraised price to give credit for improvements made to the property by CRRVP to ensure the sale could go forward and the lease be terminated. The Constitution and state statute give Ports the power to sell property without requiring appraisals or public sales to determine value. No public bidding process is required, and private sales are not prohibited. The courts have avoided chilling port property sales by micromanagement, when considering claims of unconstitutional gifts of public property in a property sale context, and that should be done here.

STATEMENT OF THE CASE

Appellant has described the property sale to CRRVP in some detail, and in response to the allegations that the Port was somehow orchestrating a “sweetheart deal” the Port corrects and supplements the record as follows.

A. The Property Sold.

The property sold to CRRVP consists of two narrow strips, between Dike Road, a Cowlitz county road, and the Columbia River, and the survey of the property appears at CP 42.

CRRVP bought its RV park property in September 2006, also depicted in the CP 42 survey, which lies between the strips of the Port property sold to it in 2011. CP 33-34. CRRVP found the strip of Port property south of it was an unofficial dump site, filled with debris. It decided to clean up the property, and asked to lease it from the Port. CP 34.

The lease of the property to CRRVP was made March 1, 2007, was for an initial period of five years, and granted an additional five year option period. CP 132. The lease could be terminated by the Port if the

property was needed for industrial development, CP 132, but of course it could not be sold as surplus if used for industrial development.

On March 19, 2009, after the property had been surveyed, the Port Commission approved Resolution 361, authorizing a boundary adjustment with Michael Landels, the neighbor to the south, to establish an agreed south boundary to the strip property. CP 149-153. The south property boundary agreed to appears as the adjusted line on Exhibit B to the Resolution at CP 152. As stated in Port Resolution 361, the property adjusted with Landels, the remainder of which was later sold to CRRVP, was never part of the Port's Comprehensive plan, and was not needed for Port purposes. CP 149. As the property was not being used for governmental purposes, the property was subject to adverse possession claims by Landels. CP 149 – para 2.

On April 8, 2009 CRRVP cooperated with the Port by agreeing to adjust the leased property to exclude the portion owned by Landels after the boundary adjustment. CP 155. The Port Commission approved granting CRRVP an option to purchase the leased property in late 2009. CP 35.

Given the CRRVP lease, the Port did not consider selling the remaining property as surplus after it was surveyed, until CRRVP

approached it and submitted an offer to purchase the property on April 22, 2010. CP 164.

B. The Port Commissioners and Executive Director Holmberg had no knowledge of CRC's desire to purchase property.

It is undisputed that Nelson Holmberg, Port Executive Director since April, 2010, knew nothing of the email sent to the prior Executive Director, Erica Rainford, by CRC in March 2010 indicating interest in buying the property sold to CRRVP. CP 369 – Dep. pages 55:19-57:13. CRC did not send a letter to the Port Commissioners, or have a representative appear before the Commissioners in person, nor did it make any further purchase requests after its sole email.

The Port Commissioners obviously did not have knowledge of the neighboring property owners' interest in the property at the time of the sale to CRRVP, as they asked Mr. Holmberg to investigate immediately prior to selling the property. CP 246.

On March 8, 2011 Mr. Holmberg met with the Columbia River Carbonates (“CRC”) to learn about their plans for their marine terminal, after being asked by the Commission to determine if they were interested in purchasing the Port property. (CP 379 -380). After he reviewed the marine terminal plans, he informed the Commission that CRC was not interested in purchasing the property. CP 293.

C. Port Commissioners directed all potential buyers be contacted, and had no intention to hold a secret sale.

The Port Commissioners believed that the small size of the parcel to be sold, and the setbacks from the Columbia River and the dike on the east side, made the parcel only marketable to the adjoining neighbors, as the property would not be commercially usable for manufacturing purposes standing alone. The cost of rezoning the strip for residential use, which would not be likely to be achieved, and the fact that residential setbacks would not be achievable, were discussed at length by the Commission in connection with the March 17, 2011 public hearing regarding declaring the property surplus. CP 278 – 283. Setbacks from the river and the dike were discussed at length as well. CP 284-285.

The Commissioners had an extensive discussion with Executive Director Holmberg on February 17, 2011, in a regular meeting, about contacting CRC, as the other neighboring owner, to discover if it had potential use for the property. Potential uses were also discussed at length. CP 246-251. The Commissioners had no reason to doubt that Mr. Holmberg had properly ascertained CRC's lack of interest in the property.

D. Port Commissioners exercised reasonable discretion as reflected in the findings adopted with their Resolution to Surplus property.

The Port of Woodland made findings when adopting Resolution 381 to approve declaring the property sold surplus, showing the basis for declaring the property surplus and ultimately selling it. The findings stated that the property was (i) subject to lease with CRRVP, (ii) CRRVP had a right for first refusal on the property, (iii) the property was only useful to adjoining, (iv) the property is zoned heavy manufacturing and is too small for a heavy manufacturing facility, and (v) the property would be subject to setbacks from the river and dike along the adjoining dike road. CP 311-312.

The lease grants CRRVP the right to the property until February 28, 2017. CP 132. The Right of First Refusal to CRRVP was granted by the Port Commission, CP 366, although apparently the actual first refusal document was not signed. All of these non-monetary factors were in mind by the Commissioners during the sale negotiations.

E. The Port Commissioners discussed the sale in multiple public meetings and did not take any action in executive session.

Although Mr. Holmberg provided information to the Commissioners in executive session regarding appraisals, no action was taken by the Commissioners in executive session. As stated by Mr.

Holmberg in his deposition in response to questions from CRC's attorney, when asked why the Commissioners did not give him direction in executive session, "Because its action, and they can't take action in executive session." CP 375 – dep. page 79.

All discussions concerning the sale were at public meetings, including the presentation of the CRRVP offer to purchase on April 22, 2010 CP 161-162, discussions with Mr. Holmberg about contacting CRC regarding the sale property at the February 17, 2011 meeting, CP 243, the March 17, 2011 regular meeting which included a public hearing regarding the property surplus decision, CP 263-288, and the April 21, 2011 meeting where the sale was approved. CP 293.

Mr. Holmberg testified that the upcoming public hearing on the surplus property decision was advertised through a news release to the media, and printed in the agenda which is always posted on the Port website in advance of the Public Hearing. CP 380-381.

F. The Port Commission ordered and considered two separate appraisals of the property prior to the sale and relied on its Executive Director's recommendation in negotiating the sale to set the final sale price at \$44,000.

The Port Commission received two independent appraisals before selling the surplus property to CRRVP. The industrial appraisal performed by North by Northwest Appraisal appears at CP 43-81, and the

Integra Appraisal, valuing the property after based on a rezone to residential property, appears at CP 175-230. The North by Northwest appraisal concluded the property was best used in conjunction with adjoining properties under its current Heavy Manufacturing zoning, CP 52, and valued the property sold at \$65,000, based on \$1.00 per square foot for the whole property acreage. CP 29.

The Integra appraisal valued the property at \$120,000, assuming a zone change to residential use and that improvements could be located on the property to include a well and septic system. CP 179.

The Cowlitz County assessor valued the strip adjacent to Landels and CRC at only \$3,340. CP 48.

Both independent appraisals agreed on the \$1.00 - \$2.00 per square-foot value of the property for industrial purposes. The Integra Appraisal notes at CP 207 that heavy industrial properties comparables were selling between \$1-\$2 per usable foot, and also notes that the usable building site is only .76 acres. CP 204 – first two lines. Since an acre is 43,560 square feet, the usable property would be 33,105 square feet, and valued as industrial this amounts to \$33,105 to \$66,210 in industrial value.

The Port Commissioners extensively discussed the difficulties of rezoning the property to residential, as well as potential uses of the property when the public hearing regarding declaring the property surplus,

in its regular public meeting of March 17, 2011. (CP 278-287). They accepted the North by Northwest industrial appraisal to base the selling negotiations upon.

June Jones, broker of Woodland Real Estate, had submitted a 1 ½ page letter with a much higher valuation, \$350,000 on June 16, 2008, generated for Ms. Rainford in conjunction with boundary disputes and encroachments from Mike Landels, without discussion of zoning, utilities, setbacks or potential uses. (CP 146-147). This excessive value opinion was not used by the Commissioners or Mr. Holmberg.

G. Commissioners relied on price recommendation and negotiations of Executive Director Holmberg and discussed all factors related to the property.

The sale price of \$44,000 was based on the Commissioners' acceptance of their Executive Director's recommendation of \$44,000 set forth in CP 290. The recommendation reduced the price from the \$65,000 appraisal in recognition of the costs of improvements to the site paid for by CRRVP, and lack of utilities to the property, and was made in the context of the long term lease that CRRVP had impliedly agreed to cancel to facilitate the sale.

The Commissioners' discussion at the April 21, 2011 public port meeting transcribed at CP 296-310 shows this price was discussed by the

Commissioners at length, and determined to be fair and lawful given the information received and the context of the sale. Mr. Holmberg stated that the Cowlitz County Department of Planning told us “in no uncertain terms last week that the only people who could have any possible use” for the property were the adjacent neighbors, and the “Adjacent neighbor to the south has no interest whatsoever” in the property, CP 302 Line 1-2,

Even with those considerations, Commissioner Peterson stated that “we can’t give away public funds,” CP 303 line 6, that that he was concerned that the price was significantly lower than the first appraisal. CP 303, Line 7-13. Mr. Holmberg explained the first appraisal was based on residential, when the property was zoned for heavy manufacturing, and that the usable space with residential setbacks, and high water line issues and the property size, and needing to dig a well and locate a septic would make the property unusable. CP 303 L14-CP 304 L11.

Commissioner Boon asked for verification of the money spent on the property by CRRVP. CP 305- Line 5-14. Commissioner Cline stated he appreciated Mr. Holmberg’s investigation and meeting with Cowlitz County Planning and Zoning to obtain the information. CP 307 Lines 16-18.

H. Commissioners had no donative intent.

In depositions, Port Commissioner Boon testified he at no time had discussions with the CRRVP principals outside of public meetings. CP 494- Page 45 Line 8-12. He explained that before the sale the Port explored its possibilities, and the property was not salable to anyone else besides CRRVP, and not of any use to the Port of Woodland. CP 495 Page 72 L8-17.

Port Commissioner Boon testified that the Port used, "sound business discretion" in the sale of the property to CRRVP by obtaining appraisals and determining who was interested in purchasing the property. (CP 496 Pg. 76, Line 10-14). Mr. Boon was aware that the Washington Constitution prohibits the gift of public funds and public property, and he did not consider this transaction as a gift and that it was a negotiated sale (CP 498, Page 88 L3- 12).

Port Commissioner Gerald Peterson's testimony was similar to Commissioner Boon's. Mr. Peterson, a long-time farmer in Woodland, and a long term Port Commissioner, had knowledge of the value of real estate in the area, and he thought the appraised value was reasonable. (CP 502-503. Page 79, line 5- pg. 80 line 25,) that he had no "donative intent". (CP 503 Page 80, Lines 20- 25).

Port Commissioner Cline also testified that he had no "donative intent" in the sale to CRRVP, and that he understood that the Port was getting fair market value for the property. CP 507-508, Pages 53 line 24 to page 54 Line 7.

ARGUMENT

I PORT IS ENTITLED TO RELY ON STATUTE IN CONDUCTING SALES

A. Statutory Authority.

The statutory authority for the sale of Port real property is contained in one statute, RCW 53.08.090 which states in pertinent part:

... A port district may sell and convey any of its real or personal property valued at more than ten thousand dollars when the port commission has, by resolution, declared the property to be no longer needed for district purposes, but no property which is a part of the comprehensive plan of improvement or modification thereof shall be disposed of until the comprehensive plan has been modified to find the property surplus to port needs. The comprehensive plan shall be modified only after public notice and hearing provided by RCW 53.20.010.

In this case the property was not part of the Port's comprehensive plan, and there was thus no public hearing requirement to modify the plan. (CP18 - para 4).

When a statute is clear and unambiguous, as here, the Courts "will not construe language that is clear and unambiguous, but will instead give effect to the plain language without regard to rules of statutory construction." *Herrington v. David D. Hawthorne, CPA, P.S.*, 47 P.3d 567, 111 Wn.App. 824 (Wash.App. Div. 1 2002).

Courts do not review municipal corporation's property sales, which are legislative actions, and municipal corporations have the right to

sell their unused property as allowed by statute. As stated in 10 McQuillin on Municipal Corporations (3rd Ed., Rev 2009) §28.42 in pertinent part:

The right to dispose of municipal property is generally expressly conferred by statute or charter provision, or derived from constitutional authorization, and, with respect to certain forms of municipal property, as already has been discussed, the right of disposal does not exist apart from those laws. ... However, the courts will not control the discretion of a municipality in disposing of its property unless that discretion is manifestly abused. A decision to sell municipal property is a legislative action not subject to judicial review.

1. Authority to Surplus Property

No Washington case has ever construed or limited RCW 53.08.090, nor has it imposed additional requirements on property sales above the statutory requirements set forth in the statute, which are to pass a resolution declaring the property to be no longer needed for Port purposes. The statute does not set any guidelines as to when the Port may declare the property surplus, and leaves it to the Port's discretion, as admitted in CRC's Brief (P-19).

CRC argues that if the property may conceivably be used for a Port purpose, such as a marine facility or a driveway to help CRC, it cannot be declared surplus to the Port's needs and sold. However the statute does not set such a requirement, and the Washington Attorney General has declared an actual use standard for determining if property is needed or can be surplussed. The attorney general opinion considered property of a

library board, and stated that even without express statutory power to sell property, the board may sell its property if it is not *actually* being used for a public purpose. In *AGLO 1974 No. 101, 1974* the attorney general stated in pertinent part:

... Although it is the general rule that municipal corporations which have the power to acquire property have implied power to sell it, that rule does not apply to property held by a municipal corporation for governmental use. *Com'l Waterway Dist. No. 1 v. King County*, 200 Wash. 538, 94 P.2d 491 (1939). Therefore, absent express authorization, we still must conclude that a library district does not have the general power to sell its property. This does not mean, however, that when property is no longer needed for public use by such a district, it cannot be disposed of in some appropriate manner. As we said in AGLO 51-53-466 [[to J. C. Merkel, Prosecuting Attorney, Kitsap County on January 21, 1953]], copy enclosed, such authorities as the above cited case ". . . should not be construed to mean that municipal officers can never dispose of real property of the corporation without express legislative authority. The rule is correctly stated in 10 McQuillin on Municipal Corporations (3rd Ed.) § 28.38, amply supported by citations in the footnotes, as follows: "Property devoted to a public use cannot be sold or leased without special statutory authority, although property which has *ceased to be used or is not used by the public* may be sold or leased as the public welfare may require." ... (italic emphasis added)

Similarly, the Washington Supreme Court in *City of Seattle v. Pacific States Lumber Co.*, 166 Wash. 517, at pp 530-531, 7 P.2d 967 (1932), allowed the City of Seattle to sell unused property, which in that case was standing timber on municipal water system property, without complying with state statutes proscribing vote approval for sale of a water

system or any appurtenances thereof, as the standing timber was not an “operating part” of the water system, but merely incidental thereto.

In this case the property was never used for a public purpose and was leased for a nominal sum so that it would be maintained and cleaned up. The Port was well within its legal rights to declare the property unneeded and surplus. If the any-possible-use standard posited by CRC were to be required, then property could never be declared surplus.

2. No Public Hearing Requirement for Surplus Resolution

CRC makes much of the fact that although a public hearing was called in regards to the surplus property resolution, and public testimony was allowed, notice of hearing was not published in the newspaper. In fact RCW 53.08.090 does not require a public hearing at all, and specifies declaring property surplus by resolution only. The Port of Woodland adopted Resolution 381 (CP 312-313) declaring the property surplus, in the manner required by statute. RCW 53.12.245 governs proceedings of a port commission, and states with regard to resolutions in pertinent part:

... All proceedings of the port commission shall be by motion or resolution recorded in a book or books kept for such purpose, which shall be public records.

There is no requirement in the statute that resolutions be adopted at public hearing, rather only requiring that the resolution be maintained as a public record.

3. No uniform requirement for Notices of Public Hearings.

Even though not required, a public hearing was held by the Port and public testimony was accepted regarding the decision to surplus the property on March 17, 2011. CP 256-261. The hearing was publicized by news release and issuing a pre-meeting agenda referring to the sale. CP 380-381. There is no uniform requirement for the type of notice to be used for public hearings in the Revised Code, or in RCW Chapter 53. For example, RCW 53.31.030, requires a public hearing to be held for formation of an export trading company by a Port District, and requires no prior notice of the hearing whatsoever, while public hearings for formation of industrial development districts are required to have a pre-hearing notice published in a paper of general circulation under RCW 35.25.040.

The type of notice to be given is determined by statutes. Since the plain language of RCW 53.08.090 does not even require a public hearing to declare property surplus, when a public hearing is voluntarily held and public testimony accepted, it is unreasonable to argue that a particular type of notice of that hearing must be given when other public hearings are authorized without any notice being given.

B. Port is Not a Private Trustee of property.

CRC argues that the Port of Woodland, as a municipal corporation, holds its property as a fiduciary or trustee to the public, and thus has a statutory or case law duty to obtain the highest possible sale value for surplus property, requiring public bidding in every sale instance, without consideration of the factors set forth in the Port Resolution 381 to declare surplus the property prior to the sale. (See Page 7 *infra*).

There is no public bidding requirement under RCW 53.08.090, which should be determinative of the issue, however CRC argues that public notice and bidding is extra-statutorily required when the Port sells surplus property on the following bases.

1. WPPA Referenced Publication - Knowing the Waters.

CRC argues that the Washington Public Port Association, (“WPPA”) which maintains various member resource documents on its website, one of which is entitled Knowing the Waters — Basic Legal Guidelines for Port District Officials, by Robert Hauth, Attorney (Dec 1996, updated Oct. 2007), has imbued the opinions of attorney Hauth with the force of law pursuant to RCW Sections 53.06.010-030, and thus imposed additional conditions on property sales in addition to those set forth by statute. However, RCW 53.06.030 which itemizes the purposes, powers and duties of the WPPA, states only that the WPPA is to be a

coordinating agency to conduct studies, and analyze data, establish joint marketing and coordinating bodies, exchange information, and promote development and trade. Nowhere is the WPPA given the power to adopt binding rules or regulations related to member port activities.

Mr. Hauth states he is trying to help Ports avoid legal problems, (CP 336) and is erring on the side of caution in his recommendations. As asserted by CRC in its brief, Mr. Hauth states that the Port must exercise sound business discretion (CP 338), but even he does not reach the conclusion that this means a private sale to one individual cannot be made. Rather he states that “As a rule, a port district may sell unneeded port district property, both personal and real property, at its discretion and without calling for competitive bidding.” (CP 338). Mr. Hauth states the Commission “ordinarily should ...have the property appraised by at least two independent appraisers to be certain that the port district is receiving fair market value.” (CP339) This is exactly what the Port did as it had two independent appraisals of the property performed. See North by Northwest Appraisal at CP 43-81, and Integra Appraisal at CP 175-230.

While Mr. Hauth is a knowledgeable attorney in the municipal government area, his opinions do not have legislative status. Even so, the Port Commissioners clearly exercised good business judgment in thoroughly investigating the zoning and usability of the property, and

discussing and evaluating the lease, the single known interested party to the purchase, the improvements to the property, and the need not to give away public property.

Mr. Hauth recognizes that ports can consider non-market value issues in disposing of property, when he states in relation to sale of Port property:

In all such transactions, especially by port districts, there may be values other than money that can be considered in that determination, but they must be real and substantial.

Certainly the Port considered all aspects of the sale, the price paid, and the property circumstances before it authorized the sale.

2. Private trust standards not applicable to ports.

CRC cites RCW 42.17A.001(2) for the proposition that “the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings.” While this is true, and applies to personal integrity of elected representatives, this statute is a part of the Open Government Act dealing with Public Records, Freedom of Information, and Disclosure of Campaign Contributions. Having personal integrity and honesty has nothing to do with determining the proper terms of sale for surplus property.

CRC also cites *Skamania County v. State*, 685 P.2d 576, 102 Wn.2d 127 (Wash. 1984), for the proposition that Port lands are held in trust and are subject to trusteeship and fiduciary standards in relation to land owned by others. That case dealt with public lands granted to the State in trust, to actually be held in trust for various beneficiaries by the State pursuant to the Washington Enabling Act, 25 Stat. 676 (1889) and RCW 76.12.030. The Court in *Skamania County* court stated that:

Every court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees. 102 Wn.2d at page 132.

The Court also noted that it was incorrect that these public land trusts “are merely honorary, that there is a "sacred obligation imposed on (the state's) public faith," but no legal obligation” and that “This trust is real, not illusory”. 102 Wn.2d at page 134. The Court also stated that in the case of land trusts the Washington Enabling Act and the Washington Constitution Art. 16, § 1 requires the state to seek the full market value of the particular interest being sold. Article 16, § 1 states in pertinent part:

Section 1 Disposition of: All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, ...

Port property is not held in trust for named beneficiaries nor subject to similar constitutional provisions, and the *Skamania County* case has no application to ports.

The trust language recital contained in the Port Delegation of Authority to its Executive Director, that “The board acts in trusteeship for port owners who are the citizens of the Woodland Port” (CP 332), does not and was not intended to create private trustee duties, and is the same legally non-enforceable honorary trust language as referenced in the *Skamania County* case.

3. Administrative appeal standards do not apply.

CRC also cites “arbitrary and capricious” standards as somehow applicable to the sale of surplus property, quoting the case of *Conway v. Washington State Dept. of Soc. & Health Services*, 120 P.3d 130, 131 Wn.App. 406 (Wash.App. Div. 1 2005). However *Conway* dealt with the issue of whether an appeal under the Administrative Procedure Act from an adjudicative action of the Department of Social and Health Services revoking a license for a day-care center was allowed.

The Washington Administrative Procedure Act (WAPA), Chapter 34.05 RCW, governs judicial review of final agency action, and an arbitrary and capricious decision is one of the standards for overturning an agency action. However agency actions explicitly exclude sale or

management of public lands or real property interests from judicial review under RCW 34.05.010(3), and thus the WAPA and its standards have no application to this case.

4. Open Public Meeting Act Not Violated

CRC also asserts that the Port of Woodland violated the Open Public Meetings Act, RCW Chapter 42.30, which requires all meetings be open to the public except those authorized to be held in executive session.

Under RCW 42.30.020(4), a meeting occurs only when action is taken, and under RCW 42.30.020(3):

"Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

Receiving information, except from public testimony, is not an action as statutorily defined, and thus no prohibited non-public meeting takes place if only information is received.

Mr. Holmberg testified that he provided updates regarding the sale in executive session to the Commissioners. When asked what direction the Commissioners gave him, he stated "The commissioners don't give me direction in executive session ... Because its action, and they can't take

action in executive session.” CP 375 at Dep. Page 79 Line 4-12. He also stated no suggestions were made by the commissioners in executive session. CP 375 Dep. Page 79 Line 13-15.

Further the Open Public Meeting Act allows executive sessions, where Port Commissions could take the enumerated actions in private meeting, under RCW 42.30.110(1)(c) which states in pertinent part:

(1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:

(c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public; ...

CRC claims that it has had no opportunity to develop evidence about its Open Public Meeting claim. However it has deposed every Port Commissioner, Carol Moore, Port Auditor, and Mr. Holmberg, and obtained every single document related to all property sale related Port meetings. It clearly has had sufficient opportunity to produce some evidence of a prohibited action outside of a public meeting, and has not been able to do so.

CRC claims that after two motions for summary judgment were made, the second being for complete dismissal of its case by dismissing all remaining issues, CP 472, it was unaware that its open public meeting act

violation claim could be dismissed. This is disingenuous. As CRC had the burden of proof, it was required to come up with concrete evidence of a violation under CR 56 (e) which states in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

II PORT OF WOODLAND ACTED WITHIN CONSTITUTIONAL AUTHORITY

A. Special constitutional provision for ports.

Article 8, Section 7 of the Washington Constitution provides:

CREDIT NOT TO BE LOANED. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

However, in 1965 the people amended Article VIII of the Washington State Constitution by adding a provision empowering the Legislature to authorize uses of port district funds for industrial development, trade promotion and promotional hosting, as a “public purpose:”

Constitution Article VIII, Section 8 Port Expenditures—Industrial Development--Promotion. The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development or trade promotion and promotional hosting shall be deemed a public use for a public purpose, and shall not be deemed a gift within the provisions of section 7 of this Article. [AMENDMENT 45, 1965 ex.s. Senate Joint Resolution No. 25, p 2819. Approved November 8, 1966.]

To the extent that the sale of port property promotes industrial development or trade promotion, it is exempt from the lending of public credit provisions of Article VII Section 7.

The legislature has revised RCW 53.08.090, the property sale enabling act, in 1994, 1981, 1969, and 1995, after the passage of Amendment 45. As discussed that statute does not require public bidding, appraisals, or fair market value sales, and presumably all funds received from surplus property will be used by ports for their mission of industrial development and trade purposes. Although a court has never considered this amendment in relation to port property sales, the conjunction of the constitutional amendment and RCW 53.08.090 being modified after the adoption thereof implies that sales of Port property can be made for any price without being deemed a gift of public property.

B. Non-monetary consideration for sale must be recognized.

The Port was only able to sell the property as surplus if CRRVP consented to lease termination. This consent to lease termination in itself was a legal consideration for a reduced sale price to CRRVP. In the case of *Northlake Marine Works, Inc. v. City of Seattle*, 857 P.2d 283, 70 Wn.App. 491 (Div. 1, 1993), Northlake Marine accused the City of Seattle of violation of Article 8, Section 7 of the Washington Constitution,

because it deeded away its interest in a railroad right of way for no monetary consideration. The Court denied the Northlake Marine's claim, stating:

The Washington Supreme Court has noted that the underlying rationale of this section was to prevent the appropriation of public funds for private enterprises, specifically railroads. *Tacoma v. Taxpayers of Tacoma*, 108 Wash.2d 679, 701, 743 P.2d 793 (1987). Although the parties have largely ignored the most recent cases interpreting this section, the Supreme Court has increasingly narrowed the application of this prohibition in order to more precisely conform to "the evils the framers sought to prevent." *Tacoma v. Taxpayers*, 108 Wash.2d at 702, 743 P.2d 793. In order to determine whether a gift has occurred in violation of the constitutional prohibition, it is necessary to find that property has been transferred with donative intent and without consideration. *Tacoma v. Taxpayers*, 108 Wash.2d at 702, 743 P.2d 793. If donative intent cannot be proven, the adequacy of consideration will not be closely scrutinized, but assessed for legal sufficiency: "a bargained-for act or forbearance is considered sufficient consideration." *Tacoma v. Taxpayers*, 108 Wash.2d at 703, 743 P.2d 793 (citing *Adams v. Univ. of Wash.*, 106 Wash.2d 312, 327, 722 P.2d 74 (1986)). An incidental benefit to a private individual will not invalidate an otherwise valid transaction for a public purpose. *Tacoma v. Taxpayers*, 108 Wash.2d at 705, 743 P.2d 793. The Supreme Court has recognized that any in-depth analysis of the adequacy of consideration would interfere with the government's ability to contract and establish a "burdensome precedent." *Tacoma v. Taxpayers*, 108 Wash.2d at 703, 743 P.2d 793. 70 Wn.App. 507-508.

Seattle had received conditional rights to a trail running across the grantee's property, and this was sufficient consideration according to the Court. The Port in our case received not only monetary consideration, but

also the ability to sell the property free of lease from CRRVP. This is sufficient legal consideration for the sale price granted to CRRVP.

C. Unconstitutional public gift requires both donative intent and no legal consideration; adequacy of consideration not considered.

The Court in *King County v. Taxpayers of King County*, 949 P.2d 1260, 133 Wn.2d 584 (Wash. 1997), stated:

In deciding whether a public expenditure is a gift under art. VIII, §§ 5 and 7, we have focused on two factors: consideration and donative intent. *City of Tacoma v. Taxpayers of City*, 108 Wash.2d 679, 702, 743 P.2d 793 (1987). Thus, to meet the burden of showing violation of the constitutional prohibition against gifts, the Taxpayers must show the lease amounts to "a transfer of property without consideration and with donative intent." *General Tel. Co. v. City of Bothell*, 105 Wash.2d 579, 588, 716 P.2d 879 (1986). In assessing consideration, courts do not inquire into the adequacy of consideration, but employ a legal sufficiency test. *Adams v. University of Wash.*, 106 Wash.2d 312, 327, 722 P.2d 74 (1986); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wash.App. 491, 857 P.2d 283 (1993). We have been reluctant to engage in an in-depth analysis of the adequacy of consideration because such an analysis interferes unduly with governmental power to contract and would establish a "burdensome precedent" of judicial interference with government decision making. *City of Tacoma*, 108 Wash.2d at 703, 743 P.2d 793.

Legal sufficiency "is concerned not with comparative value but with that which will support a promise." *Browning v. Johnson*, 70 Wash.2d 145, 147, 422 P.2d 314, amended, 430 P.2d 591 (1967) ("[A]nything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised." 1 WILLISTON, CONTRACTS § 115, cited in *Puget Mill Co. v. Kerry*, 183 Wash. 542, 558, 49 P.2d 57, 64, 100 A.L.R. 1220 (1935)."). The adequacy of the consideration for the lease is a question of law. "Whether a contract is supported by consideration is a question of law and may be properly determined by a court on summary

judgment." *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 195, 840 P.2d 851 (1992).
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The Washington Supreme Court has made it clear in the *King County v. Taxpayers* case that legal sufficiency of consideration is the standard when considering a claim of gifts of government funds, and that legal sufficiency is considered on summary judgment by the court as a matter of law. Anything supporting a promise is legally sufficient consideration, and the determination is not the adequacy of the consideration given for the property sold, but rather its legal sufficiency.

Also stated by the Court is that in depth analysis of the consideration given will not be made by the Courts in reviewing property sales, precisely because what the Port of Woodland is objecting to, undue interference with governmental power to contract and make decisions.

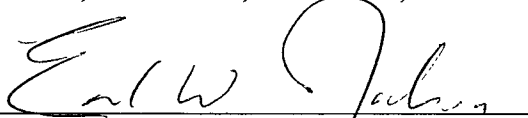
III CONCLUSION

Respondent Port of Woodland requests that the Court of Appeals affirm the trial court dismissal of CRC's claims against it. The Port of Woodland clearly obtained legally adequate consideration and the best value that it could negotiate given the fact that CRRVP's lease had to be terminated in order for it to sell the property as surplus. Termination of the lease was necessary to avoid the property being held until 2017 without any benefit to the Port. The sale to CRRVP at the price paid was the result of the special circumstances relating to the property, and is an instance where a private sale to a tenant makes sense due to the long term lease.

Whether or not the Port Commissioners misunderstood CRC's desire to purchase at the time of the sale to CRRVP is irrelevant, as the Courts do not engage in in depth analyses of consideration and sale procedures so as not to interfere with governmental decision making.

Respectfully submitted this 12th day of October, 2013.

JACKSON, JACKSON, & KURTZ, INC. PS

By: 
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Attorney for Respondents Port of
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DECLARATION OF SERVICE

I, Earl W. Jackson, declare as follows, pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Jackson, Jackson & Kurtz, Inc., PS. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On October 12th, 2013, I caused the foregoing document to be served on the following persons via first class mail:

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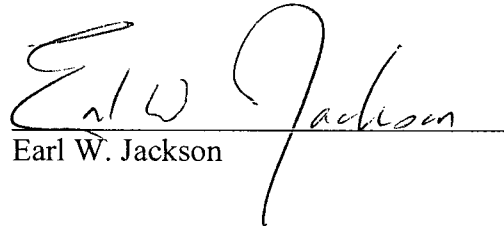
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I declare the foregoing is true and correct under penalty of perjury
under the laws of the State of Washington.

Signed this 12th day of October, 2013 at Battle Ground,
Washington.


Earl W. Jackson