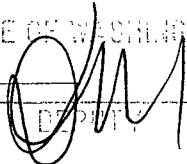


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STATE OF WASHINGTON

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NO. 44942-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COLUMBIA RIVER CARBONATES,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT CRRVP, LLC

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF ISSUES 2

III. STATEMENT OF THE CASE 3

A. Substantive History 3

 1. *Background on the Parties* 3

 2. *CRRVP’s Clean Up and Lease of the Property*..... 4

 3. *CRRVP’s Offer to Purchase the Property and Subsequent Negotiations with the Port at Public Hearings*..... 6

 4. *The Commissioners surplused the Property at a Public Hearing* 9

 5. *The Commissioners approved the Property’s sale at a public hearing* 10

 6. *The Port had no donative intent* 11

B. Procedural Facts 14

IV. ARGUMENT 14

A. Summary judgment standard..... 15

B. CRRVP was a bona fide purchaser for value 16

 1. *The Port’s Decision to Designate the Property as Surplus was not Ultra Vires*..... 16

 2. *CRRVP was a Bona Fide Purchaser for Value* 19

C. CRC failed to raise any disputed issues of material fact showing that the Port’s sale constituted an illegal gift of public fund 21

1.	<i>Issues of Donative Intent and Consideration are Questions of Law that may be Decided on Summary Judgment.....</i>	22
2.	<i>No donative intent exists in this case because the Port complied with all legal requirements before selling the Property and acted within its statutory authority when doing so.....</i>	24
3.	<i>The Property's sale was supported by legally sufficient consideration.....</i>	28
4.	<i>CRC's reliance on non-Article 8, §7 cases to determine consideration is misplaced.....</i>	29
D.	The trial court did not err in dismissing CRC's OPMA claim when (1) CRRVP is a bona fide purchaser for value and (2) CRC can show no set of facts that justify finding a violation of the OPMA	30
V.	<u>CONCLUSION</u>.....	33

TABLE OF AUTHORITIES

Table of Cases

<i>Cathcart v. Andersen</i> , 85 Wn.2d 102, 530 P.2d 313 (1975).....	31
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987)).....	28
<i>CLEAN v. City of Spokane</i> , 133 Wn.2d 455, 947 P.2d 1169 (1997).....	23, 24, 25, 29
<i>Doe v. Dep't of Transp.</i> , 85 Wn. App. 143, 931 P.2d 196 (1997).....	15
<i>King County v. Taxpayers of King County</i> , 133 Wn.2d 584, 949 P.2d 1260 (1997).....	23, 24, 25, 28, 29, 30
<i>Layne v. Hyde</i> , 54 Wn. App. 125, 130, 773 P.2d 83 (1989).....	15
<i>Meyer v. Univ. of Wash.</i> , 105 Wn.2d 847, 852, 719 P.2d 98 (1986).....	15
<i>Northlake Marine Works, Inc. v. City of Seattle</i> , 70 Wn. App. 491, 857 P.2d 283 (1993).....	22
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	15
<i>Saldivar v. Momah</i> , 145 Wn. App. 365, 186 P.3d 1117 (2008), <i>rev. denied</i> , 165 Wn.2d 1049 (2009).....	31
<i>South Tacoma Way, LLC v. State</i> , 169 Wn.2d 118, 122, 233 P.3d 871 (2010).....	16, 18, 19, 20
<i>Tran v. State Farm Fire & Cas. Co.</i> , 136 Wn.2d 214, 961 P.2d 358 (1998).....	15
<i>Verdon v. AIG Life Ins. Co.</i> , 118 Wn. App. 449, 76 P.3d 283 (2003).....	15
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	15

Table of Statutes

Chapter 42.30 RCW 14, 32
RCW 42.30.010 31
RCW 42.30.020 32
RCW 42.30.030 31
RCW 42.30.110 32
Chapter 53.08 RCW 19
RCW 53.08.080 4
RCW 53.08.090 14, 16, 17
Chapter 53.20 RCW 18, 19
Chapter 53.25 RCW 17, 18, 19

Rules

CR 56 15

Other Authority

Washington Constitution, Article VII, § 7 21

I. INTRODUCTION

After more than a year-long period of negotiations and discussions held at a series of at least nine public meetings, the Port of Woodland (the “Port”) Commissioners declared two small strips of real property (the “Property”) abutting Respondent CRRVP, LLC’s (“CRRVP”) property to be surplus and sold the Property to CRRVP. CRRVP purchased the Property for the appraisal price minus the cost of some improvements that CRRVP had put into the Property at its own cost. CRRVP and the Port negotiated the terms of the deal at arm’s-length and came to an equitable deal.

Despite numerous notifications to the public about the surplus decision and sale, Appellant Columbia River Carbonates (“CRC” or “Columbia River Carbonates”) failed to take any action to educate itself about the Port’s public actions. CRC did not raise any objection to CRRVP’s purchase of the Property until this lawsuit was filed, nine months after the Port and CRRVP had finalized the Property’s sale. CRC now argues that, despite no statutory authority imposing a duty on the Port, the Port should have sold the Property to CRC. CRC cites a host of events it would have liked to have seen happen. However, none of the issues raised by CRC are required by statute or regulation and they do not undermine the validity of the Port’s decision to surplus and sell the Property to CRRVP.

The only statutory requirement required before the Port could sell the Property was to declare it surplus. The Port held a public hearing on the issue, declared the Property surplus, obtained appraisals on the Property, and negotiated terms with CRRVP, an abutting landowner to the Property. The Port in fact took more steps than required by law.

CRC's argument boils down to the fact that it would have paid more for the Property than CRRVP paid and thus believes the deal was "bad." Washington case law is clear that courts should not second-guess the decision making of bodies like the Port when they decide to sell real property. No genuine issues of material fact exist and CRRVP was entitled to judgment as a matter of law on all claims raised by CRC.

II. RESTATEMENT OF ISSUES

1. Should this Court hold that the Port had authority to declare the Property surplus and sell it to CRRVP when the Port followed all statutory requirements and the extraneous issues raised by CRC do not create genuine issues of material fact? **Yes.**

2. Should this Court hold that CRRVP was a bona fide purchaser for value when the Port followed all procedural requirements for selling the Property and CRRVP paid a fair market rate for the Property? **Yes.**

3. Should this Court hold that the trial court did not err in determining that the Port's sale of the Property to CRRVP did not constitute an unconstitutional gift of public funds when there is no

evidence of donative intent and legally sufficient consideration supports the sale? **Yes.**

4. Should this Court hold that the trial court did not err in dismissing CRC's claim for violation of the Open Public Meetings Act when there is no evidence that the Port took action to sell the Property during an executive session? **Yes.**

III. STATEMENT OF THE CASE

A. Substantive History

1. Background on the Parties.

The Columbia Riverfront RV Park ("RV Park"), owned by Respondent CRRVP is located on approximately 10 acres of property at 1881 Dike Road in unincorporated Cowlitz County, near Woodland, Washington. 1 Clerk's Papers ("CP") at 33. The RV Park has approximately 800 feet of frontage on the Columbia River. 1 CP at 33. The park has 76 sites for RVs with power, sewer, and water connections. 1 CP at 34. It also has a clubhouse, swimming pool, and other amenities. 1 CP at 34. The RV Park has been in this location since 1990. 1 CP at 34. CRRVP purchased the RV Park in September 2006. 1 CP at 34. Shirley Temming is CRRVP's managing member. 1 CP at 33.

The Columbia River lies to the west of the RV Park, and former-plaintiff Michael Landels' house, barn, and other out-house buildings lie to the south of the RV Park. 1 CP at 34. This lawsuit involves two small pieces of property at the north and south end of the RV Park which were owned by Respondent, Port of Woodland, until purchased by CRRVP in

June 2011. The strip of land to the south of the RV Park lies between Landels' and the RV Park's properties. 1 CP at 34.

2. *CRRVP's Clean Up and Lease of the Property.*

At the time CRRVP purchased the RV Park in 2006, the strip of property to the south of the RV Park was an unofficial dump site which was difficult or impossible for the Port of Woodland to police. 1 CP at 34. The site was filled with old tires, railroad ties, creosote coated pilings, appliances, batteries, broken concrete and other construction debris. 1 CP at 34.

CRRVP considered the site an eyesore, and potential liability hazard to its RV park customers, especially children, so it approached the Port about cleaning up the strip. 1 CP at 34. The Port gave approval for CRRVP to clean up the Property. 1 CP at 34. After it began to do so, CRRVP approached the Port about leasing the strip so it could control access, and for additional vehicle parking for guests at the RV Park. 1 CP at 34. On March 1, 2007, CRRVP entered into a lease with a five-year term, and an option to extend for an additional five years. 1 CP at 34. CRRVP paid \$50.00 rent annually.¹ 1 CP at 34. CRRVP continued cleaning up the Property and graded the Property, provided gravel parking area, and landscaped and installed landscape irrigation, expending approximately \$29,000.00 to improve the Property. 1 CP at 34. CRRVP's lease did not forbid the Port from providing CRRVP with any credit for

¹ RCW 53.08.080 permits a port district to "lease all lands...owned and controlled by it, for such purposes and upon such terms as the port commission deems proper..."

these improvements, but simply stated that the Port's approval of these improvements did not create any obligation to reimburse CRRVP at the end of the lease. 1 CP at 135.

In 2008, after CRRVP began leasing the Property, Cowlitz County and the Consolidated Diking District re-surveyed the area. 1 CP at 34. The surveying work revealed that Landels' buildings encroached on the south strip that CRRVP leased from the Port. 1 CP at 34. The Port did not require Mr. Landels to remove the improvements, but instead agreed to a boundary line revision which allowed Mr. Landels to obtain title to the Property where his improvements were located. 1 CP at 34 – 35, 148 – 52. Mr. Landels paid nothing to the Port in exchange for receiving this property. 1 CP at 148 – 52. This also required the lease between the Port and CRRVP to be revised because after the boundary line revision the legal description was incorrect. CRRVP approved of the boundary line revision with Mr. Landels, which decreased the size of the property it leased from the Port. 1 CP at 35, 154.

When the new lease came up for discussion with the Port in late 2009, after the Landels' boundary line revision, the Port Commission, at a public meeting, agreed to enter into a new lease with CRRVP, granting CRRVP a right of first refusal to purchase the property. 1 CP at 35; 2 CP at 182 – 83. CRRVP also suggested to the Port staff that they discuss the purchase of the property. 1 CP at 35.

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3. *CRRVP's Offer to Purchase the Property and Subsequent Negotiations with the Port at Public Hearings.*

At a public meeting on April 22, 2010, CRRVP presented a written offer to the Port Commissioners for the purchase of the property for \$35,000.00. 1 CP at 35, 159 – 61. The Port Commissioners tabled the proposal until the next regular Port meeting to allow the Executive Director to “check into the proper steps that will be needed before the Port can sell these two strips of property and to follow up with surveys and appraisals.” 1 CP at 161. The Port Commission Minutes are a public record and included on the website for the Port Commission. 2 CP at 369.

Over the next year, the Port obtained two commercial appraisals of the property, apparently at the direction of the Port’s attorney. 1 CP at 36. The first appraisal was wildly inaccurate. The Port obtained this appraisal from Integra Realty Resources dated September 23, 2010, which determined the fair-market value of the property at \$120,000.00. 1 CP at 176 – 77. This appraisal determined the highest and best use of the property as a residential lot. 1 CP at 176. Integra apparently did not determine first whether the Property could be rezoned residential and “assumed that such a change would be possible at a cost to the buyer.” 1 CP at 176. That appraisal also stated that if the property was valued for industrial purposes, the value would be \$1 to \$2 per square foot, which is consistent with the second appraisal by Daniel West. 2 CP at 205; 1 CP at 45, 75.

According to the Cowlitz County Assessor's office, the property in question was an orphan strip of a parcel the Port owned to the north of the RV Park; that the zoning was MH (Heavy Manufacturing); and, that no conditional use had been granted such as the RV Park and Landels have now. 1 CP at 35. The Cowlitz County Department of Building and Planning confirmed the strip was indeed an orphan strip, meaning that it had never been legally segregated into a separate parcel, with little or no use. 1 CP at 35. They stated that it was highly unlikely that the strip could be re-zoned residential. 1 CP at 35 – 36. They also confirmed that the strip was too small (resulting square footage after all setbacks) for creating a true land parcel with MH zoning. 1 CP at 36; 2 CP at 277 – 78. The setbacks included the 60-foot Diking District front setback and the Fish and Wildlife 200 foot zone from the ordinary high water line of the Columbia River on the opposite side of the property. 1 CP at 36; 2 CP at 283 – 84.

The fact that the strip could not be used for residential purposes and was insufficient in size for MH parcel creation, the Department of Building and Planning said that the most probable use was to incorporate the strip through a boundary line adjustment to either property to which it was adjacent. 1 CP at 36. They also confirmed it would be difficult to conduct a sale of the strip as it was not a parcel, but a part of a much larger parcel to the north of the RV Park. 1 CP at 36. They concluded that a boundary line adjustment to incorporate it into the RV park property would be favorable and that once a boundary line adjustment was

concluded the strip would be part and parcel to the RV park property and there would be no zoning or conditional use issues to address. 1 CP at 36. All of the above was repeated and confirmed in a follow-on meeting between Nelson Holmberg (Port of Woodland), Shirley Temming and Jay Pyle (CRRVP, LLC) and Ray Little of the Cowlitz County Department of Building and Planning. 1 CP at 36.

It was this information and the Department of Building and Planning's firm statements that the property in question would not and could not be re-zoned Residential that raised issues with the assumptions in (and validity of) the first appraisal. 1 CP at 36.

The Port Executive Director, Nelson Holmberg, in discussions with the Cowlitz County Assessor and the Cowlitz County Planning Department, determined that the Property could not be utilized for residential purposes due to its zoning as MH. 2 CP at 374. These facts were reported to the Port Commissioners at a public meeting on April 21, 2011, prior to approval of the sale of the Property. 2 CP at 300 – 03. The Port apparently requested a refund of fees paid due to the gross errors by the first appraiser. 1 CP at 36.

The Port obtained a second appraisal of the property by Daniel C. West, a Washington licensed appraiser, dated March 11, 2011. 1 CP at 45. Mr. West determined the fair-market value of the property at \$65,000.00, and determined the highest and best use of the property to be "For development and use in conjunction with adjoining tracts also zoned for heavy industrial uses." 1 CP at 52.

At the public hearing, CRRVP requested consideration for improvements it had made which improved the value of the property (clean-up expenses) as a credit on the purchase price. 1 CP at 37. Recognizing that CRRVP's work contributed to the fair-market value of the property, the Port Executive Director recommended to the Port Commissioners a credit toward the purchase price of approximately \$17,000.00. 2 CP at 288. He also recommended that the price be reduced by an additional 5% due to the fact that the property did not have water or sewer, as did the comparable properties in the West appraisal. 2 CP at 288.

At a public hearing of the Port Commission on February 17, 2011, the Executive Director gave a report during public session regarding the status of the appraisals on the subject property. 2 CP at 246.

4. *The Commissioners surplused the Property at a Public Hearing.*

On March 17, 2011, the Port Commissioners held a public hearing to determine whether to declare the subject property surplus. There was notice of this public hearing, referencing the address of the property, in the agenda for the meeting. 2 CP at 379 – 80. The Port Commission's agendas are provided on the Port's website approximately one-week prior to the hearing, and also in email public notices sent by the Port. *Id.* Mr. Holmberg testified at his deposition that there was a news release regarding the public hearing. 2 CP at 379. The agenda was also included in an "e-mail blast" to those on the Port's e-mail list. 2 CP at 364, 254,

256 – 57. Following considerable discussion on the issue, the Port declared the Property surplus. 2 CP at 254 – 57, 261 – 85.

Following the March 17, 2011 public hearing, the Port's Executive Director worked to respond to the Port Commissioners' questions at the public hearing by meeting with the Cowlitz County Assessor and the Planning Department to determine the restrictions on use of the property. 2 CP at 256. He also contacted the appraiser, Dan West, regarding reducing the value of the property due to the unavailability of water and sewer improvements, which were assumed in the appraisal. 2 CP at 384 – 85. Mr. Holmberg then met with CRRVP to negotiate a purchase price for the property. 2 CP at 288, 384.

5. *The Commissioners approved the Property's sale at a public hearing.*

On April 21, 2011, at a public meeting of the Port Commission, the Port Commissioners approved Mr. Holmberg's recommendation to sell the property to Defendant, CRRVP, for \$44,000.00. The possible sale of the property was again referenced in the agenda for the meeting, which was posted on the Port's website. 2 CP at 291, 386. The Port Commissioners' approval was conditioned upon verification of the expenses incurred by CRRVP to improve the property. 2 CP at 291. The transcript of this portion of the April 21st public meeting includes approximately ten pages of discussion between the Port Commissioners and Mr. Holmberg regarding the terms of the sale and his responses to the Commissioners' questions. 2 CP at 296 – 307.

The \$44,000.00 purchase price included a small boundary line correction at the north end of the RV Park which added approximately nine feet to the north end of the park where landscape improvements had been made that straddled the property line with the Port. 2 CP at 291; 1 CP at 37.

The purchase of the Property was completed in June 2011, through a boundary line revision, with the two pieces of property incorporated into the larger parcel owned by CRRVP. 1 CP at 37. CRRVP paid \$44,000.00 to the Port and obtained a Quit Claim Deed for the property from the Port dated June 3, 2011. 2 CP at 318 – 21. Throughout this public process, which took more than one year, neither Mr. Landels nor anyone from Columbia River Carbonates, appeared at any Port Commission meeting, or objected to the sale of the property. 1 CP at 37.

6. *The Port had no donative intent.*

The Port's Executive Director was not aware until months after the sale of the property to CRRVP that CRC had sent an email to the prior Port Executive Director expressing interest in purchasing the property. 2 CP at 368 – 69. On March 8, 2011, with directions from the Commissioners to find out CRC's interest in purchasing the Property, Mr. Holmberg met with CRC to find out about CRC's plans for its marine terminal. 2 CP at 379 – 80. Mr. Holmberg reviewed CRC's marine terminal plans and informed the Commissioners that CRC had no interest in purchasing the Property. 2 CP at 293.

Mr. Holmberg testified that he had no discussion with Port Commissioners about giving preference to CRRVP for the purchase of the property. 2 CP at 387. At an Executive Session of the Port Commissioners on April 20, 2011, Mr. Holmberg updated the commissioners on the price negotiations, but Holmberg specifically testified that the commissioners only received an update from him and made no decisions regarding the sale of the property. 2 CP at 388. At an earlier Executive Session on October 19, 2010, Mr. Holmberg testified that he advised the commissioners regarding the status of the appraisals that were in process, but no action was taken, acknowledging that, “. . . they can’t take action in an executive session.” None of the Port Commissioners individually gave him any direction. 2 CP at 374.

Port Commissioner Dale Boon testified that he thought the Port used, “sound business discretion” in the sale of the property to CRRVP. 3 CP at 496. “[W]e had explored our possibilities, and so wasn’t salable to anybody else. It wasn’t of any use for the Port of Woodland at that point.” 3 CP at 495. Mr. Boon understood this was a negotiated transaction between the Port and CRRVP. 3 CP at 498. 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. (3 CP at 498. This was nothing more than a negotiated sale of a small parcel of surplus property that had no utility to the Port, and had been unused by the Port for more than forty (40) years. 3 CP at 498.

Port Commissioner Gerald Peterson's testimony was similar to Commissioner Boon's. Mr. Peterson, a long-time farmer in Woodland, and also a long-term Port Commissioner, had knowledge of the value of real estate in the area, and he thought the appraised value was reasonable. 3 CP at 500, 502 – 03. He also agreed that he had no "donative intent" in the sale of the property to CRRVP. 3 CP at 503.

Port Commissioner Paul 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. 3 CP at 505, 507 – 08.

The sale price was supported by an appraisal obtained by the Port from Daniel West. 1 CP at 45 – 81. Mr. West, an appraiser with approximately 30 years of experience, considered the recent sale by Mike Landels to Columbia River Carbonates when preparing his appraisal, but rejected it as a "comparable sale." 1 CP at 81, This seems to be CRC's primary issue – that the Port did not consider the amount paid by Columbia River Carbonates to Landels in setting the sales price for CRRVP. The property "purchased"² by Columbia River Carbonates included a home, which was grandfathered in as a non-conforming use. 3 CP at 510, 520. Mr. West considered the potential industrial use of the property purchased by Columbia River Carbonates as "highly speculative." 3 CP at 520.

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²This was not an outright purchase between Landels and Columbia River Carbonates, but a purchase on a non-recourse real estate contract.

B. Procedural Facts

CRC filed suit seeking to void the Port's sale of the Property to CRRVP, alleging four causes of action: (1) illegal designation of surplus property in violation of RCW 53.08.090, (2) illegal sale of Port property in violation of RCW 53.08.090, (3) illegal gift of public funds, and (4) violation of the Open Public Meetings Act, chapter 42.30 RCW. 1 CP at 7 – 10. On CRRVP's motion summary judgment, the trial court dismissed CRC's statutory claims, finding that CRRVP was a bona fide purchaser for value. 3 CP at 462 – 65. The trial court reserved for trial the issue of whether the Property's sale constituted a gift of public funds. 3 CP at 463. On May 8, 2013, the trial court granted CRRVP's second Motion for Summary Judgment on the remaining issue, finding that there was no genuine issue of material fact and CRRVP was entitled to judgment as a matter of law as to CRC's gift of public funds claim. 4 CP at 666 – 68. CRC appeals.

IV. ARGUMENT

The trial court did not err in granting summary judgment in favor of CRRVP because CRC failed to raise any genuine issues of material fact or demonstrate that it was entitled to judgment as a matter of law as to any of its claims. The Port's decision to surplus and sell the Property was not ultra vires and thus not void. CRRVP was a bona fide purchaser for value, which serves as a defense to any procedural failings by the Port, though there were none. The Port had no donative intent and the sale was supported by legally sufficient consideration, so the Property's sale did not

constitute an unconstitutional gift of public funds. Finally, CRC failed to demonstrate any facts that would indicate a violation of the OPMA.

A. Summary judgment standard

This Court reviews a trial court's summary judgment Order de novo. *Verdon v. AIG Life Ins. Co.*, 118 Wn. App. 449, 452, 76 P.3d 283 (2003). Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997). While a material fact is one upon which the outcome of the case depends, it is the job of the moving party to show the absence of an issue of material fact. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). When a motion for summary judgment is before the court, it may decide questions of fact as a matter of law when reasonable minds could reach but one conclusion. *Ruff v. Cnty. of King*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995).

Once the moving party demonstrates that there is no genuine issue of material fact present and that the party is entitled to judgment as a matter of law, the opposing party may not rest on the pleadings, but must instead demonstrate that a triable issue remains. CR 56(e); *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). To meet this burden, the party opposing a motion for summary judgment must present facts that would be admissible in evidence at trial, and not ultimate facts or conclusions. *Layne v. Hyde*, 54 Wn. App. 125, 130, 773 P.2d 83 (1989).

B. CRRVP was a bona fide purchaser for value

The trial court did not err in dismissing CRC's statutory claims. The Port's action designating the Property as surplus was not ultra vires and the Port followed all procedural and substantive requirements laid out by law. Additionally, even if the Port failed to take a necessary action, such failure was procedural, and CRRVP was a bona fide purchaser for value.

1. *The Port's Decision to Designate the Property as Surplus was not Ultra Vires.*

The Port's decision to surplus the property is not void or illegal because the Port acted pursuant to RCW 53.08.090's grant of authority to sell surplus Port property. The Port's action was not ultra vires and cannot be voided.

A government entity is liable for – and thus bound by – those actions it had the general authority to perform. A government action is truly ultra vires only if the agency was without authority to perform the action. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 122, 233 P.3d 871 (2010). Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed. *South Tacoma Way*, 169 Wn.2d at 123.

The Port of Woodland has statutory authority to sell real property pursuant to RCW 53.08.090, which provides in relevant part that “[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.”

The only restrictions on the Port’s ability to sell the Property comes from RCW 53.08.090(1),³ which allows the Port to “sell and convey any of its real or personal property valued at more than [\$10,000] when the port commission has, by resolution, declared the property to be no longer needed for district purposes....”⁴ Here, the Port during an open meeting declared the Property surplus and at a separate open meeting approved the sale. The Property was an eyesore and dump site before CRRVP improved the Property. The County Department of Building and Planning confirmed that the Property likely could not be rezoned residential or made into an independent parcel because of its size and the required setbacks. After the required setbacks, the available square footage of the Property was too small to create a true land parcel with MH zoning. The County Department of Building and Planning and Mr. West determined the only real use for the Property was for the adjoining landowners (CRRVP or Landels). The Port had no use for the Property and, in fact, had not used it.

³ Tellingly, CRC based its first and second claims on the Port’s alleged violation of RCW 53.08.090. 1 CP at 7 – 8. However, as has been demonstrated, the Port did not violate RCW 53.08.090. CRC’s attempts to use irrelevant statutes to impose new requirements on the Port should be rejected.

⁴ In fact, the “Knowing the Waters – Basic Legal Guidelines for Port District Officials” handbook that CRC relies upon so heavily, recognizes that all the Port had to do to sell the Property was declare it surplus and that chapter 53.25 RCW applies only to industrial improvement districts. 2 CP at 337. The handbook itself states that no public bidding is required.

“[A] contract formed between a government entity and a private entity will be void only where the government had no authority to enter the contract in the first place.” *South Tacoma Way*, 169 Wn.2d at 123. If the government was “generally authorized to sell the surplus property, its act of doing so is not ultra vires.” *South Tacoma Way*, 169 Wn.2d at 123. CRC does not dispute that the Port had statutory authority to sell the Property, only the procedure followed by the Port followed in doing so.

Because the Port properly determined that the Property was surplus, the Port complied with all statutory requirements before selling the Property – it declared by resolution that the Property was surplus. At a separate public hearing, the Port approved the Property’s sale. The Port complied with all statutory requirements for selling the Property and its actions cannot be voided as ultra vires.

CRC errs in relying on chapter 53.25 RCW and chapter 53.20 RCW to argue that the Port had an obligation to post public notice, seek two appraisals, or use the average of the appraisals to determine the sale price for the Property. Br. of Appellant at 22 – 29. Chapter 53.25 applies to marginal lands and industrial development districts, which are real property seized by the government for purposes of developing derelict property for industrial use. Chapter 53.20 RCW applies to the adoption of harbor improvement plans. Neither of these chapters discuss the Port’s ability to designate and sell property it owns outside of either of these specialty statutory schemes. There is no evidence in the record that the

Property fell within a harbor improvement plan or industrial development district.

Unlike chapter 53.25 RCW and chapter 53.20 RCW, chapter 53.08 RCW includes no requirements for providing public notice in a newspaper, obtaining an appraisal, or notifying adjacent owners. Accordingly, the Legislature did not intend to place those restrictions on the Port when it sold non-industrial development district and non-harbor improvement district properties.

The trial court did not err in entering judgment in favor of CRRVP on CRC's claims for illegal surplus. The Port followed all statutory requirements for surplusizing and selling the Property and its actions were not ultra vires. CRC's attempts to impose additional requirements not required by statute should be rejected.

2. *CRRVP was a Bona Fide Purchaser for Value*

The Port's sale to CRRVP is not void because the Port followed all statutory requirements for the sale and CRRVP is a bona fide purchaser for value.

The court will not set aside the sale of property to a bona fide purchaser, even in the case where there is a procedural defect. *South Tacoma Way*, 169 Wn.2d at 127. In *South Tacoma Way*, the State failed to follow a statutory requirement to notify abutting landowners of its intent to sell a strip of property before it made the sale. The Court held that this failure was procedural and that the sale was not void because the

purchaser was a bona fide purchaser for value. *South Tacoma Way*, 169 Wn.2d at 128 – 29. As the Court explained,

Notably, this court has already laid the foundation for applying the bona fide purchaser doctrine to good faith purchasers of state-owned land. As early as 1913...we stated,

A purchaser of land sold by the state or patented by the government has a right to presume that all proceedings leading up to the sale are regular. He is not bound to look beyond the face of the deed, either to find out whether the Department has strictly complied with the law or rightly decided some fact, nor is he bound to investigate the conduct of the patentee or grantee.

Using this reasoning, [we] concluded that absent fraud, and where the state has general authority to sell land, a good faith purchaser has the right to rely on the resulting deed. A bona fide purchaser may thus enforce a procedurally irregular land sale, as occurred in this case. That same reasoning applies today and controls the outcome here.

South Tacoma Way, 169 Wn.2d 127-28.

Unlike *South Tacoma Way*, there are no procedural or substantive requirements that the Port did not follow before it surplused and sold the Property. There is no analogous statutory requirement that the Port notify abutting landowners of its intent to sell the Property. Additionally, CRRVP paid fair market value for the Property. Both appraisals obtained by the Port found that if industrial zoning was the land's highest and best use, the Property was worth about \$1.00 per square foot. Based on this valuation, Mr. West set the Property's value at \$65,000.00. Through

arm's-length negotiations, the Port and CRRVP negotiated a reduction in that price based on the value that CRRVP had added to the Property. Of the \$29,000.00 in costs CRRVP invested, the Port credited only \$17,000.00. CRRVP's price was more than fair under market conditions.

The trial court did not err in determining that CRRVP was a bona fide purchaser for value and dismissing all of CRC's statutory claims.

C. CRC failed to raise any disputed issues of material fact showing that the Port's sale constituted an illegal gift of public funds.

The trial court did not err in finding that the Port's sale of the Property was supported by adequate consideration and was not an unconstitutional gift of public funds to CRRVP. CRC's arguments about how it believes the Port should have conducted the sale are a side show designed to distract from the fact that the Port followed all statutory requirements to surplus and sell the Property. CRC's real argument is that the sale was a bad deal and CRC wanted to be the purchaser. This is insufficient to support a claim for an unconstitutional gift of public funds.

Article VIII, 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.

Government entities have broad discretion to determine the adequacy of consideration. *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn.

App. 491, 508, 857 P.2d 283 (1993). “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.” *Northlake Marine Works*, 70 Wn. App. at 508.

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 Wn.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*, 108 Wn.2d at 702. In order to determine whether a gift has occurred in violation of the constitutional prohibition, it is necessary to find that the property has been transferred with donative intent, and without consideration. *Tacoma*, 108 Wn.2d at 702. 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*, 108 Wn.2d at 703 (citing *Adams v. Univ. of Wash.*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986)).

Northlake, 79 Wn. App. at 507-508.

I. Issues of Donative Intent and Consideration are Questions of Law that may be Decided on Summary Judgment.

Issues of adequacy of consideration and donative intent are *not* issues of fact. CRC’s argument to the contrary directly contradicts the holding in *King County*⁵ and is essentially lifted from Justice Sanders’ dissent in that case. In *King County*, Justice Sanders passionately argued

⁵ *King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 949 P.2d 1260 (1997).

that the Court should not be deciding the case on summary judgment because donative intent and grossly inadequate return are “factual issues [that] may be determined only by the trier of fact, not the trial court sitting in summary judgment, nor this court.” *King Cnty.*, 133 Wn.2d at 630-31 (Sanders, J., dissenting). As Justice Sanders lamented,

There are 1,199 pages of record here. The lease is 108 pages long. This cannot be shoehorned into a summary judgment. *If this record, construed most favorably to the Taxpayers, does not present at least one fact or inference of (1) donative intent or (2) a grossly inadequate return, I can't imagine what would.*

King Cnty., 133 Wn.2d at 638 (Sanders, J., dissenting) (emphasis added).⁶

However, the majority found no donative intent and affirmed the trial court’s grant of summary judgment in favor of the County.

In *CLEAN v. City of Spokane*,⁷ another “gift of public funds” case decided on summary judgment shortly after *King County*, the plaintiff argued that the significant difference between the negotiated lease rate and market rate for a parking garage evidenced an unconstitutional gift. The court summarily disposed of the issue finding no evidence of a gift.

⁶ Some of the evidence of “donative intent” in *King Cnty.* included the following:
(1) Evidence in correspondence, business records and declarations, stating that the reason for the stadium project was to aid the Mariners by making it more profitable for them to stay in Seattle than go elsewhere. *Id.* at 625;
(2) The resignation letter from the chair of the stadium’s public facilities district which stated that that she was resigning as the balance of public and private interest had shifted radically to the welfare of the Mariners ownership over that of the public. *Id.* at 628;
(3) The new lease rate, approximately one-half of the rate in the Kingdome. (*Id.* at 629);
(4) There was an expert opinion that the lease rate was 50 times less than fair market value. (*Id.* at 634);
(5) The Mariners got to keep the \$45 million for the naming rights to the stadium. (*Id.* at 629).

⁷ 133 Wn.2d 455, 947 P.2d 1169 (1997).

Justice Sanders, who wrote the lengthy dissent in *King County*, reluctantly joined in the decision in the interests of stare decisis, noting that the majority already “emasculated Const. art. VII, sec. 7’s prohibition against gifts of public funds to private persons by adopting a ‘legally sufficient’ consideration test.” *CLEAN*, 133 Wn.2d at 477. As demonstrated in *King County* and *CLEAN*, whether donative intent exists is an issue of law that must be decided on summary judgment.

2. *No donative intent exists in this case because the Port complied with all legal requirements before selling the Property and acted within its statutory authority when doing so.*

No donative intent exists in this case because the Port complied with all legal requirements before selling the Property and acted within its statutory authority when doing so.

In 1997, there was a significant shift in Washington’s approach to addressing the question whether there is an unconstitutional gift of public funds. *King Cnty.*, 133 Wn.2d 584.⁸ Donative intent is not present simply because a transaction is favorable to the non-governmental party so long as the government acted within its statutory authority. *King Cnty.*, 133 Wn.2d at 599. In *King County*, the taxpayers argued that the stadium lease to the Mariners was so much in favor of the Mariners that it amounted to a gift. *Id.* However, the Court rejected this argument, noting that there was no donative intent because the County was acting to implement a statute

⁸ CRC fails to acknowledge this 1997 change in the jurisprudence on this issue, but instead relies on 1987 and earlier cases, which are not fully in accord with the present jurisprudence.

providing for the stadium's construction. *King Cnty.*, 133 Wn.2d at 599. Thus, so long as the government entity is acting within its legal authority, the Supreme Court will not infer donative intent. Just as the negotiation of below market rents in both *King County* and *CLEAN* were not found to create issues of fact precluding summary judgment, and the same is the case here.

The law allows the Port to sell property once it is deemed surplus without further statutory limits. The Port properly declared the Property surplus. CRC's entire argument is that the Port should have undertaken a more rigorous selling process. However, there is no requirement in that law that the Port undertake a competitive bidding process, sell the property for a highest and best use, have the buyer pay any survey or closing costs, sell the property for market value, or otherwise take any action complained of by CRC. The Port acted within its statutory authority to sell surplus property and, as such, no donative intent can be found.

CRC cites as evidence of donative intent that the purchase price was reduced by the \$17,000.00 in expenses CRRVP incurred cleaning up the property during the term of the lease. CRC goes on to repeat, as it has often, that CRRVP's lease legally barred any such credit. CRC apparently believes that if it keeps making this statement, it will become true. It is not true, and even if it was true, it is irrelevant and evidence of nothing more than the give and take of negotiating a purchase price between a buyer and seller. This lease provision, found in section 8, subparagraph G of the 2007 lease between CRRVP and the Port, deals with the

authorization for the tenant to make improvements to the property during the term. 1 CP at 132, 135. What CRC contends is the offending provision states:

Moreover, neither Tenant nor any third party may construe the permission granted Tenant hereunder to create any responsibility on the part of the Landlord to pay for any improvements, alterations or repairs occasioned by the Tenant.

1 CP at 135.

This lease provision has nothing to do with the sale of the property, or setting the purchase price for the property. It means what it plainly says, that if the Tenant makes any “improvements, alterations or repairs” with the approval of the landlord, the landlord’s approval will not be construed as creating a duty to pay for the work.

The starting point for the negotiations between CRRVP and the Port was CRRVP’s offer to purchase the property for \$30,000.00, which offer was made in writing and orally at a public meeting of the Port on April 22, 2010. 1 CP at 158 – 68. Subsequently the Port had two appraisals, one of which was thrown out as it mistakenly appraised the property as a residential lot,⁹ and the second came up with a value of \$65,000.00. CRRVP negotiated the price down to \$44,000.00, in part arguing that its clean-up efforts increased the value of the property. This was not a question of the Port ignoring the lease or acting in a manner

⁹ This appraisal, by Robert Hickock, MAI, when referencing the value of the property as “heavy industrial” stated a value, “between \$1 and \$2 per square foot is indicated” which is consistent with the valuation by the second appraiser, Dan West.

prohibited by the lease. It was CRRVP negotiating to get the price of the property down to what it wanted to pay. There is nothing to indicate that the Port thought it had some duty to reduce the purchase price based on the costs incurred by CRRVP in cleaning up the property. This is not evidence that the Port intended to make a gift to CRRVP.

CRC also argues that the Port paying half the cost of a survey, and the cost of the two appraisals, is evidence of donative intent. These decisions by the Port to pay some of the costs relating to the sale of the property are hardly evidence that the Port Commissioners intended to make a gift to CRRVP.

Additionally, CRC claims that the Port's negotiation with only one potential buyer, and not contacting neighbors regarding the sale of the property is evidence of donative intent. It is legally permissible for a Port to negotiate the sale of property with an individual. The Port commissioners asked the Port Director to see if CRC was interested in purchasing the property, but he mistakenly failed to do so. This is not evidence of the Port Commissioners intent to make a gift to CRRVP.

Finally, CRC argues that the facts show that the Port planned to sell the property to CRRVP from the start, inferring that the appraisal process was a sham, and this creates an inference of donative intent. The Port did not accept CRRVP's initial offer of \$30,000.00 for the property. It did the appraisals, and got CRRVP's agreement to purchase the property for nearly 50% more – \$44,000.00. This is not evidence of Port Commissioner intent to make a gift to CRRVP.

3. *The Property's sale was supported by legally sufficient consideration.*

CRC's argument regarding the adequacy of consideration mirrors the dissent issued in *King County* by Justice Sanders. It is essentially arguing, as did he, that the Courts should not be focusing simply on "legally sufficient consideration," they should instead inquire in the "adequa[cy]" of that consideration. *King Cnty.*, 133 Wn.2d at 618 (J. Sanders, dissenting). However, the Supreme Court has staunchly rejected such an approach.

In assessing consideration, courts do not inquire into the adequacy of consideration, but employ a legal sufficiency test. The Supreme Court is "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." *King Cnty.*, 133 Wn.2d at 597 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 703, 743 P.2d 793 (1987)). Legal sufficiency is concerned "not with comparative value but with that which will support a promise." *King Cnty.*, 133 Wn.2d at 597 (internal quotations omitted). "**The adequacy of consideration is a question of law** [that] may be properly determined by a court on summary judgment." *King Cnty.*, 133 Wn.2d at 598 (emphasis added). Justice Sanders made the low level of proof needed to establish legally sufficient consideration even more clear. As Justice Sanders acknowledged in his dissent in *King County*, the

majority held that “if there is *legally sufficient* consideration (a peppercorn will do) to support the enforceability of a promise” then “the constitution is satisfied.” *King Cnty.*, 133 Wn.2d at 618 (Sanders, J. dissenting).

In *CLEAN*, the Court held that there was no evidence of donative intent or grossly inadequate consideration because in “exchange for its assistance, the City of will receive a parking garage – an item that would unquestionably constitute *legally sufficient consideration*.” 133 Wn.2d at 470 (emphasis added).

Similarly, the legal sufficiency supporting the Port’s sale to CRRVP defeats any claim of donative intent or grossly inadequate consideration. CRRVP paid \$44,000.00 for the Property. The Property’s sale is supported by legally sufficient consideration.

Essentially, CRC believes that the Port made a bad deal. As the majority in *King County* explained, “At its core, the Taxpayers’ argument is the District and the County made a bad deal. While that may or may not be true, ‘The wisdom of the King County plan is not for the consideration of this court – its constitutionality is.’” 133 Wn.2d at 601; *See also CLEAN*, 133 Wn.2d at 470 (holding that “[a]lthough Appellants may view the transaction as an unwise use of public funds that unduly benefits the Developers, the wisdom of the plan is not for this court to consider”).

4. *CRC’s reliance on non-Article 8, §7 cases to determine consideration is misplaced.*

As did Justice Sanders in his *King County* dissent, CRC relies on a variety of cases to argue the gross inadequacy of consideration. *King*

Cnty., 133 Wn.2d at 630-31 (Sanders, J., dissenting). However, the Supreme Court made clear that the only question is the legal sufficiency of consideration. Justice Sanders himself acknowledged as much in his dissent. *King Cnty.*, 133 Wn.2d at 632 (acknowledging that the majority found no grossly inadequate return based on the existence of legal consideration). The sole focus must be the legal sufficiency of the consideration between the Port and CRRVP.

In this case, CRRVP and the Port negotiated in public meetings and in an arms-length transaction for the purchase and sale of the property at issue. Although the Appellant may second-guess the Port on the amount of the consideration, the purchase price was supported by an appraisal of the property, with consideration provided to CRRVP for improvements it had made to the value of the property during the period of the lease. It must also be kept in consideration that CRRVP had a long-term lease of the property with annual payments of \$50.00 per month. The Port Commissioners' testimony, which was not available at the first summary judgment motion, makes clear that this sale was completed as an arms-length transaction, without donative intent.

D. The trial court did not err in dismissing CRC's OPMA claim when (1) CRRVP is a bona fide purchaser for value and (2) CRC can show no set of facts that justify finding a violation of the OPMA.

The trial court did not err in dismissing CRC's claim for violation of the Open Public Meetings Act when (1) the bona fide purchaser

doctrine defeats the claim and (2) there are no facts that the Port approved the Property's sale in an executive session.¹⁰

First, CRC incorrectly argues that CRRVP did not move for summary judgment on its OPMA claim. In CRRVP's Reply on its Motion for Summary Judgment, it rejected CRC's argument that CRRVP did not move for judgment on all of CRC's claims. "CRRVP has moved for summary judgment on all issues in this case, and respectfully requests that this Court dismiss the Plaintiffs' Complaint with prejudice. CRC argues that the issue of a violation of the Open Public Meetings Act remains an issue, but that is not the case. CRC has presented no facts which support this theory." 3 CP at 412.

CRC claims that the Port violated the OPMA when it allegedly approved the Property's sale in an executive session. 1 CP at 10 – 11. CRC presented no facts in support of this claim.

The OPMA requires that "[a]ll meetings of the governing body of a public agency [are] open and public." RCW 42.30.030. The OPMA is intended to facilitate the transparency of government decision-making. RCW 42.30.010; *Cathcart v. Andersen*, 85 Wn.2d 102, 107, 530 P.2d 313 (1975). A governing body may take action only at a public meeting.

"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

¹⁰ Although CRRVP believes that it properly raised this issue, even if it did not, this Court can affirm on any ground supported by the record. *Saldivar v. Momah*, 145 Wn. App. 365, 403, 186 P.3d 1117 (2008), *rev. denied*, 165 Wn.2d 1049 (2009).

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.

RCW 42.30.020(3). However, there are several issues that a governing body may discuss in private, executive sessions.

Nothing contained in [chapter 42.30 RCW] may be construed to prevent a governing body from holding an executive session during a regular or special meeting...[t]o 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.

RCW 42.30.110(1)(c).

Here, there is no evidence that the Port took any “action” during an executive session let alone approved the Property’s sale at an executive session. At an executive session of the Port Commissioners on April 20, 2011, Mr. Holmberg updated the commissioners on the price negotiations, but Holmberg specifically testified that the commissioners only received an update from him and made no decisions regarding the sale of the property. 2 CP at 388. At an earlier Executive Session on October 19, 2010, Mr. Holmberg testified that he advised the commissioners regarding the status of the appraisals that were in process, but no action was taken, acknowledging that, “. . . they can’t take action in an executive session.” None of the Port Commissioners individually gave him any direction. 2 CP at 374.

In contrast to CRC's claims, the Port's approval of the Property's sale came during a public meeting in which it took testimony and comment. On April 21, 2011, at a public meeting of the Port Commission, the Port Commissioners approved Mr. Holmberg's recommendation to sell the property to Defendant, CRRVP, for \$44,000.00. The possible sale of the property was again referenced in the agenda for the meeting, which was posted on the Port's website. 2 CP at 291, 386. The Port Commissioners' approval was conditioned upon verification of the expenses incurred by CRRVP to improve the property. 2 CP at 291. The transcript of this portion of the April 21st public meeting includes approximately ten pages of discussion between the Port Commissioners and Mr. Holmberg regarding the terms of the sale and his responses to the Commissioners' questions. 2 CP at 296 – 307.

The trial court did not err in dismissing CRC's claim for violation of the OPMA. First, CRRVP was a bona fide purchaser for value and that defense defeats CRC's claims. Additionally, CRC failed to produce any evidence that the Port Commissioners violated the OPMA. The Port Commissioners did not take any action, as that is defined by statute, at an executive session and did not approve the Property's sale until a public hearing on April 21, 2011.

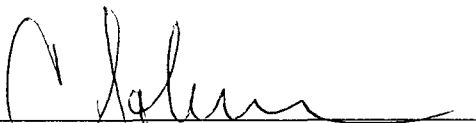
V. CONCLUSION

CRC failed to raise any genuine issues of material fact or show that it was entitled to judgment as a matter of law. Accordingly, CRRVP

requests that this Court affirm the trial court's entries of summary judgment

RESPECTFULLY SUBMITTED this 16th day of October, 2013.

EISENHOWER CARLSON, PLLC

By: 

Robert G. Casey, WSBA #14183
Chrystina R. Solum, WSBA #41108
Attorneys for Respondent CRRVP,
LLC

CERTIFICATE OF SERVICE

CINDY C. ROCHELLE, declares and states as follows:

1. I am a legal assistant at the law firm of Eisenhower & Carlson, PLLC, am over the age of 18, and otherwise competent to testify.
2. On the 16th day of October, 2013, I caused a true and correct copy of the foregoing document to be served upon the following parties in the manner indicated below:

Charles A. Klinge Forrest Fischer Groen Stephens & Klinge LLP 10900 NE 8 th Street, Suite 1325 Bellevue, WA 98004 (425) 453-6206 <i>Counsel for Plaintiff</i> <i>Columbia River Carbonates</i>	<input checked="" type="checkbox"/> by postage prepaid United States Mail <input type="checkbox"/> by Legal Messenger <input type="checkbox"/> by Facsimile <input type="checkbox"/> by FedEx/Express Mail <input type="checkbox"/> by Personal Delivery <input checked="" type="checkbox"/> by E-mail
Earl W. Jackson Jackson, Jackson & Kurtz, Inc. PS 704 East Main, Suite 102 P.O. Box 340 Battle Ground, WA 98604 (503) 294-1414 <i>Counsel for Defendants</i> <i>Port of Woodland and Port</i> <i>Commissioner of Port of Woodland</i>	<input checked="" type="checkbox"/> by postage prepaid United States Mail <input type="checkbox"/> by Legal Messenger <input type="checkbox"/> by Facsimile <input type="checkbox"/> by FedEx/Express Mail <input type="checkbox"/> by Personal Delivery <input checked="" type="checkbox"/> by E-mail

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 STATE OF WASHINGTON
 DEPUTY

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

DATED at Tacoma, Washington this 16th day of October, 2013.


CINDY C. ROCHELLE