

68128-1

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NO. 68128-1

COURT OF APPEALS

DIVISION I

OF THE STATE OF WASHINGTON

EDDIE MARTIN RICHTER, et al,

Appellants

vs.

THE PORT OF SEATTLE,

Respondent

APPELLANTS' OPENING BRIEF

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STATUTES

RCW 64.04.01016

I. INTRODUCTION

This appeal presents a unique set of legal circumstances involving a public entity, the Port of Seattle (hereinafter “Port”), private landowners (hereinafter “Richter”), and a real estate transaction which, pursuant to a written contract, continued through performance in an orderly manner towards closing for 12 years before the Port disavowed it. During that 12 year period, the parties performed and consented to actions in a manner consistent with their joint understanding of the contract and the properties ultimately to be exchanged at closing. This case is even more unique in that the Port received 100% of the benefit of its contractual bargain before it refused to perform the minimal acts necessary to bring the contract to a closing.

This transaction should be understood, as it was by the parties, in the context of a real estate transaction moving, albeit slowly, toward a final closing through the normal stages of a real estate transaction. Each side knew which properties were involved, the actions that needed to be accomplished in order to reach closing and even the documents and manner of achieving the documents which would be required to complete the transaction. During the ensuing 12 years, the parties methodically performed various of the conditions precedent to the closing and then, at virtually the end of the road, the Port disavowed the contract.

At the formation of the contract, the Port and Richter each had a full understanding of the transaction and intended to complete the transaction in order to receive the benefit of the bargain. It was only after the Port achieved the full benefit of its bargain that it determined not to perform any further.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law when it denied Richter's Cross-Motion for Summary Judgment.
2. The trial court erred as a matter of law when it granted the Port's Motion for Summary Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it legal error for the court to apply the Statute of Frauds rather than recognizing that the writing between the parties was binding as a bilateral contract made by the parties.
2. Was it legal error for the court to apply the Statute of Frauds when the parties had proved a meeting of the minds and established the material terms of the contract by almost complete performance.
3. Was it legal error for the court to declare the contract merely an agreement to agree when the doctrines of parol evidence and partial performance were supported by the fact that each party

performed as required and the Port received the full benefit of its bargain.

4. Is the Port required to complete the terms of the contract through specific performance when it can complete the final condition precedent and close the transaction as contemplated.

IV. STATEMENT OF THE CASE

The Richters are the owners of property in West Seattle, Washington bordered on the east by 29th Avenue SW, an unvacated, but undeveloped, platted street belonging to the City of Seattle. Richter owns lots 10 and 11, Block 1, Meades 1st Addition, Lot 8, Block 438, Seattle Tidelands east of Lots 10 and 11 together with Lots 1, 2, 3, 4 and 5 Block 1, Steel Works Addition to West Seattle. King County, WA (hereinafter the “Richter Property”)¹. Beginning as early as 1992, the Port of Seattle commenced discussions with Richter regarding the Port’s interest in vacating 29th Avenue SW as part of a master plan which had been developed for the Port’s Terminal 5 development project (hereinafter “Terminal 5 Project”). (See Declaration of Eddie Richter CP202-214 and Second Declaration of Richter CP 366-370 for full factual discussion.)

¹ See Exhibit A, a map showing the location of the Richter Property, the platted but undeveloped 29th Avenue SW (hereinafter “29th Avenue SW”), and the adjacent property to the east of unvacated 29th Avenue SW. CP 220-221.

The Terminal 5 Project was one of three expansion projects the Port was developing at the same time. Each project included the necessity of vacating a number of platted, but, at least in the case here, unconstructed streets in each of the project areas. This required the Port to apply to the City of Seattle for street vacations. The Port needed the vacation, here, of the unconstructed, but platted 29th Avenue SW in order to meet other contractual obligations to which it had previously committed in order to accomplish the Terminal 5 Project. That prior commitment involved an agreement with Birmingham Steel, Richter's industrial neighbor, which owned and operated property to the east of unvacated 29th Avenue SW. (The Richter Property is immediately to the west of unvacated 29th Avenue SW.)

The City of Seattle agreed in principle that the streets involved in the Terminal 5 Project, including unvacated 29th Avenue SW, could be vacated, but as was usual in such street vacation applications, the City required certain conditions precedent to be accomplished by the Port. (It should be noted that the conditions were negotiated by the City and the Port prior to their imposition by the City.) See Exhibit B. CP 222-228.

In order to insure completion of its Terminal 5 Project, the Port needed to relocate certain features of the Birmingham Steel operation,

which action required the Port to vacate the portion 29th Avenue SW relevant here and build a substantial retaining wall on that vacated street. See Exhibit C, 30(b)(6) Deposition of England. CP 229-231. Without the street vacation and the construction of the retaining wall, the Port would have been unable to complete its Terminal 5 Project.

In order to vacate 29th Avenue SW, however, the Port was required to get the consent and joinder of both Birmingham Steel and Richter, the respective private property owners on each side of the unvacated street. In June, 1995, Richter, relying on a general understanding with the Port, signed to join with other landowners to Petition the City of Seattle to vacate a number of streets associated with the Terminal 5 Project, including 29th Avenue SW. See Exhibit D, the Amended Petition to Vacate. CP 232-248.

While Richter signed the petition, the specific needs of the Port and the terms on which Richter would continue pursuing vacation, were not formally negotiated in detail and reduced to writing until 1996. Through a series of in-person visits and fax communications, Richter and the Port hammered out the terms of an agreement² which the parties reduced to a final and binding writing on July 22, 1996. See Exhibit F, the

² See Exhibit E, the major negotiating communications by fax and the earlier letters by the Port of a proposed offer CP 249-262.

Terminal 5 Project. All parties knew, furthermore, that when 29th Avenues SW was vacated, Richter would own the property to the west of the centerline of the vacated street and some portion of the retaining wall to be built by the Port would encroach on that new Richter ownership.

As a result of this understanding, each step described below was intended to move the parties through a complicated real estate transaction to an ultimate closing between Richter and the Port and, from the Port's perspective, the completion of the Terminal 5 Project.

The consideration for the Contract was as follows:

1. The Port would process and complete the vacation of 29th Avenue SW.
2. The vacation of 29th Avenue SW would allow the Port to complete its obligations to Birmingham Steel through the construction of the retaining wall by the Port.
3. With respect to any portion of the retaining wall which encroached over the centerline of the vacated 29th Avenue SW, the Port would compensate Richter by granting them replacement land from adjacent parcels to be purchased by the Port. The compensation equal to, on a square foot basis, that portion of Richter's vacated 29th Avenue taken by the construction of the retaining wall.
4. The Port would purchase adjacent lots 6,7,8, and 9 from which the Port's exchange square footage for Richter would be taken.
5. The Port would grade a portion of Richter's existing property for use of one of Richter's tenants (GT Towing).
6. The Port would provide easements for Richter's access to the exchanged square footage and would provide a right of first refusal for those portions of the exchange lot(s) which

remained in Port ownership after the exchange of square footage for square footage.

7. All of the above would be accomplished by the Port at no expense to Richter.
8. Richter, in turn, would not withdraw its previous agreement to vacate that portion of 29th Avenue SW needed for the retaining wall.
9. Richter would complete the exchange square foot for square foot at the time of the vacation of 29th Avenue SW to allow the Port to build the retaining wall.
10. Richter would permit the Port access to its side of both the Richter Property and the vacated or unvacated 29th Avenue SW in order for the Port to construct the retaining wall in question.
11. Richter would allow the Port to build an access road to the area behind the wall, which access road would connect to Harbor Avenue and which could cross a portion of Richter's property.
12. Richter would cooperate with all requirements, if any, which the City required to complete the vacation of 29th Avenue SW and the construction of the retaining wall.
See generally the Contract. Exhibit F. CP 263-276.

As a result of the approval of the Contract by the Port

Commissioners, the parties commenced performance as contemplated.

(There was a square footage example in the Contract, but all parties understood and acknowledged that whatever the actual square footage needed by the Port, as determined exclusively by the Port from a survey, Richter would deed that square footage to the Port.)

Under the Contract, the Port's acts of performance included, inter alia,

1. Taking actions to vacate 29th Avenue SW;

2. Grading the property which the Richter's tenant, GT Towing, occupied;
3. Surveying the properties to determine the legal descriptions and amount of square feet that would be exchanged after street vacation See Exhibit I; CP 289-291.
4. Preparing and delivering to Richter the Exchange Agreement, See Exhibit J that would be required to complete the transaction contemplated under the Contract; CP 292-304.
5. Ordering a title policy using the legal descriptions of all the properties subject to the terms of the Contract See Exhibit K, CP 305-309.
6. Ordering an appraisal for the exchange properties; See Exhibit Q, CP 334-342. and
7. Purchasing the lots, portions of which would be exchanged for Richter's interest in a vacated 29th Avenue SW.

Richter's performance included the following:

1. Continuing to support vacating 29th Avenue SW from 1996 to the present;
2. Allowing the Port to perform its functions necessary to complete the Contract, including the surveying work, the construction of the access road described above and the grading, even though 29th Avenue SW had not be vacated;
3. Receiving, accepting and returning the Exchange Agreement submitted by the Port in furtherance of the Contract. (Richter received the draft of the Exchange Agreement and only corrected the designation of the exhibits to the Exchange Agreement which were drafted incorrectly. Otherwise, the Exchange Agreement was returned by Richter to be executed at the proper time for closing); See Exhibit S, CP 373-384.
4. Granting access to the Richter and that portion of 29th Avenue SW which would belong to Richter after vacation to build the retaining wall to satisfy the Port's obligations to Birmingham Steel; and
5. Taking no action to renegotiate or terminate the Contract, based upon the assurances of the Port that the Contract would be completed.

After the Contract became binding and even though 29th Avenue SW had not been vacated, the Port completed its obligation to Birmingham Steel by building the retaining wall on unvacated 29th Avenue SW, which continues to be City of Seattle's property. Having built the retaining wall, the Port is assured that, when it completes all the other conditions for the Terminal 5 Project at other locations, it will have completed the entirety of the Terminal 5 Project.

Every time, over the years since the formation of the Contract and since the retaining wall was built, that Richter sought to move to closing, the Port told Richter that it still had to accomplish the street vacation conditions. At no time did the Port ever tell Richter that it would neither complete the Contract nor close the real estate transaction.

The building of the retaining wall by the Port was and is a critical step contemplated by the Contract. Without obtaining the street vacation for 29th Avenue SW, after entering into the Contract and years before it ever attempted to disavow the Contract, the Port built and completed the retaining wall. See Exhibit M the CR 30(b)(6) Deposition of the Port. CP 314-320. The construction of the retaining wall on unvacated 29th Avenue SW was the original inducement for the Contract for the Port and intended end result of Contract performance by both the Port and Richter. The ultimate benefit of the bargain, the construction of the retaining wall

has been achieved by the Port, even though the Port has not completed the street vacation of 29th Avenue SW. Having achieved all that its entry into the Contract was intended to produce, the Port refuses to proceed further and has notified Richter that it will drop the 29th Avenue SW street vacation from its schedule for the completion of the Terminal 5 Project. See Exhibit R, CP 343-349.

The Port has acknowledged that it is almost completely finished with all of the City's conditions precedent to vacating the Terminal 5 Project streets, including 29th Avenue SW. The additional expense to accomplish the 29th Avenue SW street vacation, particularly given the costs expended to date on the Terminal 5 Project, is de minimus. Furthermore, because the Terminal 5 Project has taken close to two decades to complete, the staff of the Port recently sought reauthorization from the Port Commissioners for the remaining costs of completion, which reauthorization included the cost of vacating 29th Avenue SW. See Exhibit O, Deposition of the Port. CP 324-328. This satisfied the Contract's provision concerning a second approval by the Commissioners.. See Exhibit N and Exhibit O. CP 321-328.

As late as June, 2008, the Port was still performing pursuant to the Contract and the Port acknowledged that it still was required to close its agreement with Richter. See Exhibit Q. CP 334-342. The Exchange

Agreement in anticipation of closing had been completed and approved, there was a mechanism for determining the language of the easements, and all the parcels associated with the final closing had been clearly and mutually identified and shown on exhibits supporting the closing. (Just like the Exchange Agreement, whatever the Port placed in the documents in good faith, would be acceptable to Richter. If there were any minor language issues, the Contract provided for mediation, but Richter could always have merely accepted the Port's writings and moved directly to closing).

It was not until July, 2008, that the Port finally changed its position on the Contract. Subsequently, the Port disavowed the Contract in April, 2009, almost 13 years after the formation of the Contract and the continuous performance under the Contract.. See Exhibit R. CP 343-349.

Lastly, it is important to note that Richter relied upon the actions and good faith of the Port from 1996 to 2008 / 2009. During that time, on several different occasions, Richter incurred the services of an attorney to deal with the Port on various issues under the Contract and each time, received promises and reassurance from the Port that the Contract was moving forward in an appropriate manner. Richter discussed with representatives of the Port on a number of occasions the progress toward completing the Contract and the street vacation. Each time the Port

indicated that the matter was continuing and that the Port was completing its performance. On several occasions, the Port also speculated that it would only take another year or year and a half to complete the street vacation, the terms of the Contract, and the closing. See Second Declaration of Richter. CP 366-370.

V. ARGUMENT

1. The standard for review here.

Appellate review by the Court of Appeals of an order granting or denying summary judgment is *de novo* both as to the law and as to the facts. Mains Farm Homeowners Association v. Worthington, 121 Wash. 2d 810, 854 P. 2d 1072 (1993); Folsom v. Burger King, 135 Wash. 2d 658, 958 P. 2d 301 (1998). In order to grant summary judgment, the Court must find that there are no material issues of fact which would require a trier of fact to hear the live testimony on the subject matter. CR56(c). Young v. Key Pharmaceuticals, Inc., 112 Wash 2d 216, 225, 770 P. 2d 182 (1989). This is clearly the case in this matter as both Richter and the Port moved for summary judgment and, therefore, agreed that this matter was and is determinable as a matter of law. Both parties, by filing motions and cross-motions for summary judgment argued that the matter was ripe for determination. In addition, since the *de novo* standard is that the non-moving party is entitled to have the evidence

viewed in a light most favor to it and since both parties moved for Summary Judgment, on appeal, both Richter and the Port stand on an equal footing when this Court reviews the evidence submitted by each side. See, Taggert v. State, 118 Wash. 2^d 195, 199, 822 P. 2d 243 (1992); Mountain Park Homeowner's Ass'n, Inc. v. Tydings, 125 Wash. 2d 337, 883 P. 2d 1383 (1994).

2. The writing of July 22, 1996, the Contract, constituted a bilateral contract enforceable under the laws of the State of Washington.

The Contract of July 22, 1996 consists of a promise by Richter to exchange property with the Port following completion of the street vacation of 29th Avenue SW so that the Port can build the required retaining wall and a promise in return by the Port to grade certain Richter parcels, grant easement access for the Richter Property to parcels acquired by the Port and to execute the exchange of adjacent property while absorbing the costs of all such actions. A bilateral contract does not require performance by either party to be enforceable but rather is binding as soon as the promises have been made. Wise v. City of Chelan 133 Wn.App. 167, 135 P.3d 951 (2006). (a contract is bilateral when there is an exchange of promises, it is the exchange of promises that makes the contract enforceable not performance.) See also, Flower v. T.R.A. Indus., Inc., 127 Wn.App. 13, 27, 111 P.3d 1192 (2005). The terms of the

Contract are undisputed. “In a bilateral contract, it is the exchange of promises-not performance-that makes the contract binding.” Wise at 172 (internal citations omitted).

The conclusion that this is a bilateral contract is evident, when viewing the facts of this case. The parties understood that this was not a real estate transaction that could be closed in 60 or 90 or even 120 days. The parties understood that the Terminal 5 Project hinged on completing all conditions placed upon the Port by the City of Seattle for street vacations, including 29th Avenue SW. When the parties discussed closing, as the years of performance progressed, the Port talked not of months, but of years. However, in all that time, the mutual promises of the bilateral contract and the good faith performance by both sides highlight the contractual nature of the relationship between the parties.

3. The Statute of Frauds is inapplicable. The Contract is an agreement to perform acts over time and not a real estate purchase and sale agreement leading to an immediate deed.

The trial court relied on the “Statute of Frauds argument in Key Design, Inc. v. Master, 138 Wn. 2d 875 (1999)” to grant the Port’s Motion for Summary Judgment. That line of analysis and that case are clearly distinguishable from the facts and writings in this case. Moreover, in that case, the Washington Supreme Court was hardly unanimous in its view of

the application of the Statute of Frauds with dissenting and even concurring opinions which expressed a considerable variation from the majority opinion. See the concurrence of Sanders, J. when he stated that ” I concur in the majority's result because it follows the clear holding in Martin v. Seigel, 35 Wash.2d 223, 212 P.2d 107, 23 A.L.R.2d 1 (1950) that every real estate contract must describe the property “by the correct lot number (s), block number, addition, city, county, and state.” Martin, 35 Wash.2d at 229, 212 P.2d 107. However, I would prefer to overrule Martin than follow it, and therefore concur by separate opinion.” Key Design at p. 890.

Notwithstanding the variety of opinions and analysis in Key Design, the facts here lend itself to a much different legal result. No one needed protection from potentially fraudulent descriptions. The parties clearly understood the properties and the descriptions that were to be involved and needed respectively for the final conveyances. As Justice Sanders asserted in his concurrence, there is a difference between a conveyance (read “deed”) and an agreement to convey and the Statute of Frauds should not apply to the latter. Id. at p. 892. Furthermore, the purpose of the Statute of Frauds was to prevent fraud, not to allow the Port to defraud Richter.

What is clear from the facts of Key Design, supra, is that, in that case, there was never any attempt to address the actual legal description through subsequent addition or to provide clarity as to other material terms of the Real Estate Purchase and Sale Agreement.

The Statute of Frauds, RCW 64.04.010, provides in pertinent part that “every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed”. The writing of July 22, 1996, the Contract, was not a conveyance of real property and was not an encumbrance on real property. It was a contract requiring a series of acts of performance prior to the preparation and recordation of a document or documents which would satisfy the Statute of Frauds. The clear intent of the parties, that the actual conveyance was to be accomplished through a separate writing, is found in the language of the Contract concerning a purchase and sale agreement and the subsequent preparation and offer by the Port and acceptance by Richter of the Exchange Agreement that was intended to be used to consummate the transaction using full legal descriptions that satisfied the Statute of Frauds. Had Richter merely attempted to use the Contract as the conveyance, recording it as a deed or seeking to encumber the parcels in question, the Statute of Frauds would have prevented or voided such an action. However, here, the Contract required a series of performance

actions leading to the closing with a document or documents which would be subject to the Statute of Frauds. It is that document which Richter seeks to require the Port to specifically perform through completion of the vacation of 29th Avenue SW, the execution of the Exchange Agreement which Richter accepted, and the preparation and recordation of deeds and easements as required by the Contract and consistent with the survey made by the Port.

4. **Even if the Statute of Frauds were determined to be applicable, the Contract of July 22, 1996 is valid and enforceable when the writing is viewed in light of the almost complete performance of the parties and the parol evidence rule**

Even if the Statute of Frauds was not satisfied by the Contract, Washington law tempers its effect through the addition of the parol evidence rule and the law concerning the importance of partial performance. Under the parol evidence rule, Washington courts may consult extrinsic evidence of the circumstances under which the contract was made to aid interpretation, but not to show a party's unilateral intent, intent independent of the contract, or to contradict or modify the contract as it was written. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Here, utilizing extrinsic evidence under the parol evidence rule does not modify the contract, but shows the understanding of the

parties that the writing when signed would constitute a contract. See Exhibit E, CP 249-262, including the communication by fax of July 16, 1996, in which Richter indicated the necessity of providing a complete and binding document because the July 22, 1996 writing would be a contract.

At the time the parties signed the writing of July 22, 1996, Exhibit F, CP 263-267, the Port placed a single caveat to the formation of the contract in the document: the separate and subsequent approval of the Port Commissioners to the writing. That confirmation was achieved on August 27, 1996, Exhibit H, CP 273-288, when the Port Commissioners gave their unanimous consent to a binding contract. The Port Commissioners' approval provided the authority to "Execute All Documents Necessary" to accomplish the terms of the Contract. Exhibits G and H CP 268-288. (The Port was the sole author of the Contract, except for the handwritten addition by Richter, which addition was initialed by the Port. With the Port as the drafter, "We resolve any ambiguity against the contract drafter." N. Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920, 540 P.2d 1387 (1975). The question of the interpretation of the language of the Contract is to be construed against the Port in all instances.)

The extrinsic evidence supporting the existence of a contract includes the fact that the Port memorialized the legal descriptions of the parcels to be exchanged in Exhibit G, CP 268-272, when it had a surveyor create a survey of the parcels, Exhibit I, CP 289-291, and when it ordered a preliminary title which incorporated the legal descriptions for the exchange parcels, Exhibit K, CP 305-309. Furthermore, the creation of the Exchange Agreement, Exhibit J, CP 292-304 is additional extrinsic evidence of the existence of a contract. Finally, Exhibit Q, CP 334-342, a Memorandum dated June 3, 2008, drafted by Port staff, clearly identifies that the contractual obligations between the Port and Richter remained in full force and binding effect.

The enforceability of the Contract is further supported by the doctrine of partial performance. As stated in Richardson v. Taylor Land & Livestock Co., 25 Wn 2d 518, at 527, 171 P.2d 703 (1946). “It is therefore now generally accepted that a sufficient part performance by the purchaser under a parol contract for the sale or exchange of real estate removes the contract from the operation of the statute of frauds and authorizes a court of equity to enter a decree of specific performance of the agreement by the vendor”(Internal citations removed) . Furthermore, under the doctrine of part performance, Washington courts have specifically enforced agreements containing inadequate descriptions. See

Stephens v. Nelson, 37 Wn 2d 28, 221 P.2d 520 (1950); See also
Dunbabin v. Allen Realty Co., 26 Wn. App. 660, 613 P.2d 570 (1980).
Thus, even where the July 22, 1996, Contract would be viewed as a parol
contract, the performance by both Richter and the Port would enable this
Court to enter a decree of specific performance.

The doctrine of part performance, furthermore, is an equitable
doctrine, in order to prevent a wrong or fraud upon one of the parties if the
other party were allowed to escape performance of the contract after
reliance on the agreement. The doctrine requires acts which have so
altered the relations of the parties as to prevent their restoration to their
former position. Richardson v. Taylor Land & Livestock Co., 25 Wn 2d
518 at 527. In this case, the acts relate directly to the fact that Richter
permitted the entry on their property for the construction of the retaining
wall and the Port constructed the retaining wall. The relationship cannot
be restored, the massive wall now extends on the Richter side of
unvacated 29th Avenue SW and consists of cement, rebar, and footings,
together with the access road out to Harbor Avenue.

Under all circumstances, the parties acknowledged and acted in
accordance with the binding nature of the Contract. The relationship of
the parcels to each other and the impact on Richter's Property cannot be

undone. Such is the predicate for the application of the equitable doctrine of specific performance.

5. The Contract of July 22, 1996 is clearly distinguishable from an agreement to agree.

The trial court, in granting the Port's summary judgment motion also cited the Port's agreement to agree analysis and the case of Keystone Land and Development Co. v. Xerox Corp., 152 Wn. 2d 171, 94 P.3d 945 (2004). The Keystone decision at p. 174-175, relying exclusively on the fact pattern in that case, answered the question: "Will Washington contract law recognize and enforce an agreement, whether implicit or explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?"

While the answer "under the circumstances presented in [that] case" was no, of greater significance here was the examination by the Supreme Court of the first of three types of agreements to agree under Washington law. The Court in Keystone, supra described that unenforceable agreement to agree as follows:

The first type of agreement is an agreement to agree. An agreement to agree is "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete." Sandeman v. Sayres, 50 Wash.2d 539, 541-42, 314 P.2d 428 (1957). Id. at 176-177.

Under the facts of this case, the analysis derived from Keystone, supra and Sandeman v. Sayres, 50 Wn. 2d 539, 314 P.2d 428 (1957) do not support the trial court's determination that the Contract was merely an agreement to agree. The parties in Keystone agreed to negotiate to produce a real estate purchase and sale agreement, but took no binding steps to accomplish that result. The Supreme Court, therefore, declined to enforce a contract where there were few or no binding terms and where there was no performance. The parties in Sandeman had no contractual basis to determine and could clearly disagree as to the monetary value of the commission at issue. There was no description of a mechanism for determining that commission nor was there any mechanism for resolving any conflicts. The performance merely quantified the amount of gross dollars, but required the court to go beyond the performance to create a "fair" result.

Such is not the case here. This case displays exactly the opposite of the uncertainty relied on by the Court in Keystone and the citation to Sandeman to find an agreement to agree.

1. The exact boundaries for exchange to be created were in the sole determination of the Port based upon its needs for and use of the location of the retaining wall which it has now built.

2. The properties from which the exchange between the Port and Richter would occur were clearly called out with specific legal descriptions so that there would be no guesswork as to which properties would be involved.
3. The exchange was based on the exact square footage needed by the Port and was determinable exactly and scientifically by a surveyor.
4. The Port caused a survey to be accomplished and the retaining wall to be built so that there could be no question as to the exact area that would need to be described by the surveyor and, therefore, the exact area of the designated exchange lot(s) that would be exchanged.
5. The Port prepared and offered and Richter accepted and returned the Exchange Agreement, Exhibit S, CP 373-384 to the Port and therefore the parties had agreed on not only the mechanism, but the actual document for transfer.
6. The parties had already described which lots were to be subject to the easement and Richter relied on the Port to prepare appropriate easements in good faith as had occurred with the Exchange Agreement. Moreover, the Port, subject to the requirement of good faith, undertook to prepare the easements.
7. The actual right of first refusal was fully addressed in the Exchange Agreement.

8. Finally, the parties had a mechanism to address any disputes in language under the Contract as they had agreed to mediation.

This Contract differs in one additional key respect from the circumstances in Keystone and Sandeman: The Port offered and Richter accepted the Exchange Agreement, the critical step to closing and the further binding agreement to accomplish all the transfers agreed upon by the parties in the Contract. This was the kind of agreement that even the courts in Keystone and in Sandeman would have agreed took any earlier writing out of the context of an agreement to agree and into a binding contract.

Finally, in terms of any agreement to agree analysis, the trial court's reliance on Keystone and indirectly on Sandeman has one final dispositive distinguishing feature from the circumstances in this case. In this case, the parties performed step by step according to the Contract and, even created a mechanism for addressing language issues, mediation. However, equally important with respect to the fact that this matter could and should go to a closing with all the final documentation required by the Exchange Agreement is that Richter can (and in the example of the Exchange Agreement did) agree to any language that the Port proposes in

good faith in order to close the contract contemplated by the Contract and the Exchange Agreement.

6. The Port should be estopped from claiming that there is no contract based upon the detrimental reliance of Richter on the existence of a contract, performance and the actions and promises from the Port.

At various points from 1996 into 2008, Richter inquired or met with the Port to determine the status of performance under the Contract. The Port repeatedly indicated that all that was holding up the process was the street vacation and that that could and would be accomplished. The Port even went so far as to speculate that it might take another year or year and one-half to complete the street vacation. (These promises must also be understood in the context of the actual construction of the retaining wall at the heart of the Port's needs, therefore, making the promises and assurances all the more reasonable upon which to rely over the lengthy period of time associated with the Contract and the Terminal 5 Project completion.)

During the course of the performance from 1996 to 2008, Richter, relying on the representations and actions of the Port, took steps in reliance on the existence of the Contract. Richter retained several attorneys to assist in their performance, as evidenced in part, by the fact

that the Port sent the Exchange Agreement for review by one of those attorneys. Richter allowed the Port to build the retaining wall using the Richter Property and its anticipated one-half of the soon to be vacated 29th Avenue SW and cooperated in facilitating and making space on its property for the grading and filling.

These and other actions developed through the Declaration, CP 202-214 and Second Declaration, CP 366-370 of Eddie Richter, clearly indicate that Richter has detrimentally relied upon the promises and actions of the Port. In Oakbrook, 7th Addition Homeowner's Ass'n v. Newhouse, 142 Wn. App. 1006 (2007), the Court addressed the concept of detrimental reliance. "Generally speaking, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts. Detrimental reliance doctrine is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence."

In Majerus, Inc. v. County of Walla Walla, 127 Wn. App. 1044 (2005), a case involving statements made by a governmental entity, the Court explained the rationale for imposing equitable estoppel as a result of detrimental reliance.

Majerus, Inc., must next show it acted in reasonable reliance on the Department's statement. The Department's statement, however, was not made outside its authority. Majerus, Inc., must further show it would suffer injury if the county were allowed to repudiate or contradict the Department's earlier statement. To prove an injury for equitable estoppel purposes, a party must establish it justifiably relied to its detriment on the words or conduct of another. Kramarevcky, 122 Wn.2d at 747. 'In Washington, injury, prejudice and detrimental reliance have been used interchangeably to express the requirement that a party asserting equitable estoppel must show a detrimental change of position.' *Id.* Relying on the Department's statement

The representatives of the Port clearly had the authority to make the Contract and to make the assurances and representations to Richter. In addition, the representatives of the Port clearly had the authority to perform the acts and write the documents which were required to move to closing. The Port should be estopped from now claiming that there is no contract between the parties.

7. Richter is entitled to specific performance under the Contract of July 22, 1996.

The standard for specific performance was set forth in Kruse v. Hemp, 121 Wn.2d 715, 853 P.2d 1373 (1993) . Specific performance will be granted when the party seeking it proves by clear and convincing evidence that the parties have agreed upon the essential elements of a contract. *Id.* at 722. Specific performance is a proceeding in equity. Sheldon v. Hallis, 72 Wn.2d 993, 996, 435 P.2d 988 (1967). Specific

performance will be granted where, as here, there is not an adequate remedy at law, if performance is possible and if, under the facts and circumstances, it would be inequitable not to compel the defendant to perform. Streater v. White, 26 Wn.App. 430, 433, 613 P.2d 187 (review denied), (1980). Specific performance should place the parties in the position they would be in if the transaction closed pursuant to the original agreement. Paris v. Allbaugh, 41 Wn.App. 717, 719, 704 P.2d 660 (1985).

A contract is subject to specific performance when “the precise act sought to be compelled is clearly ascertainable.” Emrich v. Connell, 105 Wn.2d 551, 558, 716 P.2d 863 (1986). “[B]ecause land is unique and difficult to value, specific performance is often the only adequate remedy for a breach of contract regarding real property.” Cornish College of the Arts v. 1000 Virginia Ltd. Partnership, 158 Wn.App. 203, 242 P.3d 1 (2010) review denied 171 Wash. 2d 1014, 249 P.3d 1029 (2011). Here the necessary acts to be performed are clearly ascertainable under the Contract, the Exchange Agreement and the parol evidence rule. The Port must complete the conditions for the street vacation of 29th Avenue SW to bring its action of already building the retaining wall into compliance. The parties should then proceed to closing, execute the Exchange Agreement which it offered and which Richter accepted and complete the transaction contemplated by the Contract and the Exchange Agreement

Finally, as an action at equity, the parties are charged with the necessity of coming to the Court with “clean hands”. Portion Pack v. Bond, 44 Wn 2d 161, 265 P.2d 1045 (1954). In this case, only one party, Richter, comes to equity with clean hands. The Port has already built the retaining wall which was intended to be the benefit of the bargain more than 12 years before it decided to attempt to disavow the Contract. The Port built the retaining wall on property belonging to the City of Seattle, which could only have been available for construction if the Port now completes the street vacation of 29th Avenue SW. (Also note that in order to terminate the street vacation, the Port would have to obtain the consent of Nucor the successor to Birmingham Steel for new consideration and the consent of Richter which would not be given.) Finally, it is clear under Washington law that, while specific performance requires specificity of terms in the contract, absolute certainty with respect to the terms is not required. Luther v. National Bank of Commerce, 2 Wn. 2d 470, 477– 478, 98 P.2d 667 (1940). If from all the evidence in the case, the court can determine the contract with “reasonable certainty”, that is sufficient for granting specific performance. Id at 477-478.

VI. CONCLUSION

Throughout the proceedings below, the Port claimed that Richter was seeking a free lunch at the Port’s expense. Nothing could be further

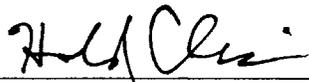
from the truth and, in fact, if there were a free lunch, the only recipient would already have been the Port. The Port and Richter performed regularly and consistently under the Contract from 1996 until days before the 2008 letter from Mr. Kriston suggesting that the Port did not recognize a contract. The 2008 Port letter and the 2009 Port letter disavowing the Contract, however, were inconsistent with not only the Port's actions, but its authority. The authority that the staff requested and that was granted by the Commissioners August 27, 1996, provided that the Port was authorized to "Execute All Documents Necessary" to complete the entire transaction. See Exhibit G. CP 268-272. The Port obtained a second authorization contemplated by the Contract when it sought and obtained a reauthorization of the budget including the vacation of 29th Avenue SW. See Exhibit N and Exhibit O. CP 321-328. Finally, the Port got the full benefit of its bargain, the construction of the retaining wall which means that the Terminal 5 Project, in its entirety, can be completed.

When the Port has achieved its end of an arms length bargain, it should be required to complete the rest of the bargain. Richter respectfully requests that this Court recognize the Contract and the Exchange Agreement, reverse the trial court's rulings on the Port's Motion for Summary Judgment and Richter's Cross-Motion for Summary Judgment and grant summary judgment of specific performance to Richter

by requiring the Port to complete the vacation of 29th Avenue SW and close the agreed upon transaction.

Respectfully submitted on this 24 day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2012, I caused to be served the foregoing Appellants' Opening Brief on the following party at the following address:

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