

71867-3

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NO. 71867-3-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RED LETTER MINISTRIES,

Appellant/Cross-Respondent,

v.

CITY OF NORTH BEND,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Red Letter Ministries¹ is the latest in a confusing “shell game” of multiple entities wholly created, dissolved, re-created, and controlled by Salli DeBoer (later known as Salli Beaumariage) which claim to provide charitable or social services to families in need. DeBoer and all such related entities are subject to the terms of a Consent Decree with the Attorney General which effectively precludes their ability to solicit donations. As part of her efforts to evade the Attorney General – and well after formation of the claimed verbal agreements at issue here regarding the house and related ground lease - DeBoer knowingly and voluntarily dissolved “Network Services of Puget Sound,” the entity in existence at the time of the claimed agreement regarding the house and ground lease.

DeBoer then formed a wholly new entity, “Red Letter Ministries,” and brought this action. Red Letter Ministries (“RLM”) did not exist until long after the formation of the claimed agreements regarding the house and ground lease. RLM has no standing to bring this suit, and has never had any such standing.

¹ Prior to forming Red Letter Ministries, DeBoer controlled other entities known as Network Services of Puget Sound, Red Letter Housing and Programs, Network Ministries, and Red Letter Corporation. Appellant Red Letter Ministries did not exist at the time of the claimed agreements with the City. Those agreements involved Network Services of Puget Sound, which DeBoer subsequently voluntarily dissolved.

Additionally, this appeal is moot. The Complaint seeks only equitable relief prohibiting the City from demolishing the house. After the trial court properly dismissed this action below, RLM appealed but never posted a supersedeas bond. The house has been demolished.

Finally, given the standing and mootness issues described above, the Court need not even reach the remaining issues involving a claimed verbal agreement² under which the City would sell the house to Network Services. To the extent that the Court does choose to address the claimed verbal contract, however, DeBoer and RLM repudiated and materially breached the agreement by proposing material new terms and by utterly and completely failing to provide the promised family services program.

II. CROSS-APPELLANT'S ASSIGNMENTS OF ERROR AND RE-STATEMENT OF ISSUES.

A. Cross-Appellant's Assignments of Error.

1. The trial court erred in denying in part North Bend's first "Motion for Summary Judgment and Denying Motion to Dissolve Preliminary Injunction," entered on August 27, 2013.

2. The trial court erred in denying "North Bend's Motion for Reconsideration of Order Denying in Part and Granting in Part North Bend's Motion for Summary Judgment and Denying Motion to Dissolve

² The trial court's order of August 27, 2013 dismissed Red Letter Ministries' claims regarding a written contract. CP 664. That order was not appealed. CP 822-823.

Preliminary Injunction,” entered on September 16, 2013.

3. The trial court erred in denying “North Bend’s Application for Award of Attorney Fees and Expenses Incurred to Dissolve Preliminary Injunction,” entered on April 18, 2014.

B. Restatement of Issues Pertaining to Assignments of Error.

1. RLM seeks no money damages and the house has been demolished. Is this case moot because the Court can no longer grant RLM’s requested relief of an injunction and specific performance?

2. Did the trial court properly dismiss on summary judgment RLM’s claims when:

- i. RLM has no standing to pursue this lawsuit?
- ii. There were no material facts in dispute regarding the terms of an alleged oral agreement between City and RLM?
- iii. RLM repudiated its promise to the City to provide family services in the house, thereby materially breaching any agreements with the City?
- iv. State law expressly vests the authority to contract in the City Council, and the Mayor accordingly has no authority unilaterally to bind the City to contracts?

- v. Free use of some or all of the house by RLM for its own “administrative purposes” is unconstitutional and violates public policy?
- vi. State law expressly vests the authority to contract in the City Council, and the Mayor’s oral promises to contract are accordingly void as ultra vires acts?

3. Whether the trial court properly dismissed on summary judgment RLM’s claims that the statute of frauds was not met by “judicial admission” and RLM’s partial performance where:

- i. RLM cannot establish partial performance?
- ii. Application of the statute of frauds is necessary to prevent RLM from modifying the agreed material terms of the contracts?
- iii. Judicial admission does not constitute an exception to the statute of frauds in Washington?

4. Whether the trial court properly awarded judgment against RLM and Salli DeBoer individually when RLM is not a recognized legal entity, and functionally operates as Salli DeBoer’s sole proprietorship?

III. RE-STATEMENT OF THE CASE

A. Procedural Background.

RLM filed a Complaint against the City of North Bend (“City” or “North Bend”) on August 7, 2012, claiming a breach of a promise by the City to sell a house that had been scheduled for demolition, and to provide a ground lease for a separate parcel, to RLM. Clerk’s Papers (“CP”) 1-5. The Complaint alleges promissory estoppel, breach of contract and requests a “Temporary Restraining Order,” “Preliminary Injunction,” and “Specific Performance.” The Complaint does not seek money damages. Id.

City filed an Answer and Counterclaims alleging promissory estoppel, negligent misrepresentation, breach of contract and nuisance abatement. CP 395-402.

City filed a “Motion for Summary Judgment and to Dissolve Preliminary Injunction” on July 26, 2013. CP 506-603. The trial court granted the City’s Motion for Summary Judgment in part and denied it in part. CP 636-639. Specifically, the court dismissed RLM’s claim seeking to enforce written contracts between the parties and dismissed RLM’s promissory estoppel claim. Id. The court denied the City’s Motion on other issues and found that there were material facts in dispute regarding apparent authority, partial performance, and consideration in the plaintiff’s

effort to enforce a claimed verbal agreement between the Mayor and Deboer. CP 639. The City filed a “Motion for Reconsideration” which was denied. CP 640-656. RLM did not appeal the first summary judgment ruling issued by the trial court. CP 822-823.

City filed a second Motion for Summary Judgment and Motion for Dissolution of Preliminary Injunction on February 14, 2014. That Motion alleged that RLM lacked standing and sought dismissal of the remaining claims. CP 9-76. RLM filed a “Motion to Substitute or Join Red Letter Programs and Housing Red Letter Ministry,” on March 3, 2014. CP 121-135. The trial court denied RLM’s Motion to Substitute or Join. CP 182-183.

The trial court granted the City’s second “Motion for Summary Judgment and to Dissolve Preliminary Injunction” on April 2, 2014, and all remaining claims of RLM were dismissed. CP 184-186. The trial court denied the City’s subsequent “Application for Attorney Fees” on April 18, 2014. CP 819-821.

On April 23, 2014, the City completed the demolition of the house at issue here. Declaration of Londi K. Lindell in Support of City of North Bend’s Motion to Dismiss (“Lindell Decl.”) at 2, ¶ 3.³ Five days later, on

³ The City acknowledges that Ms. Lindell’s declaration is outside of the trial court’s record. This Court earlier authorized the City to raise this issue in its Brief of Respondent. See, Notation Ruling entered by this Court on October 14, 2014.

April 28, 2014, RLM filed with the King County Superior Court its “Notice of Appeal to Division One of the Court of Appeals, and Intent to File a Supersedeas Bond” (RLM never did file a bond). CP 822-829. The City filed a Cross-Appeal. CP 830-841.

B. Factual Background.

The City separately sets forth the pertinent facts before each separate legal argument below.

IV. ARGUMENT

A. Standard of Review.

The Court of Appeals reviews summary judgment rulings de novo, engaging in the same inquiry as the trial court. Korslund v. DynCorp Tri-Cities Servs., Inc. 156 Wn.2d 168, 177, 125 P.3d 119 (2005).

B. This Appeal is Moot and the Court Cannot Grant Effective Relief.⁴

1. Statement of Facts Relevant to Mootness.

a. RLM Sought Only Injunctive Relief and Specific Performance.

On August 8, 2012, RLM filed its “Complaint for Temporary Restraining Order, Preliminary Injunction, and Specific Performance.” CP 1-5. In its Complaint, RLM did not seek money damages. Rather, it claimed only that “injustice can only be avoided by enforcing the [verbal]

⁴ See, Notation Ruling entered by this Court on October 14, 2014.

promise” and “injustice can only be avoided by specific enforcement” of the verbal promise. CP 3 at ¶ 15; see CP 4 at ¶ 18. On April 2, 2014, the trial court dismissed this case in its entirety. CP 184-200.

b. After Dismissal and Before Filing of RLM’s Notice of Appeal, the City Demolished the House. RLM Never Filed a Supersedeas Bond.

On April 23, 2014, the City demolished the house. Demolition and removal of the debris were completed on April 23, 2014. Lindell Decl. at 2, ¶ 3. Five days later, on April 28, 2014, RLM filed its “Notice of Appeal to Division One of the Court of Appeals, and Intent to File a Supersedeas Bond.” CP 822-823. RLM never filed a supersedeas bond.

2. Analysis.

Under RAP 18.9(c):

Dismissal on Motion of Party. The appellate court will, on motion of a party, dismiss review of a case . . . if the application for review is . . . moot

a. This Appeal is Moot. The City’s Motion to Dismiss Under RAP 18.9 Should Be Granted Because RLM Only Sought Injunctive Relief and Specific Performance, Neither of Which Can Now Be Granted Because the House Has Been Demolished.

This case is moot because the only relief RLM sought was an injunction to prevent demolition of the house and specific performance of the claimed verbal agreement to sell the house. RLM sought no money

damages. CP 3-5. The house has been demolished.

“A case is moot if a court can no longer provide effective relief.”
Thomas v. Lehman, 138 Wn. App. 618, 622 n.3, 158 P.3d 86 (2007)
(quoting In re Det. of Cross, 99 Wn.2d 373, 376–77, 662 P.2d 828
(1983)); In re Recall Charges Against Seattle Sch. Dist. No. 1 Directors,
162 Wn.2d 501, 505-06, 173 P.3d 265 (2007).

In the event that RLM attempts on appeal to claim money damages
or other alternative relief, its failure to raise such claims in the trial court
bars them now.

[W]e will not address the alternate theories
of damages because they were not raised at
trial. Purchasers did not ask for such relief
in their complaint and raised the issue of
alternative damages for the first time . . . on
appeal.

Cordell v. Stroud, 38 Wn. App. 861, 866, 690 P.2d 1195 (1984), review
denied, 103 Wn.2d 1015 (1985).

Even if RLM had sought money damages here, the City of course
denies that RLM would be so entitled. In Cordell, the situation was
different – there, the Court indicated that the “trial court would have
awarded damages” had it been asked to do so, and that the “facts in this
case warrant a finding that purchasers are entitled to monetary relief.”

Even so, the Court nonetheless concluded that it could not consider the tardy request for damages “without indulging in inappropriate judicial creativity.” Id. at 866-67. The Cordell Court accordingly declined to permit the otherwise deserving purchasers to raise the issue of damages for the first time on appeal.

RLM likewise did not argue an alternative theory of damages in its Brief of Appellant. It cannot do so in its Reply. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

While RLM cites to Powers v. Hastings, 20 Wn. App. 837, 845, 582 P.2d 897 (1978), for the unremarkable proposition that part performance of a contract can support an action for damages, a plaintiff must actually request damages in his or her complaint for that to be the case. In Powers, plaintiffs actually did so, and “obtained a verdict for damages.” Id. at 839. RLM did not do so here. It is too late now. Cordell, *supra*; see, Cowiche Canyon Conservancy, 118 Wn.2d at 809.

The house has now been demolished. The Court cannot grant the relief requested in the Complaint. This case is accordingly moot.

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C. RLM Lacks Standing to Bring This Lawsuit.

1. Statement of Facts Regarding Standing.

a. The Verbal Agreement Between the Mayor and Network Services.

The claimed verbal agreement has only three material terms – sale of the house, grant of a five year ground lease, and use of the house for a program to serve homeless families. As Salli DeBoer herself testified:

In particular, on or about June 10, 2010, North Bend Mayor Kenneth Hearing called me via telephone and expressly offered RLM ownership of the House along with a five-year ground lease ... to use in its program that houses local homeless families.

...

On behalf of RLM, I immediately accepted the City's offer.

CP 46.

The house was moved in July 2010. CP 50.

b. Network Services' (and "Red Letter Housing" and "Network Ministries") Formation and Dissolution.

Salli DeBoer formed Network Services of Puget Sound in or around 2003. At some point, she "changed the name to Red Letter Programs and Housing" ("RLPH"). At other times, it was referred to as "Network Ministries." CP 29-30. This was the Salli DeBoer-created entity in existence at the time of the claimed verbal agreement between the Mayor and Salli DeBoer described above.

The sole plaintiff below and sole appellant here is “Red Letter Ministries.” RLM first came into existence in January 2012, about 18 months after formation of the claimed verbal agreement between the Mayor and Salli DeBoer. CP 39.

In September 2008, the Attorney General of the State of Washington sued DeBoer and her many organizations for, among other violations, impermissibly soliciting charitable donations without being registered as a charitable organization and for misrepresenting that donations had been expended on charitable programs when they had actually been spent on DeBoer’s salary and other claimed administrative costs. CP 51-57.

In response, Network Services and DeBoer individually executed a Consent Decree with the State of Washington. The Consent Decree enjoins them (and their “successors, assigns . . . and all other persons in active concert or participation with the Defendants”) from soliciting charitable donations without being registered as a charitable organization, and from misrepresenting the use of the collected donations. CP 60-61.

At the time of the claimed agreements with the City in June 2010 (CP 201), Salli DeBoer operated Network Services/RLPH, a Washington non-profit corporation. Plaintiff/appellant RLM did not even exist until January 2012, nearly 18 months later. CP 39.

On January 12, 2012, Salli DeBoer as “founder/officer” voluntarily dissolved Network Services/RLPH. CP 68-69. On January 1, 2012, DeBoer opened an account with the Department of Revenue under the name “Red Letter Ministries.” CP 39. RLM is not now, and has never been, registered with the State of Washington as a separate legal entity, or as a charitable organization authorized to solicit donations. CP 40-43.

This litigation was filed solely in the name of “Red Letter Ministries”. CP 1.

2. Analysis.

a. RLM Lacks Standing to Bring This Lawsuit.

The City has no verbal or other agreement with RLM. By Salli DeBoer’s knowing act, RLM came into existence 18 months after the claimed verbal agreements at issue in this lawsuit. As such, RLM is not a real party in interest and has no standing to sue. “Every action shall be prosecuted in the name of the real party in interest.” CR 17(a).

The claimed verbal agreement between the Mayor and DeBoer on behalf of Network Services/RLPH occurred in June 2010. Plaintiff below and appellant here is not Network Services/RLPH. DeBoer herself knowingly and voluntarily dissolved Network Services/RLPH months before the filing of this case. CP 68; see CP 1. Plaintiff and appellant “RLM” first came into existence in January 2012. CP 39, 45.

For all intents and purposes, legal and otherwise, RLM is Salli DeBoer Beaumariage, and nothing and nobody else. DeBoer dissolved Network Services/RLPH and formed RLM in a misguided and unsuccessful effort to evade the terms of a Consent Decree with the Attorney General. CP 58-67.

Among other things, the Consent Decree enjoins and directs that DeBoer and Network Services/RLPH, their “successors and assigns,” and “all other persons or entities in active concert or participation” with them “shall not solicit charitable contributions from the general public in the state of Washington without being registered to engage in charitable solicitations as required by RCW 19.09.” CP 60-61.

RLM is certainly an “entity” in “active concert or participation” with DeBoer, but RLM is not registered to solicit charitable contributions in Washington. CP 40-43.

RLM did not exist at the time of the claimed verbal agreement between the Mayor and Network Services/RLPH. RLM simply has no standing to assert the claims of Network Services/RLPH.

A contract is only enforceable by a party to that contract or a third party intended beneficiary. No others have standing to enforce the contract. Kim v. Moffett, 156 Wn. App. 689, 701, 234 P.3d 279 (2010); Coast Trading Co., Inv. v. Parmac, Inc., 21 Wn. App. 896, 905, 587 P.2d

1071 (1978).

RLM is not a party to the claimed verbal contract for the sale of the house. Likewise, RLM cannot be a third party beneficiary here because RLM did not exist at the time of contract formation. A party seeking to enforce a contract as a third party beneficiary must exist at the time of formation of the contract at issue. Kim, 156 Wn. App. at 701. In Kim, the Court specifically rejected the argument that an organization not yet in existence could constitute a third party beneficiary. Id.

A party without standing cannot assert the rights of other parties or nonparties. Ullery v. Fulleton, 162 Wn. App. 596, 604, 256 P.3d 406 (2011). Where a party lacks standing, it has no claims to assert and the court should not consider the merits of any such claims in whole or in part. Id., *citing* Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 580, 958 P.2d 962 (1998).

RLM did not exist until 18 months after the verbal agreement between the Mayor and Network Services/RLPH. It has no standing.

- b. Red Letter Has Abandoned Any Argument That Network Services/RLPH Should Have Been Joined Below.

In its Notice of Appeal, RLM purports to appeal the trial court's order denying RLM's motion to substitute or join Network

Services/RLPH as a proper party. CP 822-825.⁵ In its Brief of Appellant, however, RLM fails to assign error to the trial court's order, and completely fails to brief the matter. RLM has abandoned its appeal regarding this argument.

No alleged error will be considered on appeal unless clearly set forth in the "assignments of error" in appellant's brief. State v. Tanzymore, 54 Wn.2d 290, 292, 340 P.2d 178 (1959). A supplemental assignment of error in a reply brief cannot be considered. Id. at 293. "An assignment of error not addressed in the appellant's brief is deemed abandoned." Zabka v. Bank of Am. Corp., 131 Wn. App. 167, 174, 127 P.3d 722 (2005), published with modifications (Jan. 19, 2006).

c. State Statute Prevents Network Services/RLPH From Ratifying, Joining or Substituting.

To the extent that the Court determines that RLM has not abandoned its appeal regarding the trial court's order denying joinder of Network Services/RLPH, joinder was properly denied. Network Services/RLPH had only two years to initiate litigation from the date of its knowing and voluntary dissolution. It failed to do so by many months. Under RCW 24.03.300:

⁵ "Network Services" and "Red Letter Programs and Housing" were the same legal entity; DeBoer just "changed the name." CP 29-30. By contrast, "Red Letter Ministries" is a separate entity with a separate state registration number (CP 39), formed after DeBoer voluntarily dissolved Network Services/RLPH (CP 68).

The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, officers, or members, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution.

Since its voluntary dissolution in January 2012, Network Services/RLPH has never filed any action against the City of North Bend. Network Services/RLPH is not a party to the underlying lawsuit or to this appeal. No statutory authority exists to authorize a dissolved corporation – especially a voluntarily dissolved corporation - to join or commence litigation now. Moreover, RLM here sought to enforce a verbal agreement that was allegedly formed in June 2010 between Network Services/RLPH and the City, but RLPH filed no lawsuit, and the statute of limitations on an oral agreement is three years. RCW 4.16.080(3).

Joinder would not have served to recreate and reconstitute Network Services/RLPH as an operating non-profit corporation – it would still be dissolved, even if joined here. A dissolved corporation can be involved in litigation when timely instituted, but it cannot continue its business operations.

As directed by the Legislature, after a corporation dissolves, “[t]he corporation shall cease to conduct its affairs except in so far as may be

necessary for the winding up thereof.” RCW 24.03.220 (emphases added). Even if Network Services/RLPH had later joined in and ultimately even prevailed in this lawsuit, the provision of services to homeless families - the verbal promise that it made to Mayor Hearing (CP 94, 363; see CP 46 at ¶ 8) - in no way constitutes activity necessary “for the winding up” of its business and affairs, the sole activity that the Legislature has authorized a dissolved corporation to undertake.

Additionally, the sole remedies sought in the complaint are an injunction and specific performance (CP 3-4). Specific performance is not a remedy that can be performed by a non-existent entity which must now “cease to conduct its affairs” other than the “winding up thereof.”

d. Even If RLM Had Standing as a Successor to a Real Party in Interest, Awarding Any Relief Authorizes RLM to Violate the Consent Decree With the Attorney General.

Even if RLM somehow had standing on behalf of a now non-existent entity, RLM is both legally and practically incapable of performing its obligation to provide homeless family services.

As DeBoer testified, RLM has no available resources and intended to solicit donations in order to raise “all” of the resources necessary to perform its obligation to make the house habitable for homeless family services. CP 37. To the extent that DeBoer individually, Network

Services/RLPH, or RLM has already solicited or in the future solicits donations in order to provide homeless family services, those solicitations violate the plain terms of the Consent Decree. CP 60-61. RLM is not registered with the State as a charitable organization authorized to solicit donations. CP 40-43.

In the Consent Decree, DeBoer and all “persons or entities in active concert or participation” with her promised “not to solicit charitable contributions from the general public in the State of Washington without being registered to engage in charitable solicitations.” CP 61 at ¶ 3.3.

DeBoer testified that solicitation of donations was the sole means to raise the resources necessary to renovate and use the house to serve the homeless in North Bend as promised. CP 34-37. Neither DeBoer nor RLM (which is clearly “in active concert or participation” with DeBoer) can legally make such solicitations.

D. No Ambiguity Exists Regarding the Material Terms of the Verbal Agreement. Accordingly, Nothing Exists to Construe in That Regard.

1. Statement of Facts Regarding the Verbal Agreement.

The trial court dismissed RLM’s claims on the written contracts. CP 664. RLM did not appeal that order. CP 822-823. Some discussion of the written contracts is nonetheless included below in order to provide full context.

To the extent that the Court chooses to consider the verbal agreements on appeal, the claimed verbal agreement has three and only three material terms – sale of the house, provision of a five-year ground lease on separate City property to which the house could be relocated, and use of the house and lease by Network Services to provide a program for homeless families. CP 46 at ¶¶ 8, 12; CP 364 at ¶ 3.

RLM never provided the promised family services. After considerable time had passed without any action by RLM to make the house ready for its family services program, the City had no choice but to declare RLM in default for its repudiation and material breach. CP 545 at ¶ 4; CP 366 at ¶¶ 11, 13; CP 382; CP 384.

The Mayor had previously advised RLM that the City Council would be required to approve written contracts for sale of the house and the ground lease. CP 364 at ¶ 4; CP 365 at ¶ 7. DeBoer agreed with the need for written contracts. On June 19 and June 24, 2010, DeBoer specifically requested written contracts. CP 202 at ¶¶ 5, 8; CP 364 at ¶ 4; CP 365 at ¶ 7.

The North Bend City Council meets on the first and third Tuesdays of each month. In June 2010, those dates were June 1 and June 15, and the next regular meeting was July 6, 2010. CP 365 at ¶ 7. Network Services/RLPH contracted with Nickels Brothers to move the House to the

City's Bendigo Boulevard property. At Network Services/RLPH's sole direction, Nickel Brothers completed the move on July 2, 2010, prior to the July 6 City Council meeting. CP 202 at ¶¶ 4, 9.

On September 7, 2010, the City Council authorized the Mayor to execute a purchase and sale agreement for the house ("Sale Agreement") and ground lease. CP 368-380. Both agreements expressly included the agreed, material term requiring that RLM use the house only for its family services program. CP 364 at ¶ 6; CP 370 at ¶ 4.1; CP 377 at ¶ 6.

Network Services/RLPH declined to sign, and instead proposed to use at least a portion of the house and ground lease "for administrative purposes associated with the Buyer's non-profit business." CP 204 at ¶ 16; CP 248 at ¶ 4.1; CP 252 at ¶ 6; CP 365 at ¶ 9; CP 367-380; see CP 203 at ¶ 14; CP 229-242. RLM also deleted a term that would have prohibited use of the house for "other business purposes." CP 252 at ¶ 6. The City Council never accepted RLM's counteroffer. CP 365 at ¶ 9.

As Network Services/RLPH Board Member Fritz Ribary expressly advised the City in September 2010, "This specific language [regarding use of the house for "administrative purposes"] is requested due to the language which appeared in the King County grant application." CP 204 at ¶ 17; CP 258 (second paragraph of text, regarding Sale Agreement); CP 259 (first

paragraph of text, regarding ground lease). The City Council declined to accept this material change in terms. CP 365 at ¶ 9; see CP 366 at ¶ 10.

2. Analysis.

An enforceable contract requires a “meeting of the minds.” McEachern v. Sherwood & Roberts, Inc., 36 Wn. App. 576, 579, 675 P.2d (1984). “The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.” Sea-Van Investments v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). No meeting of the minds occurred here.

As DeBoer’s declaration makes clear, at the time of formation of the claimed verbal agreement, the agreement had three and only three material terms – sale of the house, provision of a five-year ground lease on separate City property to which the house could be relocated, and use of the house and lease by Network Services to provide a program for homeless families. CP 46 at ¶¶ 8, 12. The Mayor and DeBoer made this agreement on the express condition that Network Services/RLPH use the house and ground lease “only for its family assistance program.” CP 364 at ¶ 3.

Instead of honoring its self-proclaimed verbal agreement, Network Services and DeBoer repudiated and breached, by countering with a new proposal to use the house and ground lease for “administrative purposes associated with the Buyer’s non-profit business,” based solely on its own

King County grant funding obligations and not because of any action of the City. Network Services offered no declaration or other admissible evidence to prove that use of the house and ground lease for “administrative purposes associated with the Buyer’s non-profit business” was even discussed with the Mayor at the time of formation of the oral agreement, let alone agreed. As such, it cannot form part of the Mayor’s verbal agreement that the house be used for homeless family services.

RLM cites Saluteen-Mschersky v. Countrywide, for the proposition that “generally the trier of fact in a trial setting should make the final determination with respect to the existence of an oral contract; disputes about oral contracts should not be decided by summary judgment.” Appellant’s Brief at 13, citing 105 Wn. App. 846, 851-52, 22 P.3d 804, 807 (2001). Here, however, the material terms of the verbal agreement are undisputed – sale of the house by North Bend, provision of a five year ground lease by North Bend, and provision of a program for homeless families by Network Services. Network Services declined to provide the promised family services, and instead proposed a material new term allowing for use of the house for “administrative purposes.” Once the City rejected this new term, RLM simply walked away. CP 545 at ¶ 4; CP 366 at ¶¶ 11, 13; CP 382; CP 384.

While RLM now contends that it “finally executed a written agreement on January 31, 2012, that it believed ‘clearly memorialized the terms of the parties’ verbal agreement’” (Appellant’s Brief at 11), RLM failed to appeal the trial court’s dismissal of its claims on the written agreements. CP 822-823.

E. RLM Cannot Meet the Threshold for Partial Performance, Or Establish That These Agreements Otherwise Fall Outside of the Statute of Frauds.

1. Statement of Facts Regarding RLM’s Alleged Partial Performance.

RLM contracted with Nickels Brothers to move the house to the City’s Bendigo Boulevard property. At RLM’s sole direction, Nickel Brothers completed the move on July 2, 2010, prior to the July 6th City Council meeting at which written contracts could have been approved. CP 202 at ¶¶ 4, 9. Once the house was moved, it was inspected by both RLM and the City on a number of occasions. CP 351-362. The house was not on any kind of foundation, and was supported only by girders left in place by Nickel Brothers Company when the house was moved. CP 352 at ¶ 3.

The City observed a number of violations of the North Bend Municipal Code (“NBMC”), including NBMC Chapter 8.38 regarding “Vacant Structures.” CP 352; CP 354-359. The house was unsecured and unfenced, and several windows were open and unsecured. *Id.* The house

lacked sanitary and heating facilities and areas of the floor were buckled and unsafe. *Id.* After the house was moved, it was vandalized on a number of occasions. *Id.*; CP 354-359; CP 361 at ¶ 6. As a result of vandalism and to prevent unauthorized access to the house, the City installed plywood, additional hinges and a padlock to prevent entrance into the house. CP 361.

2. Application of the Statute of Frauds is Necessary Here in Order To Prevent RLM From Modifying the Agreed Material Terms of the Contracts.

RLM argues that the ground lease is excluded from the statute of frauds under either a theory of part performance or judicial admission. RLM is mistaken.

a. Even If Relocation of the House Was Part of the Consideration Here, Relocation Alone Falls Well Short of the Legal Standard for “Part Performance”.

In an apparent effort to show part performance, RLM claims that an “agreement was reached where the City gave the building to RLM on the condition that RLM would move the building at its own expense.” Appellant’s Brief at 6. By DeBoer’s own testimony, this is simply not the case – relocation of the house is wholly absent from the Mayor’s verbal “express offer” which DeBoer claims to have “immediately accepted.” CP 46 at ¶¶ 8, 12.

Relocation of the house had no value to the City. Prior to DeBoer's involvement, the City had contracted to demolish the House in order to build its new street. The City certainly would not expend taxpayer dollars to relocate the house prior to its demolition.

RLM correctly notes that part performance can operate to remove a contract from the statute of frauds, but only if a party satisfies a three-part test: (a) delivery and assumption of actual and exclusive possession of real property; (b) payment or tender of consideration; and (c) the making of permanent, substantial, and valuable improvements to the real property. Berg v. Ting, 125 Wn.2d 544, 556, 886 P.2d 564 (1995) (emphasis added). RLM fails to satisfy each of these elements.

First, Network Services/RLPH did not have actual and exclusive possession. The material facts are not in dispute. Network Services/RLPH and the City both entered and inspected the house after the formation of the claimed verbal agreement, and the City is the sole owner of the land that would have been subject to the ground lease. Network Services/RLPH did not have "actual and exclusive" possession of either the house or the land.

In addition, Network Services/RLPH did not provide consideration. The material facts are not in dispute. In her declaration, DeBoer testified that she "immediately accepted" the Mayor's verbal offer, and that the verbal offer consisted solely of the house sale, ground lease, and RLM's

commitment to provide homeless family services. CP 46 at ¶¶ 8, 12. Assuming only for purposes of argument here that the provision of homeless family services also entails use of the house for “administrative purposes,” RLM’s sole consideration was provision of those homeless family services. RLM has not done so. And, as the Berg Court further noted, “consideration alone is insufficient evidence of part performance” to defeat the statute of frauds. Berg, 125 Wn.2d at 558.

Finally, RLM did not provide permanent, substantial and valuable improvements to the real property. Again, the material facts are not in dispute. Since relocation of the house in 2010, the house remained perched on girders, without a foundation, and disconnected from water, sewer, power, natural gas, and other utilities. CP 351-362. As such, it had no value, and actually constituted a public nuisance subject to a costly abatement.

To the extent that RLM may argue that it attempted to make improvements but was refused permits in October 2011, that occurred more than a year after RLM’s repudiation and material breach, and after the City had delivered two notice letters to RLM, the second of which advised that the City “was terminating all negotiations” with RLM. CP 545 at ¶ 4; CP 366 at ¶¶11, 13; CP 382; CP 384. The house did not constitute an improvement to the property of any sort, let alone the required

“permanent, substantial, and valuable” improvement. As a result, the house was subsequently demolished when RLM failed to file a supersedeas bond.

b. The Doctrine of “Judicial Admission” Does Not Constitute an Exception to the Statute of Frauds in Washington.

Likewise, RLM has failed to prove that the ground lease is excluded from the statute of frauds under a theory of judicial admission. Initially, the City stands by its position, whether denominated as a judicial admission or the simple truth – the claimed verbal agreement is comprised of the sale of the house and provision of the ground lease by the City, expressly in exchange for DeBoer’s promise to use the house and lease to provide its family services program. While the City stood by that agreement, Network Services and DeBoer walked away, apparently due to their own grant funding requirements with King County, none of which were part of the claimed verbal agreement.

RLM contends that the agreement between the Mayor and RLM “was acknowledged by the City Council of North Bend in its own minutes, and the statute of frauds governing the oral agreements under RCW 62A.2-201(3)(b).”⁶ RLM goes on to cite a Maine case and argue that RCW 62A.2-201(3)(b) is applicable to a contract for the sale of goods alone but also should apply equally to the instant contract involving both

⁶ Appellant’s Brief at 14.

goods and real estate.⁷ Besides being a Maine case which has no binding authority in Washington, RCW 62A.2-201(3)(b) deals with the “sale of goods” and has not been adopted by Washington courts for the sale or lease of real property and the statute of frauds:

In the context of the statute of frauds, the judicial admissions doctrine exists as part of the Uniform Commercial Code and as judicially created in some non-U.C.C. factual settings, which often involve contracts for the sale of real property. A contract for the sale of goods which does not meet all the requirements of the statute of frauds but which is otherwise valid is enforceable “if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made.” RCW 62A.2-201(3)(b). The U.C.C. limits the exception to cases in which a party admits that a contract existed.

Key Design Inc. v. Moser, 138 Wn.2d 875, 884, 983 P.2d 653, amended, 993 P.2d 900 (1999). In Key Design, plaintiff asked the Court to overrule fifty years of precedent holding, “in addition to the other requirements of the statute of frauds,” that contracts conveying real property interests must include adequate descriptions of the property by lot and block number, addition, and city, county, and state. Id. at 882. The Court declined. Id. at 884. See also, Berg, “We have not previously recognized [a judicial

⁷ Appellant’s Brief at 17.

admission exception to the statute of frauds], and do not do so here.” 125 Wn.2d at 562. The contracts at issue here are similarly deficient.⁸

F. RLM Was the Only Party that Insisted on a Change in the Three Material Contract Terms, and RLM’s Repudiation Excused the City From Any Further Obligations.

1. Facts Regarding RLM’s Repudiation.

The City incorporates by reference the facts previously stated above under the “Statement of Facts Regarding the Verbal Agreement” at Section IV(D)(1) above. Further, the City Council declined to accept Network Services/RLPH’s proposed new material terms. CP 365 at ¶ 9; CP 366 at ¶ 10.

Sections 4.1 of the Sale Agreement and Section 6 of the Lease, approved by the City Council in September 2010, set forth RLM’s obligation to provide a family services program. CP 370 at ¶ 4.1; CP 377 at ¶ 6. Section 10 of the Lease obligates RLM to prepare the building for occupancy (i.e., foundation, utility connections and other work necessary for occupancy). CP 377-378 at ¶ 10.

RLM then proposed revisions that would allow it to also use the house for “administrative purposes associated with the Buyer’s non-profit business,” and rejected a term that would have prevented use of the house

⁸ CP 369-373, 376-380; CP 231-235, 238-242.

for “other business purposes.” The City understandably rejected those material new terms.

Subsequently, RLM essentially abandoned the house and lease, and the house remained on support girders in the same uninhabitable and unusable condition as when it was placed there in July 2010. CP 365 at ¶ 9; CP 247-255; CP 366 at ¶ 10.

After ten months passed without RLM providing the promised family services program or doing any work on the house, the City, by letter dated July 11, 2011, advised RLM “to contact us to negotiate the transfer of ownership of the [House]” within 30 days, or the City would remove or demolish the house. CP 366 at ¶ 11; CP 382.

RLM did not respond. By a second letter, this one dated October 11, 2011, the City advised RLM that the City was “terminating all negotiations with your organization and will take appropriate action to sell, remove or demolish the house.” CP 366 at ¶ 11; CP 384.

When RLM representatives finally surfaced, they attended and spoke at a City Council meeting in January 2012. Individual Councilmembers requested additional information from RLM by January 31, but the City Council itself took no action by majority vote regarding the Sale Agreement or Ground Lease. CP 280. RLM provided certain additional documents on January 31, 2012, including a signed Sale

Agreement and Ground Lease, but even those contracts were not in the forms approved by the City Council in September 2010, fifteen months earlier. CP 284-296.

In February 2012, by majority vote at an open public meeting as required by RCW 42.30, the City Council took action and reaffirmed its October 11, 2011 decision “terminating all negotiations” with RLM. CP 319.

2. Analysis.

a. RLM Breached These Contracts When It Repudiated Its Promise to Use the House and Ground Lease for Its Family Services Program.

The oral agreement between the Mayor and DeBoer did not even include discussion, let alone agreement, about use of the house for any administrative or office purposes, or for any purpose other than provision of services to benefit homeless families. Rather, and relying here entirely on DeBoer’s own testimony, the undisputed material facts are that the Mayor “expressly offered” – and DeBoer “immediately accepted” - ownership of the house and a five-year ground lease for RLM to use in its “program that houses local homeless families.” The oral agreement neither prohibits nor permits the “administrative purposes” use because it was never discussed prior to formation of the oral agreement. This fact is undisputed.

Rather, in September 2010, months after formation of the oral agreement in which it promised to provide homeless family services, RLM for the first time requested to use the house “for administrative purposes associated with the Buyer’s non-profit business.” CP 248 at ¶ 4.1; CP 252 at ¶ 6. Again, using RLM’s own evidence, RLM made its “administrative purposes” proposal due to RLM’s own grant funding obligations with King County, and not due to any agreement (or even discussion) with the City. CP 204 at ¶ 17; CP 258 (second paragraph of text, regarding Sale Agreement) and at CP 259 (first paragraph of text, regarding Ground Lease).

Further, the City’s proposed Ground Lease – perfectly consistent with the material terms of the oral agreement - also provided that “[u]se of the Premises for other business purposes shall not be permitted without the Lessor’s prior written consent.” RLM deleted that provision. CP 252 at ¶ 6. The City Council declined to accept RLM’s proposals and correctly insisted that RLM perform as agreed. To the date of the house’s demolition, RLM failed to perform its oral agreement. These facts are undisputed.

RLM’s repudiation constituted a material breach, excusing the City from any further contract performance. A party conveys its intent to repudiate either expressly by assertion or circumstantially by conduct. CKP, Inc. v. GRS Const. Co., 63 Wn. App. 601, 620, 821 P.2d 63 (1991) (citing Hemisphere Loggers & Contractors, Inc. v. Everett Plywood Corp.,

7 Wn. App. 232, 234, 499 P.2d 85, review denied, 81 Wn.2d 1007 (1972)). Repudiation occurs when a party makes “a positive statement or action indicating distinctly and unequivocally that the repudiating party will not substantially perform his contractual obligations.” Id. (citing Lovric v. Dunatov, 18 Wn. App. 274, 282, 567 P.2d 678 (1977)). When one party to a contract expressly or impliedly repudiates the contract prior to the time for performance, an anticipatory breach has occurred. Id. Washington courts have found repudiation and a resulting anticipatory breach to occur where a party insisted upon modification of a contract prior to performance. *See e.g.*, Id.; Turner v. Gunderson, 60 Wn. App. 696, 703, 807 P.2d 370 (1991).

RLM repudiated its promise to provide family services – that promise was the sole benefit of North Bend’s bargain in agreeing to sell the house for a dollar and to grant the ground lease for a dollar annually. CP 365 at ¶ 9; CP 204 at ¶ 16; CP 248 at ¶ 4.1, CP 252 at ¶¶ 6, 8. The City received no benefit at all from RLM’s decision to move the house. The City had to pay to demolish the house in either location. The house had no value to the City – regardless of its physical location – without the family services program.

A material change in terms proposed by one party excuses the other party’s obligation to perform. Oak Hill Terrace Associates v. Jahnke, 29

Wn. App. 351, 353, 628 P.2d 520 (1981). A change in the terms of an agreement is “material” when such change “disturbs the intent of the parties.” *Id.* Here, the intent of the parties at the time of formation of the claimed verbal agreement was to use the house and ground lease “in [Red Letter’s] program that houses local homeless families.” The verbal agreement is completely silent regarding use of the house and ground lease for “administrative purposes” or any other purpose. By her own admission, DeBoer insisted upon a material change in terms – use of the house and ground lease for “administrative purposes.” CP 204 at ¶ 16; CP 244-249, 251-255; CP 365 at ¶ 9.

The City declined. For ten months thereafter, RLM refused to execute the contracts without modification and failed to take any other steps to improve, repair and prepare the house as promised. CP 365 at ¶ 8; CP 366 at ¶ 10. These actions constitute repudiation by RLM, both expressly and circumstantially, and excuse the City from performance.

- b. The City Council’s Proposed Additional Terms Were Wholly Unrelated to the Three Agreed Material Terms, and Do Not in Any Fashion Modify or Even Address the Agreed Material Terms of Sale, Lease, and Family Services Use.

RLM contends that the City had added onerous provisions in the lease which would have nullified the ground lease and reverted ownership of the house to the City if more than two cars were ever parked on the

property. Appellant's Brief at 9-10. In September 2010, the City Council approved a written Ground Lease and a separate house Sale Agreement, specifically incorporating the verbal agreement between the Mayor and DeBoer that the house and ground lease would be used only for RLM's stated mission of family services. While RLM attempts to justify its refusal by claiming that the City Council's approved contracts included additional "onerous" terms, the City Council's proposed terms were wholly unrelated to the three agreed material terms, and do not in any fashion modify or even address the agreed material terms of sale, lease, and family services use. CP 238-242.

The City Council's proposed additional terms constitute only unremarkable boilerplate language largely reflecting only the law of default and reversion. *Id.* The City Council's approved Ground Lease - consistent with the agreed material term of the deal that the house be used for family services - included a term prohibiting use of the leased premises "for other business purposes" of RLM. RLM deleted that term. CP 252 at ¶ 6.

A material change in terms proposed by one party excuses the other party's obligation to perform. Oak Hill Terrace Associates, 29 Wn. App. at 353. A change in the terms of an agreement is "material" when it "disturbs the intent of the parties." *Id.* RLM complains that the City

proposed additional terms, but then likewise concedes that those terms were not part of the Mayor's "express offer" to which DeBoer "immediately agreed." As DeBoer testified, "None of these unreasonable terms had been part of the parties' oral contract." CP 553 at ¶ 64. As such, they cannot and certainly did not "disturb the intent of the parties" in the verbal agreement for the City to provide the house and ground lease, and for RLM to use them for its family services program.

c. RLM's Counteroffer, Seeking to Use the House and Ground Lease as Office Space, Was Also Rejected by the City.

The City rejected RLM's counteroffer, which proposed to use the house for administrative purposes rather than to provide family services. CP 365 at ¶ 9; CP 204 at ¶ 16; CP 247-249, 251-255; see CP 252 at ¶ 6 (RLM deletion of term prohibiting use of the leased premises "for other business purposes" of RLM).

It is long- and well-settled law that "an expression of assent that changes the terms of the offer in any material respect may be operative as a counteroffer; but it is not an acceptance and consummates no contract." Blue Mountain Constr. Co. v. Grant Cnty. School Dist., 49 Wn.2d 685, 688-689, 306 P.2d 209 (1957); see, 1 Corbin, Contracts 259, § 82.

Further, “The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.” Sea-Van Investments, 125 Wn.2d at 126. A response which changes the terms of the offer in any material respect has the effect of a counteroffer, not a meeting of the minds sufficient to form an agreement. Id. A change in the terms of an agreement is “material” if such change “disturbs the intent of the parties.” Oak Hill Terrace Associates, 29 Wn. App. at 353. A counteroffer further has the legal effect of rejecting an original or previous offer. Collins v. Thompson, 679 F.2d 168, 171 (9th Cir. 1982).

RLM’s counteroffer materially changed the heart of the deal between the City and RLM. The counteroffer functionally authorized rent-free office space (“administrative purposes”) for RLM, rather than provision of the family services program promised by DeBoer and relied upon by the City. CP 201 at ¶ 3; CP 202 at ¶ 3 (house and ground lease were for “use in housing local homeless families”), CP 248 at ¶ 4.1; CP 252 at ¶ 6.

The Mayor’s specific purpose in soliciting interest in the house from various non-profit organizations was to facilitate use of the house for their respective non-profit missions. CP 363 at ¶ 9. As DeBoer testified, the Mayor’s proposal was to use the house and ground lease “in housing

local homeless families.” CP 201 at ¶ 3; CP 202 at ¶ 3. RLM’s stated “mission [is] assisting the homeless in the Snoqualmie Valley” CP 201 at ¶ 2.

At no point did the City offer, or even suggest, that it would sell the house for one dollar and provide a five year ground lease for one dollar annually in order to provide RLM with office space. As further addressed below, the City constitutionally cannot do so.

G. Free Use of Some or All of the House by RLM for “Administrative Purposes Associated with Its Non-Profit Business” is Unconstitutional and Violates Public Policy.

1. Statement of Facts.

The City incorporates by reference the facts previously stated above.

2. Analysis.

The City is constitutionally prohibited from permitting RLM to use some or all of the house and ground lease for “administrative purposes.” Even if DeBoer had discussed this with the Mayor, he could not have agreed to such use. Under Article VIII, § 7 of the Washington Constitution:

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.

“The purpose of this constitutional provision is to prevent state funds from being used to benefit private interests when the public interest is not being served.” Hudson v. City of Wenatchee, 94 Wn. App. 990, 995, 974 P.2d 342 (1999) (citing Japan Line, Ltd. v. McCaffree, 88 Wn.2d 93, 98, 558 P.2d 211 (1977)). Contract performance is excused when performance would violate public policy. See, e.g., Citoli v. City of Seattle, 115 Wn. App. 459, 61 P.3d 1165 (2002). While the public interest would have been served by RLM’s provision of the promised family services, no public interest is furthered by the provision of free office space to be used for RLM’s “administrative purposes.”

H. North Bend Was Additionally Entitled to Summary Judgment on Both the Ground Lease and Sale Agreement Because the Mayor’s Verbal Promises, Without Subsequent City Council Approval, Were Void as Ultra Vires Acts.

1. Facts.

The City incorporates by reference the facts previously stated above.

2. Analysis.

RLM’s appeal focuses on the claimed verbal agreement between the Mayor and DeBoer to sell the house for one dollar and to provide a five year ground lease for one dollar annual rent.⁹

⁹ The trial court granted the City’s first motion for summary judgment “to the extent that plaintiff seeks to enforce the written contract.” At that time, the trial court identified issues of material fact regarding enforcement of the “verbal agreement” between the Mayor and DeBoer. CP 664.

Under State law, the City Council has the sole legal authority to enter into leases and contracts for sales.¹⁰ In RCW 35A.11.010, the Legislature specifically conferred the power “to contract and be contracted with”, the power to “lease”, and the power to “otherwise dispose” of “real and personal property of every kind”, exclusively with “the legislative body” and not with the Mayor. Under RCW 35A.11.020, the Legislature further defined the “powers vested in legislative bodies” to specifically include “acquisition, sale, . . . [and] leasing” of “real property of all kinds . . .”).

The Legislature then separately defined the authority of city mayors. In North Bend, the Mayor’s powers as the “chief executive and administrative officer of the city” are wholly distinct from those of the “legislative body,” are separately set forth in RCW 35A.12.100, and do not include the power to contract.

- a. The Agency Doctrine of Apparent Authority Cannot Overcome the Doctrine of Ultra Vires When the City Exercised Governmental Authority and Not Proprietary Authority.

The agency doctrine of apparent authority cannot overcome the doctrine of ultra vires action in this case because the oral agreement here was made in the exercise of the City’s governmental authority, rather than its proprietary authority. “[T]his court has said that the [apparent

¹⁰ The City is organized under Title 35A, the Optional Municipal Code. CP 633 at ¶ 1.

authority] doctrine is applicable where the municipality is engaged in a proprietary function.” State v. O’Connell, 83 Wn.2d 797, 832, 523 P.2d 872 (1974).

A city has both “governmental” and “proprietary” power:

With reference to its first or governmental power, it acts strictly as a public corporation. It is held by its charter and cannot be bound by any act committed ultra vires by its officers.

Id. at 833. By contrast, a city exercises its proprietary power when it is effectively operating a business for a profit:

When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire. It is performing a function, not governmental, but often committed to private corporations or persons, with whom it may come into competition It leads to profit, which is the object of the private corporation.

Id. Examples of proprietary municipal functions include the operation of electrical power and natural gas utilities. Id. at 834. Finally, the O’Connell Court describes six principles to be derived from its case review. Two such principles are especially applicable here:

1. “[T]he doctrine of apparent authority may be invoked against a municipal corporation in the exercise of its proprietary functions” Id. at 835-36 (emphasis added); and

2. In the case of an ultra vires contract like the oral agreement here, RLM cannot recover on either the contract itself, or even on a theory of implied contract, “even though [it] has performed in reliance upon the authority of the agent with whom [it] has contracted.” Id. at 835.

Of particular importance to the dismissal of RLM’s apparent authority argument here, “This principle includes the rule that one dealing with a public officer whose powers are defined by statute is presumed to know the limits of those powers.” Id. at 835, and fn. 10 (emphasis added). In this context, the Mayor’s powers are expressly “defined by statute” in RCW 35A.12.100. Under that statute, the Mayor has absolutely no authority – actual, apparent, or otherwise - to enter into leases and contracts on his own. Rather, that authority is separately and specifically conferred, again by statute, only on the City Council. RCW 35A.11.010 and .020.

Here, the material facts are not in dispute. The Mayor and Salli DeBoer discussed a deal under which the City would effectively give away the house (for a price of only one dollar) and a ground lease (for one dollar per year), rather than expend City funds to demolish the house, in

order to make way for a new public street. In exchange, the City was to have received the wholly governmental (and not proprietary) service of a program to aid homeless families. The oral agreement did not involve the proprietary functions of the City of operating utilities or otherwise conducting a business for profit. Under the plain dictates of RCW 35A.11.010, the authority to enter into sales contracts and leases is expressly outside of the Mayor's authority.

b. The Mayor's Verbal Promises to Sell the House and Lease Other City Property is Void as an Ultra Vires Act.

The Mayor's verbal promises to sell and lease City property, standing alone and without subsequent City Council approval, are unauthorized under State law and the North Bend Municipal Code ("NBMC").

Any such verbal promises of the Mayor are void and unenforceable as ultra vires acts. The agency doctrine of apparent authority does not serve to overcome the doctrine of ultra vires action. Apparent authority depends upon the objective manifestations of a principal who holds actual authority. King v. Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1994). Here, under RCW 35A.11.020, the City Council was the "principal" for purposes of entering into leases and contracts, and it had no verbal agreement of any kind with RLM. To the extent the Mayor acted as the

principal, he had no actual authority to approve contracts or leases. That authority lay exclusively with the City Council. The Mayor would have been an unauthorized agent.

Unauthorized contracts of governmental entities are void and unenforceable as ultra vires acts. Chemical Bank v. Washington Public Power Supply System, 99 Wn.2d 772, 798, 53 P.U.R. 4th 1 (1983) (citing Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982)). “Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act ever existed, even where proper procedural requirements are followed.” South Tacoma Way, LLC v. State, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (emphasis added). Ultra vires acts cannot be later validated by ratification or other events. Id.

Here, the Mayor’s verbal promises to sell and lease City property were not within the Mayor’s “realm of powers” because the Mayor had no statutory authority to do so. Board of Regents v. Seattle, 108 Wn.2d 545, 552, 741 P.2d 11 (1987). As to the Mayor, “no power to act ever existed.” South Tacoma Way, 169 Wn.2d at 123.

c. NBMC Chapter 3.30 Does Not Authorize the Mayor to Lease City Property Without City Council Approval.

RLM argues that NBMC 3.30.010 authorizes the Mayor unilaterally to sell or lease City property. Appellant’s Brief at 7. RLM is

mistaken.

The plain terms of NBMC 3.30.010 authorize the Mayor only to “purchase or enter into contracts for materials, equipment, supplies, and services, not otherwise subject to other provisions of state law or city code, in amounts up to \$7,500.” It does not allow sales or leases under any circumstances. CP 535-537, 541-542.

NBMC Chapter 3.30 is entitled “Purchasing.” As the title makes clear, it confers no authority on the Mayor to sell the house or anything else, nor does it authorize the Mayor unilaterally to enter into a lease. Rather, that chapter provides the Mayor with the authority to effect purchases under limited circumstances, in some cases with a contract and in some cases without. CP 535-537, 541-542.

I. City is Entitled to Collect Judgment Against DeBoer Individually Because RLM is Her Sole Proprietorship.

1. Facts.

The City incorporates by reference the facts previously stated above.

2. Analysis.

The City alleged counterclaims against RLM in its Answer in the original suit. CP 397-401. RLM filed a Reply denying the counterclaims. DeBoer now alleges that judgment was improper against her individually because she was never served. Appellant’s Brief at 22.

Fundamentally here, RLM is nothing and nobody other than Salli DeBoer. In its Complaint, RLM calls itself an “unincorporated religious association.” CP 1, 2. In Washington, an “unincorporated religious association” is not a legal entity, non-profit or otherwise. See generally, RCW 24. Functionally, RLM is nothing more than Salli DeBoer’s sole proprietorship.

Likewise, DeBoer should be equitably estopped from asserting a defense of service of process. Equitable estoppel is based on the notion that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” Lybbert v. Grant Cnty., State of Wash., 141 Wn.2d 29, 35, 1 P.3d 1124 (2000). The elements of equitable estoppel are: (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. Id.

Here, DeBoer did not give notice to the City that she had voluntarily dissolved Network Services/RLPH and formed RLM as a new and separate entity many months after formation of the claimed verbal agreement. She and her able counsel chose to sue in RLM’s name, and

chose to pursue the alleged agreement with the City in RLM's name.

J. North Bend Should Be Awarded Its Attorney Fees and Costs Necessarily Incurred to Dissolve the Preliminary Injunction.

1. Analysis.

The trial court abused its discretion in failing to award the City its attorney fees and costs incurred to dissolve the preliminary injunction issued in this case on September 4, 2012. The trial court granted the City's motion to dissolve the preliminary injunction. CP 185. The trial court denied the City's related motion for fees. CP 839-840.

A court may award on equitable grounds a party's attorney fees reasonably incurred in dissolving a wrongfully issued preliminary injunction. Ino, Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 143, 937 P.2d 154 (1997), opinion amended by Ino, Ino, Inc. v. City of Bellevue, 943 P.2d 1358 (1997). An injunction is "'wrongful' if it is dissolved at the conclusion of a full hearing." Id. (citing Cecil v. Dominy, 69 Wn.2d 289, 293-94, 418 P.2d 233 (1966)). The equitable principle authorizing the award of attorney fees for a dissolved injunction is intended to deter a plaintiff from seeking relief before a trial on the merits. Id. (citing White v. Wilhelm, 34 Wn. App. 763, 773-74, 665 P.2d 407, review denied, 100 Wn.2d 1025 (1983)). A party is entitled to recover its attorney fees

incurred up until the date the wrongfully-issued injunction is dissolved. Id., at 144.

Here, given DeBoer's knowingly deceptive and manipulative machinations in this case, the equities weigh strongly in favor of awarding to North Bend its reasonable attorney fees and costs. DeBoer should not be rewarded for earlier misleading the Court about use of the house for an administrative office, nor for the shell game of name changes to her various entities.

V. CONCLUSION

This case is moot. RLM failed to post a supersedeas bond, and the City completed its long-standing plan to demolish the house. Enjoining such demolition and ordering specific performance of the sale agreement was the sole relief requested in RLM's complaint.

Additionally, RLM has no standing. RLM did not even exist until 18 months after formation of the claimed verbal agreement.

Even if RLM could establish standing, DeBoer and those "acting in active concert or participation" with her are prohibited by the terms of a Consent Decree with the Attorney General from soliciting charitable contributions, the sole means by which DeBoer proposed to renovate the house for use in their family services program. It would have been impossible for DeBoer and RLM to perform their end of the bargain, and

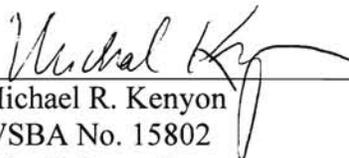
make the house habitable for the family services program.

Even if RLM could proceed, its proposed additional material terms regarding use of the house for office space and other “administrative purposes” constituted a repudiation and material breach of its own promise to use the house for family services.

The trial court’s order dismissing all of RLM’s claims and granting judgment to the City on its claims should be affirmed. The trial court’s order denying the City its attorney fees should be reversed.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

KENYON DISEND, PLLC

By 
Michael R. Kenyon
WSBA No. 15802
John P. Long, Jr.
WSBA 44677
Attorneys for Respondent/Cross-
Appellant City of North Bend

DECLARATION OF SERVICE

I, Margaret Starkey, declare and state that:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 5th day of December, 2014, I served a true copy of the foregoing *Brief of Respondent* on the following counsel of record using the method of service indicated below:

<p><i>Attorneys for Appellants/Cross-Respondents:</i></p> <p>Stephen Pidgeon Attorney at Law, P.S. 3002 Colby Avenue, Suite 306 Everett, WA 98201</p>	<p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid</p> <p><input checked="" type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> Overnight Delivery</p> <p><input type="checkbox"/> Facsimile</p> <p><input checked="" type="checkbox"/> E-Mail: stephen.pidgeon@comcast.net</p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of December, at Issaquah, Washington.


 Margaret C. Starkey

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COUNTY OF WA
STATE OF WA
CLERK OF COURT