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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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WILLIAM HOLDNER; RANDAL HOLDNER; HOLDNER FARMS, a  
partnership; HOLDNER FARMS WASHINGTON, a partnership,

Appellants,

v.

PORT OF VANCOUVER, USA,  
a Washington municipal corporation,

Respondent.

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PORT OF VANCOUVER, USA,  
a Washington municipal corporation,

Respondent.

v.

WILLIAM HOLDNER and RANDAL HOLDNER d/b/a HOLDNER  
FARMS, a partnership,

Appellants.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

This case involves a commercial property lease (“the Lease”) between Respondent Port of Vancouver, USA (“the Port”) and Appellants William Holdner and Randal W. Holdner, doing business as Holdner Farms (“the Holdners”). Paragraph 15 of the Lease contains the parties’ clear and unequivocal agreement that the “Lease may be terminated by the PORT at any time the PORT needs said premises to carry on its industrial development or other PORT activities.” The Lease contains no limitations on the Port’s discretion to determine when it “needs” the premises to carry on its industrial development or other Port activities.

In this case, the Port terminated the Lease because it determined that it needed the premises to prepare for the development of the Columbia Gateway Project (“Columbia Gateway Project”). The trial court properly granted summary judgment to the Port on its right to terminate the lease because no genuine issues of material fact exist regarding the Port’s need to access the premises leased by the Holdners under Paragraph 15.

It is undisputed that the Port has been planning the Columbia Gateway Project for many years. The development project will create hundreds, if not thousands, of industrial jobs and have untold economic benefits for Clark County, Washington. As a condition of development approval for the completion of this hugely beneficial and expensive

project, the Port is legally required to use the parcels leased to the Holdners (“the Property”) for wetlands mitigation and the creation of wildlife habitat.

To advance these important goals, the Port needed certain information in May 2006 regarding the hydrology of the Property. The Port advised the Holdners of its need and requested access to the property to install fourteen groundwater monitoring wells on the Property. Installation of the wells was necessary to assess the mitigation measures that would be needed to complete the legally-mandated requirements for completion of the Project.

The Holdners refused to allow the Port access to the property for the purpose of installing the wells. After the Holdners refused to cooperate, the Port terminated the lease by providing the Holdners with the 90 days’ notice required under Paragraph 15 of the Lease. The Holdners then refused to vacate the property. The Port ultimately sued for unlawful detainer and moved for summary judgment.

The trial court correctly allowed summary judgment in favor of the Port and issued a writ of restitution because: (1) the language of the Lease clearly and unambiguously gave the Port the contractual right to terminate if it needed access to the Property; and (2) there were no genuine issues of material fact regarding the Port’s need to access the Property to engage in

activities to further its legitimate goals with regards to the development of the Project.

On appeal, the Holdners attempt to distract this Court from the central legal issue of this case – that is, the Port’s right to terminate the Lease because of a legitimate need to access the Property to engage in lawful activities – by raising tangential issues, many of which were not preserved properly below. Because no genuine issues of material fact exist and the Port is entitled to judgment as a matter of law, this Court should affirm the trial court’s grant of summary judgment.

## **II. ASSIGNMENTS OF ERROR**

The Port does not assign error to the trial court in this appeal.

Issues pertaining to the Holdners’ assignments of error are as follows:

(1) Whether a genuine issue of material fact exists as to the Port’s right to terminate the Lease when the uncontroverted evidence established that the Port needed the property to conduct groundwater monitoring in order to further its development plans for the Columbia Gateway Project?

(2) May the equitable defense of retaliatory eviction be asserted under *Port of Longview v. International Raw Materials, Ltd.*, 96 Wash. App. 431, 979 P.2d 917 (1999), when termination of the lease agreement is not in response to constitutionally protected activity?

(3) Does a landlord impose a “commercially unreasonable” time for vacating a property when it is undisputed that the landlord provided the tenant with the notice required by the express terms of the lease agreement?

### **III. COUNTERSTATEMENT OF THE CASE**

The Holdners’ Statement of the Case contains many facts that are irrelevant to the legal issues presented by this appeal. The relevant facts are as follows:

#### **A. Negotiation of the Lease.**

The Port’s Director of Property and Development, Patricia Stryker negotiated the Lease with William Holdner in November 1997. CP 70. During those negotiations, Stryker informed Holdner that the Port had definite plans to use the Property for future development. CP 70. Holdner entered the Lease knowing that the Port would need the property for development and that it was likely at some point that the Port would need to terminate the Lease to accommodate that development. CP 70.

At the time of the lease negotiations in 1997, the Port was planning for the development of Columbia Gateway and was not actively seeking a tenant for the Property. CP 71. Rather than being solicited, the Holdners themselves contacted the Port and expressed an interest in leasing the Property. CP 71. The Port liked the idea of having a tenant on the

Property to deter criminal activity that previously had occurred in the area and agreed to lease the Property to the Holdners. CP 71.

Because the Port believed that development would occur in approximately 10 years, the Port negotiated a 10-year lease with the Holdners. CP 70. However, the Port specifically negotiated an early lease termination provision, Paragraph 15, in the event it needed the property for industrial development or other Port activities. CP 71. This provision was negotiated to ensure that the Port would have unobstructed access to the Property when it was needed for Columbia Gateway. CP 71.

During the lease negotiations, Stryker informed William Holdner of the Port's plans for the Property, including the fact that the Property would be part of the Project. CP 71. Holdner voiced no objection to the fact that the Port intended to use the Property for Columbia Gateway or with regards to Paragraph 15, the early termination provision in the Lease. CP 71, 105.<sup>1</sup> Stryker was candid with Holdner that the Port's use for the property "was either to develop the property or use it to assist us in developing other properties." CP 103.

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<sup>1</sup> Holdner's deposition testimony regarding the negotiations for the lease does not contradict Stryker's account in any material way. Holdner admits that the Port informed him that it would eventually need the Property for its development purposes. CP 95.

**B. The Language of the Lease.**

Based on the parties' negotiations, the Port drafted the Lease, and both parties signed it on or about November 26, 1997. CP 42, 102.

Paragraph 1 of the Lease states:

1. TERM: The initial term of this Lease shall be for ten (10) years subject to termination by the PORT as provided for in paragraph 15.

CP 35 (emphasis added).

Paragraph 15 of the Lease states:

15. EARLY TERMINATION BY THE PORT:

It is understood and agreed that this Lease may be terminated by the PORT at any time the PORT needs said premises to carry on its industrial development or other PORT activities. The PORT shall give at least ninety (90) days written notice to the LESSEE of its intention to terminate said Lease and in addition, shall give the LESSEE an opportunity to remove all of its growing crops or in lieu thereof, the PORT shall pay the LESSEE the value of said crops which cannot be harvested by reason of the early termination of said Lease.

CP 41 (emphasis added). Nothing in the Lease limits the Port's rights to decide what "industrial development or other Port activities" it wished to conduct on the Property or to otherwise determine, in its best judgment, its "needs." CP 34-47.

**C. The Port Had a Need for the Property To Conduct Required Hydrologic Testing Activities.**

It is undisputed that the Port had a legitimate need for the Property because the Port was legally mandated to conduct hydrologic testing to assess the wetland mitigation and wildlife habitation measures in order to get ultimate approval for the completion of the Columbia Gateway Project. CP 126, 166-72.

Columbia Gateway is a very complicated project involving several parcels of land, and various state and federal regulatory agencies. CP 123-26, 130, 194-201. The costs for the Project may approach two hundred million dollars. CP 162. In 1994, an environmental group called Columbia River Alliance for Nurturing the Environment (“CRANE”) filed a lawsuit against the Port based upon its concern about the potential environmental impacts of the Port’s plans to develop Columbia Gateway. CP 118-19. As a result of that lawsuit, the Superior Court ultimately allowed the Port to continue its development of Parcels 1-A, 1-B, 1-C, and 1-D of the Project, but required it to complete a State Environmental Protection Analysis (“SEPA”) regarding Parcels 3, 4, and 5. CP 119.

Parcels 4 and 5 constitute the Property which the Port leases to the Holdners. The development of parcels 1-B and 1-C was completed in approximately 1997 or 1998 (at or about the time the Port was engaged in

lease negotiations with the Holdners) and resulted in the construction of the Port's Terminal 4, which is currently a Subaru facility. CP 118-19. Parcel 2 was used for wetland mitigation for the development of Terminal 4. CP 118.

The Port commenced its preparation of a SEPA for Parcels 3, 4, and 5 in approximately 1989. CP 119. The Port used the J.D. White Company as the lead consultant for the preparation of the draft SEPA. CP 119. The City of Vancouver served as the lead agency overseeing this very complicated process. CP 119. The draft SEPA ultimately was issued for public comment in 2002. CP 119.

In the year or so after the completion of the draft SEPA, the Port, its staff, and consultants conducted numerous public meetings, consulted with affected stakeholders and community groups, received and reviewed numerous written comments, and conducted several relevant studies, all in preparation for the completion of a Final Environmental Impact Statement. ("FEIS"). CP 240. These measures were taken in furtherance of the Port's goals to develop Columbia Gateway, the largest piece of industrial zoned property in the Portland/Vancouver area, for the purposes of creating long-term, family wage jobs, and attracting new business, while preventing, minimizing and mitigating the effects on natural areas and wildlife. CP 239. As part of this process, the Port was required to

determine the appropriate use of Parcels 4 and 5, which were leased by the Holdners. CP 122-23.

The process of gaining public input regarding Columbia Gateway culminated in a formal resolution by the Port's Board of Commissioners in the fall of 2003. CP 119-20. In that resolution, the Port decided, among several plans that had been considered, to engage in a marine-oriented development on 504 acres of Parcel 3 "combined with mitigation on Parcels 4 and 5." CP 239-40. The Port commissioners decided that this plan would be "its Preferred Alternative for further consideration and evaluation under the FEIS and other administrative and public processes." CP 240. The FEIS was scheduled for completion in July 2004. CP 123.

At or about the time that this plan was adopted by the Port Commissioners, the Port entered into a very complicated Settlement Agreement with CRANE, which had been pursuing several legal challenges in different forums regarding environmental issues on the Columbia River. CP 120-21. In general, the Settlement Agreement allowed industrial development of the Project to proceed on Parcel 3 upon the grant of a restrictive covenant and conservation easement restricting such development on Parcels 4 and 5. CP 166-71. The Settlement Agreement called for the "study and planning of habitat enhancements on

Parcels 4 and 5” and implementation of these enhancements if development went forward on Parcel 3. CP 166.

Under the Settlement Agreement, the Port in essence agreed to forgo development on Parcels 4 and 5 in favor of a plan of mitigation of environmental impacts, and enhancement of wildlife habitat, all as set forth in great detail in paragraphs 3 and 4 of the Settlement Agreement. CP 169-73. The intent of the Settlement Agreement was that CRANE and the Port would work together for the purpose of finalizing and implementing plans regarding mitigation of environmental impacts, wildlife habitat creation (including the improvement and creation of habitat for sandhill cranes), and the completion of the FEIS. CP 171. The Agreement further required that each party would be permitted access to Parcels 3, 4, and 5 for the purpose of performing studies and getting information consistent with the purposes of the Settlement. CP 172.

Unfortunately, the FEIS was not completed by July 1, 2004 because of numerous legal and other complications. CP 124. Among other things, CRANE disagreed with the wetland plan that the Port had prepared. CP 124. Experts were retained to help resolve the parties’ dispute, and an agreement ultimately was reached regarding wetland mitigation in February of 2006, with the approval of the U.S. Army Corps of Engineers, which had obtained jurisdiction over the project. CP 126.

On February 14, 2006, a Mitigation/Habitat Creation Schedule was issued by Jones & Stokes Associates, Inc. (“Jones & Stokes”), the Port’s environmental consultant on the Project, setting forth milestones for the wetlands mitigation and wildlife habitat work that needed to be done on Parcels 4 and 5. CP 156, 305-08. One of the tasks set forth in the detailed Schedule was: “Plan to obtain improved/adequate hydrological data/modeling.” CP 306. The projected cost of the mitigation/habitat creation process for Parcels 4 and 5 alone was approximately 36.6 million dollars. CP 158, 309-10.

Shane Latimer, a senior ecologist for Jones & Stokes, was given the task of obtaining the necessary hydrology data. CP 50. In order to plan for the placement of wetland and other environmental mitigation on Parcels 4 and 5, an analysis of the hydrology of the Property was necessary. CP 51. The most efficient and least intrusive means of determining the groundwater status on the Property was to install and monitor several groundwater monitoring wells. CP 51.

The plan created by Jones & Stokes was to place 14 groundwater monitoring wells on the Property. CP 51. Placement of the wells required drilling a two-inch hole in the ground and inserting a two-inch PVC pipe approximately 15-20 feet below the ground surface. CP 51. Readings for

the wells would need to be taken by a Port employee approximately two times per week by use of a simple handheld device. CP 51.

The groundwater wells needed to be installed in June 2006 in order to capture the seasonal fluctuations between the wet and dry seasons. CP 51. If the wells were not installed by June of 2006, Jones & Stokes would have to wait another year to gather the information that was uniquely available in the month of June. CP 51. Failure to timely install the wells in June 2006 would delay the Port's Columbia Gateway development efforts. CP 6.

**D. The Port's Meeting with William Holdner.**

Linda Carlson, the Property Administrator for the Port, and Shane Latimer with Jones & Stokes met with William Holdner in his offices on May 5, 2006. CP 6-7, 52. They discussed the Port's need to access the property in order to install, maintain, and monitor the groundwater monitoring wells. CP 52. Holdner was presented a map showing the location of the proposed wells. CP 52. Latimer explained ways in which any impacts to Holdner's farming operations on the Property could be minimized, for example, placing the well heads almost flush to the ground and marking them to facilitate avoidance with farm equipment. CP 52.

Despite these assurances, Holdner stated that he would not consent to the placement of the wells anywhere on the leased premises. CP 7, 52-53.<sup>2</sup>

In view of the Holdners' refusal to allow access to the Property, the Port elected to terminate the lease with 90 days' notice pursuant to Paragraph 15. CP 23. The notice was sent on May 12, 2006, terminating the lease effective August 15, 2006. CP 23. Shortly after receiving the notice, the Holdners filed suit against the Port, seeking a declaration regarding the Port's rights to terminate the lease, and for damages. CP 3-4. *Holdner v. Port of Vancouver*, Clark County Superior Court Number 06-2-02694-6. CP 3-4.

In response to the Holdners' action, the Port sought a preliminary injunction seeking the right to enter the premises under Paragraph 12 of the Lease, which allowed for inspections of the Property by the landlord during the term of the Lease. CR 26-27, 40. The Port's motion was denied by the trial court. CP 377.

On the same day that the order denying the injunction was issued, the Holdners advised the Port in writing that, if suitable compensation in

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<sup>2</sup> Holdner's deposition testimony does not materially contradict this account. He admits he had concerns about the Port's plans, specifically, that the wells would damage his crops and would cost him a lot of money. CP 324. His testimony clearly indicates that he would not allow the wells to be sunk under the circumstances then existing. CP 324.

the range of \$25,000-\$30,000 was paid by the Port, the Holdners would allow the Port access to the Property to drill the wells. CP 163-64, 381-382. The amount sought by the Holdners for access exceeded the annual rent on the Property. CP 144. This proposal was unacceptable to the Port. CP 144.

When the Holdners refused to vacate the premises on August 15, 2006, after expiration of the 90-day notice period, the Port filed a Complaint for Unlawful Detainer seeking a writ of restitution. (Clark County Superior Court Number 06-2-04327-7.) CP 347-349. The Holdners' case seeking declaratory relief and damages and the Port's unlawful detainer action were consolidated. CP 383-84.

The Port then filed a Motion for Summary Judgment on its unlawful detainer claim. CP 66-67. The trial court granted the Port's motion on October 23, 2006. CP 325. On the same date, the court granted the Port a writ of restitution, entitling the Port to take possession of the Property. CP 321.

In her oral decision granting summary judgment in favor of the Port, the trial judge recognized that the evidence established that the Port had a legitimate need to drill wells on the Property. RP (10/16/06): 71. The trial court also recognized that the drilling of the wells was part of the environmental mitigation process which was "a significant step in the

procedure in order to pursue the overall development plan.” RP (10/16/06): 73-74. The trial court concluded that there were “no material disputed facts in the record” and “that the Port was acting within its rights in terminating the lease pursuant to Paragraph 15.” RP (10/16/06): 75.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. Standard of Review**

Appellate court review of a grant of summary judgment is *de novo*. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). A party is entitled to summary judgment when the record establishes that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. CR 56.

The interpretation of an unambiguous contract is a question of law which is appropriate for resolution on summary judgment. *Matter of Estates of Wahl*, 99 Wn.2d 828, 664 P.2d 1250 (1983). If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision. *Mayer v. Pierce County Medical Bureau*, 80 Wn. App. 416, 909 P.2d 1323 (1995). Summary judgment is proper if reasonable minds can reach only one conclusion from the evidence presented. *Korlund*, 156 Wn.2d at 177.

## B. Argument

### 1. Paragraph 15 of the Lease Is Clear and Unambiguous.

Under Washington law, the words in a contract must be given their “ordinary meaning,” which is generally considered to be the dictionary definition of the words. *Bellevue Sch. Dist. No. 405 v. Bentley*, 38 Wn. App. 152, 684 P.2d 793 (1994). The court must read each contract as an average person would read it, without giving it a strained or forced meaning. *McInturff v. Dairyland Ins. Co.*, 56 Wn. App. 773, 785 P.2d 843 (1990). Undefined terms in a contract are to be given their “plain, ordinary and popular meaning.” *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 691, 871 P.2d 146 (1994). The court does not interpret “what was intended to be written but what was written.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005).

Here, the parties agreed that the Port could terminate the Lease “at any time the Port needs said premises to carry on its industrial development or other Port activities.” CP 41. The Holdners pluck the verb “needs” out of this clear and unambiguous phrase to argue, without any factual or legal foundation, that the Port does not “need” the premises unless it can show that it had no “other alternatives.” According to the

Holdners, the Port had no “need” to enter the premises to sink groundwater wells unless the Port could prove that doing so was a strict “necessity” which could, under no circumstances, be dispensed with and for which no alternatives existed. (Brief of Appellants, p. 20.)

The Holdners’ interpretation of the word “needs” in the Lease is strained, forced, ignores the plain meaning of the words that the parties used and renders Paragraph 15 a nullity. The plain meaning of the verb “need” does not support the Holdners’ contention, providing:

**Need** vi: to be in want 2. to be needful or necessary/ vt. to be in need of: **REQUIRE** –verbal auxiliary: be under necessity or obligation to.

Merriam-Webster, *Webster’s Ninth New Collegiate Dictionary*.<sup>3</sup>

Applying the plain meaning of the word “needs,” one “needs” something when it is wanted or required for some particular purpose. The term “need” as used in normal parlance does not connote that there must be no other alternative to obtaining the object of the “need.” For example, a person who is lost in the Sahara Desert without supplies certainly “needs” a drink; it is a physical necessity without which life is impossible. Similarly, a person who has just jogged five miles may be thirsty and “need” a drink although he wouldn’t die without one. Generally, to say

that a person “needs” something does not imply that the person could not live without it, but merely that the person has some legitimate requirement or want for it.

The Holdners’ construction of the verb “need” to imply that the object of the need must be indispensable or that there be no alternative to obtaining the object of the need is an implausible construction. This is especially true when one considers the textual context in which the word is used. Paragraph 15 states that the Port may terminate the Lease if “at any time the Port needs said premises to carry on...PORT activities.” CP 41. The term “at any time” is broad and unlimited, giving the Port free reign to decide when it needs the premises.

In addition, the word “needs” is tied directly to the Port’s “activities” on the premises. This is important because the Port clearly has the sole and unfettered authority to decide upon the activities that it wishes to engage in. Nothing in the Lease restricts the Port from conducting whatever activities that it wants on the Property that it owns, nor does it give any other parties the right to second-guess or nullify those decisions. The only limits are those imposed by law upon the operations of port

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<sup>3</sup> The Holdners use a different edition of *Webster’s* in their brief for the verb “need” but come up with a substantially similar meaning: “to have need of; require.” (Brief of Appellants, p. 18.)

districts generally, and no party contends on appeal that the development of Columbia Gateway and related predevelopment and prepermitting activities are anything but lawful activities conducted for lawful purposes.

Since it is undisputed that the Port has the legal right to conduct water testing “activities” on Parcels 4 and 5 in connection with its predevelopment and prepermitting activities regarding Columbia Gateway, the sole remaining question is whether it “needs” to access the premises for that purpose. Again, the evidence is uncontradicted that the Port “needs” the premises for these “activities.” Shane Latimer, the environmental consultant for the Port, stated without contradiction that the most efficient and least intrusive means of assessing the groundwater status on the Property was to install and monitor fourteen groundwater monitoring wells. CP 51.

The trial court’s interpretation of Paragraph 15 was the only reasonable interpretation: if the Port had a legitimate requirement to sink wells on the property to monitor groundwater in order to further its development goals for Columbia Gateway, it “needs” the property within the broad meaning of the Lease. Since the Holdners did not present any evidence establishing that the Port did not have a legitimate reason to test the groundwater on the Property, the trial court was correct in finding that there was no genuine issue of material fact.

The Holdners' interpretation of Paragraph 15 is unreasonable and inconsistent with the parties' objective manifestation of intent as reflected by the language of the Lease. The Holdners construe the Lease to mean that, if there were any "other alternatives" to placing groundwater wells on the Property, the Port did not "need" access to the premises and could not terminate the Lease. (Brief of Appellants, p. 20.) The logical extension of the Holdners' argument is that the possibility of such "alternatives," even if they involved expending millions of dollars or "scrapping" the entire Columbia Gateway project altogether, would prevent the Port from having a "need" for the Property within the meaning of the Lease.

Under the Holdners' strained interpretation, unless the Port had "a gun to its head" and was compelled to sink the wells without any alternative, it could not terminate the Lease. This construction makes lease termination a virtual impossibility and renders Paragraph 15 a nullity. Any construction of a contract which renders some of the language meaningless or ineffective must be avoided. *Seattle-First Nat. 'l Bank v. Westlake Park Associates*, 42 Wn. App 269, 711 P.2d 361 (1985).

The Holdners also erroneously contend that the trial court erred by focusing on the Port's "need" to sink wells in order to monitor the groundwater rather than upon the Port's "need" to evict its tenants from the property. (Brief of Appellant, p. 21.) According to the Holdners, the

issue under Paragraph 15 was whether the Port “needed” to evict them from the Property. However, this construction of the Lease is also unreasonable and is not based upon any wording in the parties’ agreement. Paragraph 15 of the Lease gives the Port the right to terminate the Lease if the Port needs the premises to conduct lawful activities. It simply does not state that the Port can only terminate if it “needs” to evict the tenant. The trial court properly focused on the issue as posed by the express language of Paragraph 15: whether the Port had a need to access the Property to conduct its lawful activities.

Paragraph 15 of the Lease is simply not ambiguous. It gives the Port the right to terminate if it has a legitimate need related to industrial development or other lawful Port activities. Under Washington law, the court looks to the parties’ intent to determine the meaning of a contract term. Under the “context rule” of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), the court determines the intent of the parties by viewing the contract as a whole in the context of its surrounding circumstances, including consideration of: (1) the subject matter and objective of the contract; (2) the circumstances surrounding its formation; (3) the subsequent acts or conduct of the parties; (4) the reasonableness of the respective interpretations advocated by the parties; (5) statements made in preliminary negotiations; and (6) usage of trade and course of dealings.

An examination of these factors supports the Port's contention that the Lease gave it the right to terminate the Lease on 90 days' written notice if it had a legitimate need connected with its lawful activities. None of these factors supports the Holdners' position that the Lease could only be terminated if the Port had no "other alternative."

The objective of this Lease was simple: to put a tenant on the Property until the Port needed the Property to move forward with the development of Columbia Gateway and to allow the Holdners to conduct their farming and related activities on the Property for a term of ten years or until the Port had a need for the Property for industrial development or other Port activities. CP 70-71. Early termination was clearly envisioned, and the parties expressly dealt with that eventuality by negotiating language requiring the Port to compensate the Holdners for the value of any "crops which cannot be harvested by the reason of the early termination of said Lease." CP 41.

The Holdners did not submit any evidence to the trial court – nor do they point to any on appeal – tending to establish, in any way, that the Port's ability to terminate the Lease based on its own assessment of its needs was limited to situations where there were no "other alternatives." Instead, the uncontradicted evidence establishes that the Port expressly informed the Holdners during the Lease negotiations that the Port would

some day need the property for the Columbia Gateway project and might have to terminate the Lease prior to the expiration of its ten-year term. CP 70-71, 95. Paragraph 1 of the Lease memorializes these discussions in a clear and unambiguous manner: the “initial term of this Lease shall be for ten (10) years subject to termination by the Port as provided in paragraph 15”. CP 35 (emphasis added).

The Holdners’ claim that the Lease could only be terminated if the Port had “no other alternative” reads language into the Lease that is not present. This construction is not reasonable and places a condition upon lease termination that would be impossible to meet and that was not intended by the parties.

The parties’ intent, as expressed by the words used in the contract, is clear and unambiguous. Washington follows the objective manifestation theory of contracts, which imputes to a person an intention corresponding to the reasonable meaning of his words and acts. *Hearst Communications*, 154 Wn.2d at 503; *Weimerkirch v. Leander*, 52 Wn. App. 807, 764 P.2d 633 (1988). Here, the language of the Lease is unambiguous and is subject to a single reasonable interpretation of intent. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 20 P.3d 921 (2001). Any unexpressed subjective understanding of the Lease unilaterally held by the Holdners cannot serve to contradict or modify the

clear language used by the parties to express their agreement giving the Port a broad right to terminate the Lease. *Hearst Communications*, 154 Wn.2d at 503-04.

2. The Holdners' Retaliation Defense Is Without Merit.

The Holdners attempt to avoid the fact that Paragraph 15 of the Lease is clear and unambiguous by raising a meritless “retaliation” defense to the unlawful detainer action. They argue, somewhat obliquely, that they had a contractual right under the Lease to prevent the Port from entering the property to sink the wells and that the Port’s invocation of its contractual rights under Paragraph 15 to terminate the Lease was therefore retaliatory and improper. (Brief of Appellants, p. 16)<sup>4</sup>. The Holdners’ argument is both unpreserved and without merit.

First, the argument that the Port unlawfully retaliated against the Holdners due to the invocation of their contractual rights was never made to the trial court. Instead, citing *Port of Longview*, the Holdners argued to the trial court that the Port had retaliated against them due to the exercise

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<sup>4</sup> The Holdners’ brief contains a lengthy section regarding the meaning of Paragraph 12 of the Lease regarding inspections. (Brief of Appellants, pp. 14-15.) Since the Port is not alleging on appeal that the trial court erred when it denied the Port a preliminary injunction based on its contention that Paragraph 12 did not allow the Port to drill the groundwater wells, the Holdners’ lengthy discussion is unnecessary to the issues presented by this appeal.

of their constitutional rights.<sup>5</sup> CP 430-31; RP (10/16/06): 48-49. The Holdners did not argue to the trial court that it was illegal or improper retaliation for the Port to invoke its contract rights to terminate the Lease in response to the Holdners' invocation of their contract rights to prevent the Port from entering the Property. The Holdners' assignment of error consequently was not properly presented to the trial court and is not preserved on appeal. RAP 2.5(a); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 803 n. 2, 863 P.2d 64 (1993).

However, even if the Court was to consider the Holdners' retaliation argument, it is without merit. The equitable defense of retaliatory eviction "does not arise whenever it seems 'equitable' to recognize it." *Stephanus v. Anderson*, 26 Wn. App. 326, 331, 613 P.2d 533 (1980). Instead, a retaliatory eviction defense "must be premised upon an established substantive legal right." *Id.* In this case, no such right exists because the Lease entitled the Port to terminate the leasehold on 90 days' notice if the Port had need for the property. Because the undisputed evidence established that the Port had such a need, the Holdners' retaliatory discharge claim fails as a matter of law.

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<sup>5</sup> On appeal, the Holdners have completely abandoned their constitutional retaliation claim asserted below stating that "this is a case of exercising contract rights rather than free speech rights\*\*\*." (Brief of Appellants, p. 16.)

The decision in *Motoda v. Donohoe*, 1 Wn. App. 174, 459 P.2d 654 (1969), illustrates that point. In *Motoda*, the tenant asserted the equitable defense of retaliatory discharge, alleging that “the landlord acted out of malice and spite; that partial constructive discharge occurred; that moving to a new apartment will be costly and inconvenient and that the purpose of the action is to punish her for informing tenants of their legal rights against the landlord.” *Id.* at 176. In rejecting the tenant’s arguments, the court pointed out that the landlord had the right to terminate the lease with the appropriate 20-day notice regardless of his motives. *Id.* In view of that fact, the court concluded that the tenant’s retaliatory discharge claim must fail because the required substantive legal right to the tenant’s possession of the premises did not exist. *Id.*

That same reasoning applies to this case. The Lease expressly gave the Port the right to terminate the Lease if it needed the property. After the Holdners proved unwilling to allow the Port access to the property to conduct the tests that it needed to perform for the Columbia Gateway Project, the Port exercised its contractual right of termination and provided the Holdners with the required 90-day notice. The fact that the Holdners exercised their right to exclude the Port from the Property does not change the fact that the Port had the right to terminate the tenancy under the express provisions of the Lease. As in the *Motoda* case, the

Holdners' retaliatory discharge claim fails because their claim is not premised on an existing substantive legal right.

The Holdners' unpreserved theory that a government landlord can be guilty of improper retaliation by properly invoking its own contract rights is simply unsupported by existing law and cannot serve to defeat summary judgment. The only case the Holdners cite in support of their theory is *Port of Longview*. However, in that case, the court merely held that a commercial tenant of a government landlord may assert retaliation as an equitable defense to eviction based on the exercise of First Amendment rights. *Port of Longview*, 96 Wn. App at 438. The court held that the tenant's right of free speech constituted a "substantive legal right worthy of protection in this context." *Id.* There is certainly no language in the *Port of Longview* decision to indicate that its holding would reach situations where constitutional rights were not being exercised by the tenant and where the landlord merely exercised its own contract rights in a legal manner in response to the tenant's exercise of its contract rights.

Parties to a contract have the freedom to negotiate the terms of their agreement, and nothing prevents one party from exercising its contract rights in response to the other party's exercise of its own contract rights. In fact, parties to contracts do this all the time, and many contracts contain provisions which give one party the right to exercise certain rights

in the event the other party takes advantage of their own rights under the contract. *Port of Longview* simply has no application here. No retaliatory discharge defense exists under the facts of this case.

3. The Holdners' Theory That They Should Have Been Granted More than Ninety Days' Notice Based on Commercial Reasonableness Was Never Raised Below and Is In Any Event, Without Merit.

The Holdners' argue for the first time on appeal that the Port was obligated to supply more than 90 days' written notice of lease termination based upon notions of "commercial reasonability." (Brief of Appellants, p. 22.) This argument was never raised to the trial court and, consequently, is not preserved for appeal. RAP 2.5(a).<sup>6</sup>

In any event, notions of commercial reasonableness cannot be used to vary or contradict clear contract language. In *Wilson Court Ltd. Pshp. v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1998) – the case cited by the Holdners – the court construed an ambiguous contract in light of notions of commercial reasonableness. The Holdners cite no case in which a court resorted to such principles of contract construction in the face of clear and unambiguous contract language. In this case, Paragraph

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<sup>6</sup> During the trial court proceeding, counsel for the Holdners argued vaguely that the Port unduly delayed giving notice, but did not mention "commercial reasonableness." RP (10/16/06): 50. Instead, the Holdners argued that the delay was evidence of unclean hands, a position apparently abandoned on appeal. CP 432; RR (10/16/06): p. 50.

15 clearly gives the Port the right to terminate the Lease upon “at least ninety (90) days written notice[.]” CP 41. Nothing in the Lease Agreement indicates that some greater amount of notice is due based upon some undefined notion as to what is commercially reasonable or unreasonable.

To accept the Holdners’ contention that the Port was required to provide more than 90 days’ notice – notwithstanding the parties’ express agreement to allow termination with 90-days notice – would inject grievous uncertainty into any contractual relationship where the parties have set forth specific time limits for the giving of notice or the taking of other action. The term “at least ninety (90) days” means exactly what it says. Because the Port gave the Holdners at least 90 days’ written notice before terminating the Lease, the Port was within its rights to terminate the lease, and “commercial reasonableness” does not enter the picture.

4. The Holdners Are Not Entitled to Attorney Fees.

The Holdners did not claim attorney fees in either their complaint for declaratory relief or by way of answer to the Port’s wrongful detainer action. Notwithstanding that fact, they now inexplicably seek such fees on appeal under the authority of *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998), which allows attorney fees on equitable grounds when a party has acted in bad faith. Alleging such a bad-faith

claim for fees at this stage of the litigation is inappropriate because the trial court was deprived of the opportunity to make findings regarding the Port's good faith. In *Pearsall-Stipek*, the Supreme Court reversed an award of attorney fees by the trial court in the absence of any findings by the trial court of bad faith. *Id.* at 267. The Holdners' failure to raise this issue below is fatal to its claim.

However, even if this Court was to reach the issue, there is no indication that the Port has acted in bad faith. Rather, the only reasonable conclusion to be drawn is that the Port acted based upon a good-faith need to access the property for the purpose of conducting hydrologic studies which would advance the development of a project which had substantial public benefits. The Holdners' claim for attorney fees due to bad faith is completely baseless.

## V. CONCLUSION

The language of the Lease is fundamentally clear and unambiguous. It allowed the Port to terminate the Lease upon ninety days' written notice if it had a legitimate need for the premises in order to conduct its lawful activities. The undisputed evidence established that

such a need existed. The trial court acted properly in granting the Port's motion for summary judgment. The appeal should be denied.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of June, 2007.

SCHWABE, WILLIAMSON & WYATT,  
P.C.

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**DECLARATION OF SERVICE**

I, Michael T. Garone, hereby certify that I mailed a copy of the foregoing BRIEF OF RESPONDENTS to Philip A. Talmadge, Attorney for Appellants, at Talmadge Law Group P.L.L.C., 18010 Southcenter Parkway, Tukwila, Washington 98188-4630, postage prepaid on the 27th day of June, 2007, via first-class U.S. mail.



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### CERTIFICATE OF FILING

I, Michael T. Garone, hereby certify that I filed the original and one copy of the foregoing BRIEF OF RESPONDENTS on the Clerk of the Court of Appeals, Division II, 950 Broadway, Suite 300, MS-TB-06, Tacoma, WA 98402-4427, via Federal Express on the 27th day of June, 2007, with postage prepaid.



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