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

ELK PLAIN 63, LLC, a Washington limited liability company,
Plaintiff/Respondent,

v.

PIERCE COUNTY, a political subdivision of the State of Washington,
Defendant/Appellant

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This lawsuit arises out of a dispute involving a Real Estate Purchase and Sale Agreement ("REPSA") for real property owned by Petitioner County ("Elk Plain Property") originally entered into with John Mastandrea. **CP 1-2; CP 449 (No. 2 Plt. Ans. to PC First RFA).**

Respondent claims Breach of Contract, Breach of Good Faith and Fair Dealing, Unjust Enrichment, Quantum Meruit, and Promissory Estoppel. **CP 6-7.** The Elk Plain Property is a large parcel of vacant land, zoned Mixed Use District, consisting of approximately 60 acres located at 23101 Mountain Highway in Spanaway, identified as Tax Parcel 031814-2001. **CP 347-348.**

The REPSA is an earnest money agreement pursuant to which the Seller agreed to sell the Elk Plain Property to Purchaser, and Purchaser agreed to pay the Purchase Price by the Outside Closing Date if both Seller's and Purchaser's conditions for closing were satisfied or waived. **CP 85-94 (REPSA ¶¶4, 16, 17).** If any condition was not satisfied or waived, either Seller or Purchaser had the right to terminate the REPSA, and neither would have further rights or remedies. **CP 93-94 (REPSA ¶16.3).** It is undisputed that to close; i.e., have the Closing Agent disburse sale proceeds to the Seller and record the deed conveying title, the Purchase Price must be delivered to the Closing Agent by the Outside

Closing Date. **CP 93-93 (REPSA ¶¶16.2.3, 17, 18)**. The Outside Closing Date was a date certain specified in the Agreement, time was of the essence, and the Outside Closing Date could not be amended unless it was modified in writing signed by both Parties. **CP 94, CP 98-99 (REPSA ¶¶17, 28, 29); CP 256-259 (Third Amendment ¶2)**.

If the Purchase Price was not paid by the Outside Closing Date, the REPSA provided in ¶17 that the REPSA would automatically terminate. **CP 94 (REPSA ¶17)**. The last Outside Closing Date agreed to by the parties was April 15, 2019. **CP 256**. There is no dispute that Respondent failed to pay the Purchase Price by the April 15, 2019, Outside Closing Date. **CP 454 (No. 23 Plt. Ans. to PC First RFA)**.

II. ASSIGNMENTS OF ERROR

The trial court erred when it denied Appellant County's Motion for Summary Judgment and ignored the intent and terms of an unambiguous Real Estate Purchase and Sale Agreement (REPSA) regarding automatic termination, the right of Appellant County to terminate the REPSA, and where the ruling presumed contrary to law that a governmental entity can promise Governmental Approvals to a developer. **CP 830-833; VRP**.

III. STATEMENT OF ISSUES

1. Should Respondent's claims be dismissed where it is undisputed that Respondent never delivered the Purchase Price

to Closing Agent by the "not later than" Outside Closing Date that provided for automatic termination of the real estate purchase and sale agreement if closing does not occur.

2. Whether Respondent's claim regarding obligation to provide governmental approvals is barred because, even if proved, would constitute an ultra vires act in that Petitioner County cannot enter into a real estate contract with a potential purchaser that obligates its land use permitting authority to supply land use permit approvals for the purchaser's proposed development.
3. Should Respondent's claims be dismissed where they rely on an interpretation of the REPSA that would make the REPSA unlawful?
4. Should Respondent's claims be dismissed where they presume that Seller can have contractual duties that were never made part of a written contract nor amendment to the REPSA?

IV. STATEMENT OF THE CASE

On February 20, 2018, the County and John Mastandrea entered into a Real Estate Purchase and Sale Agreement (REPSA) for the subject property. **CP 10-47 (REPSA)**. John Mastandrea is a well-known local developer with 45 years of experience acquiring real property for

development and pursuing developmental approvals. **CP 60 (Mastandrea Dec. ¶1)**. Mr. Mastandrea negotiated the terms of the REPSA with County representative Rick Tackett. **CP 338 (Tackett Dec. ¶13)**. Rick Tackett is a Real Estate Specialist for the County's Facilities Management Department ("FMD"). **CP 336 (Tackett Dec. ¶1)**. FMD is the Department that the County Executive delegated responsibility for negotiating and managing the sale of the Elk Plain Property. **CP 337 (Tackett Dec. ¶6)**.

FMD's Director is Karl Imlig. *Id.* **(Tackett Dec. ¶7)**. As FMD's Real Estate Specialist, Mr. Tackett was empowered to negotiate agreements for the sale of the Elk Plain Property. *Id.* **(Tackett Dec. ¶9)**.

Mr. Mastandrea negotiated with Mr. Tackett to finalize the terms for purchase of the Elk Plain Property. **CP 61 (Mastandrea Dec. ¶4); CP 338 (Tackett Dec. ¶13)**. It was agreed that the sale would be "AS-IS" without land use entitlements (i.e., development permits/approvals) for the Purchase Price of \$7.5 million. **CP 338 (Tackett Dec. ¶18); CP 63 (Mastandrea Dec. ¶16), CP 92 (REPSA ¶14.1)**. Mr. Mastandrea knew that the \$7.5 million Purchase Price was based on the value of the land "AS-IS," and knew that the agreed Purchase Price did not represent the value of the same land if it later became entitled for a large-scale residential development. **CP 64 (Mastandrea Dec. ¶21)**. At the time the

REPSA was executed, Mr. Mastandrea had not yet decided on a type of development, and the REPSA he negotiated did not obligate him to pursue a specific type of development. *Id.* (¶¶22-23).

Mr. Mastandrea's objective in entering into the REPSA was to "obtain a certain amount of time to review the feasibility of undertaking a development on the Elk Plain Property, and once [he] was satisfied regarding the feasibility, close on the purchase, acquire title to the Elk Plain Property, and potentially sell some or all of [his] real estate interests in the Property." **CP 61 (Mastandrea Dec. ¶5).**

The REPSA provided that "[t]ime is of the essence of this Agreement and of every term and provision hereof," (*Id.* at ¶28), with a "not later than" date for closing, and by its own terms would automatically terminate on the Outside Closing Date if closing did not occur; i.e., payment of the purchase price. **CP 63 (Mastandrea Dec. ¶19); CP 94 (REPSA ¶17).** The REPSA provides in relevant part:

Closing shall take place at the offices of Closing Agent, or at such other place as Seller and Purchaser may mutually agree in writing, within THIRTY (30) calendar days after Purchaser's Notice to Proceed, ***but in any event not later than December 31, 2018 ("Outside Closing Date"), which shall be the termination date of this Agreement.***

Id. (emphasis added).

Closing deliveries required, among other things, that the Purchaser deliver to the Closing Agent a Real Estate Excise Tax Affidavit relating to the Bargain and Sale Deed, and Purchase Price. **CP 94 (REPSA ¶18.2)**. Mr. Mastandrea knew that as Purchaser he was obligated to deliver the agreed upon price to the Closing Agent by the Outside Closing Date or the REPSA would automatically terminate unless the Outside Closing Date was extended by mutual agreement. **CP 49, 51 (Mastandrea Dec. ¶¶6, 19); CP 98-99 (REPSA ¶29 – "The Agreement may be modified only in writing signed by both Parties.")**. The REPSA did not require or obligate the County as Seller "to wait for the Purchase Price until after the Purchaser had obtained 'governmental approvals.'" **CP 64 (Mastandrea Dec. ¶25); see, also, CP 93 (REPSA ¶16.2 – Conditions Precedent to Closing, Seller's Conditions)**.

As is typical of a purchase and sale agreement, the REPSA included conditions precedent that must be satisfied before the Purchaser becomes obligated to complete the transaction. The conditions precedent are listed in Section 16.1 of the REPSA. **CP 93**. Under the REPSA, "Governmental Approvals" were a condition precedent for Purchaser. *Id.* **(REPSA ¶16.1.2)**. It is indisputable that the Purchaser's list of conditions precedent never obligated the County as Seller to wait for the Purchase Price until after the Purchaser had obtained "governmental approvals."

The County as Seller also had conditions precedent to its obligation to complete the transaction. Those conditions are listed at Section 16.2 of the REPSA. *Id.* Delivery of the Purchase Price by Purchaser to the Closing Agent on or before Closing was a condition precedent for Seller. *Id.* (REPSA ¶16.2.3).

Mr. Mastandrea did not negotiate a financing contingency for the REPSA, and he knew that he would need to find cash to close, whether by finding an equity investor to put up the cash or finding someone who had sufficient assets to help obtain a loan to fund closing. CP 64-65 (Mastandrea Dec. ¶¶26-27). Mr. Mastandrea figured that 10 months would be sufficient to obtain financing for closing. *Id.*

Approximately two months after entering into the REPSA, Mr. Mastandrea formed Elk Plain 63, LLC (Plaintiff/Respondent) with Philip Mitchell and assigned the REPSA to Elk Plain 63, LLC. CP 135-137 (Assignment); *see, also*, CP 65 (Mastandrea Dec. ¶¶28-32). As a managing member of Elk Plain 63, LLC, and as authorized under the Elk Plain 63, LLC April 2018 Operating Agreement, Mr. Mastandrea had full and independent authority to act on behalf of Respondent Elk Plain 63, LLC and served as Pierce County's contact for Elk Plain 63, LLC. CP 114-133 (Operating Agreement); CP 65 (Mastandrea Dec. ¶¶28-31).

In 2018 and through April 15, 2019, Mr. Mastandrea was the person, who, on behalf of Elk Plain 63, LLC kept track of deadlines in the REPSA, initiated requests for extensions of those deadlines before they arrived, negotiated the extensions with Mr. Tackett, worked with Mr. Tackett to get the terms for extensions memorialized into written amendments, signed all three amendments, and coordinated Mr. Mitchell's signatures on the second and third Amendments. **CP 339-340 (Tackett Dec. ¶26).**

Around the same time that the REPSA was assigned, Mr. Mastandrea and Mr. Mitchell decided to change the original development concept to one that would require them to pursue a rezone of the Elk Plain Property for a moderate-high density residential development that would involve subdivision of the land into several hundred single family lots. **CP 341 (Tackett Dec. ¶35).** Development permit applications were subsequently submitted to the County Planning Division in October 2018. **CP 341-342 (Tackett Dec. ¶¶36, 38).**

Because of the change in development concept which necessitated work on a new application, Mr. Mastandrea recognized that Elk Plain 63, LLC would need an extension of time to perform Due Diligence Review. **CP 67 (Mastandrea Dec. ¶39).** Ahead of the June 21, 2018, expiration of the Due Diligence Review Period, Mr. Mastandrea asked Mr. Tackett for

an extension of the Due Diligence Review Period from 120 days to 165 days and an extension of the deadline to apply for land use permits from 30 to 60 days after the end of the Due Diligence Review Period. **CP 340 (Tackett Dec. ¶¶27-28); CP 67 (Mastandrea Dec. ¶39)**. These extensions were memorialized in the First Amendment to the REPSA. *Id.* **(Tackett Dec. ¶¶27-29; Mastandrea Dec. ¶39); CP 114-148**. All other terms of the REPSA remained the same, including the December 31, 2018, Outside Closing Date. *Id.*

In August 2018, Mr. Mastandrea signed a Notice of Satisfaction of Due Diligence Contingency effective August 5, 2018, which also referenced cash payment of the \$250,000 escrow earnest money deposit. **CP 68 (Mastandrea Dec. ¶¶42-44); CP 182-183 (Removal of Contingencies)**. Had these actions not been taken, the REPSA would have automatically terminated. *Id.*; **CP 340-341 (Tackett Dec. ¶30)**.

By fall of 2018, Mr. Mastandrea was meeting several times a day with Philip Mitchell, they had negotiated an agreement with LGI Homes-Washington for purchase of the Elk Plain Property once they obtained Preliminary Plat Approval, and also negotiated a purchase loan from Juniper Capital. **CP 67-68 (Mastandrea Dec. ¶40), CP 150-178; CP 69-70 ¶¶48, 52-53), CP 185-187; CP 70-72 (Mastandrea Dec. ¶¶54-60)**. Respondent was ready to close. *Id.* **(Mastandrea Dec. ¶50)**.

In anticipation of closing, and as required by Pierce County Code §2.110.120 and REPSA ¶¶6 and 16.2.1, Mr. Mastandrea sought County Council ratification of the REPSA. **CP 72 (Mastandrea Dec. ¶¶61); CP 86-87 (REPSA ¶6); CP 341 (Tackett Dec. ¶¶31-34).** Mr. Mastandrea understood that waiver of the REPSA ¶8 "governmental approvals" contingency would be helpful in persuading the County Council to pass the resolution ratifying the transaction. **CP 72 (Mastandrea Dec. ¶¶61-65); CP 189; CP 341-342 (Tackett Dec. ¶¶35-36).** Mr. Mastandrea had multiple conversations with Philip Mitchell regarding the need to waive the REPSA ¶8 governmental approvals contingency, and Mr. Mitchell never objected and told Mr. Mastandrea, "Do what you have to do, to get it done." **CP 69, 72 (Mastandrea Dec. ¶¶50-51, 63).**

On November 1, 2018, Mr. Mastandrea signed a Notice of Waiver waiving ¶8 governmental approvals contingency in the REPSA. **CP 72 (Mastandrea Dec. ¶64); CP 189; CP 342 (Tackett Dec. ¶37).**¹ County Council subsequently passed Resolution R2018-131 on November 6, 2018, ratifying sale of the Elk Plain Property "substantially in accordance with the terms as set forth in that certain Agreement ... which is attached hereto and incorporated herein by reference as Exhibit B." **CP 72**

¹ Respondent claims that this contingency was not waived. **CP 729-730 (Mitchell Dec.).**

(Mastandrea Dec. ¶¶64); CP 342 (Tackett Dec. ¶¶ 40-41); CP 391-425 (County ratification resolution). The REPSA is the "Agreement" incorporated by reference in the County ratification resolution. **CP 342 (Tackett Dec. ¶41); CP 391-425.**

The FMD and County Executive would not have requested County Council ratification of the REPSA in November if Respondent had indicated that it wished to negotiate changes to the terms of the REPSA to further extend the Outside Closing Date. **CP 342 (Tackett Dec. ¶38).** The County expected that the transaction would proceed in accordance with the REPSA, which required payment of the Purchase Price by the end of 2018. **CP 342 (Tackett Dec. ¶39).**

However, after waiving the governmental approvals contingency, Mr. Mitchell rejected the Juniper Capital financing, and Respondent was forced to seek an extension of the REPSA Outside Closing Date. **CP 73-74 (Mastandrea Dec. ¶¶70-74); CP 231-234.** The Second Amendment to the REPSA extending the Outside Closing Date to March 1, 2019, was signed by both Mastandrea and Philip Mitchell, and payment of \$25,000 was deposited into escrow. **CP 75 (Mastandrea Dec. ¶75); CP 231-236.**

After obtaining the extension to March 1, 2019, Respondent continued its search for a lender to provide financing. **CP 75-76 (Mastandrea Dec. ¶¶76-79).** In addition, Respondent sought to obtain an

agreement to acquire additional County-owned parcels known as the East Pit Parcels so that Respondent's proposed development could use the parcels to create secondary road access to 232nd Street that would serve the development. **CP 76 (Mastandrea Dec. ¶¶80-82)**. Use of the East Pit Parcels had not been negotiated in the REPSA because in February 2018, Mastandrea did not know access to the East Pit parcels would be needed. **CP 76 (Mastandrea Dec. ¶¶80-82); CP 342-343 (Tackett Dec. ¶43)**. It was only after the development concept changed in summer 2018 that the need for secondary road access through the East Pit Parcels became apparent. **CP 76-78 (Mastandrea Dec. ¶¶80-87)**.

As the March 1, 2019, Outside Closing Date approached, Respondent sought another extension to April 15, 2019, which was again signed by both Mastandrea and Philip Mitchell. **CP 77-78 (Mastandrea Dec. ¶¶86-90); CP 256-259**. The County warned Respondent that the extension would likely be the last extension the County would grant. **CP 78 (Mastandrea Dec. ¶90)**. Mr. Mastandrea repeatedly communicated to Philip Mitchell that the County would not provide additional extensions past April 15, 2019, and that it was time to prepare for closing. **Id. ¶91**. Unfortunately, at this time Respondent's/Phillip Mitchell's collateral for the new lender was collapsing, and alternative financing could not be obtained. **CP 79 (Mastandrea Dec. ¶¶92-93)**.

On April 15, 2019, the Outside Closing Date, Respondent did not deliver to the Closing Agent the Purchase Price for the subject property, had not obtained any agreement from the County to extend the Outside Closing Date, and by its own terms the REPSA automatically terminated. **CP 78-79, 81 (Mastandrea Dec. ¶¶91-95, 106); CP 454 (No. 23 Plt. Ans. to PC First RFA).**

Section 17 of the REPSA provides for automatic termination of the REPSA absent closing by the Outside Closing Date. Section 17 defines "closing" as "the date upon which the Bargain and Sale Deed is recorded by Closing Agent and the proceeds of sale are legally available for disbursement to Seller." **CP 85-108 (REPSA).**

In addition, the REPSA is also clear that if either the Seller or the Purchaser's conditions precedent for closing are not satisfied or waived by the date specified for satisfaction of the condition, the Party may elect to terminate the REPSA in the Party's "sole and absolute judgment and discretion" whereupon Earnest Money may be refunded to Purchaser if Purchaser is not in material default and "*neither Party shall have any further rights or remedies.*" **CP 93-94 (REPSA ¶16.3) (emphasis added).**

On April 18, 2019, the County notified Respondent that the REPSA terminated on April 15, 2019, and also indicated that it had no

intention to extend or revive the agreement unless Respondent delivered to the Closing Agent by 5 p.m., April 22, 2019, the purchase price and all other items necessary for the transaction to close. **CP 79 (Mastandrea Dec. ¶¶96); CP 261.** Respondent did not deliver to the Closing Agent the Purchase Price by April 22, 2019. **CP 80-81 (Mastandrea Dec. ¶¶97, 103-104); see, also, CP 456 (No. 29 Plt. Ans. to PC First RFA).**

The County has consistently affirmed that the REPSA expired on April 15, 2019. **CP 79-81 (Mastandrea Dec. ¶¶96-102); CP 261; CP 343-345 (Tackett Dec. ¶¶48-53); CP 427-439 (June 3, 2019, pre-litigation communication to Respondent's former attorney, Lawrence Glosser).** But Respondent continues to pursue at its own financial detriment governmental approvals. **CP 82 (Mastandrea Dec. ¶112); see, also, CP 427-439; CP 460-464 (Revised MDNS).** Respondent admits that it does not know if it will ever receive "Governmental Approvals" for its proposed development on the Elk Plain Property. **CP 458 (No. 37 Plt. Ans. to First RFA).**

Respondent now claims that the County breached the REPSA when it terminated the agreement by failing to provide governmental approvals and a No Further Action Letter from the Department of Ecology. **CP 2-6 (Plaintiff Complaint ¶¶ 3.6, 3.20, 3.23, 3.26).**

V. ARGUMENT

A. Standard of Review

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *see, also*, CR 56(c). *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

B. There Was No Breach of the REPSA

1. As a Matter of Law Under the Terms of the REPSA the Contract Terminated

Contract interpretation of an unambiguous contract is a question of law. *Mega v. Whitworth Coll.*, 138 Wn. App. 661, 672, 158 P.3d 1211, 1216 (2007); *see, also*, *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362,

832 P.2d 105 1992). If contract is unambiguous, summary judgment is proper even if parties dispute legal effect of certain provisions. *Id.*

The subject REPSA is unambiguous and clear on its face. The REPSA provided a finite period of time for Purchaser to deliver the Purchaser Price of \$7.5 Million to the Closing Agent for Closing. The expiration of that finite period of time was a "not later than" Outside Closing Date that by the agreement's terms would automatically terminate the agreement if closing did not occur; the REPSA at ¶28 provided that "[t]ime is of the essence...;" the REPSA as required by ¶29 could only be modified in writing signed by all parties to the REPSA; the Outside Closing Date was extended only twice, in writing, and signed by all parties; the last Outside Closing Date agreed to by the parties was April 15, 2019; and Respondent admits it failed to pay the Purchase Price by the April 15, 2019, Outside Closing Date. **CP 456 (No. 29 Plt. Ans. to PC First RFA)**. Because Respondent failed to pay the Purchase Price by the Outside Closing Date, the agreement as provided in ¶17, the REPSA automatically terminated. It is undisputed that Respondent was not willing to close on the Outside Closing Date and asked for another extension of the Outside Closing Date. It is further undisputed that the County never agreed to extend the Outside Closing Date.

Respondent claims that the County breached the REPSA when it terminated the agreement by failing to provide governmental approvals and a No Further Action Letter from the Department of Ecology. **CP 2-6 (Plaintiff Complaint ¶¶ 3.6, 3.20, 3.23, 3.26)**. Respondent argues that the governmental approval contingency of the REPSA created a condition precedent obligating the County to provide governmental approvals. However, there is no express condition precedent that obligated the County to provide government approvals or a No Further Action Letter from the Department of Ecology. **CP 93-94 (REPSA ¶¶16, 16.2-16.2.4)**. There is no express condition that obligated the County to continue to provide extensions of the Outside Closing Date for as long as the Purchaser continued to pursue Governmental Approvals or until a NFA letter from the Department of Ecology was offered.

The burden of proving performance of an express condition precedent in a contract is on the party who seeks to enforce the contract. *Ross v. Harding*, 64 Wn.2d 231, 391 P.2d 526 (1964). Respondent's self-serving declaration arguing that it did not waive the governmental approvals contingency cannot overcome the unambiguous terms of the REPSA. As required by Section 16.1.2, governmental approvals only related to Respondent's obligation to apply for and pursue governmental approvals, not a County obligation to provide governmental approvals.

Even if the Court were to accept Respondent's position that the governmental approvals contingency was not waived or was a condition precedent, the absence of a waiver does not avoid termination of the REPSA. Under REPSA Section 16, both Respondent and the County had conditions precedent that if they were not satisfied or waived, either Respondent or the County could elect to terminate the agreement in the party's sole and absolute discretion pursuant to Section 16.3. **CP 93-94.** Section 16.3 of the REPSA is clear as to Purchaser's only remedy if one of Purchaser's conditions precedent is not satisfied or waived by the date specified for satisfaction of the condition precedent: Purchaser can elect to terminate the REPSA "in its sole and absolute judgment and discretion" and if the Purchaser is not in material default, Purchaser has the right to a refund of the Earnest Money, but no further rights or remedies. *Id.*

Respondent admits it did not deliver the Purchase Price to Closing Agent to make the sale proceeds available for disbursement as part of closing by the Outside Closing Date. **CP 454 (No. 23 Plaintiff's admission to RFA No. 23).** Purchase Price delivery was a condition precedent for Seller obligation to complete the transaction contemplated by the REPSA. **CP 93 (REPSA ¶16.2).** The County as Seller never waived delivery of the Purchase Price as a condition precedent. When the Purchase Price was not delivered on April 15, 2019, by the terms of the

REPSA at Section 17, the REPSA terminated. **CP 94 (REPSA ¶17).**

Moreover, at Section 16.3 the County as Seller had the right to deem the REPSA terminated in its sole and absolute discretion. **CP 93-94 (REPSA ¶16.3).** "If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance." *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986), quoted in *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994).

In the instant case, it is undisputed that Respondent failed to close on the transaction and pay the Purchase Price by the Outside Closing Date agreed to by the parties. By its own terms the REPSA expired. There is no breach

2. Creating a Contractual Duty on a Government Seller to Provide Approvals for Land Use Permits Would Make the Contract Ultra Vires

Respondent claims that the REPSA imposes a duty on the County to supply a No Further Action (NFA) letter and Governmental Approvals for its land use permit applications, and that until the duty is fulfilled, the County has the added duty to indefinitely extended the Outside Closing Date before it becomes obligated to pay the Purchase Price. **CP 2-3 (Complaint ¶¶3.8, 3.6- 3.7); CP 523 (Plt. Opp. to MSJ, p. 9, lines 9-19).**

There is no express condition precedent that obligated the County to provide a No Further Action Letter from the Department of Ecology, and there is no law that supports the legality of a county entering into a real estate contract that obligates its land use permitting authority to supply governmental approvals/land use permit approvals for a purchaser's proposed development. However, there are many laws that would make such agreements illegal. Respondent's claim implicates the State Environmental Protection Act ("SEPA"), RCW 43.21C, *et seq.*; the appearance of fairness doctrine at RCW 42.36.010; and other laws governing project review, review of applications for site-specific rezone, and preliminary plat approval that make it ultra vires for the County to promise to supply governmental approvals or promise to extend the closing date for delivery of the Purchase Price.

For example, RCW 36.70B.110(6) requires that procedures adopted by a local government involving project permits be integrated with environmental review under RCW 43.21C ("A local government shall integrate the permit procedures in this section with environmental review under chapter 43.21C RCW"); *see, also*, RCW 36.70B.050. Subdivision and platting of real property in Washington also implicate both state statutes and local ordinances that impose subdivision and platting controls. Local land use permitting jurisdictions such as the

County are mandated to "inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication." *See* RCW 58.17.110(1). Likewise, the Growth Management Act (GMA) does not allow a local government to unilaterally promise land use determinations and provides, "[i]t is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning." *See, also, Ahmann-Yamane, LLC v. Tabler*, 105 Wn. App. 103, 10 P.3d 436, *corrected, review denied*, 144 Wn.2d 1011, 31 P.3d 1185 (2001) (Planned rezone from agricultural to suburban was not in the best interests of the public, and thus property owner was not entitled to have rezone, where proposed rezone, especially when balanced against goals of the GMA and objectives for irrigated land in comprehensive plan, offered little more than opportunity for "rural living" in area that would rapidly become urban in character.).

In Pierce County, authority to review and decide plat applications has been delegated to the Hearing Examiner, who must inquire into the public use and interest served by the proposed subdivision. *See* RCW 58.17.100; Pierce County Code 18.30.020; PCC 18F.40.030. The County is deemed to be taking quasi-judicial action when its Hearing Examiner determines the "legal rights, duties, or privileges of specific parties in a

hearing or other contested case proceeding." RCW 42.36.010. When taking quasi-judicial actions, the County's Hearing Examiner is subject to the appearance of fairness doctrine which requires hearings to not only be fair but also appear to be fair so that the public can have faith in an impartial permitting process. *See* RCW 42.36.010. Site-specific rezones are also quasi-judicial and subject to review standards in County code and state law. *See Ahmann-Yamane, LLC v. Tabler, supra; see, also, PCC 18A.95.070 (Rezone Procedures – Hearing Examiner's Authority).*

If the County had promised to provide preliminary plat approval or a site-specific rezone to a developer or otherwise assumed some sort of "duty" to provide land use permit approvals as part of an agreement to sell County-owned real property, it would have fundamentally undermined the public's faith in an impartial permitting process. It would also violate the appearance of fairness doctrine to have assumed such a "duty" when the Respondent's applications for site-specific rezone and preliminary plat approval are scheduled for a hearing before the Hearing Examiner.

Moreover, the alleged promise to supply land use entitlements for Respondent's development would have been unenforceable under SEPA and the GMA, and any agreement that purported to contractually bind the County to indefinitely extend its REPSA until the land use entitlements were provided would have been subject to SEPA challenge and potentially

invalidated. SEPA effectively prohibits public agencies from taking actions that would limit a land use authority's consideration of the range of alternatives to approval of land use permit applications for development. *See Columbia Riverkeeper v. Port of Vancouver*, 189 Wn. App. 800, 818 (2015), *citing ILWU, Local 19 v. City of Seattle*, 176 Wn. App. 512, 524-25 (2013); *see, also*, Washington Administrative Code implementing SEPA at WAC 197-11-070(1) (prohibiting government agencies from taking an "action" that limits the choice of reasonable alternatives). Decisions to sell publicly-owned land can constitute an "action" under SEPA if the decision involves entering into a contract specifying a development project. *See* WAC 197-11-704(2)(a)(ii).

Allowing claims like Respondent's exposes the County to suspicion by the public that the County may not be conducting an impartial land use permitting review process. Any hearing on Respondent's land use permit applications would be subject to charges that the hearing does not appear to be fair as long as there is a possibility that the Petitioner could be found to have a "duty" to supply land use permit approvals to Respondent. Likewise, if there is a possibility that the County could be found to have a "duty" to extend the closing date for delivery of the Purchase Price for as long as the land use permit approvals are not supplied, the County's review of Respondent's land use permit

applications would be perceived by the public to be biased or otherwise unfairly influenced by Petitioner's financial motive to collect sale proceeds.

In addition, extension agreements cannot be held to undermine the time is of the essence clause that remained in the subject REPSA – *see Mid-Town Ltd. Limited Partnership v. Preston*, 69 Wn. App. 227, 234, 848 P.2d 1268 (1993), and no authority exists that supports the allegation that processing of land use permitting applications by a local land use authority constitutes conversion of a contractual Outside Closing Date to a floating, undetermined date – *see, also, Mid-Town*, 69 Wn. App. at 234 (when alleged conduct occurs after the contract has expired, that conduct cannot be used to revive the contract). The statute of frauds, mutual intent/meeting of the minds, also cannot be ignored where a contract involves the sale of real property – *see Key Design, Inc. v. Moser*, 138 Wn.2d 875, 887- 888, 983 P.2d 653 (1999).

Respondent's case depends on setting aside the plain language in the REPSA's terms to impose an entirely different obligation on the County – to keep extending the Outside Closing Date indefinitely until the Purchaser has received "Governmental Approvals" for Purchaser's proposed development – with the effect that the Elk Plain Property is locked up for Purchaser's benefit without any assurance that the County

will be paid the \$7.5 Million Purchase Price and without any additional consideration for the extension.

C. Respondent's Alternative Theories of Recovery Fail

1. Claims Based on Implied Contract Are Barred

Respondent claims the existence of an implied contract under unjust enrichment or quantum meruit based on conduct of the parties involving Respondent's pursuit of governmental approvals. **CP 7 (Complaint); CP 523 (Plt. Opp. to MSJ p. 9, line 22).**

However, a party to a valid express contract cannot bring an action on an implied contract basis related to the same subject matter. *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943); *Pierce Co. v. State*, 144 Wn. App. 783, 185 P.3d 594 (2008). Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). In addition, "quantum meruit" is not a legal obligation like contract but is a remedy to recover "a reasonable amount for work done." *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). It falls within the broader category of unjust enrichment. *Bailie Commc'ns. Ltd. v. Trend Bus. Svs., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991) ("Thus while quantum meruit, inasmuch as it involves retention

of benefits in the form of services received, falls within the unjust enrichment doctrine ...").

In addition, Washington law bars recovery from municipal corporations under implied contract doctrine where the implied contract is for services. *See Hailey v. King County*, 21 Wn.2d 53, 57 (1994) (declining to extend doctrine of implied contract to provision of services rendered for benefit of county, noting it would be contrary to statutes governing counties and contrary to public policy, and holding that counties can act only through their boards and public officials).

Respondent would have the Court believe that the County promised to cover the expenses that the LLC would incur in applying for land use permits for development of land that the LLC promised to purchase from the County. Respondent has offered no rationale, let alone any evidence, for why the County would have entered into an agreement to subsidize Respondent's land use permitting costs when Respondent's development was not decided at the time of the execution of the REPSA. *See CP 64 (Mastandrea Dec., ¶¶22-23)*.

Respondent's alternative implied contract claims are based on the same alleged obligations it claims are part of the REPSA. The REPSA is a contract that already relates to the same subject matter of Respondent's alternative theories of liability.

A claim of unjust enrichment requires proof of three elements – "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *See Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 490 (2011). There is no "benefit" to the County from the costs incurred by Respondent in applying for governmental approvals. Under the express terms of the REPSA, Governmental Approvals was a condition precedent to the Purchaser making a decision to proceed with Closing or terminate the REPSA by or before the Outside Closing Date. **CP 93 (REPSA 16.1.2)**. Respondent was obligated to apply for governmental approvals for its proposed development within a certain time frame so that Purchaser could make its decision before the Outside Closing Date. *Id.* Governmental approvals are for the benefit of Respondent's proposed development, and any development services used by Respondent or monies spent to acquire permits would not only not create a contract but would not even be considered an improvement to property subject to lien and reimbursement. *See Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 246 P.3d 835 (2011) (Performing development services such as acquiring permits does not amount to either labor or improvement under the lien statute.).

There was no agreement between the County and Respondent for any services. Respondent's implied contract claims fail, and Respondent's continued pursuit of governmental approvals while out of contract and throughout this litigation is at its own financial detriment.

2. Promissory Estoppel Does Not Exist

Promissory estoppel exists when (1) a promise is made which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of that promise. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967).

Respondent claims that the Planning Division's act of continuing to process the Respondent's permits combined with the County's prior extensions of the Outside Closing Date, modified the "Outside Closing Date" to a "floating" date. **CP 529 (Plt. Opposition to MSJ, p. 15, lines 15-20)**. The two extensions of the Outside Closing Date in the Second Amendment and the Third Amendment were from December 31, 2018, to March 1, 2019, then to April 15, 2019. **CP 231-234; CP 256-259**. Respondent has admitted that for each extension granted, Respondent executed an extension agreement which was signed by the Pierce County Executive, and Plaintiff deposited an extension payment. **CP 451-454**

(Plt. Answers to County's RFA Nos. 8, 13, 14, 15, 16, 17, 19, 20, 21, 22). Each Amendment of the REPSA provided that the REPSA, except as modified by specifically identified amendments, is "hereby ratified and confirmed in all respects and shall remain in full force and effect in accordance with its original terms, covenants, and conditions." **CP 36 (Section 4, First Amendment); CP 41 (Section 4, Second Amendment); CP 45 (Section 4, Third Amendment); CP 144, CP 232, and CP 257.**

In addition, Mr. Mastandrea was the most familiar and knowledgeable person with the terms of the REPSA and the factual background of the transaction, and was the primary agent for Elk Plain 63, LLC in communicating with the County. **CP 60-83 (Mastandrea Dec.).** The County informed Respondent that it would not agree to any more extensions. **CP 336-345 (Tackett Dec.); CP 78-79 (Mastandrea Dec. ¶¶90, 95).** Mr. Mastandrea understood and made Phil Mitchell aware on numerous occasions that time was of the essence and that the County would offer no more extensions beyond April 15, 2019. **CP 78 (Mastandrea Dec. ¶91).** There is no writing signed by both parties that extends the REPSA Outside Closing Date beyond April 15, 2019, and to the extent that Respondent may argue a course of conduct that would suggest an agreement for a floating closing date, such argument is not supported by the terms of the REPSA. The REPSA provides that the

agreement may be modified only in writing signed by both parties. **CP 98-99 (REPSA ¶29)**. In addition, a contract for the sale of real property is unenforceable unless it is in writing and contains all essential terms for the sale including but not limited to a legal description. *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 887-888, 983 P.2d 653 (1999), citing Restatement (Second) of Contracts §110 at 286 (1981) regarding statute of frauds ("The formal requirements of the statute for land contracts helps to create a climate in which parties often regard their agreements as tentative until there is a signed writing."); *see, also, Saluteen Maschersky v. Countywide Funding Corp.*, 105 Wn. App. 846, 851, 22 P.3d 804 (2001) ("For a contract to exist, there must be a mutual intention or "meeting of the minds" on the essential terms of the agreement."). The REPSA automatically terminated because Respondent failed to pay the Purchase Price and close on the transaction. **CP 79, 80-81 (Mastandrea Dec. ¶¶93-95, 101, 106)**. On April 18, 2019, the County notified Respondent that the REPSA terminated on April 15, 2019, and also informed Plaintiff that it had no intention to extend or revive the agreement. **CP 343-344 (Tackett Dec. ¶48; CP 79 (Mastandrea Dec. ¶96); CP 261**. The April 18, 2019, letter did not foreclose the possibility that a new REPSA could be negotiated if Respondent delivered to the Closing Agent by 5 p.m., April 22, 2019, the purchase price and all other items necessary for

the transaction to close. *Id.* Respondent did not deliver to the Closing Agent the Purchase Price by April 22, 2019. **CP 80-81 (Mastandrea Dec. ¶¶97, 103-104)**. Estoppel also cannot apply where agreement of the parties regarding closing was set forth in original sale agreement and amendments – and where there is no evidence of any oral conversations relating to extension of the closing date. *Mid-Town Limited Partnership v. Preston*, 69 Wn. App. 227, 234, 848 P.2d 1268 (1993). In this case, Mr. Mastandrea was the sole person representing Respondent who requested extensions of the closing date and negotiated the extension agreements with Mr. Tackett, who represented the County. **CP 60-83 (Mastandrea Dec.); CP 336-345 (Tackett Declarations)**. There is no evidence of a conversation relating to extension of the closing date before the REPSA expired on April 15, 2019. Instead, Respondent alleges that previous extensions of the closing date to March 2019 and then to April 15, 2019, constitute conduct on which Plaintiff relied. **CP 6 (Complaint ¶3.36)**. However, those extension agreements cannot be held to undermine the time is of essence clause that remained in the REPSA. All terms of original REPSA including time is of essence clause remain in effect where amendments extending outside closing date say other terms of original agreement remain in effect. *Preston*, 69 Wn. App. at 234. To the extent that Respondent may argue that the Planning Division's

continued processing of its land use permit applications constitutes conduct on which Respondent relied, the continued processing of land use applications after April 15, 2019, is at best conduct on the part of a division of the County with no authority to negotiate extensions and was conduct that took place after the Outside Closing Date when the REPSA expired. Authority to sell County-owned real property is governed by Pierce County Code and subject to its procedures. County Code vests authority to sell real property in the Executive. *See* PCC 2.110.060 and PCC 2.110.070. The Executive delegated authority to negotiate the REPSA and any amendments of the REPSA to the Facilities Management Department, not to the Planning Division. **CP 337 (Tackett Dec. ¶6).**

Conduct or events occurring after the Outside Closing Date cannot serve as a basis for arguing estoppel and conduct/events occurring after the closing date cannot revive an expired agreement. *Preston*, 69 Wn. App. at 234. In *Preston*, a letter that Seller sent after closing to provide information to the title company was deemed by the court as ineligible to serve as basis for estoppel. The court noted that the Seller's letter could not retroactively breathe life into a legally defunct agreement. *Id.*

3. There Was No Breach of Good Faith and Fair Dealing

The implied duty of good faith and fair dealing arises only in connection with terms agreed to by the parties. *See Badgett v. Security*

State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991); *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 662 P.2d 385 (1983); *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 843–44, 410 P.2d 33 (1966); *Matson v. Emory*, 36 Wn. App. 681, 676 P.2d 1029 (1984); *CHG Int'l., Inc. v. Robin Lee Inc.*, 35 Wn. App. 512, 667 P.2d 1127 (1983). There is no "free-floating" duty of good faith and fair dealing, unattached to an existing contract; rather, it exists only in relation to performance of a specific contract term. *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004); *see, also, Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 197, 49 P.3d 912 (2002) ("If no [specific] contractual duty exists, there is nothing that must be performed in good faith."); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738-40, 935 P.2d 628 (1997).

This obligation, while prohibiting one party from interfering with the other's performance, does not require a party to "affirmatively assist" the other's performance. *State v. Trask*, 91 Wn. App. 253, 272–73, 957 P.2d 781 (1998). Further, the duty neither obligates a party to accept a material change in the terms of its contract, nor does it "inject substantive terms into the parties' contract." *Betchard-Clayton, Inc. v. King*, 41 Wn. App. 887, 890, 707 P.2d 1361 (1985). Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement.

Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn. App. 630, 635 n. 6, 700 P.2d 338 (1985).

The County did not interfere with Respondent's performance and worked with and accommodated Respondent twice to extend the Outside Closing Date. **CP 74, 78 (Mastandrea Dec. ¶¶74, 89- 90)**. In addition, even after the REPSA expired, the County offered a path forward if Respondent delivered to the Closing Agent by 5 p.m., April 22, 2019, the purchase price and all other items necessary for the transaction to close. **CP 79-80 (Mastandrea Dec. ¶96); CP 261**. The April 18, 2019, letters explicitly state that there was no intent to revive the REPSA or extend the previous agreement's closing date. They were intended to provide a possible new path forward under potentially a new REPSA and other agreements to address issues such as secondary road access through the East Pit Parcels that were never addressed in the expired REPSA. **CP 343-344 (see Tackett Dec. ¶¶46-49)**. However, Respondent did not deliver to the Closing Agent the Purchase Price by April 22, 2019. **CP 80-81 (Mastandrea Dec. ¶¶97, 103-104); CP 344 (Tackett Dec. ¶49); CP 456 (No. 29 Plt. Ans. to PC's First RFA)**.

VI. CONCLUSION

It is undisputed that Respondent failed to deliver the Purchase Price by the "not later than" Outside Closing Date and that the REPSA

automatically terminated. There is no express condition precedent that obligated the County to provide a No Further Action letter from the Department of Ecology or governmental permit approvals. Appellant County cannot enter into a real estate contract that obligates its land use permitting authority to supply land use permit approvals for a proposed development. There was no breach of contract.

DATED this 14th day of September, 2020.

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CERTIFICATE OF SERVICE

On September 14, 2020, I hereby certify that I electronically filed the foregoing APPELLANT'S OPENING BRIEF with the Clerk of the Court where I delivered a true and accurate copy via electronic mail pursuant to the agreement of the parties to the following:

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