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NO. 54658-2-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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ELK PLAIN 63, LLC,  
Plaintiff / Respondent,

v.

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

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Appeal from the Superior Court for Pierce County  
Cause No. 19-2-08720-5

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**Elk Plain 63, LLC's Brief of Respondent**

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## **INTRODUCTION**

Elk Plain 63 LLC (“Elk Plain”) sued Pierce County (the “County”) over an agreement to purchase property from the County. The County moved for summary judgment on Elk Plain’s claims. The trial court denied the County’s motion, finding genuine issues of material fact precluded summary judgment. The County sought discretionary review. The trial court correctly determined that genuine issues of material fact preclude summary judgment. Accordingly, the trial court’s order denying the County’s motion for summary judgment should be affirmed.

The County raised an issue regarding ultra vires acts in its reply on summary judgment below. The trial court appears not to have evaluated or ruled on that issue. The County raises that again here. Because it was not raised below, and because Elk Plain’s claims do not involve or require ultra vires acts by the County, the trial court’s order denying the County’s motion for summary judgment should also be affirmed.

## **RESPONSE TO STATEMENT OF ISSUES**

Elk Plain respectfully disagrees with the County’s framing of the issues as incomplete and oversimplified. Rather than address them, Elk Plain suggests the following issues are raised by the County’s appeal of the trial court’s denial of the County’s motion for summary judgment below (the only decision addressed in this interlocutory, discretionary review):

1. Should this Court address the County’s argument regarding alleged ultra vires acts when the County did not raise ultra vires as an

affirmative defense or address it in its motion for summary judgment, raising it for the first time in its reply on summary judgment below?

2. Does the defense of ultra vires shield a governmental entity such as the County from Washington law regarding the duty of good faith and fair dealing implied in all contracts, shield the County from Washington law regarding the ability of a party to a contract to benefit from its own delay in performance, or prohibit the County from modifying contracts it enters into?

3. When witnesses provide conflicting testimony on material issues, is summary judgment appropriate?

4. When there are questions of fact regarding what promises were expressed in a contract, what promises were implied in a contract, and what those promises mean, is summary judgment appropriate?

5. Can post-contract conduct of the parties to a contract aid in driving the intent of the parties as to the contract's terms?

6. Whether there were genuine issues of material fact precluding summary judgment as to:

- a) The County's waiver of the "time of the essence" clause;
- b) Whether the County is estopped from enforcing the "time of the essence" clause;
- c) Whether Elk Plain agreed to waive satisfaction of conditions by the County;
- d) Whether the parties remained bound by the contract

past its last written extended closing date based on their statements and conduct;

e) Whether the “as is” clause in the contract nullifies other conditions in the contract;

f) Whether the County through its conduct ratified the contract after its last written extended closing date;

g) Whether the County breached the duty of good faith and fair dealing implied in all contracts;

h) Elk Plain’s alternative claim for relief for unjust enrichment;

i) Elk Plain’s alternative claim for relief for promissory estoppel;

j) Elk Plain’s alternative claim for relief for quantum meruit.

## **COUNTER-STATEMENT OF THE CASE**

### **A. Formation and Purpose of Elk Plain 63 LLC.**

Plaintiff Elk Plain 63 LLC is a single-asset LLC, whose sole purpose is to purchase and develop the land located at 23101 Mountain Highway East, Spanaway, Washington. Prior to Plaintiff’s formation in 2018, its now-managing member, Phil Mitchell, was interested in purchasing and developing real estate in Pierce County. In July 2017, Mitchell hired and began compensating a local self-professed real estate developer, John Mastandrea, to search for real estate opportunities on his behalf. Mitchell assumed that any and all negotiations between

Mastandrea and the County related to real estate were on behalf of him. CP 719-721. Mitchell expressed to Mastandrea that, as soon as he found a property that was suitable for potential development, the two would form an LLC and for that purpose. CP 720, ¶6.

In 2017, Mastandrea presented to Mitchell three business opportunities: the Tacoma News Tribune (“TNT”) Building, the UW Tacoma Student Housing Building, and the Elk Plain Property – the subject of this litigation. Of the three investment opportunities, Mastandrea recommended the Elk Plain Property, located at 23101 Mountain Highway East, Spanaway, Washington (the “Property”), because of some potential environmental issues with the other properties. Mitchell agreed to pursue the possible investment opportunity. Mastandrea claimed he had a connection in Pierce County, which could be helpful in a land transaction. Due to Mastandrea’s weak financial position, Mitchell was to fund the entire transaction (including Mastandrea’s salary) whereas Mastandrea was to work with the County to obtain favorable contract terms. CP 720, ¶¶6-8.

Mitchell always understood that Mastandrea’s execution of the February 20, 2018 REPSA was on behalf of a to-be-formed entity made up of Mitchell and Mastandrea. Mastandrea and Mitchell had numerous conversations about the joint venture, which was the purpose of their business relationship. At that time, and at all relevant times, it was agreed between the two that any and all financial backing necessary for earnest money, engineering, purchase price, and other costs would be provided by

Mitchell. The Elk Plain Real Estate Purchase and Sale Agreement (the “REPSA”) signed by John Mastandrea on February 20, 2018 was then assigned to Plaintiff in July 2018. CP 721, ¶¶10-13.

**B. The Transaction.**

The Property is a 63-acre parcel located in Spanaway, Washington with various environmental clean-up issues. Prior to the REPSA’s execution, the County had taken steps to address the cleanup by enrolling in the Washington State Department of Ecology’s Voluntary Cleanup Program. Elk Plain intended to develop the Property, and thus was uninterested in purchasing the Property without certain contingencies. Specifically, Plaintiff had no interest in purchasing the Property without the promise of an environmental “No Further Action” (“NFA”) Letter. Similarly, Elk Plain insisted on a “Government Approval” Contingency within the REPSA. The Property would have been a useless investment absent these promises. It was always understood by Mitchell that, before it paid the purchase price of \$7.5 million, the County was required to produce the NFA Letter, as described in the REPSA’s Recitals, and the necessary Government Approvals, described in Section 8 of the REPSA. CP 721-722, ¶¶13-19.

Contrary to what he now claims, Mastandrea discussed the required contingencies with Mitchell throughout the entirety of the transaction. CP 720-725, ¶¶9, 19-21, 30. On numerous occasions, Mastandrea expressed to Mitchell that the County would wait for the Purchase Price until it had provided the Government Approvals and the

NFA Letter; he stated that the County would continue to extend the “Outside Closing Date” as many times as it took to do so. CP 722, ¶20. Mastandrea’s statement that he never assumed that the REPSA included the County’s performance included providing Governmental Approvals is false.

The REPSA was executed on February 20, 2018 by the County and Mastandrea in contemplation of Elk Plain. The particular transaction at issue was unique because the County was both the “Seller,” and the issuer of most of the “Government Approvals.” It was always understood between the parties that the County would perform certain cleanup obligations, as reflected in the Recitals of the REPSA, before any performance was due by Plaintiff. The Recitals state:

WHEREAS Seller has entered Ecology’s Voluntary Cleanup Program (“VCP”) for the Subject Property under VCP Project No. SW1505 and has hired an environmental cleanup consulting firm to follow up on a sampling and analysis plan for the purpose of obtaining a No Further Action Letter from Ecology; and

CP 85. Indeed, internal correspondence within the County evidences the same. CP 637-639; 640-642.

Similarly, it was always understood between the parties that the Government Approvals, explained in Section 8 of the REPSA, referenced work that was to be completed by the County prior to Elk Plain’s obligation to pay:

8. Development; Governmental Approvals. On or before THIRTY (30)

calendar days after delivery of the Notice of Satisfaction of Due Diligence Contingency, Purchaser shall make written application to all governmental agencies and authorities having jurisdiction for such permits and approvals necessary to construct the Development (collectively “Governmental Approvals”) and shall diligently pursue acquisition thereof. If Purchaser’s application for the requisite Governmental Approvals are approved, Purchaser shall within TEN (10) business days thereafter notify Seller in writing of his intention to close the transaction contemplated by this Agreement (“Notice to Proceed”), in which even the Parties shall proceed to Closing as provided in Section 17 below. If Purchaser’s application for the requisite Governmental Approvals is disapproved or made subject to conditions unacceptable to Purchaser in his sole and absolute judgment and discretion, Purchaser may elect to terminate this Agreement, in which even Closing Agent shall refund the Earnest Money to Purchaser and neither Party shall have any further rights or remedies under this Agreement except those that have accrued or that expressly survive termination hereof.

CP 89. In this section, “government agencies” referred predominantly to the County, given that the Property was in Pierce County and the County had jurisdiction over the Property. CP 722, ¶19. It was always understood between the parties that Closing would be extended until the County followed through on its obligations in Section 8. CP 722, ¶20.

The REPSA’s original Outside Closing Date was December 31, 2018. Mastandrea relayed to Mitchell multiple times that the County would extend the Outside Closing Date as many times as necessary to allow for the County’s performance of its obligations to obtain the NFA Letter and provide Governmental Approvals. Mastandrea stated that,

because he had friends at the County, he could obtain favorable extensions. CP 722, ¶20. Consistent with Mastandrea’s evaluation, the County would later extend the “Outside Closing Date” three times, after each previous date passed without the NFA Letter or Governmental Approvals from the County.

As December 31, 2018 neared, it became clear that the County would not timely provide the NFA Letter or Governmental Approvals. December 31, 2018 passed, and the parties continued to work on the Approvals without extending the REPSA in writing. A written extension was not executed until January 15, 2019, extending the “Outside Closing Date” to March 1, 2019. Again, this new closing date came and went without any objection by the parties to the REPSA. It was not until April 8, 2019 that the parties put another “Outside Closing Date” extension into writing, despite working on the Approvals and NFA Letter absent a writing in the interim. The third “Outside Closing Date” was set for April 15, 2019. On that day, the County had still not provided the Approvals and NFA Letter. Plaintiff was never made aware of the County’s unwillingness to extend the closing date again – to the contrary, Mastandrea reassured Mitchell that the County would provide another extension, because it could not perform its duties under the REPSA. CP 723-725, ¶¶25-34.

The reason that Closing did not occur on December 31, 2018, March 1, 2019, April 15, 2019, or April 22, 2019, is due entirely to the County’s failure to obtain the NFA Letter and provide Governmental Approvals, not any refusal of loan terms by Elk Plain. CP 724-727, ¶¶26-

43. In fact, an email from Mastandrea on April 19, 2018, let the County know that “we have our financing in place with TREZ Capital.” CP 707. Contrary to Mastandrea’s statements, Mitchell was never even aware of Juniper Capital’s Loan terms, let alone refused the same to prevent closing. CP 724, ¶26.

The County had always treated its NFA Letter and Government Approvals obligations as a prerequisite to closing. It was only upon April 22, 2019, that the County stated that it no longer considered the REPSA live. Consistent with Mastandrea’s statements and the County’s past practice of extending the closing date (after the closing date passed), Elk Plain continued to wait for the County to meet its contractual obligations before proceeding to closing. Elk Plain, through Mastandrea, sent an email to the County on April 22, 2019 stating that the REPSA had not expired, and confirming the parties were still in contract under the REPSA. CP 726-727, ¶41. The County did not respond. Instead, the County continued to process Plaintiff’s pending permits, and provided a letter outlining the “Path Forward.” CP 801-084. The County has since taken the position that the REPSA expired on April 22, 2019, despite clear manifestations and actions to the contrary. To this day, the County continues to process Plaintiff’s permits and Project Applications necessary for the “Government Approvals.” CP 727, ¶44; CP 839-840 ¶¶9-11.

Elk Plain filed its complaint on June 14, 2019, requesting declaratory judgment and praying for relief for breach of contract and breach of the duty of good faith and fair dealing. In the alternative, Elk

Plain plead unjust enrichment, promissory estoppel, and quantum meruit for the value of its investment in the Property.

**C. Facts discovered after litigation commenced.**

After litigation commenced, Elk Plain engaged in discovery with the County, submitted requests to under the Public Records Act, and issued subpoenas to third parties. Through this, Elk Plain discovered more about the relationship between County and Mastandrea and about Mastandrea's actions contrary to Elk Plain's interests. It became clear that both the County and Mastandrea were working together with other potential buyers to sell the Property. The County intended to provide new purchasers with the benefit of Elk Plain's investment, including engineering, permit costs, and project design totaling over \$1 million. The County had anticipated breaching the REPSA, planned to provide the benefits of Mitchell's investment to another purchaser, and is now attempting to avoid contractual obligations with Plaintiff. CP 546-558; 601-630; 703-705. Documents show that Mastandrea stands to make a significant amount of money in partnership with Al Monjazebe ("Monjazebe"), the principal of South Puget Sound Properties, Inc. ("SPSP"), by selling the Property to Monjazebe inclusive of Elk Plain's investment. CP 546-558, 559-560, 561-594, 595-597, 598-600. Notably, Monjazebe's Purchase and Sale Agreement with the County does not include the County's NFA Requirement. CP 601-629.

After this litigation commenced, Elk Plain also learned of the alleged November 1, 2018 "waiver" of Section 8 Government Approvals

Mastandrea purportedly executed on behalf of Elk Plain. CP 729-730, ¶60. Despite his claims to the contrary, Mastandrea never told Mitchell about this alleged “waiver.” CP 729-730, ¶60. It appears this “waiver” occurred because Mastandrea and the County were already involved with Monjazebe and believed they could be paid quicker under Monjazebe’s transaction. Indeed, an October 31, 2018 email from Mastandrea to Monjazebe outlines the “terms” of the two’s partnership, while only one day later the November 1, 2018 “waiver” occurred, CP 630-631. Elk Plain also discovered that on November 2, 2018, the day after the alleged “waiver,” Pierce County employee, Tackett, created a list of Monjazebe’s assets. CP 541, ¶12; 632-636. Tackett was overseeing the transaction on behalf of the County and Mastandrea describes Tackett as a “dear friend.” CP 677-679, 680-682. Based on this, it appears Mastandrea attempted to “waive” Elk Plain’s most valuable REPSA provision immediately after striking a deal with Monjazebe; Tackett then created a list of all of Monjazebe’s assets; and Monjazebe would eventually become a front-runner to purchase the Property.

Documents also show that prior to the April “Outside Closing Date,” the County determined that it could not afford to obtain the NFA Letter or provide Government Approvals. CP 637-649, 650, 642. The County then began drafting purchase and sale agreements for the Property with other buyers — without the NFA language. CP 601-629. This suggests that the County recognized that it could no longer perform under the REPSA with Elk Plain, marketed the Property with Mastandrea

(including Elk Plain's investments) to another purchaser who could close without a lender, removed the NFA and Government Approval provisions, and attempted to avoid the REPSA with Elk Plain. In the process, the County worked with Mastandrea, Monjazebe, and others to hide Mastandrea's involvement with Monjazebe's transaction. CP 561-594.

#### **D. Summary Judgment Proceedings**

The County moved for summary judgment. Of particular importance now, the County did not make any reference to the defense of ultra vires, but instead moved on other grounds. Only in its reply regarding its motion did the County raise the issue of ultra vires.

The trial court held a hearing on the County's motion and denied it. The trial court explained that Elk Plain had raised multiple questions of fact, noting that the trial court stopped counting at about eight. The trial court identified some:

Is the contract an AS-IS contract? Was there actually an agreement about how the Outside Closing Date was to be interpreted? What did "practicable" mean to the parties regarding closing and any language in regards to waiver? Whether the parties intended to waive or enforce the "time is of the essence" clause."

VRP 31:17-22. The trial court went on:

There was an issue raised in regards to the County allegedly fabricating reasons to justify the REPSA termination was in bad faith, and there are a lot of allegations being made regarding bad faith on the part of the County and Mr. Mastandrea.

VRP 31:23-32:2. The trial court concluded:

All that's needed to overcome the summary judgment motion is one material issue of fact; it doesn't have to be a whole cart load, and the nonmoving party has raised a few, so I'm going to deny the motion.

VRP 32:9-12.

The County moved for reconsideration and for a certification to this Court. The trial court denied the motion for reconsideration but granted the request for certification. The trial court did not, however, identify what issue was being certified, instead stating that the “breach of contract, breach of good faith and fair dealing, unjust enrichment and quantum meruit and promissory estoppel claims are certified for discretionary review.” CP 834. The County’s motion for discretionary review by this Court was granted.

## **ARGUMENT**

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

When the Court of Appeals reviews an order on summary judgment, it performs the same inquiry as the trial court. The standard of review is de novo. Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The Court considers all facts in the light most favorable to the nonmoving party. *TransAlta Centralia Generation LLC v Sicklesteel Cranes, Inc.*, 134 Wn.App. 819, 825, 142 P.3d 209, 212 (2006). The Court considers all reasonable inferences in the light most favorable to the nonmoving party. *Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189 Wn.2d 516, 526, 404 P.3d 464, 470

(2017). The nonmoving party here is Elk Plain, so all facts and all reasonable inferences are to be considered in the light most favorable to Elk Plain.

This appeal turns in part on interpretation of a contract, and that interpretation depends in part on extrinsic evidence such as the conduct of the parties after the contract was entered into. As this Court has explained, “interpretation of a contract provision is a question of law appropriate for summary judgment only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *TransAlta*, 134 Wn.App. at 826-826.

**B. The County’s Ultra Vires Argument Is an Affirmative Defense It Did Not Plead or Brief in Its Motion for Summary Judgment**

The County asserts on appeal that it is not bound to promises it made to obtain an NFA and provide Governmental Approvals because doing so would require the County to act ultra vires — outside its legal authority to act. Washington Courts have long held that avoiding a contractual obligation claimed to be ultra vires is an affirmative defense. *Rutcosky v. Tracy*, 89 Wn.2d 606, 611, 574 P.2d 382, 385 (1978) (noting that ultra vires “is an affirmative defense to be pleaded as required by CR 8(c)” and declining to consider it on appeal because it was not pleaded or raised until a motion for reconsideration); *Impero v. Whatcom County*, 71 Wn.2d 438, 446, 430 P.2d 173, 179 (1967) (the defense of ultra vires is an affirmative defense that must be raised at the trial level); *Yakima Fruit Growers’ Ass’n v. Hall*, 180 Wn. 365, 367, 40 P.2d 123, 124 (1935) (“It is

universally held that ultra vires is an affirmative defense unless it is apparent on the face of the pleading.”); *see also Chappell v. Franklin Pierce Sch. Dist.* No. 402, 71 Wn.2d 17, 20 n.2, 426 P.2d 471, 473 (1967). The County did not assert the affirmative defense of ultra vires in its answer to the complaint. CP 56-67. In its motion for summary judgment, the County did not mention this affirmative defense. CP 316-336. Instead, the County waited until its reply on summary judgment to raise this issue for the first time. CP 817-828. It has never moved to amend its answer to assert this affirmative defense. Pierce County deprived Elk Plain of the opportunity to brief the issue to the trial court, and deprived the trial court of the benefit of written arguments from both sides on the issue.

The Washington Supreme Court has held that when ultra vires is not raised as an affirmative defense, arguments about it are not entertained on appeal. *Rutcosky*, 89 Wn.2d at 611. This Court should not evaluate or pass on the County’s arguments that the promises it made were ultra vires.

### **C. The Promises the County Made Were Not Ultra Vires**

If this Court evaluates the County’s new argument, it fails. The County sets up a classic strawman in an effort to avoid its promises on the grounds that it lacked the legal authority to make them. The County incorrectly claims Elk Plain claims the REPSA “obligates [the County’s] land use permitting authority to supply governmental approvals / land use permit approvals” and that the REPSA “contractually [binds] the County to indefinitely extend its REPSA until the land use entitlements were provided.” County’s Brief at 20, 22. The County then goes into great

lengths in an effort to explain that such promises by the County would violate various statutes governing governmental entities.

But Elk Plain did not make those claims. Rather, Elk Plain argued that: a) the County warranted that it had entered Ecology's VSP for the Property and engaged a firm to obtain an NFA Letter, such that the production of such an NFA letter was a condition precedent to closing the purchase (CP 002, ¶¶3.5, 3.6); b) under the REPSA, Elk Plain was to obtain certain Governmental Approvals that could *only* be obtained from the County because the Property is located within Pierce County (CP 002-003, ¶3.8); that c) the County, as a party to a contract, is obligated by the same duties of good faith and fair dealing as all parties to contracts, such that the County could not benefit from its own nonperformance of express and reasonably implied terms under the REPSA (such as choosing to not further pursue an NFA Letter or unreasonably withholding Governmental Approvals).

The express and implied terms of the REPSA do not require the County to act ultra vires, nor does the County argue as such. In particular, the County does not argue that it is ultra vires for the County, as both a governmental entity and a landowner, to obtain or seek to obtain an NFA Letter. Nor does the County argue that it is ultra vires for the County, as a party to a contract, to act consistent with the duty of good faith and fair dealing implied in all contracts.

Instead, the County appears to argue that it is immune from Washington law governing contracts under tortured, and incorrect,

interpretations of the REPSA it entered into here. For example, Elk Plain has not argued that the *terms* of the REPSA require the County to hold open the closing date indefinitely. Rather, as discussed in more detail below, Elk Plain has argued that, consistent with *Langston v. Huffacker*, 36 Wn.App. 779, 679 P.2d 1265 (1984), the County may not declare a contract to be no longer valid because it was not performed by a date in the contract when the delay is due to actions solely in the County's control. Elk Plain has also argued that the County (like others who enter into agreements) may modify terms in a written agreement, consistent with Washington law. As another example, Elk Plain has not argued that the County is obligated to bypass or ignore its statutory land-use governance obligations and provide Governmental Approvals regardless of that process. Rather, and as discussed in more detail below, Elk Plain has argued that, consistent with the duty of good faith and fair dealing implied in all contracts (including those to which the County is a party), the County may not slow or impede its land-use governance processes simply because it found another buyer willing to pay more than the amount the County and Elk Plain agreed to for the Property.

The express and implied terms of the REPSA do not obligate the County to act *ultra vires*, nor do those terms or Elk Plain even suggest that. The County entered into an agreement. The terms of the agreement and the County's conduct provide clarity as to what some of the terms of the agreement mean. The County could, and did, modify some of the terms of the agreement, sometimes in writing, and sometimes not. The County was,

and is, obligated to perform its obligations that arise under that agreement, that are implied by that agreement, and consistent with Washington law governing contracts. Doing so does not require ultra vires acts.

**D. The Impact of Conflicting Testimony**

The County relies on the Declaration of John Mastandrea for many of the factual assertions it makes, and does so heavily. By the time Mastandrea submitted the declaration the County relies on, it had become clear that Mastandrea had not been acting in Elk Plain's interest when he purported to act for Elk Plain, and that the County was well aware of this. Thus, the veracity of Mastandrea's statements are questionable.

Regardless, on a number of key issues, Mastandrea's statements conflict with the testimony of Philip Mitchell, who is now the only member of Elk Plain. These conflicting statements demonstrate that there are questions of material fact precluding summary judgment. These include, for example:

Mastandrea, who had negotiated the REPSA with the County, told Mitchell that the REPSA described the County's obligations to obtain the NFA Letter and provide Governmental Approvals, such that both were conditions to closing. CP 722, ¶¶18-19.

Mastandrea informed Mitchell that the County would extend the Outside Closing Date under the REPSA so that the County could obtain the NFA Letter and provide Governmental Approvals. CP 722-25, ¶¶20-21, 24, 27, 28, 30, 34.

Each of these is key in some way to the County's arguments.

Where there is conflicting testimony from witnesses, summary judgment is not available.

**E. There Are Questions of Fact Regarding the Promises the County Made**

Under the REPSA, the County promised to obtain the NFA Letter and the Government Approvals before any performance was due by Plaintiff. A breach of contract claim arises out of one party's failure to perform a legally enforceable<sup>1</sup> promise. WPI 301.01 Comment (quoting Restatement (Second) of Contracts § 1 (1981)). "A promise is an undertaking, however expressed, either that something shall happen, or shall not happen, in the future." *Hansen v. Virginia Mason Medical Center*, 113 Wn.App. 199, 207, 53 P.3d 60, 64 (2002) (applying contract common law definition to a medical malpractice case). A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct. Restatement (Second) of Contracts, § 2(1).

Under the language in the REPSA, the County promised Plaintiff that the County would obtain the NFA Letter and provide the Government Approvals prior to Closing. CP 772, 776. The obligation to obtain the NFA Letter as a condition to closing is evidenced by recital acknowledging that the County was in the process of doing so. CP 772. The County's own internal correspondence shows the same. CP 637-639, 640-642. Section 8 of the REPSA described Elk Plain's obligation to obtain necessary

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<sup>1</sup> "Legally enforceable" refers to mutual assent and consideration. WPI 301.01. These elements are not in issue.

Governmental Approvals, but given that the Property is situated in Pierce County, it is clear this referred primarily to approvals the County was in the sole position to provide. The parties conducted themselves as if the County were in charge of obtaining the NFA Letter and providing the Government Approvals, for example: the County continued to extend the “Outside Closing Date” after its passing, after it did not provide the NFA Letter or Government Approvals; Mastandrea reported that the County stated it would continue to extend the “Outside Closing Date” if it did not produce the NFA Letter or the Approvals; the County recognized that it could not obtain the “expected” NFA Letter; and the parties continued to cooperate in permit processing. CP 840-841, ¶2.<sup>2</sup> CP 722-25, ¶¶20-21, 24, 27, 28, 30, 34; CP 637-639; CP 700-702, 703-705. All this demonstrates that the County therefore took on the contractual duties to obtain the NFA Letter and provide the required Governmental Approvals as conditions to further performance of the REPSA. At best, and consistent with the trial court’s denial of summary judgment, there are questions of fact regarding the County’s contractual obligations. (It is undisputed that the County did not obtain the NFA Letter or provide the Government Approvals.)

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<sup>2</sup> At the trial court, Elk Plain relied on the Declaration of Matt Weber filed in a different motion in its opposition to the County’s motion for summary judgment. On the same day this brief is being filed, Elk Plain is submitting a Designation of Clerk’s Papers to identify that declaration. It is 4 pages long, and it is the only additional document Elk Plain is designating. Rather than seek additional time to submit this brief, Elk Plain will refer to this declaration by the CP designation the trial court is expected to give this declaration: CP 839-842. A copy of the declaration, with Elk Plain’s numbering along those lines, is included in the Appendix to this brief.

**F. The Effect of the County's Failure to Comply with Condition Precedents on Elk Plain's Right to Sue for Breach of Contract**

The County argues Elk Plain cannot sue for breach of the REPSA because Elk Plain did not pay the purchase price prior to the closing date, relying on *Willener v. Sweeting*. But the principle in *Willener* only applies to *concurrent* duties – not duties that must occur prior to the other party's performance. *Willener v. Sweeting*, 107 Wn.2d 388, 395, 730 P.2d 45, 50 (1986) (“[W]here performance of one party is a condition precedent to a right of action on performance of another, a party is not required to do a useless act and tender performance where the other party cannot or will not perform that party's part of the agreement.”). The County obtaining an NFA Letter and providing Government Approvals were conditions precedent to Elk Plain's payment of the purchase price.

An express condition is one that is made by agreement of the parties; it may be in the actual agreement, or implied in fact by the conduct of the parties. *Ross v. Harding*, 64 Wn.2d 231, 236-37 391 P.2d 526, 531 (1964). A reading of the REPSA makes it clear that the County obtaining an NFA Letter and providing the necessary Government Approvals are conditions precedent to Elk Plain's obligation to pay the purchase price to complete the transaction. CP 780, §16.1.2. In addition, both parties treated the NFA Letter and Government Approvals as conditions precedent, to be performed by the County, prior to any performance by Elk Plain. For example, on April 3, 2019, mere weeks before the County cancelled the REPSA, Karl Imlig of the County wrote:

“We will not be able to get a NFA as expected...” CP 637-639. The County also recognized that the NFA Letter and Government Approvals needed to be completed before closing, and worked to do so. CP 637-639, CP 700-702, CP 703-705, CP 713-714. Certainly the County treated these Approvals as its contractual duty, seeing as it extended the “Outside Closing Date” three times. Correspondingly, Elk Plain conducted itself as if the County’s duties included providing both the NFA Letter and the necessary Governmental Approvals. In fact, Mastandrea specifically told Mitchell that the County would continue to extend the REPSA until *the County* had processed and provided all Approvals and the NFA Letter. CP 722-25, ¶¶20-21, 24, 27, 28, 30, 34. The parties’ respective conduct demonstrates that there are at least questions of fact about whether the County obtaining the NFA Letter and providing the necessary Governmental Approvals were express conditions precedent to Elk Plain’s obligation to pay the purchase price.

When a party does not comply with a condition precedent in a real-estate contract and does so in bad faith, the non-breaching party is entitled to specific performance; even if the closing date passes without either party performing, and the contract allegedly “expired.” *Langston v. Huffacker*, 36 Wn.App. 779, 679 P.2d 1265 (1984). In *Langston*, the court ordered specific performance to an aggrieved buyer when the seller failed to “clear title” – one of the conditions required before closing. *Id.* Because the seller could have done so with due diligence, the buyer was entitled to specific performance. *Id.* at 789, 679 P.2d at 1271. The same is true here.

The County, acting as the Seller, had the obligation to obtain the NFA Letter, and the governmental entity with the sole power to provide most of the necessary Governmental Approvals. It failed to obtain the NFA Letter or provide Governmental Approvals. But it also acted in bad faith. At the last moment, the County determined that it could not fund the additional environmental cleanup before Closing necessary to obtain an NFA Letter and to provide Government Approvals. CP 637-639. The County never reached out to Elk Plain to inform it of its last-minute inability to perform. CP 729, ¶49. Had the County done so, given the time and money invested by Elk Plain, this issue could have been resolved through negotiation. Rather than act in good faith by being open and forthright about the issues, the County fabricated excuses to justify terminating the contract with Elk Plain, namely the incorrect assertion that Elk Plain allegedly could not secure financing. This assertion is simply untrue, and the County was aware of that. Mastandrea himself even sent an email to Tackett on April 19, 2019, stating: “[W]e have our financing in place with TREZ Capital.” CP 706-708. Mitchell and Elk Plain never refused any loan terms. CP 724, ¶26.

Yet at the same time the County was creating reasons to avoid its obligations and attempt to get out of the REPSA, it actively sought out other buyers. CP 546-558, 559-560, 703-705. In doing so, the County removed the NFA Letter and Governmental Approval language from the new proposed purchase and sale contracts for the Property. *Id.*, Ex. 6. Moreover, the County used Elk Plain’s efforts (paid for by Elk Plain and

Mitchell) as selling points for other potential buyers: when the County re-listed the Property in mid-2019, it increased the price by \$500,000 and told potential buyers that they could use (and therefore benefit from) the investments made by Mitchell. CP 715-716, 717-718. There is clear evidence that the County realized it could not perform under the REPSA with Elk Plain and wanted to create an opportunity to sell to a new buyer on more favorable terms. The County's reliance on assertions it knew were not correct to justify terminating the REPSA while offering the Property to other buyers on terms more favorable to the County (while using and benefitting from Elk Plain's efforts and expense) show the County acted in bad faith. At minimum, there are questions of fact regarding the County's bad faith. This is consistent with the trial court's denial of summary judgment.

**G. The Role of the Parties' Conduct**

Washington's "context rule" provides that subsequent acts of the parties give meaning to contract terms, even when they are unambiguous. *Berg v. Hudesman*, 115 Wn.2d 657, 663-669, 801 P.2d 222, 226-230 (1990) (holding that "extrinsic evidence is admissible as to the entire circumstances" to provide meaning to contractual terms). Therefore, to properly analyze the REPSA's "Outside Closing Date," the Court must consider the full context of the transaction and conduct of the parties.

Further, under the parol evidence rule, extrinsic evidence is admissible to show parties' intent in contracting. The existence of a boilerplate "merger" clause is not conclusive in establishing whether a

contract is integrated, especially when the parties relied on extrinsic agreements. *King v. Rice*, 146 Wn.App 662, 669-670, 191 P.3d 946, 950-951 (2008). Whether a contract is fully executed is a question of fact. *Id.* Here, the parties clearly relied upon agreements outside of the REPSA. The REPSA was not fully integrated.

These issues are important in considering whether and to what extent the parties intended by the “time of the essence” clause, whether and to what extent they intended that clause to control, and related issues.

**H. There Are Questions of Fact as to Whether the County Waived Enforcement of the “Time of the Essence” Clause**

The County claims Elk Plain lost the right to perform after April 22, 2019 because of the “time is of the essence” clause. This language is boilerplate and was never honored by the parties during the ongoing performance of the contract. A “time is of the essence” will not be enforceable if the party invoking it has waived it, or is estopped from including it. *Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App. 227, 232-236, 848 P.2d 1268, 1271-1273 (1993). A party waives a contractual provision when it takes an unequivocal action and that action is inconsistent with any intent contrary. *Id.* The parties extended the REPSA’s closing date three times; each time the extension was agreed to after the previous closing date had passed. The parties extended the first December 31 “Outside Closing Date” on January 15, 2019, more than two weeks after the expiration of that date. The parties continued to work on permitting between December 31 and January 15 before they reached a

written agreement to extend the closing date. Almost three months later, the parties extended the March 1 “Outside Closing Date” to April 15, 2019; this extension was not executed until April 8, 2019, nearly a month after the extended closing date of March 1. And on a third occasion, the April 15, 2019 extended closing date was extended after it had passed: on April 18, 2019 it was extended to April 22, 2019. The fact that the parties repeatedly acted *after* the expiration of a closing date demonstrates that the parties’ intent: that time was really not of the essence, and that passing of the original Outside Closing Date or any extension of it did not mark the termination of the REPSA. At minimum, there are questions of fact as to whether the parties intended to waive or enforce the “time is of the essence” clause.

**I. There Are Questions of Fact as to Whether the County Is Estopped from Enforcing the “Time of the Essence” Clause**

A “time is of the essence” clause will not be enforced if the party seeking to enforce it is estopped from doing so. *Mid-Town*, 69 Wn.App. at 1273. Estoppel has three elements: (i) an admission, statement or act inconsistent with the claim afterwards asserted; (ii) action by the other party on faith of such statement, act, or admission; and (iii) injury resulting therein. *Id.* After the supposed “expiration” of the last extended closing date, the County continued to process Elk Plain’s permits for the Property. Elk Plain reasonably relied upon this conduct, based on the past actions of the parties – the three extensions of the “Outside Closing Date” after its passing and actions taken during the periods after the expiration of

a closing date and before it was extended. In fact, an agent of the County told Elk Plain's engineer that he had been specifically told to continue processing Plaintiff's permits. CP 839-840, ¶9. In reliance on the County's past conduct, bolstered by the County's statements to Elk Plain's engineer that he had been instructed to continue, Elk Plain continued to invest in the Property. At minimum, there are questions of fact as to whether the County is estopped from enforcing the "time is of the essence" clause.

**J. There Are Questions of Fact as to Whether Elk Plain Agreed to the Purported "Waiver" of Section 8 of the REPSA**

The County argues Elk Plain waived the County's obligations in Section 8 of the REPSA under a November 1, 2018 document purporting to do so. There are questions about whether this "waiver" binds Elk Plain, whether and when it was "practicable" to close, and whether enforcement of this purported "waiver" was later waived by the County through its actions.

The alleged "waiver" on November 1 names Elk Plain 62, LLC. Upon information and belief, no such entity exists. When Mastandrea executed this agreement, it is unclear whether he was doing so on behalf of Plaintiff. Despite his statements to the contrary, Mastandrea never told Mitchell about any alleged "waiver." Moreover, Mastandrea's actions at the same time that were clearly contrary to Elk Plain's interest, and the County's knowledge of those activities, raise questions about whether the County had reason to believe Mastandrea was acting on behalf of Elk Plain (Elk Plain 63 LLC) in executing this purported "waiver." These are

questions of fact that preclude summary judgment.

In addition, the purported “waiver” included language that allowed the Plaintiff to close when “practicable.” This purported “waiver” was drafted and reviewed by the County’s counsel; and the term “practicable” was the County’s language. (It is important to note that the County crafted this language, as demonstrated by its change from “practical” to “practicable.” Inferences from and ambiguities about “practicable” are therefore construed against the County. *McKasson v. Johnson*, 178 Wn.App. 422, 429-430, 315 P.3d 1138, 1142 (2013).) It was not practicable to close until after the NFA Letter and the Government Approvals were executed. CP 722, ¶17. Certainly, what was meant by “practicable” is informed by the parties’ course of conduct after November 1, which included Elk Plain continuing to seek Governmental Approvals from the County. If the Government Approvals condition had been waived, the parties would not have extended the “Outside Closing Date” three times to allow the County to provide them. Therefore, there are questions of fact as to what was intended by the term “practicable.”

Even if there were no questions about the enforceability of the purported “waiver” and the meaning of “practicable,” the County has waived its enforcement of this purported waiver. A party waives a contractual provision when it takes an unequivocal action, and that action is inconsistent with any intention other than to waive. *Mid-Town*, at 1273. The County continued to process Plaintiff’s permits after November 1, 2018. E.g., CP 839-841. Had the waiver been enforceable, there would be

no reason to continue work with the permits (which were part of the necessary Governmental Approvals) after November 1, 2018 and even after April 22, 2019. At minimum, there are questions of fact as to whether the County waived the right to enforce this purported “waiver.”

**K. There Are Questions of Fact as to Whether the County and Elk Plain Agreed to Proceed with the Transaction After the Last Written Extension of the “Outside Closing Date” of April 22, 2019**

Throughout the course of the parties’ relationship, Mastandrea expressed to Mitchell numerous times that the County would extend the Closing Date until it obtained the NFA Letter and provided the necessary Government Approvals. Mastandrea told Mitchell that if the County could not fulfill those two obligations, it would not force the closing. Consistent with Mastandrea’s statements to Mitchell, the County extended the “Outside Closing Date” three times in writing when it could not timely provide the NFA Letter and Government Approvals. Furthermore, all extensions occurred after each newly-established “Outside Closing Date.” The County even recognized that necessary meetings and approvals must occur before Closing. CP 700-703, 703-705. In addition, it did not respond to Elk Plain’s April 22, 2019 email, stating that the parties were still in contract. It also had drafted a Letter of Intent for the East Pit on 4/15 – the third “Outside Closing Date” evidencing an intent to remain in contract with Elk Plain. CP 686-688. The County even internally discussed extending the “Outside Closing Date” on April 24 (after April 19, 2019). CP 680-682. In short, the parties never treated the “Outside Closing Date”

as a hard-and-fast date, and the County's failure to respond to Elk Plain's assertion that the parties were still under contract and the County's actions after that assertion consistent with that assertion evidence that the parties agreed to continue with the transaction after April 19, 2019. At minimum, there are questions of fact as to whether the parties agreed to do so.

The County suggests that any modification is not enforceable for consideration issues. A contract may be modified in writing, orally, or by conduct, based on: (1) mutual manifestation of intent of parties to modify; (2) consideration; and (3) a clear mutual modification. W.P.I. 301.07. The continued extension of the Closing Date, coupled with the continued processing of Plaintiff's permits, constitutes a clear manifestation of intent to modify the "Outside Closing Date" to a "Floating Outside Closing Date." Consideration is unnecessary under the Restatement (Second) of Contracts when the contract is executory in nature and either: (a) the modification is fair and equitable in view of the circumstances, not anticipated; or (b) to the extent that justice requires enforcement based on a material change in position on reliance of the promise. Restatement (Second) of Contracts, § 89 (1981). The REPSA is executory, and both (a) and (b) apply. Modification of the REPSA is fair and equitable given that the County controls the timing and the permit approvals. Further, Elk Plain invested money in reliance on the County's reassurances, conduct, and continued processing of permits/applications. CP 721, ¶11.

The County asserts that an agreement to extend the closing date must be in writing to satisfy the statute of frauds. But the case the County

relies on for this assertion discusses the need for the legal description of the property at issue to be in writing; the County cites no case that an extension of a closing date for a contract to purchase real property must be in writing to be enforceable. Moreover, under the analogous UCC, the statute of frauds would not preclude such a modification. *See Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn.App. 637, 644, 898 P.2d 347, 351 (1995) (Under the UCC, “[A] modification to a contract which initially satisfied the statute does not require a new memorandum.”).

**L. The “As Is” Clause Does Not Nullify the Promises the County Made**

The County contends that, because the Property was “as-is,” no Approvals/NFA Letter were required prior to closing. It adopts the simplistic and incorrect position by labelling this complex, multi-million dollar contract as an “as-is” transaction:

14.1 Condition of Subject Property. Other than as may be expressly set forth in this Agreement, neither Party has made any statement, representation, warranty, or agreement of any kind, type or nature whatsoever as to any matter concerning the Subject Property or the suitability thereof for Purchaser’s intended uses. Purchaser acknowledges and agrees he is acquiring the Subject Property in its “AS-IS” condition with all faults and without warranty of any kind, type or nature whatsoever, express or implied.

CP 779. This provision specifically includes an exception for express statements “set forth in this Agreement.” The REPSA included numerous

contingencies and conditions, including the County's obligation to obtain an NFA Letter and provide necessary Governmental Approvals. This "as-is" provision excludes those promises and is limited in scope.

Further, the course of conduct of the parties does not contemplate the "as-is" provision in the way that the County now asserts. Under *Berg*'s context rule, subsequent acts of the parties should be taken into account in interpreting the contract. *Berg*, 115 Wn.2d at 657. Both parties conducted themselves as if closing could not occur without the NFA Letter and the County's Governmental Approvals; for example, internal County correspondence noted the County would not be able to get "a NFA as expected." CP 638. Other examples of internal County correspondence corroborate this. CP 680-682 (April 24, 2019 internal email within the County, discussing whether the REPSA should be extended yet again); CP 683-685 (noting that the County's "environmental issues" are a problem for the buyer's lender, and that the County, through Tackett, is working on them); CP 686-688 ("Buyer has indicated they are expecting to be signing their closing documents once they work through lender and builder concerns..."); CP 689-691 ("Note that remediation is important to buyer and their lender...we are under a voluntary clean up action with Ecology and acting to get a no further action status."); CP 700-702 ("Buyer's lender is requesting that several items be resolved prior to closing."). (These documents listed also contradict Mastandrea and Tackett's statements that the buyer was ready to close in the fall of 2018.) Had the REPSA been "as-is" in the manner the County suggests, it would have

been a two-page contract and would not have elsewhere discussed the NFA Letter and necessary Governmental Approvals. At minimum, there are questions of fact as to whether the “as-is” clause nullifies the other obligations in the REPSA.

**M. There Are Questions of Fact as to Whether the County Ratified the Agreement After April 22, 2019**

If the REPSA did expired as of April 22, 2019 because Elk Plain did not tender the purchase price by that date, the County ratified the REPSA after that date by continuing to participate in the permitting process despite knowledge that Elk Plain had not tendered the purchase price. A party ratifies a contract after it discovers facts that would warrant rescission, but then continues to accept benefits under the contract or remains silent. *Kellar v. Estate of Kellar*, 172 Wn.App. 562, 583-584, 291 P.3d 906, 918 (2012). Ratification can be inferred through a principal’s silence when the context would “according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent.” *Smith v. Hansen, Hansen, & Johnson, Inc.*, 63 Wn.App. 355, 369, 818 P.2d 1127, 1135 (1991). Under the County’s theory, after the December 31, 2018 “Outside Closing Date” passed, the County could have deemed the REPSA expired. The same is true of the March 1, 2019, April 15, 2019, and April 22, 2019 Closing Dates. Yet, even to this day, the County continues to accept the benefit of Elk Plain’s continued permit processing. The County never responded to Elk Plain’s April 22, 2019 letter stating that the parties were still in contract. The County even

expressed to Elk Plain’s engineers that it had been specifically told to continue processing the permits. Elk Plain must invest a significant amount of money before the County can fulfill its NFA Letter and Government Approvals obligations. The benefit to the County is that, when the permits are complete, the Property will be worth significantly more than the County had originally marketed it at, and the additional value will be attributable to the permitting work done by, and at the expense of, Elk Plain. Instead of cutting off the processing of all of Elk Plain’s permits because Elk Plain allegedly no longer had a contract to purchase the Property, as it could have, the County continued to accept the benefit from Elk Plain’s effort and expense. The County’s actions in continuing to process the necessary Governmental Approvals (creating the appearance that it was still acting consistent with the REPSA) ratified the REPSA. At minimum, there are questions of fact as whether the County ratified the REPSA.

**N. There Are Questions of Fact as to Whether the County Breached the Promises Implied in All Contracts of Good Faith and Fair Dealing**

A duty of good faith and fair dealing is implied in all contracts.

“The implied duty of good faith, in a contract, requires faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” *Edmonson v. Popchoi*, 172 Wash. 2d 272, 280, 256 P.3d 1223, 1227 (2011) (citing Restatement (Second) of Contracts § 205 comment) differently by the Washington Supreme Court in *Badgett v. Security State Bank*: “There is in every contract an implied duty of good

faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356, 360 (1991).

The County’s dealings with John Mastandrea and Al Monjazez, before the alleged “expiration” of the REPSA and after was in bad faith. There is evidence that the County, and Mastandrea, worked together to sell the Property to other purchasers before April 18, 2019. CP 546-558, 559-560, 561-594, 595-597, 598-600. These actions were not within the “justified expectations” of Elk Plain and certainly were not consistent with affording Elk Plain the opportunity to obtain the full benefit of the County’s performance. At minimum, the timing and extent of the actions of Mastandrea, Monjazez, and the County raises questions of fact regarding the County’s good faith under the REPSA.

**O. There Are Questions of Fact as to Elk Plain’s Alternative Claim for Unjust Enrichment**

Elk Plain seeks unjust enrichment as an alternative remedy to the County’s breach of contract. If it is determined that Elk Plain is not entitled to enforce the REPSA (for whatever reason), Elk Plain alternatively seeks unjust enrichment. Unjust enrichment requires: (i) the party receiving a benefit must retain value unjustly; and (ii) the party seeking unjust enrichment not be a volunteer. *Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 165, 776 P.2d 681, 683 (1989). The County unjustly received benefit through Elk Plain’s continued investment in the

Property via Mitchell's personal investment in the land. Elk Plain did so in reliance on the closing of the REPSA, which itself was contingent on the County's obtaining an NFA Letter and providing necessary Governmental Approvals. Mitchell, on behalf of Elk Plain, provided upwards of \$1 million dollars in expenses to provide entitlements on the land with the expectation of purchasing the Property under the REPSA. Elk Plain's investment in the Property (which continued after April 2019) is significant. It will allow the Property to sell for millions more than Elk Plain was to pay under the REPSA. There is ample evidence that the County intended to breach the REPSA even before its "Outside Closing Date" by marketing the Property inclusive of Elk Plain's investments. CP 546-558, 559-560, 561-594, 595-597, 598-600, 703-705, 715-716, 717-718. There is also evidence that the County and other third parties recognized that the benefit Elk Plain's efforts produced. CP 643-645, 715-716, 717-718. Elk Plain cannot be said to have acted as a volunteer. The County attempts to frame Plaintiff's contribution as a known "risk." Elk Plain never expected to close on the Property unless the County obtained the NFA Letter and provided necessary Governmental Approvals that necessarily required investment in the Property. It was never a known "risk" that the County would market the property to other purchasers inclusive of Elk Plain's own investments, breach the REPSA, and then claim that Elk Plain had simply lost its entire investment. Indeed, the County and others working with Monjazez contemplated paying Elk Plain back for its and Mitchell's investment. The question of Elk Plain's alleged

status as a volunteer is generally a question of fact. *Ellenburg v. Larson Fruit Co., Inc.*, 66 Wn.App. 246, 251, 835 P.2d 225, 229 (1992) (“Whether one acts as a volunteer is determined in the light of the surrounding circumstances...”). At a minimum, there are questions of fact as to whether the County unjustly benefited from Elk Plain’s investment, and whether Elk Plain provided those benefits as a volunteer.

**P. There Are Questions of Fact as to Elk Plain’s Alternative Claim for Promissory Estoppel**

Likewise, Elk Plain asserted a claim of promissory estoppel as an alternative to the County’s breach of contract. If it is determined that Elk Plain is not entitled to enforce the REPSA (for whatever reason), Elk Plain alternatively is entitled to relief under promissory estoppel.

The elements of promissory estoppel are as follows: (1) a promise; (2) for which the promisor should reasonably expect to cause the promisee to change his position; (3) which does cause the promisee to change positions; (4) justifiably relying upon the promise; and (5) injustice can only be avoided by enforcing the promise. *Klinke v. Famous Recipe Fried Chicken*, 94 Wn.2d 255, 259 n.2, 616 P.2d 644, 646 (1980). Elk Plain detrimentally and reasonably relied upon the County’s conduct in continually processing Elk Plain’s permits, and its statement to Elk Plain’s engineer to the effect. Elk Plain changed its position by continuing to invest in the Property after April 2019, resulting in unjust harm to Elk Plain. At minimum, there are questions of material fact as to many of the elements of Elk Plain’s promissory estoppel claim.

The County argues Elk Plain's promissory estoppel claim attempts to "breathe life into" the REPSA, relying on *Mid-Town vs. Preston*. But that case addresses the defense of equitable estoppel, not the claim for relief or cause of action for promissory estoppel, and is inapplicable here.

**Q. There Are Questions of Fact as to Elk Plain's Alternative Claim for Quantum Meruit**

Finally, Elk Plain seeks unjust quantum meruit as an alternative remedy to the County's breach of contract. If it is determined that Elk Plain is not entitled to enforce the REPSA (for whatever reason), Elk Plain alternatively seeks quantum meruit damages.

Quantum meruit results from an agreement that is implied, and necessarily depends on the facts and circumstances of a particular situation. "An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties, showing, in the light of the surrounding circumstances, their tacit understanding.'" *Hercules v. U.S.*, 516 U.S. 417, 424, 116 S. Ct. 981, 986 (1996). The conduct between the County and Elk Plain undoubtedly implies a contract between the two parties. After the alleged expiration of the REPSA, the County provided Plaintiff with a "path forward" in reference to Elk Plain's purchase of the Property. CP 801-804. The County continued to process Elk Plain's permits and necessary Government Approvals pursuant to the REPSA. The County expressed to Plaintiff's engineer that he had been specifically ordered to continue processing permits. (To the extent that the County argues that the

instructions were to or from a “separate” department within the County is irrelevant. The County is a single entity and may not absolve itself from liability based on inconsistent actions taken by different departments within it. Further, there is evidence that the two departments the County referred to communicate with each other. CP 700-702, 703-705.) The County had acknowledged that the fruits of Elk Plain’s efforts benefitted the Property and would benefit the County if the Property were sold to someone other than Elk Plain (through a higher purchase price and benefits to another seller). Elk Plain expended countless hours and nearly \$1 million in investments, all with the expectancy of purchasing the Property. At minimum, there are questions of fact as whether a contract should be implied to support Elk Plain’s claim for quantum meruit damages.

### **CONCLUSION**

Genuine issues of material fact preclude summary judgment. Elk Plain’s claims do not implicate ultra vires acts by the County. The trial court’s order denying the County’s motion for summary judgment should be affirmed.

DATED this 14th day of October, 2020.

SCHLEMLEIN FICK & FRANKLIN, PLLC

/s/ Brian K. Keeley

James G. Fick, WSBA No. 27873

Colleen A. Lovejoy, WSBA No. 44386

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Attorneys for Plaintiff / Respondent Elk  
Plain 63, LLC

**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Schlemlein Fick & Franklin, PLLC.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On the date shown below, I served one true and correct copy of the foregoing on the following parties via the method(s) indicated:

**Counsel for Pierce County:**

Frank Cornelius, WSBA # 29590  
Soojin Kim, WSBA #26505  
Pierce County  
Prosecutor’s Office  
Civil Division  
955 Tacoma Ave S, Suite 301  
Tacoma, WA 98402

- COA II E-Filing Notification
- Legal Messenger
- E-Service Agreement:
- [soojin.kim@piercecounitywa.gov](mailto:soojin.kim@piercecounitywa.gov)
- [frank.cornelius@piercecounitywa.gov](mailto:frank.cornelius@piercecounitywa.gov)
- [christina.smith@piercecounitywa.gov](mailto:christina.smith@piercecounitywa.gov)
- [nadine.christian-brittain@piercecounitywa.gov](mailto:nadine.christian-brittain@piercecounitywa.gov)

DATED this 14th day of October, 2020.

/s/ Lisa R. Werner  
Lisa R. Werner, Legal Assistant

# APPENDIX

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The Honorable Michael E. Schwartz  
Friday, December 6, 2019  
9:00 a.m.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

ELK PLAIN 63, LLC, a Washington limited liability company,  
  
Plaintiff,  
  
v.  
  
PIERCE COUNTY, a political subdivision of the State of Washington,  
  
Defendant.

No. 19-2-08720-5

**DECLARATION OF  
MATT WEBER IN SUPPORT OF  
PLAINTIFF’S OPPOSITION TO  
MOTION TO CANCEL LIS  
PENDENS**

I, Matt Weber, declare as follows:

1. This declaration is based upon my own personal knowledge. I am over the age of eighteen (18) and am otherwise competent to testify herein.

2. I, Matt Weber, am a Principal/Owner and Civil Engineer at AHBL, Inc. (“AHBL”). Among others, I work with Lisa Klein who is a Planner at our offices. AHBL is an engineering firm that represents developer clients for various permitting, land use, real estate, and developments projects.

3. AHBL was retained in early 2018 to assist Elk Plain 63, LLC (“Elk Plain”) with their design, permitting, and land development of the Elk Plain Property (“the Property”) currently owned by Pierce County (“County”).

4. Since February 2018, we have worked and communicated with both members of Elk Plain 63, LLC, Mr. Phil Mitchell, and Mr. John Mastandrea. Since that time and up through

1 today, we have also had extensive and continual contact with various departments at the County  
2 on the permitting approval process.

3 5. At the beginning of the project, we had originally worked with the County and  
4 Elk Plain 63, LLC to seek approval for the construction of a Lowes Home Improvement store.  
5 There were certain traffic and access issues along Mountain Highway E. The County had  
6 assured Elk Plain 63, LLC they could assist in overcoming these issues with Washington State  
7 Department of Transportation. Ultimately the County could not provide the assistance as  
8 promised to Elk Plain 63, LLC. Elk Plain 63, LLC then changed the project to a large residential  
9 proposal with some commercial/retail space. We submitted the permit application for this on  
10 October 11, 2018. It was our understanding from Elk Plain 63, LLC, that the project was given  
11 Director's Priority. However, we have come to learn the County failed to give the project this  
12 designation. Without Director's Priority, the process is much slower.

13 6. Since February 2018 we have worked continuously with representatives at the  
14 Planning and Public Works department at Pierce County. We have never delayed in advancing  
15 the permit application process. In fact, given the location in Spanaway, there were a number of  
16 complex design issues that came into play in addition to many other considerations to comply  
17 with the Graham Community Plan. Despite the complexities and unique design requirements of  
18 the project, we moved the project forward as quickly as possible.

19 7. At no time from our initial engagement did we receive any word or indication  
20 from the County that they would not continue to cooperate, or that the County was frustrated  
21 with the timing of our work or progress.

22 8. The County has continued to approve applications and permits for Elk Plain 63,  
23 LLC up to this day.

24 9. It is my understanding that the County has taken the position that Elk Plain 63,  
25 LLC is no longer under contract for the purchase and sale of the Property – and has not been as  
26 of April 2019. This is surprising as we continue to work on the application process with the  
27 County unabated. In fact, I was told by a representative at the County that the County has been

1 specifically instructed to continue to process the Elk Plain 63, LLC applications.

2 10. The County has never withdrawn, reject, or rescinded the Elk Plain 63, LLC  
3 permit applications. They could have done so long ago.

4 11. We have continued to work on the Elk Plain 63, LLC application and approval  
5 process. In fact, we have a Project Approvals Hearing with the Pierce County Hearing  
6 Examiner, current scheduled for December 18, 2019. Recently, the Central Pierce Fire and  
7 Rescue ("CPF&R") filed a SEPA appeal to be heard by the Hearing Examiner. In advance of the  
8 Project Approvals hearing, and in the hopes of getting the appeal withdrawn, AHBL met with  
9 CPF&R to negotiate and execute a Voluntary Mitigation Agreement. We, on behalf of Elk Plain  
10 63, LLC, were able to reach a resolution and CPF&R withdrew their appeal.

11 12. We plan to attend the December 18, 2019 hearing and are hopeful the Elk Plain  
12 63, LLC permit application is approved.

13 13. I hereby declare, under penalty of perjury under the laws of the State of  
14 Washington, that the foregoing is true and correct.

15  
16 DATED this 3rd day of December, 2019.

17  
18   
19  
20 Matt Weber



**SCHLEMLEIN FICK & FRANKLIN, PLLC**

**October 14, 2020 - 4:11 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54658-2  
**Appellate Court Case Title:** Elk Plain LLC 63, Respondent v. Pierce County, Appellant  
**Superior Court Case Number:** 19-2-08720-5

**The following documents have been uploaded:**

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Briefs - Respondents  
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- C.Lovejoy@soslaw.com
- christina.smith@piercecountywa.gov
- fcorne1@co.pierce.wa.us
- hbc@soslaw.com
- jgf@soslaw.com
- nadine.christian-brittan@piercecountywa.gov
- pcpatvecf@piercecountywa.gov
- soojin.kim@piercecountywa.gov

**Comments:**

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Sender Name: Lisa Werner - Email: lrw@soslaw.com

**Filing on Behalf of:** Brian Keith Keeley - Email: bkk@soslaw.com (Alternate Email: )

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66 S. Hanford St.  
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