

FILED

MAY 15 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 321916

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NAUMES, INC., an Oregon corporation,

Petitioner,

v.

CITY OF CHELAN, a municipal corporation,

Respondent.

PETITIONER NAUMES, INC.'S REPLY BRIEF

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I. REPLY ARGUMENT

- i. **The underlying claims in this dispute involve matters set out in the Development Agreement, which claims should proceed to arbitration under the Arbitration Provision.**

The City repeatedly argues that Naumes seeks an amendment of the General Binding Site Plan through private arbitration, rather than following the process for amending general binding site plans set forth in the City Code. The City mischaracterizes the issues in the underlying claims. Naumes does not seek an amendment of the General Binding Site Plan in its claims; rather, Naumes asserts that no such amendment is required.

Naumes' LUPA petition and breach of contract claim assert that the City was correct in its 2005 interpretation of the City Code that no amendment to the General Binding Site Plan is required because the specific binding site plan process under the City Code authorizes the proposed street infrastructure and lot configurations and because Extended Isenhart Road was already vacated via the appropriate process. CP 3-19, CP 22-23 (at ¶¶ 22-27). The City's interpretation in 2005 is consistent with RCW 58.17 *et seq.* and the City Code with respect to the two-step process for binding site plans in commercial and industrial developments: (1) approval of a general binding site plan as a basic concept with

preliminary engineering, and (2) approval of subsequent specific binding site plans for individual lots when specific user's needs and comprehensive engineering data are available (handled administratively by the municipality). CP 22-23 (at ¶¶ 22-27); RCW 58.17 *et seq.* The City's interpretation in 2005 is also consistent with the parties' past dealings. The City previously processed and approved specific binding site plans within the Development that had deviations from the General Binding Site Plan as to access locations, street infrastructure, and lot size and configuration. CP 318. For example, the City approved the following recorded specific binding site plans within the Development that each deviated from the approved General Binding Site Plan as noted:

- Manson Growers Storage Facilities Division SBSP (3/7/05) – reconfigured lot location and sizing and provided access from SR 150, as opposed to an internal road;
- Chelan Retail SBSP (10/28/05) – eliminated the East half of the E-Line Road along with the consolidation of several lots (Wal Mart);
- Lake Chelan School District SBSP (5/12/08) – included the property for the extension of the A-Line street in the SBSP, which resulted in the School District making the utility and road improvements to serve their property along with the City's Ballfield property that was donated by Naumes to the City in the Ballfield Division in 2004;
- Lake Chelan Community Hospital SBSP (10/14/09) – deviated in lot size, eliminated the C-Line Road, and allowed direct access for the Northern lot directly from Apple Blossom Drive; and
- Amendment to Manson Growers Storage Facilities Division SBSP (12/4/12) – relocated access from SR 150 to Gala Avenue.

CP 318. Naumes' LUPA and breach of contract claims argue that the

City's 2005 interpretation was correct, that such interpretation is consistent with the parties' prior dealings regarding the Development, and that no amendment to the General Binding Site Plan in this case is required.

In addition, Naumes' promissory estoppel and breach of oral covenant claims assert that, even if the City's 2005 interpretation of the City Code was incorrect, Naumes is not required to construct Extended Isenhart Road because the parties agreed to construct a different road, Naumes performed its obligations pursuant to that agreement, and no such amendment to the General Binding Site Plan is required pursuant to the City's prior representations to Naumes. CP 3-19, CP 22 (at ¶ 20). Naumes' promissory estoppel and breach of oral covenant claims further assert that if Naumes is now required to construct Extended Isenhart Road, Naumes is entitled to its damages suffered by virtue of the City's breaches of its promises and agreements. *Id.*

All of these claims of Naumes are subject to arbitration under the parties' Development Agreement which governs the Development. Naumes' claims do not seek an amendment to the General Binding Site Plan. The issue before the arbitrator (or the trial court if the subject order is affirmed on this appeal) is whether Naumes must build Extended Isenhart Road as shown on the General Binding Site Plan and, if so,

whether it is entitled to damages. The City takes the position that because Extended Isenhart Road is shown on the General Binding Site Plan, Naumes is required to build the road as shown unless Naumes applies for and obtains an amendment to the General Binding Site Plan. Naumes takes the position that there is no requirement to build Extended Isenhart Road as shown on the General Binding Site Plan. Naumes' position is that the final layout of the lots and roads in the Development is to be determined through the specific binding site plan process as provided for in the City's Code, as previously represented by the City, and as is consistent with the City's prior actions in approving numerous other specific binding site plans within the Development that each deviated from the approved General Binding Site Plan. CP 318.

The issues to be determined by the arbitrator (or the trial court) are:

- (a) Whether a proposed specific binding site plan which does not include Extended Isenhart Road as shown on the General Binding Site Plan should be processed under the procedures for approving a specific binding site plan, or whether an amendment to the General Binding Site Plan must first be sought; and
- (b) If Naumes is ultimately required to construct Extended Isenhart Road, whether Naumes is entitled to damages suffered as a result of the City's breaches of its prior promises and agreements.

Once the arbitrator (or the trial court) determines whether the proposed Specific Binding Site Plan should be processed or whether an

amendment to the General Binding Site Plan must first be sought, Naumes will proceed as required under the City Code for such process.

The City's position skips the first step, which is the determination of the correct procedure to proceed with the development of the Apple Blossom Center Development without construction of Extended Isenhart Road. The City's argument starts from the position that the City is correct, i.e., that Naumes must seek an amendment to the General Binding Site Plan if Naumes does not want to build Extended Isenhart Road. From that position, the City then argues that referring the matter to an arbitrator would circumvent the City Code pertaining to amendments to general binding site plans and the associated public hearing process.

The City's argument is, in essence, that it is never appropriate to use private arbitration to resolve disagreements concerning land use decisions and real property developments. However, the City specifically agreed to arbitrate disputes and land use matters pertaining to this Development. Framed correctly, the current dispute is over which City procedure should properly be used if Naumes wants to develop the Apple Blossom Center Development without building Extended Isenhart Road. It is not an attempt to modify the City Code procedures. This is the type of dispute that is perfectly suited to private arbitration and the type of dispute that the Arbitration Provision in the parties' Development

Agreement was intended to encompass.

First, the nature of a binding site plan development is such that the final lot and street configurations are often not determined until there is an identified purchaser with specific needs. This generally means there is a need to move fairly quickly to process a specific binding site plan for the lot to be sold. Given trial court calendars, which are almost filled to capacity and typically hear more criminal and domestic relations matters, it is often difficult to proceed rapidly with a civil matter of this nature. Naumes contracted for the Arbitration Provision in its Development Agreement so that it would have the benefit of an expedited process for disputes pertaining to the Development.

Second, there is the issue of expertise. The nature of superior court is such that trial court judges do not tend to be experts in the specific area of land use matters. Naumes specifically contracted for the Arbitration Provision in its Development Agreement so that the parties would have the benefit of retaining an experienced land use attorney, who is familiar with binding site plans and commercial and industrial developments, to resolve their disputes.

The trial court's order denying arbitration not only deprives Naumes of the benefit of the Arbitration Provision in the parties' contract, but it also essentially renders the Arbitration Provision meaningless. If the

Arbitration Provision does not apply to these claims, to what type of dispute would it apply?

When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless. *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wn. App. 353, 361-62, 127 P.3d 762 (2006) (citing *P.U.D. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 373, 705 P.2d 1195, *modified*, 713 P.2d 1109 (1986)). Every matter set out in the Development Agreement pertains to some aspect of the Development that is the subject of some City Code requirement. The fact that these claims involve a question of interpretation and application of the City Code with respect to the Development does not remove the matter from the umbrella of the Arbitration Provision. All of Naumes claims pertain to matters set out in the Development Agreement. If the Court finds the Arbitration Provision does not apply to this dispute, it would essentially be rendering the Arbitration Provision meaningless because there are no other material disputes to which the provision would apply.

Naumes' claims pertain to matters set out in the Development Agreement and are subject to arbitration under the Arbitration Provision. The trial court erred when it entered the order denying arbitration.

Naumes respectfully requests that the Court reverse the order of the trial court.

ii. The trial court's order denying arbitration in the prior lawsuit did not bar the motion to compel arbitration in the underlying lawsuit and has no res judicata effect on the order subject to this appeal.

A. The City waived any res judicata argument by failing to argue res judicata in opposition to Naumes' Motion to Compel Arbitration.

The City never argued res judicata in its briefing or oral arguments made to the trial court with respect to Naumes' Motion to Compel Arbitration in this matter. Res judicata is an affirmative defense that is waived if it is "not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties." *Jumamil v. Lakeside Casino, LLC*, __ Wn. App. __, 319 P.3d 868, 876 (2014) (Washington Reporter citations not yet available) (quoting *Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976)); see also CR 8(c).

A claim for res judicata will not be considered for the first time on appeal. *Jumamil*, 319 P.3d at 876 (citing *Milligan v. Thompson*, 110 Wn. App. 628, 633, 42 P.3d 418 (2002) (refusing to consider appellant's res judicata argument because appellant did not argue res judicata when he opposed the respondent's summary judgment motion in the trial court)).

Naumes' Motion to Compel Arbitration was heard and denied by the trial court on September 27, 2013. CP 192. The City did not raise or argue res judicata or collateral estoppel anywhere in its responsive pleadings filed in opposition to the Motion. CP 54-70, 71-72, 189-191, 192. The City did not argue collateral estoppel or res judicata at the hearing on the Motion to Compel Arbitration on September 27, 2013. *Id.* Rather, the first time the City raised its res judicata and/or collateral estoppel arguments was when the City filed its Answer and Affirmative Defenses on October 27, 2013, nearly three weeks after the date that the trial court had already heard and decided the Motion to Compel Arbitration. CP 192, 193, 201.

This Court should refuse to consider the City's res judicata and collateral estoppel arguments because the City did not make those arguments when it opposed Naumes' Motion to Compel Arbitration in the trial court.

- B. The trial court's prior order denying arbitration in the first proceeding did not bar Naumes from bringing the Motion to Compel Arbitration after resolution of the administrative appeal by the Hearing Examiner.

The Court should not consider the City's res judicata argument, which the City raises for the first time on appeal and which was not argued or presented to the trial court.

In any event, the City's res judicata argument fails because the claims in the prior proceeding were not identical to the claims in the subject proceeding and the trial court's decision in that matter was not a final judgment on the merits. In order for res judicata to apply, the prior action must have ended with a final judgment on the merits and the following four elements must be identical between the prior and the present action: (1) persons and parties (or privity between prior persons and parties); (2) causes of action; (3) subject matter; and (4) the quality of persons for or against whom the claim is made. *Pederson v. Potter*, 103 Wn.App. 62, 67, 11 P.3d 833 (2000).

The trial court's prior order denying arbitration dealt with Naumes' "pre-Hearing Examiner" claims, i.e., claims that had not yet been resolved by the Hearing Examiner. CP 248-256, 257-258, 259-269. In the prior proceeding (the -619 proceeding), Naumes sought to have the "pre-Hearing Examiner" claims transferred to arbitration, rather than proceeding with the administrative appeal before the Hearing Examiner. *Id.* The City argued in the prior proceeding that the dispute needed to first be submitted to the City's Hearing Examiner as an administrative appeal pursuant to the City Code. CP 380-387. The trial court denied arbitration at that time, finding the dispute must first proceed under the City's Code to an administrative appeal before the Hearing Examiner. CP 388-389.

The Motion and Order denying arbitration in this lawsuit that are the subjects of this appeal address the “post-Hearing Examiner” claims. CP 3-26, 29-37, 38-50, 444-446. The underlying claims in this lawsuit are procedurally distinct from the claims in the prior lawsuit because this lawsuit arises after the Hearing Examiner’s decision in the administrative appeal. CP 3-26.

Furthermore, the trial court’s prior order was not a final judgment on the merits of this case. Washington has adopted the rule that a matter has been finally adjudicated if the status of the action is such that the parties’ suit could be disposed of. *Pederson*, 103 Wn.App. at 70; citing, *CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.*, 220 Ga.App. 394, 397, 469 S.E. 466, 469 (1996). The trial court essentially found Naumes needed to exhaust its administrative remedies by proceeding with the administrative appeal, and the trial court did not reach a final judgment on the merits of the case.

The City relies heavily on the Ninth Circuit case of *International Association of Machinists and Aerospace Workers, FLA-CIO v. Aloha Airlines, Inc.*, 790 F.2d 727 (9th Cir. 1986) to support its argument that res judicata is applicable. In that case the parties had executed an agreement, under which “minor disputes” were arbitrable and “major disputes” were not. *Aloha*, 790 F.2d 767 at 729. The trial court was asked to determine

whether a grievance provision in the parties' agreement was subject to binding arbitration as a minor dispute. *Id.* at 730. The trial court determined that it was not a minor dispute and denied the plaintiff's motion compelling arbitration. *Id.* When the plaintiff filed a second complaint over the same issue, i.e., major v. minor dispute, the trial court dismissed that aspect of the complaint under the doctrine of res judicata. *Id.* The Ninth Circuit affirmed.

Aloha is distinguishable from this case because the second proceeding in *Aloha* involved the same issue as the first proceeding. *Id.* In this case, the second proceeding (which is the subject of this appeal) involves procedurally distinct claims from the first proceeding in that the claims in the second proceeding are now "ripe" as a result of Naumes exhausting its administrative remedies and obtaining the decision from the Hearing Examiner in the administrative appeal.

The Court should decline to consider the City's res judicata argument because the City made no such argument at the trial court level. In any event, the res judicata argument is without merit because the trial court's prior order dealt with procedurally different claims than the trial court's order in this case.

iii. Washington common law and public policy support enforcement of the Arbitration Provision.

There is a strong public policy in Washington favoring arbitration of disputes. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 454, 45 P.3d 594 (2002). The purpose of arbitration is to avoid the formalities, the expense, and the delays of the court system. *Id.*; see also *Perez v. Mid-Century Ins. Co.*, 85 Wn.App. 760, 765-66, 934 P.2d 731 (1997); *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992).

If the Court finds “that no substantial issue exists as to the existence or validity of the agreement to arbitrate or the failure to comply therewith,” the Court should order the parties to arbitrate. *Mendez*, 111 Wn.App. at 455. The scope of an arbitrator’s authority depends on the agreement to arbitrate, but:

If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration unless the reviewing court is satisfied the agreement cannot be interpreted to cover a particular dispute.

Id. at 456.

In interpreting an arbitration clause, the intentions of the parties as expressed in the agreement control, but “those intentions are generously construed as to issues of arbitrability.” *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn.App. 203, 216, 156 P.3d 293

(2007) (internal quotations omitted). To rule that a particular dispute is not arbitrable under an arbitration agreement, the Court must be able to say “with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Id.* (internal quotations omitted); *see also Klickitat County v. Beck*, 104 Wn.App. 453, 462, 16 P.3d 692 (2001) (order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; doubt should be resolved in favor of coverage).

In this case, Naumes and the City agreed to use arbitration as the dispute resolution process for disputes pertaining to the Apple Blossom Center Development and agreed upon the following broad Arbitration Provision set forth in the signed Development Agreement:

16. Review Procedures and Standards for Implementing Decisions. Review and resolution of disputes by the Parties, their successors and assigns, shall be resolved by arbitration as follows: In the event the Parties cannot agree **on any matter set out in this Agreement**, they shall promptly consult together and attempt to resolve the dispute. In the event they cannot agree upon a resolution of the dispute, the same shall be settled by arbitration pursuant to Chapter 7.04 RCW...

CP 295-96 (emphasis added).

The binding Arbitration Provision of the Development Agreement is clear and broad. The Development Agreement states that if the parties are unable to agree “on any matter set out in this Agreement”, the matter shall be submitted to an arbitrator. CP 295. The broad term, “any matter set out in this Agreement,” encompasses the claims involved in this dispute because the claims involve the development of the Apple Blossom Center, the General Binding Site Plan, and certain lot and street infrastructure located within the development, all of which are “matters set out” in the Development Agreement. CP 281-82, 285. The Development Agreement references City Code processes, requirements and standards throughout.

The Development Agreement governs the development of the Apple Blossom Center Development; therefore, this dispute is a “matter set out” in the Development Agreement. The Development Agreement incorporates the General Binding Site Plan and provides requirements that development of the Apple Blossom Center shall be consistent with the General Binding Site Plan, including the lots and street infrastructure. This dispute involves claims by Naumes that it was entitled to use the prior street vacation process to eliminate Extended Isenhart Road and that the City should process Naumes’ Specific Binding Site Plan application for a certain lot within the Development.

The trial court erred in denying Naumes' motion to compel arbitration of the claims. Even if the trial court had found that there was a question of fact or law as to whether or not the Arbitration Provision clearly covers the dispute in this action, *Mendez* and the other above case law dictate that the trial court must construe this Arbitration Provision to enforce arbitration because the provision can be reasonably interpreted to cover the disputes in this action.

Again, if the Court "can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration." *Davis v. Gen. Dynamics Land Sys.*, 152 Wn.App. 715, 718, 217 P.3d 1191 (2009); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 454, 45 P.3d 594 (2002). Any doubts regarding the application of an arbitration agreement "should be resolved in favor of coverage." *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn.App. 400, 405, 200 P.3d 254 (2009) (citing *Peninsula Sch. Distr. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996)).

The parties clearly set forth their intent and agreement to submit claims involving the Apple Blossom Center Development to binding arbitration under the Development Agreement. Both parties cited the Development Agreement throughout their correspondence on the dispute.

Given the clarity of the Arbitration Provision with respect to arbitration of disputes and the strong public policy in favor of arbitration, the Arbitration Provision should have been enforced by the trial court and the claims should have been submitted to arbitration for resolution.

II. CONCLUSION

The claims in this action fall squarely within the terms of the Development Agreement. The dispute between Naumes and the City involves the street infrastructure in the Apple Blossom Center Development and the General Binding Site Plan for the development, which are matters set out in the Development Agreement.

The trial court erred when it found the claims were not subject to arbitration. Naumes requests that the Court reverse the trial court's decision and order that the claims in this action be referred to arbitration for resolution.

Dated this 14th day of May, 2014.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By 

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