

SUPREME COURT NO. 90262-3

NO. 69255-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WEST COAST, INC., a Washington Corporation,

Appellant,

v.

CAMANO CO-OPERATIVE WATER AND POWER CO.,
a Washington Corporation.

Respondent

PETITION FOR DISCRETIONARY REVIEW TO THE
WASHINGTON STATE SUPREME COURT

W. Mitchell Cogdill
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3232 Rockefeller Avenue
Everett, WA 98201

425-259-6111

Attorney for Appellant West Coast, Inc.

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STATE OF WASHINGTON
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I. IDENTITY OF PETITIONER

Petitioner is West Coast, Inc., a Washington Corporation, and the Appellant in the Court of Appeals. John Robinett is a principal of West Coast, Inc.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals Decision and Order Granting Motion for Reconsideration and Withdrawing Opinion and Substituting Opinion filed March 17, 2014, (Attached as Appendix A); and the Order Denying Motion for Reconsideration filed April 17, 2014. (Attached as Appendix B).

III. ISSUES PRESENTED FOR REVIEW

1. Was the Order of the Court of Appeals finding there was no valid agreement between the parties in error?
2. Did the Substitute Opinion of the Court of Appeals create new conflicts with existing case law as it pertains to the Court's ruling that West Coast, Inc. owed money as dues to Camano Water for shares purchased as part of West Coast's development plan?

IV. STATEMENT OF THE CASE

This case involves a contract dispute between West Coast, Inc., (West Coast) a real estate development company, and the Camano Water

Co-Operative, (Camano Water) regarding installation of new water mains for a parcel of real estate on Camano Island known as Saratoga Ridge.

Camano Water supplies water to portions of Camano Island, including Saratoga Ridge. As a cooperative, water is provided by Camano Water to shareholder/consumers of Camano Water.

West Coast learned of an earlier attempt to develop Saratoga Ridge. Part of that attempt included development of a map regarding water system upgrades which would provide water flow adequate to service Saratoga Ridge.

That information was provided to West Coast by a Camano Water representative. (V.I, p.207, Ex. 71). The information included designs which would provide fire flow of 500 gallons per minute (gpm) or 750 gpm to Saratoga Ridge. The map included in that information showed where upgrades to the system would have to be made in order to achieve the increased fire flow capacities.

The information provided by Camano Water did not show any areas where the system would require crossings under any roads and Mr. Robinett was never told about the potential need for any road crossings prior to his meeting with the Camano Water Board. (V.II, p.163-64; Finding of Fact #19). Mr. Robinett was also never told the information he received was in any way incomplete or that it should have contained

information showing placement of road crossings for the water system. (V.II, p.164).

According to the information provided by Camano Water an increase of water flow to 500 gpm could be obtained by installing approximately 2,660 lineal feet of pipe. That would be accomplished by replacing approximately 750 feet of 3 inch pipe with 8 inch pipe in one area, and replacing approximately 1,910 feet of 4 inch pipe in another. (Ex.71).

An alternate plan which would provide 750 gpm flow required much more work and included installation of approximately 5,470 lineal feet of pipe. (Ex.71).

Mr. Robinett took the two plans to a Camano Water Board meeting on February 19, 2004. He placed the information he had been provided before the board to discuss what work would be needed to provide sufficient water to allow development of Saratoga Ridge.

The Camano Board first decided the 500 gpm flow would be appropriate. Next, the total length of pipe, size of the pipe, and area in which the pipe was to be installed was confirmed. (V.II, p.165-66).

Mr. Robinett left that meeting with the clear understanding of the amount of pipe needed to be installed and the location and size of the pipe to be used to meet the requirement of 500 gpm flow. There was a rough

estimate of the cost of performing the work. (V.III, p.99-101). There was never any discussion about improving Camano Water's entire system. (V.III, p.103).

Knowing what was required to develop Saratoga Ridge in terms of water availability, West Coast finalized purchase of the property and obtained a construction loan that would provide working capital to perform the work needed. (V.II, p.154, Ex.75).

In March of 2004, West Coast hired a land surveyor to do preliminary plat and survey work. (V.I, p.37-40). He met with representatives of Camano Water regarding survey and design of the planned upgrades. Mr. Downing was directed by Camano Water to do topographical maps in a specific area of Saratoga Ridge consistent with the plans shared with the Water Board at the February 2004 meeting, and was never told to locate proposed road crossings. (V.I, p.42). Mr. Downing was never told to show any work related to hooking up homes which already existed in the area across from Saratoga Ridge. (V.I, p.47).

On October 27, 2004, after multiple inquires, West Coast received a Developer Extension Agreement which West Coast signed and then paid a \$300.00 fee. (Ex.4, Ex.5). That Agreement called for West Coast to install approximately 2,660 lineal feet of pipe to benefit Saratoga Ridge and described the location of the work. (Ex.4).

By letter dated November 22, 2004, West Coast was notified that Camano Water approved the Developer Extension Agreement. (Ex.6).

Unknown to West Coast at the time, on November 1, 2004, different plans were approved by Camano Water for upgrading the water system in the area. (Ex.22). Those plans were not attached to the Agreement sent to West Coast. They called for road crossings and additional housing hook ups.

Camano Water knew of the second plans when it received the signed Developer Extension Agreement from West Coast. In spite of this, Camano Water signed and approved the original Developer Extension Agreement which had been signed by West Coast, and did not inform West Coast of the existence of the new plans when it notified West Coast the original Development Extension Agreement had been approved by Camano Water.

Approximately four to eight weeks after the Developer Extension Agreement was signed, West Coast received some material that contained two map drawings labeled "preliminary" that were dated November 1, 2004. (V.II, p.178, Ex.21). Those drawings identified three separate road crossings to be included in installation of the water plan to increase fire flow in Saratoga Ridge.

No one from West Coast had ever seen any drawings prior to this that called for road crossings. The crossings were not a concern to West Coast at that time because they were marked “preliminary” and appeared to be a submittal to the Department of Health for a system wide expansion for Camano Water. (V.II, p.178-81).

By letter dated February 1, 2005, Camano Water notified Island County that a Developer Extension Agreement had been entered between West Coast and Camano Water. That was the original Agreement which identified the extent and location of the work to be performed by West Coast and which had been signed by West Coast on October 27, 2004 and approved by Camano Water with notice given to West Coast of the approval on November 22, 2004. (Ex.7).

West Coast proceeded to perform under the terms of the original Developer Extension Agreement but Camano Water began insisting on expanded work not included in the original Agreement. Performing the new requirements would double the scope of the work originally agreed to and double the costs. (V.III, p.14, p.38).

By letter of June 6, 2006, Camano Water demanded that West Coast provide three road crossings and hook up 33 residences to the water line to be installed by West Coast. (Ex.12).

Ultimately, West Coast determined they simply could not perform the extra work Camano Water was demanding which was not included in the signed Developer Extension Agreement. The project was shut down. (V.III, p.25-26).

On October 26, 2010, West Coast filed a Complaint for Breach of Contract/Anticipatory Repudiation, Negligent and Intentional Misrepresentation, and Estoppel. In addition, the Complaint alleged Camano Water sought to impose additional conditions to the Agreement between the parties. (CP Sub.1).

Following motions for Summary Judgment and Motions for Reconsideration, the case was tried to the court over a three day period. At the conclusion of West Coast's case in chief, Camano Water moved to dismiss. The trial court denied the motion on the basis the Developer Extension Agreement was signed by both parties, was sufficiently particular with respect to the project contemplated, and was a sufficiently binding contract. (V.III, p.137-38).

Following trial, the trial court issued a letter ruling along with Findings of Fact and Conclusions of Law. (CP Sub.109, 110). The trial court reversed its earlier holding and found there was no binding agreement between the parties and the breach of contract claim was dismissed. In addition, the court found West Coast had not paid

membership fees and assessments for water shares purchased and judgment in the amount of \$107,894.65 was entered on Camano Water's Counterclaim. (CP Sub.109, p.1).

A timely Notice of Appeal was filed. (CP Sub.111).

On appeal, the original Opinion of Court of Appeals upheld the trial court's finding there was no meeting of the minds between the parties and there was no contract formed. With regard to Camano Water's counter-claim for money owed as dues on the twenty extra shares purchased by West Coast, the Court held:

The only issue presented on this record and briefing is whether it was error for the trial court to award the Co-op dues it identified in its counterclaim. On this issue, we conclude that the purchase of 20 shares was contingent on the approval of the development plan proposed by West Coast—a contingency rendered impossible by the failure of the parties to form a binding contract. Because this contingency never occurred, the Co-op's right to collect dues allegedly owing on the shares is nonexistent. The trial court thus erred as a matter of law in determining that the Co-op was entitled to those sums.

W. Coast, Inc. v. Camano Co-op. Water & Power Co., 177 Wash.

App. 1025 (2013) (Unpublished Opinion attached as Appendix C).

The Opinion remanded the matter to determine the amount of dues owed for one share in the cooperative. *Id.*

Camano Water filed a Motion for Reconsideration. (Attached as Appendix D). As a result of that Motion, the Court of Appeals entered its

Order Granting Motion for Reconsideration, Withdrawing Opinion, and Substituting Opinion on March 17, 2014. In that Opinion, the Court reversed its prior ruling with regard to the shareholder dues and held that West Coast owed the full amount of dues associated with the extra shares purchased by West Coast in anticipation of developing Saratoga Ridge. (Substituted Opinion attached as Appendix E).

West Coast's Motion for Reconsideration was denied by the Court of Appeals on April 17, 2014.

V. ARGUMENT

1. The Finding There Was No Agreement Between the Parties Conflicts With Decisions of This Court and the Courts of Appeal.¹

a. There was a valid agreement between the parties which was breached by Camano Water.

The decision of the Court of Appeals is in conflict with cases analyzing executory contracts. The parties entered a valid executory contract when they signed, and Camano Water approved, the Developer Extension Agreement. It was more than simply an agreement to agree as found by the Court of Appeals.²

¹ The Opinion conflicts with the holdings of:

Wise v. City of Chelan, 133 Wn.App. 167, 135 P.3d 951 (2006) Section V.1(a) *infra*, re: elements of executory contract;

Mowbray Pearson Co. v. E.H. Stanton Co., 109 Wash. 601, 187 P. 370 (1920) Section V.1(a) *infra* re: consideration for executory contracts.

The terms and conditions set forth in the Developer Extension Agreement included: 1) Identity of parties; 2) Location of work for the extension and the legal description of the property; 3) Scope of the work to be performed, i.e. installation of 2,660 lineal feet of pipe; 4) Description of fees and charges; 5) Payment terms; 6) Engineering requirements; 7) Design standards; 8) Insurance requirements; 9) Easement issues; 10) Permitting requirements; 11) Grading requirements; 12) Water supply provisions; 13) Conditions for connection to Camano Water's system; 14) Conditions regarding final acceptance; 15) Bill of sale requirements; 16) Project management requirements; 17) Certification of cost requirements; 18) Agreement regarding restrictions and encumbrances in the development; and 19) Conveyance of title requirements.

Upon signing that Agreement, West Coast was obligated to perform the work described in that Agreement. When the work was completed, Camano Water was obligated to provide the lots West Coast created in Saratoga Ridge with water.

The essential elements of a valid executory contract are competent parties, legal subject matter and valuable consideration. Wise v. City of Chelan, 133 Wn.App. 167, 173, 135 P.3d 951 (2006). Those three elements are present in the instant case.

² Substitute Opinion p.1. (Appendix E).

Camano Water and West Coast were legally competent to contract for the work.³ The subject matter of the contract was legal. West Coast paid a \$300.00 non-refundable administration fee when the Developer Extension Agreement was signed.

In addition, a promise for a promise is also sufficient consideration to support an executory contract. Mowbray Pearson Co. v. E.H. Stanton Co., 109 Wash. 601, 603, 187 P. 370 (1920).

In the instant case, under the Developer Extension Agreement, West Coast promised to install 2,660 lineal feet of pipe in designated areas in order to provide sufficient fire flow to Saratoga Ridge. Camano Water promised to provide water to the property once that pipe had been installed. With water, West Coast could develop Saratoga Ridge.

If Camano Water felt the Developer Extension Agreement as presented by West Coast did not reflect the intent of the parties, it did not have to sign the agreement. Camano Water's actions speak for themselves.

West Coast made an offer through the signed Developer Extension Agreement. Camano Water notified West Coast the Developer Extension Agreement had been approved. Camano Water did not tell West Coast the agreement had been approved *with conditions or any other conditional*

³ Camano Water can enter contracts for extension work pursuant to RCW 57.22.010.

acceptance. Camano Water accepted the Agreement for West Coast to install 2,660 lineal feet of pipe in the manner and location set forth in the Developer Extension Agreement. Camano Water signed the Agreement as presented without variance.

There was a valid contractual agreement between the parties. The decision of the Court of Appeals to the contrary is error.

2. The Finding West Coast Owed Money For Dues Related To Shares In Camano Water Conflicts With Opinions Of This Court And Courts Of Appeal.⁴

In 2005, while West Coast was working to perform under the Developer Extension Agreement, Mr. Robinett received a call from a representative of Camano Water concerning co-op shares. He was told Camano Water was going to increase the price of shares from \$5,000.00 to \$7,000.00. Mr. Robinett indicated he was interested in purchasing extra shares for his development, but was concerned because his development had not been approved. He wanted assurance that if his plat was not

⁴The Opinion conflicts with the holdings of:

First Methodist Episcopal Church v. Soden, 131 Wash. 228, 229 P. 534 (1924) Section V.2(a) *infra* re: no binding obligation on a contingent promise;

Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 733 P.2d 70 (1989) Section V.2(b) *infra* re: supervening frustration and discharge of dependent obligation;

Baillie Communications, Ltd. v. Trend Business Systems, Inc., 61 Wn.App. 151, 810 P.2d 12 *amended on other grounds* 814 P.2d 699; *rev. den.* 117 Wn.2d 1029, 820 P.2d 511 (1991) and Bort v. Parker, 110 Wn.App. 561, 42 P.3d 980, *rev. den.* 147 Wn.2d 1013, 56 P.3d 565 (2002) Section V.2(c) *infra* re: unjust enrichment.

approved, he could sell the shares back to Camano Water. (V.III, p.39-40).

Prior to purchasing the shares, Camano Water offered to buy back two shares if West Coast did not use them. (Ex.24, p.301, letter dated March 2, 2005). That was not acceptable to West Coast.

Mr. Robinett agreed to purchase 20 water shares with the caveat that if the plat was not approved as proposed or was approved for less than the lots requested, he could sell the shares back to Camano Water for the same price. (V.III, p.40; Ex.25). West Coast paid \$100,000.00 for the shares. Camano Water cashed the West Coast check and Mr. Robinett never heard any response regarding the buy-back issue. (V.III, p.40-41).

While the Saratoga Ridge project remained viable, West Coast continued to pay charges associated with the water shares. When Camano Water held up development, West Coast stopped paying the assessments. (V.III, p.42).

a. Purchase of the Shares and the Obligation to Pay Dues was a Contingent Obligation.

In its first Opinion, the Court of Appeals correctly identified the contingent nature of the obligation imposed on share ownership and dues payments represented by the twenty extra shares. Once it became clear

the project could not be completed as anticipated, the contingent obligation to pay dues ceased.

When an obligation is based on a contingency that never occurs, there is no binding obligation. First Methodist Episcopal Church v. Soden, 131 Wash. 228, 234, 229 P. 534 (1924) There, payment to a church as tithing was based on a note that was contingent on the promissor remaining in Ellensburg until the time payments were to begin. The promissor moved away from Ellensburg prior to the date payments were to begin and as a result, because the contingency did not occur, there was no binding obligation.

In the instant case, liability for dues on the twenty extra shares was based on the contingency that an agreement would be reached between West Coast and Camano Water and that Mr. Robinett would be able to develop Saratoga Ridge, complete lots, and have houses built and receive water from Camano Water. Because the Court of Appeals found there was no underlying agreement, the ability of West Coast to finish the project and develop lots pursuant to the Developer Extension Agreement cannot come to fruition. As a result, the contingency anticipated by the parties never occurred and Camano Water has no right to the alleged unpaid dues.

The decision of the Court of Appeals ignores the contingent nature of the obligation to pay dues under the purchased shares. Holding West Coast owes the full amount of the dues is error.

b. Allowing Collection of Shareholder Dues Violates the Supervening Frustration Doctrine.⁵

In Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 733 P.2d 70 (1989), this Court adopted the Restatement of Contracts (Second) § 265, doctrine of supervening frustration and recognized it as a question of law. *Id.* at 704, 709. The Restatement states:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate the contrary.

Id. at 700.

Here, West Coast purchased extra shares for the sole purpose of having one share per developed lot to be available when ultimately marketing the property.⁶ Because the Court of Appeals found there was

⁵ This theory was raised in Section V. 7, of Appellant's Opening Brief beginning at p.43. Appellant argued that because the extra shares were purchased based on the understanding West Coast would be able to develop Saratoga Ridge pursuant to the Developer Extension Agreement, if there were no underlying agreement, there could be no basis to uphold the sale or liability for dues as a result of share ownership. Appellant argued the trial court's ruling was inconsistent and contradictory.

⁶ Mr. Robinett testified, "And so what I said I would be willing to do was pay the 5,000, with the understanding that if I didn't get 21 lots approved or I didn't get any lots

no agreement between West Coast and Camano Water, West Coast was unable to force Camano Water to perform under the Developer Extension Agreement and the reason for purchasing the extra lots vanished.

Comments to the Restatement show three elements must be shown to apply the doctrine. 1) the purpose frustrated must have been a principal purpose of the party making the contract; 2) the frustration must be substantial; and 3) the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. *Id.* at 700.

In the instant case, it is clear West Coast purchased the extra shares in order to have them available to sell along with the completed building lots. The principal reason for purchasing the extra shares was the expectation Saratoga Ridge would be fully developed with 21 lots and that Camano Water would provide water to those lots. (Element 1).

The frustration was substantial. While West Coast remained willing and able to perform pursuant to the Developer Extension Agreement, Camano Water's demand for expanded work caused the project to be stopped. The Court's finding there was no underlying agreement prevented West Coast from being able to force completion of the project and being able to take advantage of the increased share ownership. (Element 2).

approved, that I could sell the shares back to the Water Company without interest accruing for the original amount" (V.III, p.39-40).

The parties operated on the assumption Saratoga Ridge would be developed. Camano Water contacted West Coast to inform West Coast the cost of the shares would be increasing and wanted to give West Coast the opportunity to purchase the shares at the lower price even though the development was not complete. At the time of the contract both parties anticipated a completed Saratoga Ridge. (Element 3).

The ultimate supervening event was the decision by the Court of Appeals that West Coast has no rights under the Developer Extension Agreement. That decision did not attribute fault to either party.

Because the frustrating event was not the fault of West Coast, as shown above, the doctrine should be applied. Any obligation associated with West Coast's purchase or ownership of the extra shares must be discharged.

c. The Decision Regarding Shareholder Dues Unjustly Enriches Camano Water.

West Coast was told the extra shares West Coast purchased would be subject to the non-user fee and Camano Water knew of that representation. (Vol. I, p.134; Ex.56). Regardless, Camano Water eliminated the non-user rate the same year the shares were sold to West Coast. (Vol. I, p.135). Camano Water admitted the reason for the change

was because Camano Water “..needed the revenue, quite frankly.” (Vol. I, p.134).

Unjust enrichment occurs when one retains money which in equity belongs to another.

Three elements must be established in order to sustain a claim based on unjust enrichment: A benefit conferred upon the defendant by the plaintiff; and appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Baillie Communications, Ltd. v. Trend Business Systems, Inc., 61 Wn.App. 151, 159, 810 P.2d 12 (1991) (Internal citations omitted) *amended on other grounds* 814 P.2d 699 (1991), *rev. den.* 117 Wn.2d 1029, 820 P.2d 511 (1991).

A person is unjustly enriched when he or she profits or is enriched at the expense of another contrary to equity. Bort v. Parker, 110 Wn.App. 561, 580, 42 P.3d 980, *rev. den.* 147 Wn.2d 1013, 56 P.3d 565 (2002).

In the instant case, allowing Camano Water to collect the full user fees from West Coast would unjustly enrich Camano Water and should not be allowed. All three elements to establish a claim of unjust enrichment are met.

First, West Coast would be required to pay the same amount of dues as shareholders actually consuming water in spite of the fact West Coast has consumed no water at any time under its share ownership.

Second, Camano Water is aware that charging full dues to West Coast will confer a benefit on Camano Water. Camano Water admitted the elimination of non-user rates was because the co-op needed the money.

Third, allowing Camano Water to collect full dues allows an inequity. Camano Water represented to West Coast that if West Coast purchased water shares, they would be billed at the non-user rate. The very same year Camano Water sold those shares with that representation, Camano Water then eliminated the non-user rate and charged all shares the same rate.

Finally, the inequity is highlighted by the fact that had West Coast not purchased the shares in question, Camano Water would not have collected any money for those shares. The property has still not been developed. Camano Water has already collected \$100,000.00 for the shares and also wants to collect an additional \$100,000 as dues for goods and services never provided by Camano Water or used by West Coast. Allowing collection of the full user fees would be inequitable.

VI. CONCLUSION

The decision of the Court of Appeals conflicts with cases analyzing executory contracts and is in error by concluding there was no valid agreement between the parties.

The final Opinion of the Court of Appeals regarding money owed for co-op share dues is in error and creates a situation which violates the doctrine of supervening frustration and unjustly enriches Camano Water.

Based on the foregoing, this Court should accept review.

Respectfully submitted this 15 day of May, 2014.

COGDILL NICHOLS REIN WARTELLE
ANDREWS VAIL

By: _____


W. Mitchell Cogdill, WSBA 1950
Attorney for Appellant

DECLARATION OF SERVICE

On said day below I caused to be delivered via North Sound Legal Messenger Service a true and accurate copy of the following document: Appellant's Petition for Discretionary Review to the Washington State Supreme Court in Court of Appeals Cause No. 69255-1-1 to the following:

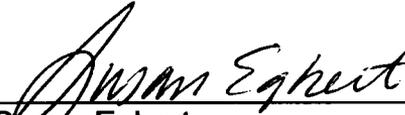
C. Thomas Moser
Attorney at Law
1204 Cleveland Avenue
Mount Vernon, WA 98273

Original and copy filed with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated May 15, 2014 at Everett, Washington.



Susan Egbert
Cogdill Nichols Rein Wartelle
Andrews Vail

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAY 15 PM 2:58

APPENDIX A

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

WEST COAST, INC., a Washington corporation,)
Appellant,)
v.)
CAMANO CO-OPERATIVE WATER AND POWER COMPANY, a Washington corporation,)
Respondent.)

No. 69255-1-I
ORDER GRANTING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

The respondent, Camano Co-Operative Water and Power Company, has filed a motion for reconsideration. The appellant, West Coast, Inc., has filed a response. The court has taken the matter under consideration and has determined that the motion for reconsideration should be granted.

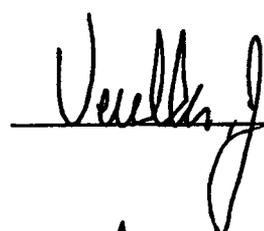
Now, therefore, it is hereby

ORDERED that the motion for reconsideration is granted; and, it is further

ORDERED that the opinion in the above-referenced case filed November 4, 2013, is withdrawn and a substitute opinion be filed in its place.

Done this 17th day of March, 2014.

FOR THE COURT:


FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2014 MAR 17 AM 9:20

APPENDIX B

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

WEST COAST, INC., a Washington
corporation,

Appellant,

v.

CAMANO CO-OPERATIVE WATER
AND POWER COMPANY, a
Washington corporation,

Respondent.

No. 69255-1-1

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, West Coast, Inc., has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 17th day of April, 2014.

FOR THE COURT:

Gunn, JPT

Judge

2014 APR 17 AM 11:59
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

APPENDIX C

2013 NOV -4 AM 11:08

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WEST COAST, INC., a Washington corporation,)	
	)	No. 69255-1-I
)	
Appellant,	)	DIVISION ONE
)	
v.	)	UNPUBLISHED OPINION
)	
CAMANO CO-OPERATIVE WATER AND POWER COMPANY, a Washington corporation,)	
)	
)	
Respondent.	)	FILED: November 4, 2013

GROSSE, J. — A contract missing material terms is nothing more than an agreement to agree, unenforceable as a matter of law. Here, the location of the water pipes was an essential element of the parties' agreement to install pipe for water distribution to the proposed housing sites. Because the parties did not agree to where the water pipes would be located, there was no "meeting of the minds" on the essential terms and, thus, no contract. We affirm the trial court's decision that there was no contract.

The trial court awarded Camano Co-Operative Water and Power Company (Co-op) a judgment for unpaid dues and assessments owed on 21 shares purchased by West Coast, Inc. The purchase of 20 of those shares was conditioned upon approval of the development of the land. Such approval could not occur without the installation of the water pipe. No water pipe was installed. Thus, there was no contract. We reverse the trial court's award on the Co-op's counterclaim against West Coast of dues for the 20 shares.

FACTS

In January 2004, West Coast signed a purchase and sale agreement for property on Camano Island with the intent of developing single family homes on the property, known as Saratoga Ridge. In order to develop the land, Island County required West Coast to provide a fire hydrant with sufficient water flow to the property site for fire services. Water was provided by the Co-op, a small cooperative utility owned by the residential property owners on the west side of Camano Island. The Co-op contracts with Water & Wastewater Services, LLC, owned by Kelly Wynn, to manage the water system.

John Robinett, the principal of West Coast, contacted Wynn and the Co-op board regarding water requirements. Wynn faxed Robinett a two-page memorandum and three pages of drawings of the water distribution system created by the Co-op's engineer, George Bratton, for a previously interested party. The drawings depict the existing water system in the area in 2004. The drawings show the location of the only 4-inch water main to be on the west side of West Camano Drive. The Bratton memorandum contained two options for installing the required fire flow to Saratoga Ridge. Option one was from the south; option two approached from the north. Robinett wanted to pursue option one, which would provide 500 gallons per minute. The Bratton memorandum described option one as "1,910 feet of 4-inch AC [(asbestos cement)] pipe on West Camano Dr. south of Uplands road." Sometime after the Bratton memorandum was created, the word "south" was crossed out of that phrase and the word "north" was handwritten in.

At the same time, the Co-op wanted to improve its antiquated water system and orally agreed to cost share with West Coast, intending to make the needed upgrades at the same time West Coast installed a new main line. This was never put into writing.

In February 2005, Bratton prepared bid documents for installing the water main. Those documents were approved by the Co-op and forwarded to the Department of Health (Department). The Department eventually granted approval after certain adjustments. The approval was then sent to West Coast, which balked because the plans required three crossovers and eleven residential service connections on its installation of an 8-inch water main, significantly increasing the project's cost.

West Coast sued the Co-op for breach of contract/anticipatory repudiation, negligent and intentional misrepresentation, and estoppel. The complaint alleged that the Co-op violated its agreement to cost share and thus breached the contract. On April 4, 2011, the trial court granted summary judgment dismissal of West Coast's complaint, finding that the cost-sharing claim was based on an oral agreement and was time barred because more than three years had elapsed.

On reconsideration, the trial court re-affirmed its decision dismissing the action for cost sharing as time barred but determined that there was still an issue about whether the Co-op had placed additional conditions on its agreement as alleged in the complaint. The Co-op then brought a counterclaim for unpaid membership fees due for West Coast's purchase of 20 additional shares. After a bench trial on the remaining issues, the court found that there was no binding

agreement between the parties and dismissed the breach of contract claim. The court found in favor of the Co-op on its counterclaim for money owing on the shares for the Co-op. Because the Co-op bylaws provided for attorney fees, the court also awarded fees and costs expended for that portion of the litigation. West Coast appeals.

ANALYSIS

"The touchstone of contract interpretation is the parties' intent."¹ Washington courts follow the "objective manifestation" theory of contracts.² A valid contract requires an objective manifestation of mutual assent to its terms, rather than any unexpressed subjective intent of the parties.³ Courts will not impose obligations that the parties did not assume for themselves.⁴ A formation of a contract requires that there be an objective manifestation of mutual assent of both parties.⁵ Intent may be imputed based on the ordinary meaning of the words within the contract.⁶ Words in a contract are given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.⁷

¹ Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

² Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005); State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783, 211 P.3d 448 (2009).

³ Hearst, 154 Wn.2d at 503.

⁴ Condon v. Condon, 177 Wn.2d 150, 162-63, 298 P.3d 86 (2013).

⁵ P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 207, 289 P.3d 638 (2012).

⁶ Hearst, 154 Wn.2d at 503.

⁷ Hearst, 154 Wn.2d at 504 (citing Universal/Land Constr. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.3d 53 (1987)).

There must be agreement on the essential terms to give rise to a contract.⁸ The findings of fact are critical to the resolution of whether there was a contract and those findings are reviewed to determine whether substantial evidence exists to support them.⁹ The application of the law to the facts is a question of law and subject to de novo review.¹⁰ The court reviews de novo the trial court's conclusions of law to determine if they are supported by the findings of fact.¹¹ Unchallenged findings of fact are verities on appeal.¹²

The trial court entered extensive findings of fact and conclusions of law which support its ruling that West Coast's breach of contract claim was based on a complete misunderstanding of the water system along West Camano Drive. West Coast believed it was replacing a 4-inch main located along the east side of West Camano Drive with an 8-inch PVC (polyvinyl chloride) pipe to be installed on that same side. West Coast relied on a misinterpretation of the Bratton memorandum, thinking that its chosen option, option one, described work "north" of Uplands Road, when in reality it described work "south" of Uplands Road.¹³ Unchallenged finding of fact 13 states that the only 4-inch main on the street was located on the west side.

⁸ Condon, 177 Wn.2d at 208-09.

⁹ Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

¹⁰ Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 870 (2008).

¹¹ Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 536 (2002) (citing City of Seattle v. Megrey, 93 Wn. App. 391, 393, 968 P.2d 900 (1998)).

¹² Brundridge, 164 Wn.2d at 439-40.

¹³ Exhibit 71 shows Bratton's memorandum with the word "south" struck out and replaced with the handwritten word "north."

The parties' discussions "never resolved how West Coast's new water main was going to 'replace' the existing main, [or] how existing customers would be reconnected (if at all)." Indeed, Robinett testified about a letter he sent transmitting his signed extension agreement in which he acknowledged that the contract had missing elements. Robinett admitted on cross-examination that the agreement does not specifically state where the 8-inch pipe would be placed or in which direction any pipe laying would start.

Placement of the 8-inch pipe was an essential element of the agreement. The court's extensive findings support its conclusion that there was no objective manifestation of this essential element. The trial testimony showed that each party objectively manifested different intents, and thus, there was no "meeting of the minds" on how the agreement would work.¹⁴ There was, therefore, no enforceable contract.

Nor is there any merit to West Coast's claim for promissory estoppel. "Promissory estoppel requires the existence of a promise. A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."¹⁵ Here, there is no promise. The mere fact that there is a written document entitled "Agreement" is insufficient to sustain a finding that there was, in fact, a valid contract. We affirm the trial court's holding that no contract existed.

¹⁴ In re G.W.-F, 170 Wn. App. 631, 640, 285 P.3d 208 (2012).

¹⁵ Tacoma Auto. Mall, Inc. v. Nissan N. Am., Inc., 169 Wn. App. 111, 127, 279 P.3d 487 (2012) (internal quotation marks and citations omitted).

Counterclaim for dues owed Co-op

The trial court determined that West Coast owed the Co-op \$107,894.65 in past dues for its 21 shares. As an owner of the undeveloped land, West Coast owned one share in the Co-op. When West Coast learned that the cost of shares was increasing from \$5,000 to \$7,000, West Coast purchased 20 additional shares for the proposed home sites on the property. When West Coast transmitted the \$100,000 check for payment of the 20 additional shares, it did so with the following letter:

Please find enclosed a check for \$100,000 to pay for 20 water shares for the Plat of Saratoga Ridge. It is understood that there is currently a share that runs with the existing lot. In the event that the Plat was not approved as proposed or approved for less than the proposed 21 lots, West Coast, Inc. may sell back to the Co-op any unused water shares for the same price they were purchased for (\$5,000.00).

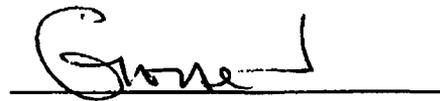
West Coast contends that this conditional offer was accepted by the Co-op when it cashed the check. Because West Coast's version of the placement of the water pipes was not accepted, it contends that the Co-op is obligated to purchase those back. West Coast is incorrect. The letter merely states that West Coast "may" sell back the shares to the Co-op for the same price purchased. West Coast made no demand to the Co-op to buy back the shares, and thus, the Co-op was under no obligation to do so.

The only issue presented on this record and briefing is whether it was error for the trial court to award the Co-op dues it identified in its counterclaim. On this issue, we conclude that the purchase of 20 shares was contingent on the approval of the development plan proposed by West Coast—a contingency

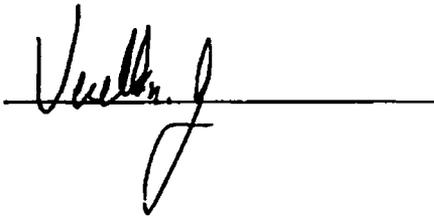
rendered impossible by the failure of the parties to form a binding contract. Because this contingency never occurred, the Co-op's right to collect dues allegedly owing on the shares is nonexistent. The trial court thus erred as a matter of law in determining that the Co-op was entitled to those sums.¹⁶

We cannot determine from this record what the dues would be for the one share that West Coast owes. We presume that the Co-op will need to recalculate dues owed by its shareholders and that the one share may thus be greater than 1/21 of the dues owed.

In conclusion, we affirm the trial court's finding that no contract was formed, but reverse its decision on the Co-op's counterclaim against West Coast for unpaid dues and assessments owed on 20 of the 21 shares it purchased. The matter is remanded for proceedings in accord with this opinion.



WE CONCUR:



¹⁶ West Coast seems to rely on its nonpayment of dues as its expression that it wanted to sell back the shares to the Co-op. But as evidenced by Co-op board minutes, West Coast had been late in paying its dues previously. Thus, nonpayment of dues cannot be considered a demand for the Co-op to repurchase those shares. Further, its argument does not address what significance, if any, to give to the fact that unchallenged finding of fact 67 notes that the plat was approved by the County.

APPENDIX D

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

WEST COAST, INC., a Washington)	
corporation,)	
)	
Appellant,)	
	)	MOTION FOR
Vs.	)	RECONSIDERATION
	)	RE: COUNTERCLAIM
CAMANO CO-OPERATIVE	)	FOR DUES
WATER AND POWER CO., a)	
Washington corporation,)	
)	
Respondent.)	
_____)	

I. IDENTITY OF MOVING PARTY

Respondent Camano Co-Operative Water and Power Company,
requests the relief described in Section II.

II. STATEMENT OF RELIEF SOUGHT

This is a request that the Court reconsider a portion of the Opinion dated November 4, 2013, starting on page seven entitled "Counterclaim for dues owed Co-op." Specifically, Respondent requests reconsideration of that portion of the Opinion to reverse the trial court's decision on the

Respondent's counterclaim against Appellant for unpaid dues. This motion is pursuant to RAP 12.4.

III. FACTS RELEVANT TO MOTION

The trial court determined that like all shareholders West Coast was required to pay dues and assessments, and for several months after purchase of 20 shares West Coast did pay dues. In Findings Of Fact that are not challenged by Appellant, the trial court stated:

64. Shareholders in the Coop are required to pay membership fees (also called dues) and assessments. Resolution 2011-28 is the most recent resolution adopting rates and charges.

65. Plaintiff paid dues and assessments for the first several months after purchasing 20 additional shares, but discontinued payments after Plaintiff believed it was not getting cooperation from the Co-op to approve its project.

In the Assignments of Error the Appellant did not assign error to either of these trial court findings. However, the Opinion of this Court reverses these findings and the conclusion that followed. Appellant presented no evidence at trial that there was any agreement the sale of 20 shares to West Coast was contingent upon approval of plans. Just as this Court determined that the sale was not conditional, the Court should affirm the trial court and determine there was no contingency.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Issue One: If the purchase of shares is not conditional, can it be said to be a contingent purchase?

On page seven of the Opinion the Court inconsistently stated that the sale of water shares to Appellant was not "*conditional*" but it was "*contingent*" upon approval of the installation of the water system. Initially the Opinion correctly affirmed the trial court determination that the sale of the shares to Appellant was not conditioned on approval of the Plat of Saratoga Ridge. In the next paragraph on page seven the Court seems to come to a contrary conclusion that "*the purchase of 20 shares was contingent on the approval of the development plans proposed by West Coast*" which was impossible because of the failure of the parties to form a contract.

On the one hand the Court is saying the sale was not "*conditional*" but on the other hand it was "*contingent*" on approval of plans. The sale could not have been "*contingent*" because it was consummated. West Coast took title to the shares and with that title came the obligation to pay dues and assessments as described in Finding of Fact No. 64, *supra*.

There does not appear in Appellant's Brief any reference to a "*contingent*" purchase of water shares. Appellant did argue that West

Coast made a "conditional purchase"¹ of shares. That argument was rejected by both the trial court and this Court. There was no theory of contingent purchase advanced by either party at trial. While it is a fair reading of the evidence to believe West Coast would not have purchased shares if West Coast did not intend to develop a plat, there is no evidence that the parties agreed that West Coast, unlike all other shareholders, did not have to pay dues if the plat was not approved or the water plan was not approved.

At the most, West Coast acknowledged that the Coop could repurchase the shares if the plat could not be approved. The plat was approved by the county, a permit to work on the right-of-way was issued and Health Department approved the plans. *Findings*² No. 56 and 57. The decision to proceed with the developer extension of the water lines to the plat is in the control of West Coast. The shares are purchased and the dues are unpaid. There was no evidence that the purchase was contingent on future events, especially events that are in the control of the shareholder.

Issue Two: Is there evidence in support of the trial court finding that West Coast was responsible for unpaid dues?

¹ Brief of Appellant, page 44.

² See Appendix 1.

The only evidence presented on the failure to pay dues were exhibits 64 and 65³, which are the spreadsheet of the West Coast Account and Resolution #2011-28 adopted by Respondent. The Resolution stated, in part, that "the Cooperative is committed to setting rates and charges in a manner that provides fairness, equity and consistency for all shareholders." There was no contrary evidence presented and no evidence that other shareholders similarly situated did not have to pay dues and assessments.

Issue Three: How should the parties proceed if West Coast is not obligated to pay dues?

The reversal of the counterclaim presents unanticipated issues and problems. There are unanticipated consequences in the Opinion by holding that the purchase of shares was contingent upon a future event. The several new issues for the parties include the following:

1) When does West Coast have to start paying dues and assessments? If the dues and assessments through the first day of trial (exhibit 64) are no longer delinquent, when does West Coast have a duty to begin paying? Once West Coast were to become obligated to pay, for what period are dues and assessments to be owed?

³ See Appendix 2

2) If the sale of shares was "contingent" but not conditional, who now owns the shares and if West Coast owns them, is there a circumstance under which West Coast can demand the Coop repurchase the shares?

3) If the bank forecloses on West Coast, or there is a transfer of ownership of West Coast's property, does the new owner have any obligation to pay dues to the Coop as owner of the shares? If so when and in what amount?

Respondent understands that this Court is not required to respond to these issues, but the unintended consequences are created not just by the reversal of the trial court, but by the determination that the purchase of shares was contingent on a future event. These issues will not be issues between the parties in the future if the Court reconsiders its Opinion with regard to the counterclaim.

V. CONCLUSIONS

The Court should reconsider that portion of the Opinion entitled "Counterclaim for dues owed Co-op." which reversed the trial court concerning unpaid dues and issues a revised Opinion that affirms the trial court's findings and conclusions.

DATED this 19 day of November, 2013.



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WSBA # 7283

APPENDIX

Appendix 1 Findings of Fact and Conclusions of Law entered on August 2, 2012

Appendix 2 Exhibits 64 and 65

including improvements on the west side of West Camano Road. Mr. Robinett referenced the February 19, 2004 Board meeting and stated "(t)he water line on the West side of West Camano Drive was not part of that discussion."

56. On March 2, 2006 the Co-op sent a letter to Plaintiff stating that the Co-op believed the plans approved in November 2004 and sent to the Department of Health were the plans agreed on between the parties and the Co-op was "unwilling to change the plan as was presented and agreed upon in the Developer Extension agreement." The letter also stated that agreement required the project be "installed in accordance with the plans and specifications approved by the water company."

57. On April 26, 2006 the Co-op applied for a permit from Island County to perform work on road right-of-way. The permit was approved on June 1, 2006.

58. On April 27, 2006 Kelly Wynn wrote a letter to Plaintiff concerning a phone call from John Robinett on April 17, 2006 seeking more details for the project construction. Mr. Wynn advised Plaintiff that the construction plan was based on information from the Plaintiff's surveyor and more detail can be provided based on additional information. The letter reminded Mr. Robinett that the November 2004 plans were already approved and submitted to the Department of Health.

59. On June 6, 2006, Wynn wrote a letter to Robinett explaining the Board's position. He said Camano Co-op agreed to cost share on the "approximately 1770 feet of 8" class C-900 water main to be located on the east side of West Camano Road... This 8" line extension will also

Camano Cooperative Water & Power Company

7-31-12

West Coast Account

APPENDIX 2

Ex 64

Month	1/1/04	2/1/04	3/1/04	4/1/04	5/1/04	6/1/04	7/1/04	8/1/04	9/1/04	10/1/04	11/1/04	12/1/04
Draw/Save Charge												
Capital Assessment												
Loan Draw												
Interest												
Loan/Loan Balance												
Total Due												
Paid												
Balance Due												

Month	1/1/05	2/1/05	3/1/05	4/1/05	5/1/05	6/1/05	7/1/05	8/1/05	9/1/05	10/1/05	11/1/05	12/1/05
Draw/Save Charge												
Capital Assessment	100.00											
Loan Draw												
Interest												
Loan/Loan Balance	100.00	100.00										
Total Due	100.00	100.00										
Paid												
Balance Due	100.00											

Month	1/1/06	2/1/06	3/1/06	4/1/06	5/1/06	6/1/06	7/1/06	8/1/06	9/1/06	10/1/06	11/1/06	12/1/06
Draw/Save Charge												
Capital Assessment												
Loan Draw												
Interest												
Loan/Loan Balance												
Total Due												
Paid												
Balance Due												

Month	1/1/07	2/1/07	3/1/07	4/1/07	5/1/07	6/1/07	7/1/07	8/1/07	9/1/07	10/1/07	11/1/07	12/1/07
Draw/Save Charge												
Capital Assessment												
Loan Draw	210.00											
Interest	78.75	78.75										
Loan/Loan Balance	288.75	367.50										
Total Due	367.50	446.25										
Paid												
Balance Due	367.50	446.25	525.00	603.75	682.50	761.25	840.00	918.75	997.50	1076.25	1155.00	1233.75

Month	1/1/08	2/1/08	3/1/08	4/1/08	5/1/08	6/1/08	7/1/08	8/1/08	9/1/08	10/1/08	11/1/08	12/1/08
Draw/Save Charge	1,050.00											
Capital Assessment	4,300.00											
Loan Draw	105.00	105.00										
Interest	153.30	135.40										
Loan/Loan Balance	1,358.30	1,493.70										
Total Due	2,066.60	2,034.50										
Paid												
Balance Due	2,066.60	2,034.50	2,002.40	1,970.30	1,938.20	1,906.10	1,874.00	1,841.90	1,809.80	1,777.70	1,745.60	1,713.50

Carrano Cooperative Water & Power Company

7-Jul-12

West Coast Account:

Balance Due	20,154.90	20,394.30	20,594.25	22,034.25	22,329.25	22,741.85	25,150.50	25,461.25	25,689.05	28,017.90	28,246.75	28,021.60
Month	7/1/08	8/1/08	9/1/08	10/1/08	11/1/08	12/1/08	1/1/09	2/1/09	3/1/09	4/1/09	5/1/09	6/1/09
Draw/Revs Charge	2,100.00			2,100.00			2,100.00			2,100.00		2,100.00
Capital Assessment												
Revs		525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00
Unrev	249.85	235.10	276.10	281.35	281.35	302.35	307.60	328.60	328.60	333.85	333.85	354.95
Item/Item Balance	31,371.45	32,151.55	32,427.65	34,809.00	35,615.35	34,912.70	38,325.30	39,178.90	39,507.50	41,941.35	42,800.20	43,155.05
Total Due	31,371.45	32,151.55	32,427.65	34,809.00	35,615.35	35,917.70	38,525.30	39,478.90	39,507.50	41,941.35	42,800.20	43,155.05
Balance Due	31,371.45	32,151.55	32,427.65	34,809.00	35,615.35	35,917.70	38,525.30	39,478.90	39,507.50	41,941.35	42,800.20	43,155.05
Month	7/1/10	8/1/10	9/1/10	10/1/10	11/1/10	12/1/10	1/1/11	2/1/11	3/1/11	4/1/11	5/1/11	6/1/11
Draw/Revs Charge	2,100.00			2,100.00			2,100.00			2,100.00		2,100.00
Capital Assessment	1,680.00			1,680.00			1,680.00			1,680.00		1,680.00
Revs		525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00
Unrev	360.10	360.10	397.90	403.15	403.15	440.95	446.20	446.20	484.00	489.25	489.25	527.05
Item/Item Balance	47,285.15	48,180.25	48,578.15	52,761.30	53,689.45	54,130.40	56,355.60	56,572.80	59,811.80	64,091.05	65,095.30	65,622.35
Total Due	47,285.15	48,180.25	48,578.15	52,761.30	53,689.45	54,130.40	58,355.60	58,522.80	59,811.80	64,091.05	65,095.30	65,622.35
Balance Due	47,285.15	48,180.25	48,578.15	52,761.30	53,689.45	54,130.40	58,355.60	58,522.80	59,811.80	64,091.05	65,095.30	65,622.35
Month	7/1/12	8/1/12	9/1/12	10/1/12	11/1/12	12/1/12	1/1/13	2/1/13	3/1/13	4/1/13	5/1/13	6/1/13
Draw/Revs Charge	2,100.00			2,100.00			2,100.00			2,100.00		2,100.00
Capital Assessment	1,680.00			1,680.00			1,680.00			1,680.00		1,680.00
Revs		525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00
Unrev	532.30	532.30	570.10	575.35	575.35	613.15	618.40	618.40	656.20	661.45	661.45	699.25
Item/Item Balance	69,834.65	70,891.95	71,569.05	74,917.40	77,017.75	77,630.90	82,025.30	83,172.70	83,828.90	89,270.35	89,456.80	90,156.05
Total Due	69,834.65	70,891.95	71,569.05	74,917.40	77,017.75	77,630.90	82,025.30	83,172.70	83,828.90	89,270.35	89,456.80	90,156.05
Balance Due	69,834.65	70,891.95	71,569.05	74,917.40	77,017.75	77,630.90	82,025.30	83,172.70	83,828.90	89,270.35	89,456.80	90,156.05
Month	7/1/13	8/1/13	9/1/13	10/1/13	11/1/13	12/1/13	1/1/14	2/1/14	3/1/14	4/1/14	5/1/14	6/1/14
Draw/Revs Charge	2,100.00			2,100.00			2,100.00			2,100.00		2,100.00
Capital Assessment	1,680.00			1,680.00			1,680.00			1,680.00		1,680.00
Revs		525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00	525.00
Unrev	704.50	704.50	742.30	747.55	747.55	785.35	791.60	791.60	829.40	834.65	834.65	872.45
Item/Item Balance	94,640.55	95,870.05	96,612.35	101,138.90	102,537.45	103,322.80	107,894.65	107,894.65	109,270.35	109,270.35	111,075.80	111,075.80
Total Due	94,640.55	95,870.05	96,612.35	101,138.90	102,537.45	103,322.80	107,894.65	107,894.65	109,270.35	109,270.35	111,075.80	111,075.80
Balance Due	94,640.55	95,870.05	96,612.35	101,138.90	102,537.45	103,322.80	107,894.65	107,894.65	109,270.35	109,270.35	111,075.80	111,075.80

**CAMANO COOPERATIVE WATER AND POWER COMPANY
ISLAND COUNTY, WASHINGTON**

2010/2011 RATES AND CHARGES

RESOLUTION # 2011-28

**RESOLUTION OF THE BOARD OF CAMANO COOPERATIVE WATER AND POWER
COMPANY, ISLAND COUNTY, WASHINGTON, ADOPTING RATES AND CHARGES
FOR THE YEAR 2010/2011.**

1. **WHEREAS**, the Camano Cooperative Water and Power Company (the Cooperative) is required to set rates and charges for all services provided by the Cooperative; and
2. **WHEREAS**, Article III, Section 8 of the By-laws authorizes the Board to determine rates and charges for services provided by the Cooperative including charges for membership fees and other charges of a capital nature; and
3. **WHEREAS**, the 2010 to 2015 capital assessment was approved by shareholders at the 2009 annual meeting; and
4. **WHEREAS**, the Board of Directors of the Cooperative is committed to setting rates and charges in a manner that provides fairness, equity and consistency for all shareholders; and
5. **WHEREAS**, the Board of Directors of the Cooperative is committed to setting rates and charges in a manner that encourages conservation of water; and
6. **WHEREAS**, other parts of the By-laws authorize specific rates and charges as stated in Attachment A;

THEREFORE BE IT RESOLVED, by the Board of Directors of Camano Cooperative Water and Power Company, Island County, Washington, that the rates and charges detailed in Attachment A to this resolution are approved for the fiscal year October 1, 2010 through September 30, 2011.

ADOPTED by the Board of Directors of Camano Cooperative Water and Power Company, Island County, Washington, at a regular meeting held on the 17th day of March 2011.

President: _____

Vice President: *[Signature]*

Treasurer: _____

Secretary: *[Signature]*

Director: *[Signature]*

Director: *[Signature]*

Director: _____

EX-66

**Annual
Camano Coop Water & Power Co
2011 Rates Fees and Charges**

Description	Price	Authority
1. Shares		
Share in Camano Coop	\$ 10,700.00	
2. Base Assessment		
Quarterly Base Charge	\$ 100.00	Article XII, Section 3 of the By-laws
3. Capital Assessments		
Assessment for 2007/2008 (one annual charge)	\$ 200.00	
2010-2015 Quarterly Capital Assessment	\$ 80.00	
4. Quarterly Water Consumption Charges per gallon		
0 to 15000	\$ 0.0005	Article XII, Section 4 of the By-laws
15000 to 22500	\$ 0.0010	
22500 to 30000	\$ 0.0017	
30,000 to 45,000	\$ 0.0042	
45,000 +	\$ 0.0068	
5. Fees		
Developer Project Manual Agreement	\$ 250.00	
Extension Manual	\$ 50.00	
New Service Hook-up	\$ 3,625.00	
Builder's Fee Reimbursement	\$ -	
Cancel Check	\$ -	
Carrying Charges	\$ 5.00	
Late Fee	\$ 25.00	
12% per Annum Interest	\$ -	
Uen Filed	\$ 125.00	Article XII, Section 5 of the By-laws
Remove Lien	\$ 125.00	Article XII, Section 6 of the By-laws
Liege Added with Other Property	\$ -	Article XII, Section 7 of the By-laws
No Charge for Water	\$ -	
NSF Fee	\$ 25.00	
Returned Check for NSF	\$ -	
Refund Credit on Account	\$ -	
Fee for tampering with Coop equipment	\$ 400.00	
Share Transfer Fee	\$ 50.00	
Water Availability	\$ 100.00	
Water Off for Non-Payment	\$ 100.00	
Turn Water On - After Full Payment	\$ 100.00	

Article III, Section 9 of the By-laws - Gives the Board the right to set rates and charges for services provided by the Corporation

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WEST COAST, INC., a Washington corporation,	)	No. 69255-1-I
)	
Appellant,	)	DIVISION ONE
)	
v.	)	UNPUBLISHED OPINION
)	
CAMANO CO-OPERATIVE WATER AND POWER COMPANY, a Washington corporation,)	
)	
Respondent.	)	FILED: March 17, 2014

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 17 AM 9:20

GROSSE, J. — A contract missing material terms is nothing more than an agreement to agree, unenforceable as a matter of law. Here, the location of the water pipes was an essential element of the parties' agreement to install pipe for water distribution to the proposed housing sites. Because the parties did not agree to where the water pipes would be located, there was no "meeting of the minds" on the essential terms and, thus, no contract. We affirm the trial court's decision that there was no contract.

The trial court awarded Camano Co-Operative Water and Power Company (Co-op) a judgment for unpaid dues and assessments owed on 21 shares purchased by West Coast, Inc. Although West Coast could have asked the Co-op to repurchase 20 of those shares if its development was not approved, it never did so and is therefore liable for the dues owed on those shares.

FACTS

In January 2004, West Coast signed a purchase and sale agreement for property on Camano Island with the intent of developing single family homes on the property, known as Saratoga Ridge. In order to develop the land, Island County required West Coast to provide a fire hydrant with sufficient water flow to the property site for fire services. Water was provided by the Co-op, a small cooperative utility owned by the residential property owners on the west side of Camano Island. The Co-op contracts with Water & Wastewater Services, LLC, owned by Kelly Wynn, to manage the water system.

John Robinett, the principal of West Coast, contacted Wynn and the Co-op board regarding water requirements. Wynn faxed Robinett a two-page memorandum and three pages of drawings of the water distribution system created by the Co-op's engineer, George Bratton, for a previously interested party. The drawings depict the existing water system in the area in 2004. The drawings show the location of the only 4-inch water main to be on the west side of West Camano Drive. The Bratton memorandum contained two options for installing the required fire flow to Saratoga Ridge. Option one was from the south; option two approached from the north. Robinett wanted to pursue option one, which would provide 500 gallons per minute. The Bratton memorandum described option one as "1,910 feet of 4-inch AC [(asbestos cement)] pipe on West Camano Dr. south of Uplands road." Sometime after the Bratton memorandum was created, the word "south" was crossed out of that phrase and the word "north" was handwritten in.

At the same time, the Co-op wanted to improve its antiquated water system and orally agreed to cost share with West Coast, intending to make the needed upgrades at the same time West Coast installed a new main line. This was never put into writing.

In February 2005, Bratton prepared bid documents for installing the water main. Those documents were approved by the Co-op and forwarded to the Department of Health (Department). The Department eventually granted approval after certain adjustments. The approval was then sent to West Coast, which balked because the plans required three crossovers and eleven residential service connections on its installation of an 8-inch water main, significantly increasing the project's cost.

West Coast sued the Co-op for breach of contract/anticipatory repudiation, negligent and intentional misrepresentation, and estoppel. The complaint alleged that the Co-op violated its agreement to cost share and thus breached the contract. On April 4, 2011, the trial court granted summary judgment dismissal of West Coast's complaint, finding that the cost-sharing claim was based on an oral agreement and was time barred because more than three years had elapsed.

On reconsideration, the trial court re-affirmed its decision dismissing the action for cost sharing as time barred but determined that there was still an issue about whether the Co-op had placed additional conditions on its agreement as alleged in the complaint. The Co-op then brought a counterclaim for unpaid membership fees due for West Coast's purchase of 20 additional shares. After a bench trial on the remaining issues, the court found that there was no binding

agreement between the parties and dismissed the breach of contract claim. The court found in favor of the Co-op on its counterclaim for money owing on the shares for the Co-op. Because the Co-op bylaws provided for attorney fees, the court also awarded fees and costs expended for that portion of the litigation. West Coast appeals.

ANALYSIS

“The touchstone of contract interpretation is the parties’ intent.”¹ Washington courts follow the “objective manifestation” theory of contracts.² A valid contract requires an objective manifestation of mutual assent to its terms, rather than any unexpressed subjective intent of the parties.³ Courts will not impose obligations that the parties did not assume for themselves.⁴ A formation of a contract requires that there be an objective manifestation of mutual assent of both parties.⁵ Intent may be imputed based on the ordinary meaning of the words within the contract.⁶ Words in a contract are given their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.⁷

¹ Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

² Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005); State v. R.J. Reynolds Tobacco Co., 151 Wn. App. 775, 783, 211 P.3d 448 (2009).

³ Hearst, 154 Wn.2d at 503.

⁴ Condon v. Condon, 177 Wn.2d 150, 162-63, 298 P.3d 86 (2013).

⁵ P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 207, 289 P.3d 638 (2012).

⁶ Hearst, 154 Wn.2d at 503.

⁷ Hearst, 154 Wn.2d at 504 (citing Universal/Land Constr. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.3d 53 (1987)).

There must be agreement on the essential terms to give rise to a contract.⁸ The findings of fact are critical to the resolution of whether there was a contract and those findings are reviewed to determine whether substantial evidence exists to support them.⁹ The application of the law to the facts is a question of law and subject to de novo review.¹⁰ The court reviews de novo the trial court's conclusions of law to determine if they are supported by the findings of fact.¹¹ Unchallenged findings of fact are verities on appeal.¹²

The trial court entered extensive findings of fact and conclusions of law which support its ruling that West Coast's breach of contract claim was based on a complete misunderstanding of the water system along West Camano Drive. West Coast believed it was replacing a 4-inch main located along the east side of West Camano Drive with an 8-inch PVC (polyvinyl chloride) pipe to be installed on that same side. West Coast relied on a misinterpretation of the Bratton memorandum, thinking that its chosen option, option one, described work "north" of Uplands Road, when in reality it described work "south" of Uplands Road.¹³ Unchallenged finding of fact 13 states that the only 4-inch main on the street was located on the west side.

⁸ Condon, 177 Wn.2d at 208-09.

⁹ Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

¹⁰ Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 870 (2008).

¹¹ Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 536 (2002) (citing City of Seattle v. Megrey, 93 Wn. App. 391, 393, 968 P.2d 900 (1998)).

¹² Brundridge, 164 Wn.2d at 439-40.

¹³ Exhibit 71 shows Bratton's memorandum with the word "south" struck out and replaced with the handwritten word "north."

The parties' discussions "never resolved how West Coast's new water main was going to 'replace' the existing main, [or] how existing customers would be reconnected (if at all)." Indeed, Robinett testified about a letter he sent transmitting his signed extension agreement in which he acknowledged that the contract had missing elements. Robinett admitted on cross-examination that the agreement does not specifically state where the 8-inch pipe would be placed or in which direction any pipe laying would start.

Placement of the 8-inch pipe was an essential element of the agreement. The court's extensive findings support its conclusion that there was no objective manifestation of this essential element. The trial testimony showed that each party objectively manifested different intents, and thus, there was no "meeting of the minds" on how the agreement would work.¹⁴ There was, therefore, no enforceable contract.

Nor is there any merit to West Coast's claim for promissory estoppel. "Promissory estoppel requires the existence of a promise. A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."¹⁵ Here, there is no promise. The mere fact that there is a written document entitled "Agreement" is insufficient to sustain a finding that there was, in fact, a valid contract. We affirm the trial court's holding that no contract existed.

¹⁴ In re G.W.-E, 170 Wn. App. 631, 640, 285 P.3d 208 (2012).

¹⁵ Tacoma Auto. Mall, Inc. v. Nissan N. Am., Inc., 169 Wn. App. 111, 127, 279 P.3d 487 (2012) (internal quotation marks and citations omitted).

Counterclaim for dues owed Co-op

The trial court determined that West Coast owed the Co-op \$107,894.65 in past dues for its 21 shares. As an owner of the undeveloped land, West Coast owned one share in the Co-op. When West Coast learned that the cost of shares was increasing from \$5,000 to \$7,000, West Coast purchased 20 additional shares for the proposed home sites on the property. When West Coast transmitted the \$100,000 check for payment of the 20 additional shares, it did so with the following letter:

Please find enclosed a check for \$100,000 to pay for 20 water shares for the Plat of Saratoga Ridge. It is understood that there is currently a share that runs with the existing lot. In the event that the Plat was not approved as proposed or approved for less than the proposed 21 lots, West Coast, Inc. may sell back to the Co-op any unused water shares for the same price they were purchased for (\$5,000.00).

West Coast contends that this conditional offer was accepted by the Co-op when it cashed the check. West Coast argues that the Co-op is obligated to purchase the shares back because West Coast's version of the placement of the water pipes was not accepted. West Coast is incorrect. The letter merely states that West Coast "may" sell back the shares to the Co-op for the same price purchased. West Coast made no demand to the Co-op to buy back the shares, and thus, the Co-op was under no obligation to do so.

West Coast paid the dues and assessments for the first several months, but ceased making payments when it was not getting approval for its project. West Coast seems to rely on its nonpayment of dues as its expression that it wanted to sell back the shares to the Co-op. But as evidenced by Co-op board

minutes, West Coast had been late in paying its dues previously. Thus, nonpayment of dues cannot be considered a demand for the Co-op to repurchase those shares.

Attorney Fees

Washington permits a party to recover attorney fees under a statute, a contract, or a well-recognized principle of equity.¹⁶ Here, the bylaws of the Co-op contain a proviso for attorney fees. This court reviews an award of attorney fees for abuse of discretion.¹⁷ An abuse of discretion is a manifestly unreasonable decision or one based on untenable grounds or made for untenable reasons.¹⁸

The Co-op supported its motion with a declaration from its attorney and itemized billing invoices detailing the hours of work. The trial court found the hours worked and rates charged reasonable. West Coast presented no evidence to contradict the Co-op's claim. We affirm the trial court's award of \$1,896.00 as reasonable attorney fees, \$200.00 in statutory attorney fees, and \$240.00 in costs.

The Co-op also requests attorney fees on appeal citing RAP 18.1. A contractual proviso in providing for attorney fees at trial supports an award of attorney fees on appeal. Because the bylaws provide for an award of attorney fees, we grant the request for fees that are attributable to that portion of the appeal.

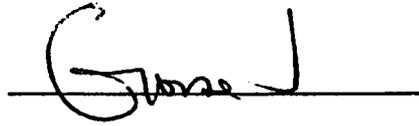
¹⁶ Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 525, 210 P.3d 318 (2009) (citing Quality Food Ctrs. v. Mary Jewell T, LLC, 134 Wn. App. 814, 817, 142 P.3d 206 (2006)).

¹⁷ Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

¹⁸ Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

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Affirmed.



WE CONCUR:

