

No. 44942-1-II

(Cowlitz County Superior Court No. 12-2-00304-2)

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

COLUMBIA RIVER CARBONATES,

Appellant,

vs.

PORT OF WOODLAND, PORT COMMISSION OF
THE PORT OF WOODLAND, and CRRVP LLC,

Respondent,

BRIEF OF APPELLANT

Charles A. Klinge, WSBA # 26093
W. Forrest Fischer, WSBA #44156
Attorneys for Appellant

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004

Telephone: (425) 453-6206

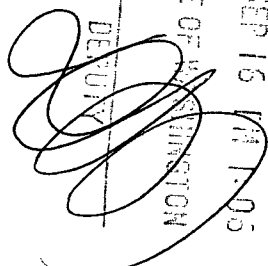
FILED
COURT OF APPEALS
DIVISION II
2013 SEP 16 PM 1:05
STATE OF WASHINGTON
BY  DEJUN

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR AND RELATED ISSUES.....	2
Assignment of Error No. 1:.....	2
Assignment of Error No. 2:.....	3
STATEMENT OF THE CASE.....	4
A. The Parties and the Subject Property	4
B. Interest in Purchasing the Subject Property	5
C. Appraisal and Surplussing of Subject Property	6
D. Private Sale of the Subject Property to CRRVP	11
E. The Lawsuit and Motions for Summary Judgment.....	13
F. CRRVP's Second Motion for Summary Judgment	16
ARGUMENT	18
I. THE PORT VIOLATED ITS TRUSTEESHIP DUTIES AND ABUSED ITS DISCRETION WHEN IT MADE THE SURPLUS DESIGNATION AND WHEN IT SOLD THE PROPERTY FOR FAR LESS THAN FAIR MARKET VALUE	18
A. Standards and Statutes Applicable to Port Commission Action.....	18
1. Statutory Standards for Port Sales of Real Property	19
2. The Port is Governed by Trust and Fiduciary Standards of Conduct and Decision Making.	20
B. The Port Abused Its Discretion in Determining that the Subject Property was Surplus.	22
1. The Port Provided No Public Notice of the Surplus Hearing.....	22
2. The Subject Property Was Not Surplus As Statutorily Defined.....	23
C. The Port Violated Its Trusteeship Duties and Abused Its Discretion by Selling the Subject Property at a Significant Discount to Fair Market Value	24

1.	The Port Abused its Discretion by Affording CRRVP Credits For Leasehold Improvements On the Subject Property	25
2.	The Port’s Failure To Sell the Subject Property For Its Appraised Value Was An Abuse Of Discretion	26
3.	Failure to Market the Property Was An Abuse of Discretion	27
II.	THE TRIAL COURT ERRED IN DETERMINING THAT CRRVP’S BONA FIDE PURCHASER FOR VALUE DEFENSE DEFEATED CRC’S STATUTORY CLAIMS	29
1.	The Bona Fide Purchaser Doctrine Does not Apply to CRRVP	29
2.	CRC’s Claims are Substantive in Nature, not Procedural	31
3.	The OPMA is Substantive in Nature, not Procedural; the Trial Court Erred to the Extent OPMA was Dismissed on the Merits	33
III.	THE TRIAL COURT ERRED IN DISMISSING CRC’S CLAIM OF UNCONSTITUTIONAL GIFT OF PUBLIC PROPERTY	36
A.	CRC’s Claim Met the Traditional Legal Standards for Finding an Unconstitutional Gift of Public Property	37
1.	Traditional Legal Standard: Grossly Inadequate Consideration or Donative Intent Requires Close Scrutiny	38
2.	CRC Presented Facts Demonstrating Gross Inadequacy of Consideration	40
3.	CRC Presented Facts Demonstrating Donative Intent Due to the Unobligated Credit for Improvements and Other Facts	41
B.	The <i>King County</i> Case Did Not Eviscerate the Traditional Legal Standards under the Gift Clause and is Otherwise Distinguishable	45
IV.	ATTORNEY FEES REQUEST UNDER RAP 18.1(b)	49
	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Adams v. University of Washington</i> , 106 Wn.2d 312 (1986).....	39
<i>Allard v. Pacific Nat'l Bank</i> , 99 Wn.2d 394 (1983).....	21
<i>Bremerton Public Safety Ass'n v. City of Bremerton</i> , 104 Wn.App. 226 (2001).....	17
<i>Buckerfield's Ltd. v. B. C. Goose & Duck Farm Ltd.</i> , 9 Wn. App. 220 (1973).....	43
<i>Casa del Rey v. Hart</i> , 110 Wn.2d 65 (1988).....	40
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	35
<i>Citizens for More Important Things v. King County</i> , 131 Wn.2d 411 (1997).....	47, 49
<i>City of Bellevue v. State of Washington</i> , 92 Wn.2d 717 (1979).....	42
<i>City of Raymond v. Runyon</i> , 93 Wn. App. 127 (1998).....	21
<i>City of Tacoma v. Taxpayers of City of Tacoma</i> , 108 Wn.2d 670 (1987).....	passim
<i>CLEAN v. State</i> , 130 Wn.2d 782 (1996).....	47, 48, 49
<i>Cook v. Brateng</i> , 158 Wn. App. 777 (2010).....	20
<i>Cool Fuel, Inc. v. Connett</i> , 685 F.2d 309 (9th Cir. 1982).....	35
<i>Equitable Shipyards, Inc. v. State By & Through Dep't of Transp.</i> , 93 Wn.2d 465 (1980).....	34
<i>In re Estate of Pearl Fitzhugh Little</i> , 106 Wn.2d 269 (1986).....	43
<i>In re Gallinger's Estate</i> , 31 Wn.2d 823 (1948).....	43

<i>Isla Verde Int'l Holdings, Inc. v. City of Camas,</i> 146 Wn.2d 740 (2002)	18
<i>King County v. Taxpayers,</i> 133 Wn.2d 584 (1997)	1, 36, 45
<i>Mead School District Number 354 v. Mead Education Association,</i> 85 Wn.2d 140 (1975)	33
<i>Miller v. City of Tacoma,</i> 138 Wn.2d 318 (1999)	34, 50
<i>Oluwa v. Gomez,</i> 133 F.3d 1237 (9th Cir. 1998)	35
<i>Portsmouth Square, Inc. v. S'holders Protective Comm.,</i> 770 F.2d 866 (9th Cir.1985)	35
<i>Protect the Peninsula's Future v. Clallam County,</i> 66 Wn. App. 671 (1992)	50
<i>Scott Paper Co.,</i> 90 Wn.2d 19 (1978)	42
<i>Skamania County v. State,</i> 102 Wn.2d 127 (1984)	21
<i>State ex rel. Madden v. Pub. Util. Dist. No. 1 of Douglas County,</i> 83 Wn.2d 219 (1973)	42
<i>State ex rel. O'Connell v. Port of Seattle,</i> 65 Wn.2d 801 (1965)	42, 43
<i>Wood v. Battle Ground Sch. Dist.,</i> 107 Wn. App. 550 (2001)	34
<i>Young v. Key Pharmaceuticals, Inc.,</i> 112 Wn.2d 216 (1989)	35
<i>Zucker v. Mitchell,</i> 62 Wn.2d 819 (1963)	40
Statutes	
RCW 42.17A.001(2)	20
RCW 42.30	14
RCW 42.30.010	34
RCW 42.30.060	33

RCW 42.30.120	49
RCW 53.06.010	19
RCW 53.08.020	23
RCW 53.08.090	passim
RCW 53.20.010	23
RCW 53.25.120	23
RCW 53.25.130	23
RCW 53.25.140	26
Other Authorities	
<i>Knowing the Waters – Basic Legal Guidelines for Port District Officials</i>	19, 20
LAWS OF 1999, CHAPTER 306 § 1.....	23
Verbatim Report of Proceedings (“RP”).....	passim
<i>WASHINGTON REAL PROPERTY DESKBOOK,</i> 3d ed. at 41-12, § 41.5(1).....	31
Constitutional Provisions	
Art. VIII, § 7 Wash. Constitution	3
Wa. Const. Art. VIII, § 8	23

INTRODUCTION

This case concerns important questions about the validity of a Port District action in selling real property far below market value and with no advertising or marketing. Here, Respondent Port of Woodland simply picked the buyer in advance and made a sweetheart deal without contacting two other potential buyers—adjacent property owners—who had made their interest in the land known to the Port. The property was valuable industrial zoned land on the Columbia River, yet the Port did not sell the land for Port purposes—the below market sale was to an RV Park owned by Respondent CRRVP, LLC (“CRRVP”).

Plaintiff/Appellant Columbia River Carbonates (“CRC”) brought this case to challenge this abuse of government authority and waste of taxpayer funds. This case raises important legal issues regarding the scope and meaning of the Constitutional prohibition on gifts of public property. Art. VIII, Sec. 7. The trial court was obviously torn on the gift issue. Specifically, in changing its prior ruling, the trial court stated that the *King County v. Taxpayers*¹ case “really eviscerated” the Constitutional provision.² Thus, this Court must determine whether the Constitutional prohibition on gifts of public funds or property still has meaning, and if so, how it is to be applied to a typical sale of public property.

¹ 133 Wn. 2d 584 (1997).

² Verbatim Report of Proceedings (“RP”), May 8, 2013 at p. 17, lines 16-18.

CRC also brought statutory challenges with the idea that the court should decide a case on non-constitutional grounds if possible. Here, the Port abused its discretion in declaring the property as surplus and in failing to use sound business discretion in making the sale. CRC also alleged violations of the Open Public Meeting Act. The trial court erred in determining that these statutory challenges amounted to mere “procedural” flaws that were barred by CRRVP’s bona fide purchaser for value defense.

CRRVP’s defense is that it did nothing wrong, but that is belied by undisputed facts. Specifically, CRRVP’s representatives asked the Port to keep the pending sale quiet by not discussing the sale at a Port Commission meeting “*Just to keep the chatter down.*” The Port agreed. CRRVP claimed credit for cleaning up the property, *even though the lease with the Port specifically precluded reimbursement for improvements.* The Port agreed. When the Port named its final price, CRRVP demanded a further discount. The Port agreed. CRRVP was no innocent purchaser—it was orchestrating this sweetheart deal.

ASSIGNMENTS OF ERROR AND RELATED ISSUES

Assignment of Error No. 1: The trial court erred in issuing its Order Granting Defendant CRRVP, LLC’s Motion for Summary Judgment in Part and Reserving Issues for Trial Pursuant to CR 56(d). CP 462-465.

Issues Pertaining to Assignment of Error No. 1:

1. Whether the Port abused its discretion in making the surplus determination?
2. Whether the Port violated its trusteeship responsibilities and abused its discretion in selling the Subject Property for far less than fair market value and without sound business discretion?
3. Whether CRC's statutory claims based on illegal sale (RCW 53.08.090) and on violation of the Open Public Meeting Act (Chapter 42.30 RCW) are precluded by CRRVP's affirmative defense of bona fide purchaser for value?
4. Whether the Open Public Meeting Act claim was improperly dismissed *sua sponte* on the merits?

Assignment of Error No. 2: The trial court erred in issuing its Order Granting Defendant CRRVP, LLC's Motion for Summary Judgment on Remaining Issue of Gift of Public Funds. CP 666-668.

Issues Pertaining to Assignment of Error No. 2:

5. Whether the trier of fact could find that the Port's sale of the Subject Property was an unconstitutional gift of public property (Art. VIII, § 7 Wash. Constitution) due to a grossly inadequate sale price?

6. Whether the Port's action in giving credit for leasehold improvements that were not reimbursable demonstrated donative intent because the Port had no obligation to do so?

7. Whether the trier of fact could find that the Port's sale of the Subject Property was an unconstitutional gift of public property based on donative intent and that consideration was inadequate?

STATEMENT OF THE CASE

A. The Parties and the Subject Property

Appellant Columbia River Carbonates ("CRC") is a Washington general partnership that owns and operates an industrial plant in Woodland, Washington. CP 2. In 2010, CRC purchased real property from Mike Landels³ ("Landels") located on Dike Road which has waterfront access to the Columbia River. CP 397. CRC paid \$500,000 for this 3.75 acre parcel with plans to build a marine terminal for its Woodland plant. *Id.*

Directly north and adjacent to CRC's Dike Road property is a 1.35 acre parcel, WB1503006 ("Subject Property").⁴ The Subject Property is zoned MH for Manufacturing-Heavy. CP 202. Prior to April 2011, the

³ Mike Landels was originally a co-plaintiff in this lawsuit but was voluntarily dismissed. CP 469. Accordingly, Mr. Landels is not party to this appeal.

⁴ Attached as Appendix A is an aerial photo of the Subject Property found within the Shirley Temming declaration, CP 40. Also attached as Appendix B is a survey map with the Subject Property labeled as "Adjustment A" which can also be found in the Temming declaration, CP 42.

Subject Property was owned by Respondent Port of Woodland, whose governing body is Respondent Port Commission which consists of three elected Port Commissioners (collectively referred to hereinafter as the “Port”). Prior to being sold, the Subject Property was being leased from the Port by Respondent CRRVP LLC (“CRRVP”) for a mere \$50 per year. CP 132-143. CRRVP owns and operates an RV park directly adjacent to the north of the Subject Property.

While CRRVP’s lease with the Port allowed for tenant improvements, it expressly prohibited reimbursement from the Port for those costs. CP 135 at §8(g).⁵ CRRVP expended money to improve the Subject Property by cleaning it up, placing gravel for a parking area, and installing landscaping. CP 34 at ¶ 7. While the record contains references to CRRVP owning a right of first refusal to purchase the Subject Property, it was conclusively demonstrated that no such agreement between the Port and CRRVP ever existed. CP 421 at 56: 14-21, 57: 6-9.

B. Interest in Purchasing the Subject Property

At various times, both Landels and CRC contacted the Port about possibly purchasing the Subject Property: Landels told the Port

⁵ The specific language of the lease reads: “neither Tenant nor any third party may construe the permission granted Tenant hereunder to create any responsibility on the part of the Landlord to pay for any improvements, alterations or repairs occasioned by the Tenant.” CP 135 at §8(g); *see also* CP 634, 636 (lease continued in effect through sale).

Commission at a meeting⁶ and CRC sent an email to the Port in March 2010 that it wanted to be placed “on the list of potential purchasers should the Port decide to sell.” CP 156. In response to CRC’s request, the Port stated that its legal counsel was contacted, but that the Subject Property could not be sold at that time. *Id.*

Exactly one month after CRC’s email, CRRVP presented the Port with an offer to purchase the Subject Property for \$30,000 plus \$5,000 for a separate .14 acre sliver.⁷ CP 163-167. CRRVP also offered to pay for surveying and other costs. CP 163 ¶ 5. CRRVP justified its offering price due to \$14,000 in leasehold improvements. CP 169.

C. Appraisal and Surplussing of Subject Property

To effectuate the sale to CRRVP, Port Director Nelson Holmberg (“Holmberg”) determined that before the Port could sell the property, it needed to obtain two independent appraisals and hold a public hearing on whether to surplus the property. CP 367 at 47:13-21. Holmberg believed that the purpose of the appraisals was to set the beginning negotiating price. *Id.* at 48:3-4. In short, Holmberg never even considered marketing the Subject Property to the public—rather, his plan was to negotiate a price with the CRRVP with the appraisals as a “starting point.” *Id.* at 48:15-16. Critically, neither the Port nor its legal counsel informed

⁶ Mike Landels testified in his declaration to this fact. CP 397 at ¶ 6.

⁷ This .14 acre sliver bordered CRRVP’s property to the north.

Holmberg of CRC's email to the Port seeking to be on the *list of potential buyers* for the Subject Property or of Landels' similar interest. CP 369-70, at 55-57, 61:10-12. Furthermore, the Port also failed to advise Holmberg that it had an opinion letter prepared by a local real estate broker who valued the Subject Property at around \$350,000. CP 146.

Holmberg began the appraisal process by first contacting Integra Realty Resources, who determined the fair market value of the Subject Property to be \$120,000 based on the possibility of a rezone to residential. CP 178. The Port had agreed in advance to this approach. CP 171 (signed authorization, value as a riverfront home site). The appraiser recognized that the Port was intending to sell to CRRVP. *Id.* (appraisal was to be used in disposition of the Subject Property; CRRVP mentioned). Upon receiving the Integra appraisal, Holmberg forwarded it to CRRVP. CP 235. In early December 2010, CRRVP's agent, Jay Pyle, challenged the appraisal as improper stating: "Let's see what the next guy says, *but evaluation as residential is not acceptable.*" *Id.* (emphasis added). Holmberg accepted this objection at face value—effectively rejecting the opinion of a certified MAI appraiser. CP 234, 376 at 83:9-25, 84:1-10. Clearly, Holmberg and the Port planned to sell the Subject Property only to CRRVP: "We're doing what we can to get this done." CP 235.

In addition to critiquing the Integra appraisal, CRRVP also urged Holmberg *to avoid any public discussions* about the planned sale of the Subject Property to CRRVP, which it expected within weeks. Appendix C; CP 231-2. Specifically, CRRVP owner Sheryl Temming and agent Jay Pyle made a request to Holmberg in October 2010, with respect to the potential sale of the Subject Property, that: “any discussions pertaining thereto *no[nt] be part of the meeting agenda or conversations.*” *Id.* (emphasis added). Incredibly, Holmberg agreed and stated that he would “strike” the public update, “*and have private conversations with the individual commissioners instead.*” *Id.* CRRVP’s response was that: “*I’d prefer a Private update. Just to keep the chatter down.*” *Id.* (emphasis added). Holmberg’s response was, “Fair enough,” and that “this should start being discussed in executive session anyway.” *Id.* Holmberg updated the Port Commissioners in a closed Executive Session in October 2010. CP 375 at 78:1-25, 79:1-3.⁸

In February 2011, the Port Commission discussed a potential sale of the Subject Property to CRC:

Commissioner Boon states that he has spoken with Ex. Director Holmberg about the possibility of selling that strip of land between CRRVP and what was Mike Landels property to

⁸ Holmberg could not defend this deception of the public in his deposition. Instead, the only reason he could give was, “Inexperience. Not knowing any better,” but that he knows better now. CP 374-5 at 74:11-25, 75:1-6, 76:1-11. He could identify no benefit to having a private meeting, rather than in public. CP 374 at 76:18-21.

Columbia River Carbonates, they then could use the strip of land as an ingress to get back to their newly purchased property.

CP 242 (meeting minutes). The transcript of the Commission meeting on February 17, 2011, reflects that Holmberg said that he intended to meet with CRC and would get back to the Commission once he had done so. CP 247-250. The transcript also reflects discussion about the possibility that the Subject Property might be part of a plan to install a boat launch operated by the Port. *Id.*; CP 378 at 92:12-24. However, Holmberg did nothing further to investigate the boat launch idea even though he admitted that a Port operated boat launch would effectuate Port purposes. CP 379 at 94:10-20.

Despite the discussion of potential CRC interest, when the second appraisal was further delayed into March 2011, Holmberg gave another private update to the Port by email. CP 253. Holmberg also stated that he hoped to have the second appraisal by the next day, “so I can take it to Jay & Shirley⁹...and hopefully we can address the declaration of the property as surplus, and take action to sell the property to Jay & Shirley, at next week’s commission meeting on the 17th.” *Id.* Port Commissioner Cline specifically agreed to this plan set forth by Holmberg. *Id.* The day after sending that email, Holmberg met with CRC *but failed to tell CRC then,*

⁹ Pyle and Temming of CRRVP.

or at any time, that the Port was selling the Subject Property. CP 379-380 at 97-98. Holmberg admitted in his deposition that *he did nothing to follow up on the direction from Commissioner Boon to contact CRC about the Subject Property.* *Id.* In this regard, Holmberg admitted in his deposition that by not contacting CRC he “failed to do my job on that one.” CP 380 at 101:6-9.

When Holmberg finally received the second appraisal from Daniel C. West of North By West Real Estate Valuations (the West appraisal), he forwarded it on to CRRVP on Saturday, March 12, 2011. CP 393-94. Within this email, Holmberg stated: “I have put an action, and public hearing, to surplus this property on the agenda for the March 17 commission meeting, and now that we have the two appraisals that shouldn’t be a problem.” *Id.*¹⁰ Holmberg also wrote: “I will also request that the Commissioners authorize me to work with you on a purchase & sale agreement that we can hopefully present at the April Commission meeting for their action.” *Id.*

The second appraisal from Dan West included both the Subject Property and the .14 acre sliver to the north. CP 47-8. The appraisal value was \$65,000 based on \$1.00 per square foot or \$43,560 per acre, with

¹⁰ The reference to appraisals in conjunction with a hearing on whether to surplus the property is totally nonsensical—the inference is that the appraisals were a sham, just a box to check on the way to selling CRRVP the property.

\$58,806.00 allocated to the Subject Property and \$6,094.40 allocated to the strip on the north, then rounded to \$65,000. CP 75.

D. Private Sale of the Subject Property to CRRVP

Although Holmberg planned a public hearing on whether to surplus the Subject Property and the sliver to the north, Holmberg did not provide any notice in The Daily News newspaper per the typical practice for a public hearing. CP 380 at 101:21-25, 102:1-3. Not surprisingly, only the representatives from CRRVP appeared to speak at the “public” hearing in March 2012. CP 263. After the hearing, the Port voted to surplus the Subject Property based on multiple false statements to the Commissioners by Holmberg.¹¹

The day before the next Port Commission meeting, Holmberg met with CRRVP to discuss the sale of the Subject Property. CP 386 at 122-3. Later that day, Holmberg met with the Port Commissioners during another executive session. *Id.* at 122:22-25. Ultimately, the Port *reduced* the \$65,000 appraised value by \$3,000 for lack of sewer and water, and **\$17,000** to reimburse CRRVP for improvements even though CRRVP previously claimed only \$14,000. CP 289. However, the lack of sewer

¹¹ These false statements include asserting that CRRVP had a first right of refusal (it was never finalized or approved) and that the Subject Property could not be a parcel on its own according to the County (he had yet to visit the County). CP 274, 277, 281-282.

and water was already factored into the West appraisal¹² and credit for the improvements was specifically barred within the lease. Thus, after applying the deductions, the Port originally asked that CRRVP pay \$45,000 for **both** the Subject Property and the 0.14 acre sliver. CP 289. But this price was adjusted downward by an additional \$1,000 to \$44,000 with no explanation except to comply with CRRVP's request. CP 386 at 123:1-11. Altogether, because these deductions were only for the Subject Property—and not the sliver to the north—and that the Port paid for the appraisals and part of the survey, the Port received only \$29,700, or \$0.50 per square foot for the Subject Property.

At the Port meeting on April 21, 2011, the Commission first voted to approve Resolution 381—the surplus declaration. CP 312. In an attempt to justify the Port's surplus of the Subject Property, Holmberg stated:

It's literally surplus property to the Port because the --the Cowlitz County Department of Planning and Building --Building and Planning told us in no uncertain terms last week that the only people who could have any possible use for it are the folks at 1881 Dike Road [CRRVP] or the adjacent neighbor to the south [CRC and Landels]... *Adjacent neighbor to the south has no interest whatsoever in it*, so -- and the folks at 1881 Dike Road do have interest in it.

¹² CP 69.

CP 301-302 (emphasis added). However, Holmberg later testified during his deposition that he did not discuss the potential sale of the Subject Property with CRC as directed by the Commission even though he met with CRC to discuss CRC's marine terminal. CP 380 at 101:1-9. The sale was approved and completed. CP 308 (vote); CP 319 (quitclaim deed).

June Jones, the real estate broker with 30 years' experience who had earlier prepared the value opinion letter mentioned above, was "shocked" when she learned the details of the Port's sale of the Subject Property and stated that it "*was sold severely under market value.*" CP 348 at 29:22-25 (emphasis added).

Because the Port never advertised the Subject Property, held a competitive bid, or took any other commercial reasonable steps to market the Subject Property, neither Landels nor CRC was ever informed of the Port's willingness to sell the Subject Property. CP 398. CRC and Landels discovered the sale of the Subject Property only after the transaction between the Port and CRRVP concluded. *Id.*

E. The Lawsuit and Motions for Summary Judgment.

After discovering the Port's sale of the Subject Property, CRC filed a complaint in Cowlitz County Superior Court naming CRRVP and the Port as defendants. Within its Complaint, CRC listed four causes of action: (1) Violation of RCW 53.08.090 – Illegal Designation of Surplus

Property; (2) Violation of RCW 53.08.090 – Illegal Sale of Port Property; (3) Illegal Gift of Public Funds; and (4) Violation of the Open Public Meetings Act – RCW 42.30. CP 1-12.

Following its answer to the Complaint, CRRVP brought a Motion for Summary Judgment. CRRVP argued that the Port had authority to sell the Subject Property, that the bona fide purchaser defense immunized the sale, and that the sale was not an illegal gift of public funds. CP 31-2. Subsequently, CRC opposed CRRVP’s Motion and cross-motivated for partial summary judgment. CP 84-122. Within its cross motion, CRC only moved for judgment on its First and Second Causes of Action—namely that (1) the Port’s surplussing of the Subject Property was flawed; and (2) the Port abused its discretion in selling the Subject Property. CP 86-7. CRC also opposed CRRVP’s bona fide purchaser defense and argued that trial was needed due to disputed issues of material fact on the gift of public property issue. *Id.*

CRC’s positions were supported by the declarations of Landels¹³ and Robert Chamberlin¹⁴ (“Chamberlin”), a certified appraiser with over 35 years’ experience.¹⁵ Specifically, Landels stated that he told the Port Commission that he was interest in purchasing the Subject Property, and

¹³ CP 396.

¹⁴ Appendix D; CP 399.

¹⁵ CRC also provided 33 additional exhibits to support its positions. *See* CP 126-394.

that he valued it at \$130,000 to \$160,000 based on his previous land sale to CRC. CP 397-8. Chamberlin provided expert analysis of the West appraisal and stated that “Mr. West’s appraisal is faulty, contains misleading information, and is altogether not a credible report,” and that, “there are no plausible explanations for a \$1.00 per square foot value contained within the Dan West appraisal.” Appendix D at ¶¶ 4-6. For this conclusion, Chamberlin explained that 7 of the 9 comparable sales in the appraisal were for greater than \$2.00 per square foot, and that the West appraisal improperly considered unidentified sales of wetland property to support the lower value. *Id.*

CRRVP **provided no rebuttal evidence** or testimony in its response to CRC’s motion, choosing instead to rely solely on the self-serving declaration of CRRVP owner Shirley Temming. CP 405-414.

At the hearing on these motions, the trial court granted, in part, CRRVP’s Motion for Summary Judgment. CP 462-4. Specifically, the trial court dismissed causes of action 1, 2, and 4 within the Complaint based on CRRVP’s bona fide purchaser defense, and preserved CRC’s third cause of action—illegal gift of public funds—finding that there were genuine issues of material fact. *Id.*

F. CRRVP's Second Motion for Summary Judgment

Subsequently, CRRVP filed a second motion for summary judgment on CRC's remaining issue. CP 472. Fundamentally, CRRVP's second motion was merely a regurgitation of its prior arguments made in its first motion for summary judgment. *Compare* CP 472 *with* CP 26-31. The only nominal difference was excerpts from the deposition transcripts of individual commissioners who claimed no donative intent. CP 473.

In opposing CRRVP's second motion, CRC provided yet more expert testimony in *addition to* the prior testimony of Landels and Chamberlin. Specifically, CRC provided the in-depth expert testimony of Darin Shedd—a Certified General Real Estate Appraiser and recipient of the Member Appraisal Institute (MAI) certification. Appendix E; CP 637-656. Like Chamberlin, Mr. Shedd also reviewed the West appraisal and found it fatally flawed. *Id.*; CP 640-4. Additionally, Mr. Shedd provided his own independent appraisal of the Subject Property and determined it to be \$206,000. *Id.*; CP 640. He also concluded that the sale “does not represent a sale for market value.” *Id.*; CP 640-1, ¶¶ 9-10.

Based on these declarations and other supporting arguments, CRC once again argued that there were genuine issues of material fact which precluded CRRVP's motion for summary judgment. CP 604-13. CRRVP

did not provide any rebuttal testimony or directly address CRC's evidence. CP 657.

On May 8, 2013, Judge Warning made a ruling following oral argument. Specifically, Judge Warning said that the statements of the Port Commissioners were self-serving: "their mere statement of lack of donative intent isn't particularly compelling one way or the other." RP 5/8/13 17:16-18. Nevertheless, and in spite of having "a lot of angst" over CRRVP's dealings with the Port, the trial court stated that case law "really eviscerated the [illegal gift of public funds] provision in the [Constitutional] amendment." *Id.* Feeling constrained by this conclusion—and despite his prior opposite ruling—the trial court granted summary judgment in favor of CRRVP. CP 666. CRC timely filed this appeal. CP 669. This Court reviews grants of summary judgment *de novo* "considering the facts and the inferences from the facts in a light most favorable to the nonmoving party." *Bremerton Public Safety Ass'n v. City of Bremerton*, 104 Wn.App. 226 (2001).

ARGUMENT

I.

THE PORT VIOLATED ITS TRUSTEESHIP DUTIES AND ABUSED ITS DISCRETION WHEN IT MADE THE SURPLUS DESIGNATION AND WHEN IT SOLD THE PROPERTY FOR FAR LESS THAN FAIR MARKET VALUE

CRC first contends that the Port's sale should be voided on statutory grounds which should be considered first before constitutional claims.¹⁶ CRC made a cross-motion for partial summary judgment on its first two causes of action—namely that the surplus designation and sale itself were illegal based on RCW 53.08.090. CP 86-7. The trial court rejected these claims as barred procedural claims under CRRVP's bona fide purchaser ("BFP") affirmative defense.¹⁷ However, the trial court erred because, *inter alia*, these statutory claims were substantive, not procedural as discussed *infra*. CRC thus contends that the trial court should have granted CRC judgment on these claims.

A. Standards and Statutes Applicable to Port Commission Action

CRC contends that the Port is bound by legal standards of action which the Port clearly ignored in selling the Subject Property to CRRVP. In particular, State law, the official guidance document for Washington Ports, and the Port's own standards document all recognize that the

¹⁶ *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752 (2002) (Court's "adhere to the fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues.")

¹⁷ RP, 8/17/2012 at 8:5-21.

Commission must act in a manner consistent with a trustee—*i.e.*, as a fiduciary. Furthermore, Port's are governed by common law and administrative law principles.

1. Statutory Standards for Port Sales of Real Property

Title 53 RCW provides the statutory authority and regulations governing Port Districts and Port Commissions. The statutory requirements applicable to sales of real property by Ports are set forth in RCW 53.08.090, which requires first that the Port declare by resolution that the real property, “be no longer needed for district purposes.”¹⁸

This statute has been authoritatively and officially interpreted by the Washington Public Ports Association (WPPA) in its Handbook entitled *Knowing the Waters – Basic Legal Guidelines for Port District Officials*.¹⁹ The Legislature formed the WPPA in 1961 as a coordinating agency of the State's port district commissions. RCW 53.06.010-.030. The WPPA's Handbook was expressly prepared, “to help port management and staff provide effective service while avoiding legal troubles.” CP 336. The relevant official interpretation in the WPPA Handbook states:

As a rule, a port district may sell unneeded port district property, both personal and real property, at its discretion and without calling for competitive bidding. However, public bidding or

¹⁸ The statute contains other unique requirements applicable to Port property when the property is part of the Port comprehensive plan or within an industrial development district, but the Subject Property was not subject to those requirements.

¹⁹ CP 335-9.

other procedures may be required by statute, depending upon the kind or situation of the property, ***and sound business discretion must be exercised in all cases.***

Knowing the Waters at 27, CP 338 (emphasis added). At a minimum, the Port must use “sound business discretion” and must do so “in all cases” while the Port has discretion in other details. Under administrative law: “An agency abuses its discretion when it exercises its discretion in an arbitrary and capricious manner. A decision is arbitrary and capricious if it is willful and unreasoning action in disregard of facts and circumstances.” *Conway v. Washington State Dept. of Soc. & Health Services*, 131 Wn. App. 406, 419-20 (2005) (citations omitted).

2. The Port is Governed by Trust and Fiduciary Standards of Conduct and Decision Making.

It is hereby declared by the sovereign people to be the public policy of the state of Washington: . . . (2) that the people have the right to expect from their elected representatives at all levels of government ***the utmost of integrity, honesty, and fairness in their dealings.***

RCW 42.17A.001(2). This profound statement of law was adopted by the People of the State of Washington in 1971 as Initiative Measure No. 276. These State law standards mirror common fiduciary standards.²⁰

The WPPA’s Handbook confirms that Port Commissioners have a trust and fiduciary duty: “Courts universally have held public office to be

²⁰ See *Cook v. Brateng*, 158 Wn. App. 777, 785 (2010) (“highest degree of good faith, care, loyalty and integrity”).

synonymous with public trust; a public officer’s relationship with the public is that of a fiduciary.”²¹ Importantly, consistent with State law and the WPPA Handbook, the Port’s own governing document recognizes that the Port Commission *acts as a trustee for the citizens in the Port District*: “The board [i.e. Commission] *acts in trusteeship* for port owners who are the citizens of the Woodland Port District.” CP 332 (emphasis added) (Resolution 378, “Delegation of Authority” (2011)).

Trust and fiduciary standards require actions designed to obtain the best price when selling assets. Under trust law, a “trustee has a duty to manage trust assets prudently” and breaches “its fiduciary duty by disposing of a trust asset without obtaining ‘the best possible price’ for the asset.” *Skamania County v. State*, 102 Wn.2d 127, 138 (1984) (citations omitted). The Supreme Court in *Skamania* was quoting its earlier decision in *Allard v. Pacific Nat’l Bank*, 99 Wn.2d 394, 406 (1983). The *Allard* court held that a trustee, in order to determine the best possible price, must either *obtain an independent appraisal* or place the property *on the open market*. *Id.* Of course, the premise of obtaining an independent appraisal is to rely upon it, *not ignore it or discredit it*, as the Port did here.

The Port’s action involved disposition of a public asset, not a mere policy decision. Therefore, these trust and fiduciary legal standards apply

²¹ CP 337. See, e.g., *City of Raymond v. Runyon*, 93 Wn. App. 127, 134 (1998).

to the Port as recognized in the official WPPA Handbook and its conclusion that the Port must use “sound business discretion” in selling real property. Without the application of these legal standards, the Port is free to violate the public trust and waste taxpayer money. CRC contends that the Port Commission did indeed abuse its discretion in both its surplus declaration and in selling the Subject Property.

B. The Port Abused Its Discretion in Determining that the Subject Property was Surplus.

The Port abused its discretion in determining that the Subject Property was surplus in two ways. First, the Port gave no public notice that a public hearing would be held on the surplus of public property. And second, the Port’s conclusion that the Subject Property was “no longer needed for district purposes” under RCW 53.08.090 was false.

1. The Port Provided No Public Notice of the Surplus Hearing

As stated in the facts, the Port determined that it needed to hold a public hearing in order to declare the Subject Property surplus. CP 367 at 47:16-21. While the Port “held” a public hearing on March 17, 2011, Holmberg testified that no public notice was sent in March 2011 for the hearing contrary to the standard practice of posting notice in The Daily News.²² CP 380-1 at 101:18-25 to 102:1-3. The Port’s failure to provide

²² Typical public notice would require publication in a newspaper of general circulation and posting in three public places at least ten days prior to the hearing. See RCW

standard notice renders its public hearing illusory since the public would have no knowledge that they should attend the meeting and comment.

2. The Subject Property Was Not Surplus As Statutorily Defined

In addition to failing to provide proper notice, the Port also abused its discretion by determining that the Subject Property was surplus.

Again, under RCW 53.08.020, Port property may only be sold after it has been designated as being “no longer needed for district purposes.” Proper Port purposes, as declared by the Legislature, are “industrial development or trade promotion.” LAWS OF 1999, CHAPTER 306 § 1 (citing to Wa. Const. Art. VIII, § 8). Given this definition, the Port’s designation of the Subject Property as surplus was obviously arbitrary and capricious.

In fact, the Court need not go beyond the Port’s own words to establish that the Subject Property was still viable for Port purposes. As stated within the facts, the Port recognized that the Subject Property could be used for access to CRC’s property, and thus could have leased or sold the Subject Property to CRC, furthering industrial development. CP 242 Furthermore, the Port recognized that the Subject Property had potential to be used as a boat ramp for the general public. CP 247-250. As described

53.25.120; *see also* RCW 53.20.010 (once a week for two consecutive weeks). Further, a typical public notice would need to describe the purpose of the public hearing and describe the property to be considered for surplus. RCW 53.25.130.

in the facts, the Port's declaration contained numerous false statements while completely ignoring these obvious Port purposes.

Altogether, the Port abused its discretion and breached its fiduciary duties to the public by: (1) failing to provide standard public notice for the public hearing; and (2) surplusing public property that could have been used for a myriad of Port related purposes.

C. The Port Violated Its Trusteeship Duties and Abused Its Discretion by Selling the Subject Property at a Significant Discount to Fair Market Value

The Port owes both trustee and fiduciary duties to the public *when selling real property* in order to ensure full and complete protection for public assets. CRC contends that the Port abused its discretion for three main reasons. First, the Port severely discounted the purchase price to compensate CRRVP for leasehold improvements, when the lease prohibited precisely that reimbursement. Second, the Port completely botched the consideration of appraisals, and failed to sell the Subject Property for the low appraised value—even if flawed. Third, the Port did no marketing whatsoever and instead simply negotiated with one party. The Port's actions do not conform to sound business practices, and violate any reasonable legal standard applied to Port action.

1. The Port Abused its Discretion by Affording CRRVP Credits For Leasehold Improvements On the Subject Property

As stated within the facts, the Port afforded CRRVP \$17,000 in “compensation” for improvements it made to the Subject Property while under the lease. However, such reimbursements for improvements were specifically barred under the property Lease. CP 136 at § 8(G). By rendering this credit, the Port abused its discretion by improperly discounting the price below the low appraisal—flawed as it was. Furthermore, the Port discounted the price by \$17,000 for improvements, which was \$3,000 more than the amount claimed by CRRVP. This was a gross violation of public trust which taints the Port’s entire decision.

Given its fiduciary duties, the Port should have sought to maximize the return on any sale of public property that has been surplus. By willingly affording a credit to CRRVP for improvements on the Subject Property when it was under no obligation to, the Port abused its discretion and breached its fiduciary and trustee duties to the Public. This was not a minor mistake—the \$17,000 credit reduced the price of the Subject Property by almost 30% below the low appraised value of \$58,000. On this basis alone, the Court should hold that the Port abused its discretion.

2. The Port's Failure To Sell the Subject Property For Its Appraised Value Was An Abuse Of Discretion

The Port had good advice available to it, but failed to adhere to it.

The WPPA Handbook carefully explains:

When disposing of any property by sale or lease or otherwise, the commission *ordinarily should* (and under chapter 53.25 RCW must) *have the property appraised by at least two independent appraisers* to be certain that the port district is receiving fair market value.²³

CP 339 (emphasis added). The WPPA Handbook goes on to say that “good business practice” is important to avoid challenges that the sale is a gift of public property. *Id.* The Port’s failure to follow “good business practice” is therefore grounds for voiding the sale.

While the Port started down the recommended path of obtaining two independent appraisals, it nevertheless failed to grasp what to do with the two appraisals once they had them. CP 367 at 47:16-21. In citing to the statute, the WPPA Handbook indicates that, at a minimum, the Port should have **averaged** the two appraisals, as is required for port property sold within industrial development districts. *See* RCW 53.25.140.²⁴

Averaging two appraisals is basically established as a “safe harbor” to assure sound business discretion. Had the Port followed this averaging

²³ The deletion is an exception for selling to another government agency under chapter 39.33 RCW, which is not applicable here.

²⁴ “[T]he purchase price must not be less than the fair market value of the property which shall be determined by an average of at least two independent appraisals performed by licensed real estate brokers or professionally designated real estate appraisers.”

procedure when it sold the Subject Property, CRRVP would have needed to pay about \$90,000. That would have more than doubled the money received and afforded much greater protection to the public.

However, the Port neither averaged the two appraisals—the safe harbor—nor followed some other sound business approach. Rather, the Port quickly and arbitrarily rejected the high appraisal when CRRVP claimed it was “unacceptable” i.e. it was too high. The high appraisal was about double the low appraisal. Then, the Port severely discounted the price far below even the flawed low appraisal. The Port abused its discretion in rejecting the conclusions of the appraisers.

The sales price was a major deviation from the fair market value stated in the two appraisals. Specifically, the Port sold the property for 68% less than the high appraisal and 35% less than the low appraisal (which CRC’s expert challenged as fatally flawed). Finally, if the Port’s out-of-pocket costs are factored in, then the Subject Property sold for 75% less than the high appraisal and for about 50% less than low appraisal. The Port abused its discretion when failing to sell the Subject Property at its appraised value, even assuming the low appraisal is relied upon.

3. Failure to Market the Property Was An Abuse of Discretion

The fundamental problem here is that the Port *did not do anything* to market the Subject Property. This failure exacerbated the problem just

discussed—not selling for appraised value. Selling for appraised value provides some protection for the public, especially if the Port had averaged the two appraisals it received—the safe harbor recommended in the WPPA Handbook. Since the Port did not do so, it was imperative that the Port market the Subject Property in a “sound business” manner to assure a fair price. The Port’s own regulations state: “All surplus port property must be made available to the public through the required notification process.” CP 331, ¶ F. In spite of this regulation, the Port did not provide any notification or otherwise use sound business methods.

The Port did not hire a real estate broker, such as June Jones whom the Port had previously retained to provide a Broker’s Price Opinion of the Subject Property at \$350,000. The Port did not use public bid process, did not advertise in the newspaper. The Port did not even put up a “For Sale” sign. Of course, the Port did not even send emails to persons that had expressed an interest in buying the Subject Property, namely CRC and Landels. There was no announcement on the Port website. The failure to do take any steps at all to market the property was a clear abuse of discretion, especially when combined with severely discounting the price far below the low and flawed appraised value.

The Court should hold that the Port needed to use some reasonable marketing approach unless the Subject Property was sold at the price in an

appraisal. Because the Port failed to do so, CRC should have been granted summary judgment.

II.
**THE TRIAL COURT ERRED IN DETERMINING THAT CRRVP'S
BONA FIDE PURCHASER FOR VALUE DEFENSE DEFEATED
CRC'S STATUTORY CLAIMS**

The trial court found that CRRVP's affirmative defense of bona fide purchaser for value (BFP) defeated CRC's three statutory claims: illegal surplus designation, illegal sale, and violation of Washington's Open Public Meetings Act (OPMA) Chapter 42.30 RCW. In ruling on the first motion, the trial court found that these statutory claims were all barred procedural claims based on BFP as applied in *South Tacoma Way, LLC v. State of Washington*, 169 Wn.2d 118 (2010). RP 7/ 27/2012 at 28:21-25, 29:1-13.²⁵ The trial court also found that the gift of public property claim was substantive, and hence not precluded by BFP. *Id.* at 29:13-19.²⁶ For that reason, the gift of public property claim survived until the second motion. However, neither the BFP doctrine nor the *South Tacoma Way* case are applicable here for reasons given below.

1. The Bona Fide Purchaser Doctrine Does not Apply to CRRVP

As stated within *South Tacoma Way*, the BFP doctrine traditionally provides "that a good faith purchaser for value who is without actual or

²⁵ The trial court later said there was no proof of violation of OPMA. RP 8/17/2012 at 8:11. That error is addressed *infra*.

²⁶ Respondents did not challenge this trial court ruling via a cross-appeal.

constructive notice of another's interest in purchased real property has superior interest in that property." *Id.* at 127 (citation omitted). In other words, in order to assert the BFP defense, the purchaser must demonstrate that they (1) acted in good faith, and (2) paid value. *See id.*²⁷

Prior to *South Tacoma Way*, the BFP doctrine was applied to "situations in which two putative titleholders existed." *Id.* However, ***given the specific facts and circumstances of the case***, the Supreme Court felt compelled to extend the equitable protection of this defense to the purchaser in *South Tacoma Way*.

The facts which warranted the Supreme Court's divergence from the traditional application of the BFP doctrine in *South Tacoma Way* **are not** present here. Specifically, in *South Tacoma Way*, ***the buyer paid the property's appraised value***. *Id.* at 120. Here, CRRVP did not pay the appraised value, even based on the flawed, low appraisal. Rather, ***CRRVP paid 35% less than the low appraised value***. Because the property in *South Tacoma Way* sold for its appraised value, the Supreme Court had no occasion to inquire whether public officials abused their discretion by selling the property far below fair market value. Thus, *South Tacoma Way*

²⁷ "The policy underlying [the BFP doctrine] is the protection of bona fide purchasers against loss from secret liens or conveyances not disclosed by any public record nor ascertainable by due diligence." *WASHINGTON REAL PROPERTY DESKBOOK*, 3d ed. at 41-3, § 41.2(1) (Wash. State Bar Ass'n 1996). This policy is not at issue here.

involved merely a *procedural irregularity*, not a substantive failure to legally designate the property surplus or to obtain a fair price. *Id.* at 126.

In addition to failing to pay the appraised value, CRRVP was not a bono fide purchaser “*for value.*” Paying a grossly inadequate purchase price disqualifies the purchaser from asserting BFP because the “*for value*” element is not met. *WASHINGTON REAL PROPERTY DESKBOOK*, 3d ed. at 41-12, § 41.5(1) (Wash. State Bar Ass’n 1996). Altogether, CRC challenged the adequacy of the value paid by CRRVP, so the issue should have gone to trial.

Another reason that the BFP doctrine does not apply here is because there was significant evidence that CRRVP manipulated the sale with the Port—*i.e.* CRRVP did not have “clean hands” and did not act in good faith. As stated above, the BFP defense is an equitable theory grounded in fairness and clean hands, and thus cannot involve “collusion” with the seller. *South Tacoma Way*, 169 Wn.2d at 128. Simply stated, the undisputed fact that CRRVP purposely sought to “keep the chatter down” should automatically disqualify it from asserting the BFP defense.

2. CRC’s Claims are Substantive in Nature, not Procedural

Assuming, *arguendo*, that *South Tacoma Way* and its expansion of the BFP doctrine were applicable to all government sales, it nevertheless would still not apply to CRC’s claims given that they are substantive in

nature, not procedural. The procedural irregularity in *South Tacoma Way* was “the State's failure to give written notice of the sale.” *Id.* at 122. The Port’s failures here go far beyond a mere procedural flaw such as lack of required notice. *South Tacoma Way* stated that even admitted procedural irregularities might have to give way to substantive challenges: “where the procedural irregularity undermines the policy behind the statutory procedure, the bona fide purchaser doctrine should not apply.” *Id.* at 128 fn. 5. In other words, if the irregularities adversely affect or impact the substantive nature of a statutory policy, the BFP doctrine does not apply.

The surplus designation is an important substantive conclusion—that the Subject Property was not needed for Port purposes. That conclusion was important to protect the public from losing Port property that could be used for valuable industrial purposes. Similarly, the need to use sound business discretion in selling Port property, public property, is an important substantive limitation. Otherwise, the mere recording of the deed completely immunizes the Port from any scrutiny, regardless of the price paid. Again, the public protection is lost. Recall that the *South Tacoma Way* case extended the BFP defense to the public arena due to unique facts that are not applicable here. That case and the BFP defense generally do not stand for a broad immunity from statutory violations.

The Court should reject the BFP defense here, and hold that CRC's claims for illegal surplus and illegal sale must be decided on the merits.

3. The OPMA is Substantive in Nature, not Procedural; the Trial Court Erred to the Extent OPMA was Dismissed on the Merits

The trial court initially sweep the OPMA claim into a barred statutory claim due to the BFP defense for value. RP 7/ 27/2012 at 28:21-25, 29:1-13. CRC objected to the ruling on that ground,²⁸ and the trial court appeared to switch or give an alternate ruling that there was no proof of violation of OPMA. RP 8/17/2012 at 8:11. The trial court erred because the OPMA claim is an important substantive claim that cannot be defeated by the BFP defense. The trial court also erred because the merits of the OPMA claim were not before the Court and CRC was prejudiced by that *sua sponte* ruling.

CRC's claim under the OPMA is clearly substantive in nature and cannot be defeated by the BFP defense. Pursuant to the OPMA, any action taken in violation of the OPMA "shall be null and void." RCW 42.30.060(1). This statutory language is clearly demonstrated in *Mead School District Number 354 v. Mead Education Association*, 85 Wn.2d 140 (1975). In that case, the Supreme Court held that a resolution passed by the Mead School District during a special meeting was deemed "legally

²⁸ CP 434.

nonexistent” as the meeting violated the OPMA. *Id.* at 145. An improper act is still null and void even if later ratified. *Miller v. City of Tacoma*, 138 Wn.2d 318 (1999). This Court recognized the “forceful” nature of the OPMA purpose provision at RCW 42.30.010. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 559 (2001).²⁹ Thus, the OPMA must be considered a substantive law to give effect to this strong public policy and the null and void standard. As such, it is wholly inappropriate to allow the BFP defense to defeat an OPMA claim, and no case has been cited to apply such a rule.

The trial court also erred to the extent the OPMA claim was dismissed on the merits. CRRVP’s motion did not challenge the merits of the OPMA claim—it nowhere mentioned OPMA. *See* CP 26-32. Rather, CRRVP’s motion argued that the sale was valid under RCW 53.08.090, that the BFP defense applied which the trial court initially read as applying to OPMA, and that there was no violation of gift of public property. *Id.* The trial court essentially ruled *sua sponte* to dismiss CRC’s OPMA claim on the merits.

Though there are few cases on this issue in state courts, the federal courts have addressed the issue of whether *sua sponte* consideration results

²⁹ “We recognize the statutory statement of purpose [in OPMA] employs some of the strongest language used in any legislation.” *Id.* (quoting *Equitable Shipyards, Inc. v. State By & Through Dep’t of Transp.*, 93 Wn. 2d 465, 482 (1980)).

in a fair hearing. The United States Supreme Court authoritatively stated that entering summary judgment *sua sponte* is appropriate only if, “the losing party was on notice that she had to come forward with all of her evidence.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Our Supreme Court follows the *Celotex* case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216 (1989).

The Ninth Circuit explained: “*Sua sponte* summary judgment is only appropriate if the losing party has reasonable notice that the sufficiency of his or her claim will be in issue.” *Oluwa v. Gomez*, 133 F.3d 1237, 1238-39 (9th Cir. 1998). “Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment.” *Portsmouth Square, Inc. v. S’holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir.1985). And further that: “It is, of course, essential that the appellate court carefully review the record and determine that the moving party against whom summary judgment was rendered ***had a full and fair opportunity to ventilate the issues involved in the motion.***” *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir. 1982) (emphasis added). CRC clearly did not have notice or “a full and fair opportunity to ventilate” the OPMA claim since the merits of the claim were not raised in CRRVP’s motion and the court did not otherwise give notice.

Here, if the Commissioners agreed to sell the property to CRRVP outside of a regular meeting in violation of the OPMA, then the ratification was ineffective and the sale would be subject to being nullified. This Court should protect the important public policy underlying the OPMA by reversing the trial court's dismissal of the OPMA claim and send the case back for review on the merits.

For all these reasons, the Court should reject the BFP defense, decide the first two statutory claims on the merits, and send the OPMA claim back to be heard on the merits.

**III.
THE TRIAL COURT ERRED IN DISMISSING CRC'S CLAIM OF
UNCONSTITUTIONAL GIFT OF PUBLIC PROPERTY**

If the statutory claims are precluded by the BFP defense or otherwise found lacking, then the Constitutional prohibition on gifts of public property remains as the only legal option to stop this abuse of government power. In denying CRRVP's first motion, Judge Warning found that the un-reimbursable credit for leasehold improvements and showing of below market sale price created triable issues. But, on CRRVP's second motion, Judge Warning changed his mind saying that the *King County v. Taxpayers*³⁰ case "really eviscerated" the

³⁰ 108 Wn.2d 670 (1987).

Constitutional provision and so he felt constrained to dismiss because there was “legally sufficient consideration.”³¹

Thus, this Court must determine whether the Constitutional prohibition on gifts of public funds or property still has meaning, and if so, how to apply it to a typical sale of public property. CRC contends that the *King County* case did not change the law and is readily distinguishable and that the sale of real property must be analyzed under the traditional standards for the Constitutional prohibition to retain any meaning or effect, and that disputed facts require a trial.

A. CRC’s Claim Met the Traditional Legal Standards for Finding an Unconstitutional Gift of Public Property

The applicable legal standards in gift of public funds or property cases appeared to be well settled, and the undisputed facts presented by CRC were more than sufficient to at least take the case to trial. Those standards require consideration of two separate elements: (1) whether there was a grossly inadequate return; or (2) whether there was donative intent and inadequate return. If either of these elements is present, an illegal gift of public funds has occurred, and CRC presented undisputed facts on both elements.

³¹ RP 5/8/13 at p. 17:15-19.

1. Traditional Legal Standard: Grossly Inadequate Consideration or Donative Intent Requires Close Scrutiny

As a general matter, Article VIII, Section 7 of the Washington State Constitution prohibits municipal corporations, such as the Port, from gifting public property. The Section provides in pertinent part:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation

The applicable standards were in the Supreme Court’s decision in *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 670 (1987). The Court articulated Section 7’s clear purpose; it was, “intended to prevent the harmful effects on the public purse of granting public subsidies to private commercial enterprises.” *Id.* at 701 (citation omitted).

Lacking a fundamental governmental purpose,³² the analysis becomes whether there is donative intent or a grossly inadequate return: “Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency test, under which a bargained-for act or forbearance is considered sufficient consideration.” *City of Tacoma*, 108 Wn.2d at 703. Thus, the Supreme Court set forth two separate and distinct circumstances in which to go beyond mere legally sufficient consideration and judge the adequacy of the consideration, namely “a

³² Neither the Port nor CRRVP has asserted that the sale effectuated a fundamental governmental purpose.

showing of donative intent” **OR** “gross inadequacy.” The Supreme Court repeated this standard for emphasis: “[u]nless there is proof of donative intent **or** a grossly inadequate return, courts do not inquire into the adequacy of consideration.” *Id.* (emphasis in original) (citation omitted). Of course, if grossly inadequate return is found, then the adequacy of consideration is legally inadequate and further scrutiny is unnecessary. In other words, grossly inadequate consideration is *per se* an illegal gift.

Otherwise, if the plaintiff makes “a showing of donative intent,” then “the sufficiency of the consideration” becomes an issue. With a showing of donative intent, an illegal gift could be found based on *merely* inadequate consideration—far less than the burden of proving *grossly* inadequate consideration. In the *City of Tacoma* case, the Court had no occasion to go further in that case because “there [was] no allegation of gross inadequacy and the trial court's conclusion that Tacoma lacked donative intent remain[ed] unchallenged.” *Id.*

At the heart of the court’s analysis of “grossly inadequate return” or “donative intent” is the element of adequate consideration. As stated by the Supreme Court in *Adams v. University of Washington*, 106 Wn.2d 312, 327 (1986), “the key factor is lack of consideration.” *Id.* Thus, it is through the lens of adequate consideration that all claims pertaining to an

illegal gift of public funds should be viewed because the purpose is to avoid public subsidies to private parties.

2. CRC Presented Facts Demonstrating Gross Inadequacy of Consideration

Here, contrary to the *City of Tacoma* case, CRC presented facts demonstrating gross inadequacy and donative intent. The facts showed that the Port sold the Subject Property for a discount of about 82% of fair market value—\$38,000 instead of \$206,000—such a substantial discount has been found by the courts to be grossly inadequate.

In many Washington cases, the term “grossly inadequate” is defined by comparison of the price paid to market value. For example, the Supreme Court in *Casa del Rey v. Hart*, 110 Wn.2d 65, 72 (1988) made a similar analysis when it found that the purchase price of \$14,125 for a property whose fair market value was at least \$290,000 was clearly “grossly inadequate.” *Id.* In addition to *Casa del Rey*, other Washington cases have also utilized market value as the proper comparison standard for analyzing whether or not the consideration paid was grossly inadequate.³³

³³ See e.g., *Buckerfield's Ltd. v. B. C. Goose & Duck Farm Ltd.*, 9 Wn. App. 220, 226 (1973) (purchase price of a ship was grossly inadequate when compared to its actual market value); *Zucker v. Mitchell*, 62 Wn.2d 819, 822 (1963) (the sale of timber property for \$35,000 with a market value of \$94,000 “grossly inadequate”)

According to Darin Shedd MAI, the fair market value of the Subject Property was \$206,000 as of the date of the sale from the Port to CRRVP (June 14, 2011). Appendix E; CP 640 . Given this value, the Port therefore sold the Subject Property to CRRVP at about an 82% discount—a discount which is grossly inadequate. This is not a surprising result given that Mr. Shedd also concluded that the Port “was not acting prudently, knowledgably, and for self-interest” when it sold the Subject Property. *Id.*; CP 642. Rather, a “prudent seller would have actively marketed the property to all potential purchasers.” *Id.*

3. CRC Presented Facts Demonstrating Donative Intent Due to the Unobligated Credit for Improvements and Other Facts

The Port’s lease with CRRVP prohibited reimbursement for improvements to the Property, yet CRRVP demanded and the Port granted a discount on the sales price of \$17,000 for improvements to the Property. That was after CRRVP valued the credit at \$14,000. These facts are undisputed and this “give away” alone proves donative intent because *the Port was under no obligation to afford that credit*. Numerous other facts demonstrate donative intent

The existence of an obligation is a key issue in determining donative intent in public gift cases. The Supreme Court held that the Port of Seattle’s promotional hosting of private individuals—paying for their

meals, drinks, etc.—was an illegal gift of public funds. *State ex rel. O'Connell v. Port of Seattle*, 65 Wn.2d 801, 806 (1965).³⁴ In so holding, the *O'Connell* court distinguished the Port of Seattle's activities from the statutes which granted pensions to public employees. Public pensions were “not a gratuity” but “deferred compensation for services rendered” stemming from: “The *contractual nature of the obligation to pay a pension when the employee has fulfilled all of the prescribed conditions.*” *Id.* (emphasis added).

Using the same analysis, the Supreme Court found no donative intent in reimbursing city officials for their restaurants tips because tips are “expected” and were effectively for “services rendered” *i.e.* there was an obligation to tip and mutual consideration. *City of Bellevue v. State of Washington*, 92 Wn.2d 717, 720-722 (1979). Other Washington cases have similarly found that the existence of an obligation defeats a gift of public funds challenge.³⁵

Here, it was undisputed that the \$17,000 credit on the selling price was expressly for tenant improvements under the lease. CP 289. This credit for improvements was the major part of lowering the offered selling price from the appraised value of \$65,000 to \$45,000 for the two parcels

³⁴ The Constitution was later amended to narrowly allow this specific custom. Amendment 45, 1965.

³⁵ See *e.g. Scott Paper Co.*, 90 Wn.2d 19, 28 (1978), *State ex rel. Madden v. Pub. Util. Dist. No. 1 of Douglas County*, 83 Wn.2d 219, 223 (1973).

combined. *Id.* Yet, the Port was under no obligation to grant the credit because CRRVP's lease with the Port ***barred the reimbursement for improvements, alterations, or repairs.*** The lease disavowed "any responsibility on the part of the Landlord to pay for any improvements, alterations or repairs occasioned by the Tenant." CP 136 at § 8(G).

The *O'Connell* case applies here as the Port was under no obligation to afford CRRVP credit for its improvements. That "give away" alone demonstrates donative intent justifying scrutiny of consideration, which here was shown to be at least inadequate if not grossly inadequate.

While the existence of donative intent can be found based on the credit for tenant improvements alone, numerous other facts should have justified a trial on donative intent. Washington law is clear that, "[t]he existence or absence of intent to make a gift ***is an evidentiary issue to be resolved by the finder of the fact.***" *Buckerfield's Ltd. v. B. C. Goose & Duck Farm Ltd.*, 9 Wn. App. 220, 224 (1973) (emphasis added).³⁶ Thus, the totality of facts presented by CRC should be considered in determining whether the trier of fact could find donative intent. Those facts are

³⁶ See also *In re Estate of Pearl Fitzhugh Little*, 106 Wn.2d 269, 288 (1986) ("donative intent is a factual issue to be resolved by the trier of fact"); *In re Gallinger's Estate*, 31 Wn.2d 823, 829 (1948) (gift determination requires trier of facts to consider credibility of witnesses and all facts relating thereto).

summarized in the Statement of the Case, and a few key facts are repeated here *and are essentially undisputed*.

Importantly, the Port was on notice by multiple sources that CRC and Landels were potential buyers of the Property, yet the Port never contacted Landels or CRC to see if they were interested. This is a significant fact given that the West appraisal, upon which the Port purported relied, recognized that the highest and best use depended upon use, “in conjunction with adjoining lands.” CP 52. The Port Commission even discussed two months prior to the sale that CRC was proposing a barge terminal on adjacent property and that CRC might buy the Subject Property “as an ingress to get back to their site.” CP 249; CP 247-249. Despite the explicit knowledge of interest in purchasing the Property, the Port never contacted Landels or CRC to see if they were interested. CP 397-8. The obvious inference taken from the Port’s failure to make contract with either CRC or Landels, especially when combined with the multitude of other facts, is that the Port was orchestrating a sweetheart deal solely for CRRVP which might be frustrated by outside competition.

The facts in the Statement of the Case are replete with references and inferences to the scheme to sell solely to CRRVP. The facts can be understood as the Port simply going through the process of the getting two appraisals without seriously considering them. The inference is that the

appraisal process was a sham and a way to cover up the true intention, namely to give away the property to CRRVP in a sweetheart, below market deal. This point was further confirmed when Holmberg settled on a price of \$45,000, only to decrease another \$1,000 for no reason at all, except that CRRVP requested the deduction.

Another incriminating fact is that CRRVP offered to pay for the entire cost of the survey, yet the Port split the survey cost without explanation—another give away. The Port provided no explanation for not making CRRVP pay for two appraisals and possibly having the Port pay to have a review appraisal done if there was any substantial difference. With the costs of survey and appraisals deducted from the amount paid, CRRVP arguably only compensated the Port for \$29,700, which would be less than the initial offer of \$30,000. Ensuring that the buyer gets a better price than originally offered resembles a gift.

In summary, under the traditional legal standards, CRC presented sufficient evidence to at least create a triable issue on grossly inadequate consideration and/or donative intent.

B. The *King County* Case Did Not Eviscerate the Traditional Legal Standards under the Gift Clause and is Otherwise Distinguishable

The trial court expressly cited to the *King County v. Taxpayers* case, concluding that the case “really eviscerated” the Constitutional

provision, and seemed to read it as requiring only legally sufficient consideration.³⁷ In other words, the contention is that the *King County* case no longer requires analysis of donative intent or a grossly inadequate return as stated in *City of Tacoma*. That interpretation of *King County* goes too far and is belied by the Supreme Court's words. Furthermore, the *King County* case is readily distinguishable from this case.

The *King County* case was the third in a series of lawsuits attempting to stop financing and construction of a new baseball stadium that would be rented to the Seattle Mariners baseball team—the stadium now known as Safeco Field. *King County v. Taxpayers of King County*, 133 Wn. 2d 584, 588 (1997). In the *King County* case, the county's issuance of bonds was challenged and that brought up the issue of whether the lease between the Mariners and the public facilities district amounted to a gift of public funds or property. *Id.* The Supreme Court in *King County* expressly followed the same analysis adopted in the *City of Tacoma* case. The Court said: "In the absence of donative intent or grossly inadequate return, the Court's review is limited to the legal sufficiency of the consideration for the lease." *King County*, 133 Wn.2d at 601 (citing *City of Tacoma*, 108 Wn.2d at 703).

³⁷ RP 5/8/13 at p. 17:15-19.

The Court concluded that the issue of donative intent had been decided in the prior lawsuit, namely *CLEAN v. State*, 130 Wn. 2d 782 (1996). The *CLEAN* case was the first challenge and it challenged the Stadium Act as an unconstitutional gift of public funds.³⁸ The Legislature had passed the Stadium Act specifically to set up a legal means of financing a new stadium for purposes of leasing it to the Mariners. The Act authorized creation of a public facilities district that would construct, own, and operate a baseball stadium, and numerous provisions designed to ensure appropriate public oversight. *Id.* at 798-791.

In line with the *CLEAN* decision, the *King County* court concluded there was no donative intent in issuing bonds pursuant to the Stadium Act. *King County*, 133 Wn. 2d at 599 (citing *CLEAN*, 130 Wn.2d at 799). The *King County* court held that no donative intent could be found based on the argument that the “obligations under the lease are a ‘sham and illusory.’” *Id.* If the Mariners’ lease promises were a sham, then the lease demonstrated donative intent because the Mariners were not obligated to do anything.³⁹ The Court easily rejected this argument finding that the lease imposed major obligations on the Mariners, including the requirements to pay \$45 million in costs, to share profits, to stay for a

³⁸ The second challenge was to the County implementing ordinances. *Citizens for More Important Things v. King County*, 131 Wn. 2d 411 (1997).

³⁹ This point is a corollary to CRC’s argument that the credit for leasehold improvements proves donative intent because the Port had no obligation to afford the credit.

minimum 20 years, and to pay all stadium maintenance and capital improvements. *Id.* at 599-601.

While the dissent by Justice Sanders points to statements of public officials for evidence of donative intent, most of those statements preceded the passage of the Stadium Act and had been referenced in the *CLEAN* case wherein the Court had already rejected the existence of any donative intent.⁴⁰ The Majority disagreed with Justice Sanders.⁴¹

With respect to grossly inadequate return, the *King County* court carefully reviewed the arguments in that regard and easily determined that the return was clearly not grossly inadequate. *King County*, 133 Wn.2d at 598. The Court cited, among other items of consideration, the \$45 million payment toward construction, the annual rent of \$700,000, payment of any construction cost overruns, etc. While the dissent by Justice Sanders looks to evidence purportedly showing lack of adequate return, the majority opinion by Justice Talmadge rejected the need to delve further because the lease terms obviously were not a grossly inadequate and no donative intent was shown. For those reasons, the Court concluded that the legal sufficiency test applied and the lease clearly met that test. The majority

⁴⁰ Compare *King County*, 133 Wn.2d at 626-628 (Sanders, J. dissent) with *CLEAN*, 130 Wn.2d at 787-789 (both citing to same letter from then King County Executive Gary Locke and various sources that intention was to save baseball or ensure its survival).

⁴¹ Justice Sanders's dissent also cited to a letter that essentially made the same arguments discussed above and rejected by the majority about the lease not imposing obligations on the Mariners. *Id.* (Yapp letter).

recognized that the Mariners were benefited, but explained that: “An incidental benefit to a private individual or organization will not invalidate an otherwise valid public transaction.” *King County*, 133 Wn. 2d at 596 (citing *City of Tacoma*, 108 Wn.2d at 705).

In summary, a fair reading of the majority opinion in the *King County* case does not result in the conclusion that the traditional legal standards were eviscerated. Justice Sanders claimed otherwise, but his dissenting opinion is not the governing opinion wherein the traditional standards were followed—though not properly in Justice Sanders’ judgment.⁴² As discussed above, CRC presented largely unrebutted evidence of grossly inadequate return and donative intent, which if considered under the proper legal standard should have resulted in denial of CRRVP’s motion to dismiss the case.

IV. ATTORNEY FEES REQUEST UNDER RAP 18.1(b)

CRC is entitled to attorney fees to the extent CRC prevails in reinstating the OPMA claim. The OPMA at RCW 42.30.120(2) states that: “Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal

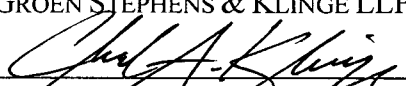
⁴² Justice Sanders also dissented in the other two stadium challenges, *CLEAN* and *Citizens for More Important Things*.

action.” The Supreme Court has made it clear that litigants that are successful on appeal are entitled to attorney fees and may be entitled to fees in the trial court as well. *Miller v. City of Tacoma*, 138 Wn.2d 318, 332 (1999) (citing *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 678 (1992)). Accordingly, CRC requests attorneys’ fees.

CONCLUSION

This case is not *King County*. There, the Legislature passed a law that specifically authorized the complicated financial arrangements to build the stadium. The opponents and Justice Sanders disagreed with the result and/or the machinations that allowed the Mariners to rent a publically owned stadium. But, this case is not that case. The Port sold a parcel of land to a pre-selected buyer and gave them a sweetheart deal. In doing so, the Port “was not acting prudently, knowledgably, and for self-interest” contrary to the actions of any normal property owner, let alone a fiduciary. As a result, the taxpayers in the Port District lost over \$165,000. This Court should reinvigorate the gift clause or otherwise remedy this egregious abuse of power.

RESPECTFULLY submitted this 13th day of September, 2013.

GROEN STEPHENS & KLINGE LLP
By: 
Charles A. Klinge, WSBA #26093
W. Forrest Fischer, WSBA #44156
Attorneys for Appellant

DECLARATION OF SERVICE

I, W. Forrest Fischer, declare as follows pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On September 13, 2013, I caused the foregoing document to be served on the following persons via the following means:

Attorneys for Port of Woodland and Commission of the Port of Woodland:

Earl W. Jackson
Jackson, Jackson & Kurtz, Inc., P.S.
704 E. Main St., Ste. 102
P.O. Box 340
Battle Ground, WA 98604

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail:
- Other:

Attorneys for CRRVP LLC:

Robert G. Casey
Terrence J. Donahue
Chrystina R. Solum
Eisenhower Carlson PLLC
Wells Fargo Plaza
1201 Pacific Ave., Suite 1200
Tacoma, WA 98402

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail:
- Other:

David C. Ponzoha, Court Clerk
Court of Appeals, Division II
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail:

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

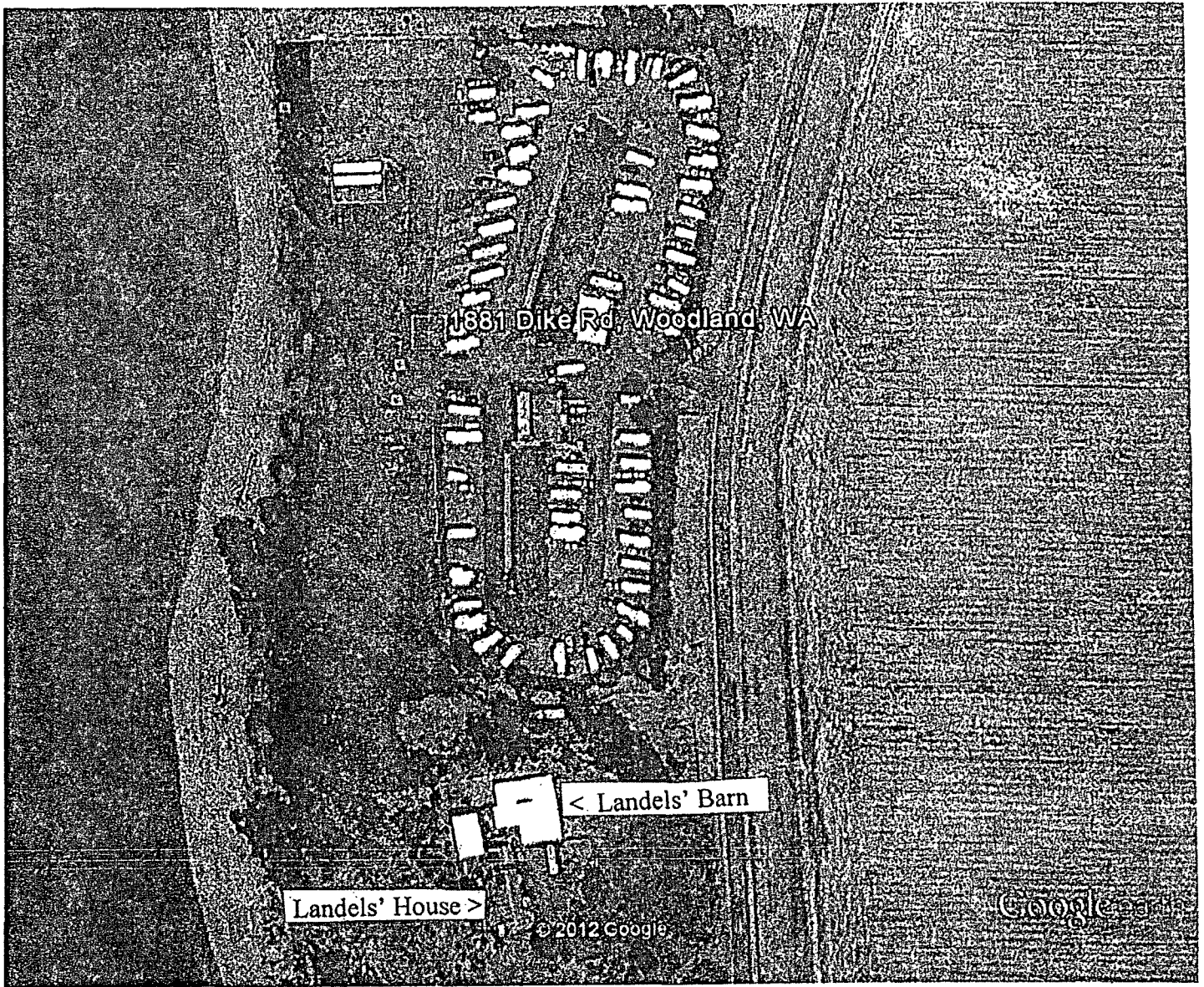
Executed this 13th day of September, 2013 at Bellevue, Washington.


W. Forrest Fischer

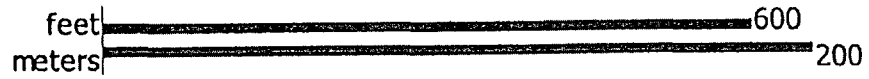
Appendix A

Columbia River Carbonates v. Port of Woodland et al. No. 44942-1-II

September 13, 2013



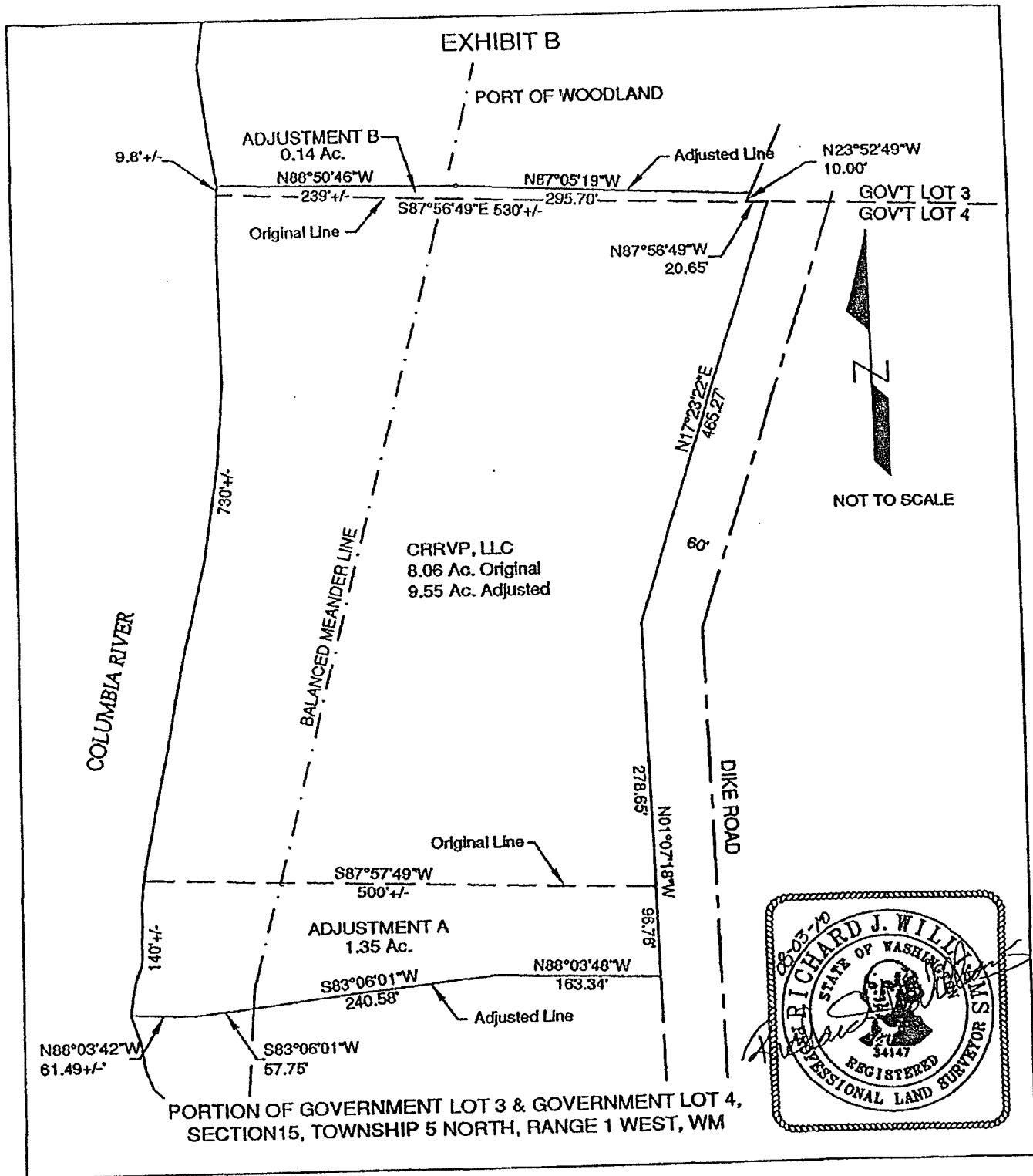
Google earth



Appendix B

Columbia River Carbonates v. Port of Woodland et al. No. 44942-1-II

September 13, 2013



Appendix C

Columbia River Carbonates v. Port of Woodland et al. No. 44942-1-II

September 13, 2013

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

SUPERIOR COURT OF WASHINGTON
FOR COWLITZ COUNTY

MICHAEL J. LANDELS; and COLUMBIA
RIVER CARBONATES, a general partnership,

Plaintiffs,

vs.

PORT OF WOODLAND, a Municipal
Corporation; PORT COMMISSION OF THE
PORT OF WOODLAND; and the CRRVP LLC,
a Washington Limited Liability Company,

Defendants.

No. 12-2-00304-2

**DECLARATION OF ROBERT W.
CHAMBERLIN**

I, Robert W. Chamberlin, declare the following:

1. I am competent to be a witness in this matter and have personal knowledge of the facts stated herein.

2. I have a Bachelor's degree in Political Science/Education from the University of Washington. I have over 35 years of experience. I have testified in 5 different county superior courts (King, Snohomish, Pierce, Clark, and Clallam). I was also the Review Appraiser for the Port of Seattle – Sea Tac 3rd Runway Acquisition. During that project, I

1 reviewed, and helped acquire, over 700 properties. With this background and experience, I
2 am intimately familiar with the real estate appraisal process and guidelines. My experience
3 and qualifications are described in greater detail in my *curriculum vitae*, a true and correct
4 copy of which is attached hereto as Exhibit 1. As a State-Certified Residential Real Estate
5 Appraiser in the State of Washington, I am authorized to prepare appraisals on residential
6 property of one to four units and on nonresidential property valued at less than \$250,000, and
7 thus am certified to provide this appraisal review. This Declaration contains my expert
8 research, analysis, and conclusions.

9 3. I conducted a thorough desk review of the appraisal conducted by Dan West of
10 North by West Real Estate Appraisals. I also reviewed the declaration of Mike Landels as
11 well as Cowlitz County Assessor data pertaining to Mr. Landels sale of property to Columbia
12 River Carbonates for \$500,000. I reviewed the above documents in order to provide my
13 expert analysis of the appraisal by Dan West. My analysis of this appraisal is as follows:

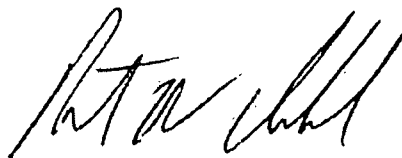
14 4. In my professional opinion, Mr. West's appraisal is faulty, contains misleading
15 information, and is altogether not a credible report. What undermines Mr. West's report is his
16 analysis of real estate comparables. In his appraisal, Mr. West stated that there were no sales
17 or listings available that clearly represented the lower limit of value. Relying on this
18 reasoning, he included prior sales of recreational or wetland habitat land which he claimed
19 sold from 5 cents to 20 cents per square foot. Mr. West did not identify these lands or justify
20 his use of them. They were not consistent with the highest and best use identified in Mr.
21 West's appraisal. It was only after considering these sales was he able to reach his \$1.00 per
22 square foot valuation. In my expert opinion, recreational and wetland habitat sales are
23 irrelevant to the property subject to the Dan West appraisal. Therefore, using these lands as

1 the lower limit of value, severely undermines the credibility and reliability of the Dan West
2 appraisal.

3 5. Mr. West also stated that 8 of the 9 comparables he reviewed each indicated
4 the upper range in value for the subject property. Seven of the nine sales indicated a value
5 greater than \$2.00 per square foot. However, stating that these properties were the upper
6 range in value is unsound and misleading. The sale directly south of the subject property at
7 \$500,000 for 3+ acres also reflects the degree that the West appraisal undervalued the subject
8 property.

9 6. Ultimately, there are no plausible explanations for a \$1.00 per square foot
10 value contained within the Dan West appraisal. Again, in my professional opinion developed
11 over 35 years of experience, the Dan West appraisal is fatally flawed and does not reflect the
12 true value of the appraised property.

13 I declare under penalty of perjury under the laws of the State of Washington that the
14 foregoing is true and correct and was executed by me this 16th day of July, 2012 at Winthrop,
15 Washington.

16
17
18
19


20 Robert W. Chamberlin
21 State-Certified Residential
22 Real Estate Appraiser No. 1701254
23

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

EXHIBIT 1

QUALIFICATIONS

ROBERT W. CHAMBERLIN

Experience

- Real Estate Appraisals: Full spectrum of individual residential appraisals up to \$80,000,000.
- Property Tax Analysis: Preliminary value consultation, appraisals, and Board of Equalization/State Board presentations for tax appeals.
- Litigation: Preliminary consulting, appraisal, court testimony.

History

- 1983-Present: Senior Associate with *Allen Brackett Shedd (formerly Bruce C. Allen & Associates, Inc.)*
- 1979 to 1983: Associate with Eastman & Allen, Real Estate Appraisers
- 1968-1994: Owner, Regional Service Company; evaluation of residential real estate for insurance companies.
- 1967: Underwriter, Allstate Insurance Company; underwriter of homeowner's policies.
- 1966: High School Teacher; Grandview, Washington

Education

- 1965: Graduate, University of Washington, B.A. degree, Political Science/Education

Court Testimony

- Qualified as Expert Witness: Park Avenue v. Buchan Construction
- Superior Court Testimony: King, Snohomish, Pierce, Clallam, and Mason Counties
- Additional Jurisdictions: United States Bankruptcy Court
Washington State Board of Tax Appeals
King County Board of Equalization
Pierce County Board of Equalization
Okanogan Board of Equalization

Client List

- Port of Seattle
- City of Bellevue
- Rodgers Deutsch & Turner
- Short Cressman Burgess
- Tousley Brain Stephens
- Hartford Insurance
- King County Prosecutors Office
- Weyerhaeuser Real Estate Corp.
- Fee appraising for individuals
- City of Seattle, Attorney's Office
- City of Seattle, Attorney's Office
- City of Sammamish -
- Danielson, Harrigan & Tollefson
- Trust for Public Lands
- K & L Gates -
- Weyerhaeuser Company
- Methow Conservancy -
- Pierce County Prosecutor's Office

ROBERT W. CHAMBERLIN (cont.)

Attorneys/Litigation/Mediation/Consultation

Christopher Brain, *Tousley Brain Stephens*
Bart Freedman, *Preston Gates & Ellis*
Linda Ebberson, *Lasher Holzapfel Sperry & Ebberson*
Earl Lasher, *Lasher Holzapfel Sperry & Ebberson*
Cassandra Newell, *King County Prosecutor's Office*
Mike Rodgers, *Rodgers Deutsche & Turner*
Isabel R. Safora, *Port of Seattle*
Kelly J. Sweeney, *Liberty Mutual*
Stephen Todd, *Todd & Wakefield*
Brian Armsbury
Barbara Bollero
Earl Bravo
Alice Brown
Kimberly Burrows
Chris Carletti
Matt Davis
Natalie de Maar

John Demco
Janet George
William Gibbs
Amber Hardwick
Dirk Holt
Steve Larson
David Law
John Wiegenstein
Rose McGillis
George Mix
Janet Nelson
Robert Ordal
Stella Pitts
Sean Small
Whitney Smith
Kim Stephens
Gregg Ursich

Major Projects

Review Appraiser. Port of Seattle – SeaTac 3rd Runway Acquisition - 700 Property Acquisitions

State Certification No. – Residential: 27017-1701254
(Revised 04/18/12)

Expiration: 02/22/14

Appendix D

Columbia River Carbonates v. Port of Woodland et al. No. 44942-1-II

September 13, 2013

SUPERIOR COURT OF WASHINGTON
FOR COWLITZ COUNTY

MICHAEL J. LANDELS; and COLUMBIA
RIVER CARBONATES, a general partnership,

Plaintiffs,

vs.

PORT OF WOODLAND, a Municipal
Corporation; PORT COMMISSION OF THE
PORT OF WOODLAND; and the CRRVP LLC,
a Washington Limited Liability Company,

Defendants.

No. 12-2-00304-2

DECLARATION OF DARIN A. SHEDD

I, Darin A, Shedd, declare as follows pursuant to GR 13 and RCW 9A.72.085:

1. I am a United States citizen over the age of twenty-one, have personal knowledge of the facts stated herein and am competent to testify to the matters stated in this Declaration.

2. I am Senior Managing Director of Valbridge Property Advisors (Allen Brackett Shedd, a national real estate appraisal and consulting company, working from our Bellevue and Tacoma offices.

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

1 3. Qualifications. I am a Certified General Real Estate Appraiser, State of
2 Washington, License No. 27011-1100566, first issued in 1997, and that classification applies to
3 the appraisal of all types of property. I received my Member Appraisal Institute (MAI)
4 certification and designation in 2000. As an appraiser and consultant I have completed many
5 complex appraisal assignments including commercial, office, retail, and industrial warehouse
6 real estate, railroads, subdivisions, master planned community developments, marinas, piers
7 and tidelands, wetlands and sensitive area properties, gravel pits and rock quarries, transfer of
8 density credits, and railroad right-of-ways. I also have experience in employment with a civil
9 engineering and surveying firm and an associate with a real estate law firm. I have a Bachelor
10 of Arts degree from the University of Washington 1987 and a Juris Doctor degree from the
11 University of Puget Sound School of Law (1991). With this background and experience, I am
12 intimately familiar with the real estate appraisal process and guidelines, real estate
13 transactions, and selling of real estate. My experience and qualifications are described in
14 greater detail in my *curriculum vitae*, a true and correct copy of which is attached as Exhibit
15 1. I have also provided expert testimony in over 20 separate court proceedings related to
16 property valuation and real estate consulting. This Declaration contains my expert research,
17 analysis, and conclusions.

18 4. Background Research. I was retained to provide appraisal services in
19 conjunction with this lawsuit. I prepared an appraisal of subject property located between 1881
20 Dike Road (Columbia Riverfront RV Park) and 1901 Dike Road, near Woodland, Washington.
21 The subject property is the parcel of land that the Port of Woodland transferred to CRRVP, LLC,
22 by quit claim deed recorded on June 14, 2011. I have also reviewed the two other appraisals and
23 the broker's price opinion related to the subject property. I have also reviewed deposition

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

1 transcripts and documents related to this lawsuit. A listing of the materials that I had available
2 for my review is attached as Exhibit 2.

3 5. Appraisal of Subject Property. I completed the investigation and research
4 necessary to appraise the subject property and prepared a Restricted Use Appraisal Report dated
5 February 28, 2013. My appraisal conformed to the requirements of the Code of Ethics and
6 Standards of Professional Appraisal Practice of the Appraisal Institute, which include Uniform
7 Standards of Professional Appraisal Practice (USPAP).

8 6. As of June 14, 2011, it is my opinion that the fair market value of the subject
9 property was \$206,000. The reasons and basis for this conclusion are summarized as follows.

10 7. The subject property was previously identified as tax parcel WP1503006 (now
11 merged into parcel WP1503003). Because the subject is undeveloped land, the scope of my
12 appraisal was based on the Sales Comparison Approach. In appraising the subject property, I did
13 the following: (1) Inspected the subject property; (2) Researched CoStar, Metroscan, CBA, and
14 Cowlitz County databases; (3) Researched Valbridge |Allen Brackett Shedd's existing database;
15 (4) Confirmed all comparable sales with buyers, selling agents, and/or public records; and, (5)
16 Reviewed all documents as cited throughout this report. The subject property is a parcel of 1.35
17 acres in size (58,806 square feet) abutting the west side of Dike Road and the east side of the
18 Columbia River. Public sewer and water are not available and any development would require a
19 well and septic system. The subject is zoned Heavy Industrial (HD) by Cowlitz County. The
20 property was undeveloped.

21 8. I determined that the highest and best use of the subject property is for water
22 dependent industrial use consistent with the existing industrial zoning designation, either
23 developed as a stand-alone tract or pursuant to assemblage with an adjacent parcel. The Sales

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

1 Comparison Approach analyzes sales and listing activity of similar sites for comparison to the
2 subject. I completed a search for industrial sites similar to the subject property throughout the
3 subject area. The most pertinent sales were six properties with the indicated unadjusted price
4 on a square foot basis as follows: (1) 1951 Schurman Way, Woodland, \$2.63 per square foot;
5 (2) 1356 Down River Drive, Woodland, \$3.88 per square foot; (3) 146 Industrial Way,
6 Woodland, \$3.71 per square foot; (4) 1901 Dike Road, Woodland, \$3.06 per square foot; (5)
7 Port of Saint Helens, Oregon, \$3.00 to \$3.50 per square foot; and, (6) Port of Kalama,
8 Washington, \$2.70 per square foot. The analyses of these Comparable Sales are set forth on
9 an Industrial Sales Summary Chart and the summary of adjustments are set forth on an
10 Industrial Sales Adjustment Chart attached as Exhibits 3 and 4. The sales after adjustment for
11 inferior and superior characteristics indicate a value above \$3.06 per square foot (Sale 4) and
12 below \$3.71 (Sale 3) per square foot. Overall, considering each sale and the adjustments
13 necessary for comparison, a value of \$3.50 per square foot is concluded, which results in an
14 opinion of market value on June 14, 2011, of \$205,821 (58,806 square feet @ \$3.50 per
15 square foot) or rounded to \$206,000.

16 9. Sale Does Not Represent A Sale For Market Value. I completed the
17 investigation and research necessary to provide my opinion about the sale of the subject property
18 from the Port of Woodland to CRRVP, LLC. In particular, I reviewed the deposition transcripts
19 of Nelson Holmberg, Jay Pyle, Shirley Temming, and others. In addition, I prepared a Review
20 Appraisal Report dated November 26-29, 2012, of the Summary Appraisal Performed by North
21 by North West Real Estate Valuations, David West, Appraiser, with a date of value as of
22 December 6, 2010 (West Appraisal). The Review Appraisal Report conformed to the
23 requirements of the Code of Ethics and Standards of Professional Appraisal Practice of the

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

1 Appraisal Institute and the Uniform Standards of Professional Appraisal Practice (USPAP). I
2 also reviewed the deposition transcript of Daniel West.

3 10. In my opinion, the sale of subject property from the Port of Woodland to
4 CRRVP, LLC, does not represent a sale for market value. The sale price of \$44,000 was for
5 both the subject property and the parcel to the north (which the West Appraisal valued at
6 \$6,100). The reasons and basis for this conclusion are summarized as follows:

7 11. The Executive Director of the Port of Woodland during the relevant time
8 period was Nelson Holmberg. Mr. Holmberg was the lead person for the Port in the sale to
9 CRRVP and provided the recommendation to sell the property to the Port Commission. Mr.
10 Holmberg's actions did not represent those of a seller seeking market value. Market value is
11 defined as:

12 The most probable price, as of a specified date, in cash, or in terms
13 equivalent to cash, or in other precisely revealed terms, for which the
14 specified property rights should sell after reasonable exposure in a
15 competitive market under all conditions requisite to a fair sale, with
16 the buyer and seller each acting prudently, knowledgeably, and for
self-interest, and assuming that neither is under undue duress. (From
The Appraisal of Real Estate, Thirteenth Edition, 2008, Appraisal
Institute, page 23).

17 12. My conclusion is based on the following. First, the property was never listed
18 or exposed on the open market and competitive bids were never sought. There was simply a
19 one sided discussion with one potential abutting purchaser. The abutting property owners to
20 the south, Landels and CRC, were never contacted even though the West appraisal indicated
21 to Mr. Holmberg that assemblage with abutting owners was the highest and best use. A
22 competitive market requires exposure to more than one potential buyer, and absent exposure
23

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

1 to all potential buyers, the transaction does not meet the market value definition and does not
2 represent a sale for market value.

3 13. Secondly, the seller in this case was not acting prudently, knowledgably, and
4 for self-interest. A prudent seller would have actively marketed the property to all potential
5 purchasers, and would have had knowledge of the potential buyers and what they were willing
6 to pay. It was in the Port's self-interest to seek competitive bids and obtain the highest
7 possible value for the property. In this case, Mr. Holmberg was unaware that one of the
8 abutting owners, CRC, had previously expressed interest to the Port in purchasing the
9 property. He was, however, told by other Port Commissioners in February 2011 that CRC
10 had purchased the abutting property for industrial development, and he committed to
11 contacting CRC based on Commissioner Boon's suggestion that CRC might want to purchase
12 the property. Mr. Holmberg subsequently met with CRC and discussed its plans for a marine
13 terminal, but failed to disclose that the subject property was available, or ask about CRC's
14 interest in the property. Mr. Holmberg, by his own admission, specifically did not talk to CRC
15 or Landels about the subject property and admitted "I didn't do it, and failed to do my job on
16 that one."

17 14. Next, Mr. Holmberg appears to have based the sale to CRRVP on the faulty
18 West Appraisal. The West Appraisal is dated March 11, 2011, and was received after the
19 February Port Commission meeting where Mr. Holmberg learned that CRC had purchased the
20 adjacent property. This was a February 2010 sale of an abutting, similarly zoned property
21 which Mr. Holmberg knew about. Inexplicably, it was not mentioned in the West Appraisal
22 and not utilized as a comparable sale to the Port parcel. Mr. Holmberg reviewed the appraisal
23 and went back to Mr. West with questions about his comparable sales, but nowhere does it

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

1 appear he asked about why the sale of the adjacent property was not utilized as a comparable.
2 This sale at \$3.06 per square foot for a larger site was clearly relevant and provided the most
3 comparable sale available. Mr. Holmberg's failure to determine the details of this sale or
4 question the appraiser regarding its non-use were not the actions of a seller acting prudently,
5 knowledgably, or in its self-interest. The transaction does not meet the definition of a sale for
6 market value absent a seller acting knowledgably and in its best interest, factors clearly not
7 evident in this sale.

8 15. Finally, there appears to have been a deduction of \$17,000 for cleanup costs
9 incurred by CRRVP while leasing the subject property. This deduction does not seem
10 appropriate or reasonable as the low lease rates of \$50 per year is a nominal lease rate for a
11 property which Mr. Holmberg accepted to be worth about \$56,000 (\$65,000 less the value of
12 the north parcel and Mr. Holmberg's reduction for lack of sewer and water). Typical land
13 lease rates are 6% to 10% of underlying fee value indicating a market rent of at least (using
14 6%) \$3,360 per year. The low lease rate arguably reflects the tenant's (CRRVP)
15 responsibility for cleanup and maintenance of the premises, and an additional deduction from
16 the sales price does not appear appropriate as it double compensates for the cleanup cost
17 already paid for in the below market land lease rate. This conclusion is supported by the lease
18 terms which provide that the tenant is responsible for property maintenance.

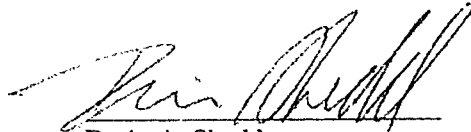
19 16. In his deposition, Mr. West subsequently stated reasons for not including the
20 sale from Landels to CRC and for severely discounting the values indicated in his comparable
21 sales. His reasons are flawed. The CRC property, like the subject property, is uniquely
22 located on the Columbia River. The site is zoned Heavy Industrial allowing use of the
23 property for water dependent purposes, such as the marine terminal proposed by CRC.

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

1 Development of the site, like most riverfront sites, will require mitigation of environmental
2 impacts. The price paid by CRC reflects these conditions and supports a higher value for the
3 subject property than stated in the West Appraisal.

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

6 Executed by me this 30th day of April, 2013 at Forest, Washington.

7
8 
9 Darin A. Shedd

10
11
12
13
14
15
16
17
18
19
20
21
22
23

GROEN STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004
(425) 453-6206

EXHIBIT 1

QUALIFICATIONS

DARIN A. SHEDD, MAI

Experience

Principal of *Allen Brackett Shedd*. Engaged in the real estate field since 1987. Obtained MAI designation in 2000. Appraisal experience includes a wide variety of complex appraisal assignments including commercial, office, retail, and industrial warehouse real estate, railroads, subdivisions, master planned community developments, marinas, piers and tidelands, wetlands and sensitive area properties, gravel pits and rock quarries, transfer of density credits, and railroad right-of-ways. Real estate experience also includes employment with a civil engineering and surveying firm and an associate with a real estate law firm.

Education

MAI, Appraisal Institute (2000)
J.D., University of Puget Sound School of Law (1991)
B.A., University of Washington (1987)

Organizations

MAI: Appraisal Institute
Member: International Right-of-Way Association

Representative Client List

Government

Bonneville Power Administration	City of Tukwila
City of Bellevue	City of University Place
City of Bonney Lake	General Services Administration
City of Bothell	Internal Revenue Service
City of Des Moines	King County Open Space
City of Edgewood	Pierce County Facilities Management
City of Federal Way	Pierce County Parks and Recreation
City of Fircrest	Pierce County Public Works
City of Kent Parks & Recreation	Port of Seattle
City of Kirkland	Port of Olympia
City of Lacey	Bethel School District
City of Olympia	Renton School District
City of Mercer Island	Seattle Public School District
City of Puyallup	Sumner School District
City of Redmond Parks	Snohomish County Public Works
City of Renton	SoundTransit
City of Seattle Parks	State Department of Natural Resources
City of Sumner	State Department of Transportation
City of Tacoma	Tacoma Public Utilities

Financial

Cascade Community Bank
Frontier Bank
Redmond National Bank
Timberland Bank
Towne Bank
U.S. Bancorp
Union Bank
Central Pacific Bank

Engineers

CH2MHill
ESM, Inc.
Gray & Osborne
HDL
Kato & Warren
Parametrix
Pertect Engineering
HDR/Pharos Corporation
Certified Land Services
Universal Field Services
David Evans & Associates

DARIN A. SHEDD, MAI (cont.)

Attorneys-at-Law

Burgess Fitzer
Cairncross & Hemplemann
City of Tacoma (City Attorney's Office)
Foster, Pepper & Shefelman
Gordon Thomas Honeywell
Graham & Dunn
Hanson, Baker & Ludlow
Jameson, Babbit, Stiles & Lombard
K & L Gates

Marten & Brown
Mosler Schermer Wallstrom et al
Perkins Coie Brown & Bain
Pierce County Prosecutors Office
Rodgers, Deutsch & Turner
United States Attorney General
VSI Law Group
Washington State Attorney General
Williams, Kastner & Gibbs

Private Sector List

Alderbrook Resort
Aoki Corporation
Campbell Properties
Cascade Land Conservancy
Cascadia Development Corp.
Enumclaw Community Hospital
Gull Industries
Indian Summer Partnership
Lone Star Cement
MAS Resources
Newland Communities

Patriots Landing
Petrich Marine Dock
Puget Sound Energy
Rabanco Company
Saint Martins Abbey
Seattle Art Museum
Sovran, Inc.
Vicwood Development
Weyerhaeuser
Williamson & Deposit
Woosley Properties

Appraisal assignments include work throughout the Puget Sound Region, including King, Pierce, Thurston, Snohomish, Lewis, Kitsap, Mason, Jefferson, Whatcom, and Skagit Counties.

Court Cases with Deposition and/or Trial Testimony

State v. Tacoma Screw Products, Inc.
Carney v. Nickerson
Cullen v. City of Tukwila (Trial)
State v. Croppi
State v. Gorney
Pierce County v. Austin Olson Holberg
Self-Storage
City of Federal Way v. David Rhodes et al
Humphreys Industries v. Clay Street Assoc.
(Trial)
Harmon v. State of Washington
Wombax Homes v. Big Sky Estates
Skillen v. State of Washington
State v. McEvoy Brothers Petroleum
In re: Dexter Dist. Corp. et al (Trial)

Sound Transit v. Evans
Sound Transit v. Holgate Properties (Trial)
Sound Transit v. Anderson/Kellis

Pierce County Cause No. 02-2-06316-6
King County Cause No. 01-2-34527-3SEA
King County Cause No. 01-2-09152-2KNT
King County Cause No. 02-2-31376-1KNT
King County Cause No. 03-2-00239-9KNT

Pierce County Cause No. 05-2-05290-8
King County Cause No. 06-2-01388-3KNT
King County Cause No. 05-2_20201-7SEA

Pierce County Cause No. 06-2-12918-6
Pierce County Cause No. 06-2-085669
Pierce County Cause No. 06-2-11639-4
Whatcom County Cause No. 07-2-02141-4
US District Court Arizona,
Case No. 2-03-bk-03546-RJH
Pierce County Cause No. 08-2-14854-3
Pierce County Cause No. 09-2-07396-7
Pierce County Cause No. 08-2-14853-4

DARIN A. SHEDD, MAI (cont.)

State v. Booth
Crawford v. WSDOT (Trial)
Sound Transit v. Tacoma Self Storage
(Trial)
Port of Seattle v. Williams (Trial)
Sound Transit v. Tacoma Rescue Mission
(Trial)
State of Washington v. Stoskopf

Sound Transit v. Elephant Car Wash

Fairweather Basin (Fisher, et. all)
v. WSDOT (Trial)

State Certification Number - General:
Expiration:

Pierce County Cause No. 09-2-06774-6
King County Cause No. 09-2-14400-1 SEA
Pierce County Cause No. 10-2-10030-5

King County Cause No. 09-2-41290-1 KNT
Pierce County Cause No. 10-2-09856-4

Thurston County Cause No. 10-2-00616-5

Pierce County Cause No. 11-2-14280-4

King County Cause No. 11-2-21568-7SEA

27011-1100566
01/24/13

(Revised 09/18/12)

EXHIBIT 2

MATERIALS PROVIDED TO DARIN SHEDD, MAI

Depositions & Exhibits

The following deposition transcripts and associated exhibits were provided to Mr. Shedd for:

1. Holmberg, Nelson
Word Index
Exhibits 1 - 27
2. Jones, June
Word Index
Exhibits 28 – 29
3. Hickok, Robert
Word Index
Exhibits 28 - 20
4. Pyle, Jay
Word Index
Exhibits 35 - 36
5. Temming, Shirley
Word Index
Exhibits 32 – 34
6. West, Daniel
Word Index
Exhibits 1 – 13

Miscellaneous Communications and Correspondence

Mr. Shedd was provided various communications and correspondence.

Property Documents

The following documents were provided to Mr. Shedd:

1. Summary Appraisal Report, prepared by Daniel West of North by West
2. Appraisal of Real Property, prepared by Integra Realty Resources
3. Woodland Real Estate's Opinion, prepared by Broker June Jones
4. Declaration of Michael J. Landels, dated July 16, 2012
5. Affidavit of Shirley M. Temming, dated June 12, 2012
6. Copy of the Complaint filed in CRC et al v. CRRVP LLC et al., No. 12-2-00304-2

7. Lease of Subject Property between Port and CRRVP, beginning on July 1, 2007
8. 3 drafts of the Subject Property Lease, Parcel #WB1503002
9. Subject Property Lease
10. "Exhibit C," Right of First Refusal to Purchase Real Estate for Subject Property, dated 12-16-2008
11. Port Meeting Presentation, 6-18-2009, re-amending Subject Property lease.
12. CRRVP, LLC Real Estate Purchase and Sale Agreement for Subject Property, dated 3-3-2010
13. CRRVP Real Estate Purchase and Sale Agreement, (Including Addendum 1), dated 4-22-2010
14. Letter from CRRVP to Nelson Holmberg & Commissioners, re: Property Value dated 4-23-2010. Attached is copy of Order of the Cowlitz Co. Brd of Equalization – assessment of Parcel #WB1503003; dated 4-23-2010
15. Letter from Port attorney, Earl Jackson, to the Cowlitz Co. Dept. of Building & Planning; re: Boundary Adjustment, dated 5-18-2011
16. Letter from Greta Lavadour, Associate Planner with Cowlitz Co.'s Department of Building and Planning, dated 5-23-2011
17. Copy of \$44,000 check for purchase of property-south parcel, dated 5-9-2011
18. Quitclaim Deed for Parcels #WB1503002 (portion) and #WB1503996, dated 6-3-2011, signed by Port Commissioners Cline and Peterson
19. Letter from Earl Jackson to Nelson Holmberg re: CRRVP Deed with attached Real Estate Tax Affidavit, dated 6-20-2011
20. Letter of Transmittal from CRRVP to Nelson Holmberg re: copy of the recorded survey for the deed transfer and the quitclaim deed, dated 7-20-2011

Port Commission Meeting and Agendas

Mr. Shedd was provided with a copy of the following Port Commission Meeting agendas:

1. February 18, 2010
2. April 22, 2010
3. May 20, 2010
4. June 17, 2010
5. August 19, 2010
6. September 16, 2010
7. February 17, 2011
8. March 1, 2011
9. April 21, 2011
10. May 16, 2011
11. July 21, 2011
12. August 14, 2011

Port Commission Meeting Audio Transcripts

Mr. Shedd was provided with a copy of the audio transcripts of specific agenda items for the following Port Commission Meetings:

1. February 18, 2010 — Unfinished Business: Outstanding lease with CRRVP
2. April 22, 2010 — Unfinished Business: A.) CRRVP Update
3. May 20, 2010 — Unfinished Business: A.) CRRVP Update
4. June 17, 2010 — Unfinished Business: C.) CRRVP Update
5. August 19, 2010 — Unfinished Business: CRRVP Update
6. September 16, 2010 — Unfinished Business: A.) CRRVP Update
7. February 17, 2011 — Executive Director Report – CRRVP Update, Bullet Points 2 – 4
8. March 17, 2011 — Public Hearing to Discuss Action Item D, Surplus Property Directly South of 1881 Dike Road
9. April 21, 2011 — Action Item A.) Resolution to Surplus Property ; Action Item B.) Consider Sale of Surplus Property

Port Resolutions

Mr. Shedd was provided with a copy of the following Port Resolutions:

1. Resolution 358, dated February 19, 2009
2. Resolution 367, dated February 18, 2010
3. Resolution 378, dated March 17, 2011
4. Resolution 388, dated January 19, 2012

EXHIBIT 3

Industrial Sales Summary Chart

Property Comp Location	Date of Sale	Sale Price	Size Sq. Ft	Zoning	Gross Price per Sq. Ft.	Comments
1 1951 Schurman Way, Woodland 507870102	8/09	\$350,000	133,294	I-1	\$2.63	Sewer and water, wetlands, and access easement - 50% useable
2 1356 Down River Drive, Woodland 502450605	10/09	\$120,000	30,928	I-1	\$3.88	Sewer and water
3 146 Industrial Way, Longview 10132-34-37	3/12	\$550,000	148,104	H-1	\$3.71	Utilities, shop/office
4 1901 Dike Road, Woodland W131503004	2/10	\$500,000	163,350	MH	\$3.06	150-foot Riparian buffer
5 Port of Saint Helens Oregon	2011	\$130,680	43,560	I	\$3.00	Clearwater lease capitalized at 10%
	Asking	\$130,680/acre	1,742,400	I	\$3.00	40-acre riverfront site. Port sites leased at 10% land lease rate on \$3.00 to \$3.50 land
6 Port of Kalama Washington	Asking	\$117,600/acre	3,049,200	HI	\$2.70	70-acre riverfront site. Port sites leased at 10% land lease rate on \$2.70 per square foot AV land Gas and water utilities

EXHIBIT 4

Industrial Sales Adjustment Chart

Property Comp Location	Price/ sq. ft.	Market Conditions	Location	Land Size	Useable Area	Utilities	Riverfront	Bldg. Improvements	Total Indicators
1 1951 Schurman Way, Woodland 507870102	\$2.63	0	0	+	0	-	+	0	+
2 1356 Down River Drive, Woodland 502450605	\$3.88	0	0	-	-	-	+	0	--
3 146 Industrial Way, Longview 10132-34-37	\$3.71	0	0	+	-	-	+	-	-
4 1901 Dike Road, Woodland W131503005	\$3.06	0	0	+	0	0	0	0	+
5 Port of Saint Helens Oregon	\$3.00 to \$3.50	0	0	++	0	-	0	0	+
6 Port of Kalama Washington	\$2.70	0	0	++	+	-	0	0	++

Appendix E

Columbia River Carbonates v. Port of Woodland et al. No. 44942-1-II

September 13, 2013

Nelson Holmberg

From: jay@jpyle.net
Sent: Friday, October 15, 2010 10:42 AM
To: 'Nelson Holmberg'
Subject: RE: OCTOBER MEETING

Always on e-mail.

Actually, we are flying south this Sunday and returning Wednesday, then we drive south starting Saturday the 23rd and the surgery is Tuesday the 26th.

Then we go to the desert for the month of November and will be back here about the 6th of December.

Thanks,

Jay

-----Original Message-----

From: Nelson Holmberg [<mailto:nholmberg@portofwoodland.com>]
Sent: Friday, October 15, 2010 10:34 AM
To: jay@jpyle.net
Subject: RE: OCTOBER MEETING

Fair enough. And we're approaching the point where this should start being discussed in executive session anyway. Not there until we get the appraisals, but we're getting close.

Not sure if I've received the first one yet or not. I've been out of the office all week in Spokane for some training and a conference.

Will you be able to access email while you're traveling?

Thanks
-Nelson

-----Original Message-----

From: jay@jpyle.net [<mailto:jay@jpyle.net>]
Sent: Friday, October 15, 2010 10:31 AM
To: 'Nelson Holmberg'
Subject: RE: OCTOBER MEETING

I think that I'd prefer a Private update. Just to keep the chatter down.

Have you received the first Appraisal yet.

Jay

-----Original Message-----

From: Nelson Holmberg [<mailto:nholmberg@portofwoodland.com>]
Sent: Friday, October 15, 2010 10:01 AM
To: jay@jpyle.net
Subject: RE: OCTOBER MEETING

Good Morning Jay,

Thanks for letting me know. Sorry that we'll miss you on the 19th. Best of luck with your surgery.

We'll certainly be looking forward to hearing how it all turns out, and we'll be thinking about you.

All I planned to do in the CRRVP update was to let the commission know we've been working on the road to the north of your property, and that I expect to have the appraisals very soon. I would be happy to strike that update and have private conversations with the individual commissioners instead.

Thanks again, travel safely.

Best,
-Nelson

-----Original Message-----

From: jay@jpyle.net [mailto:jay@jpyle.net]

Sent: Friday, October 15, 2010 9:44 AM

To: Nelson Holmberg

Subject: OCTOBER MEETING

Nelson;

With the change to Tuesday the 19th for the October meeting we will not be able to attend as we will be out of town.

Additionally, we respectfully request that CRRVP, LLC and any discussions pertaining thereto no be part of the meeting agenda or conversations.

IF we can conclude the property issue in November, Shirley will fly in. We will be south for the month of November as my wing rebuild heals.

Best Regards,

Jay & Shirley

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 9.0.862 / Virus Database: 271.1.1/3198 - Release Date: 10/14/10

23:34:00

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 9.0.862 / Virus Database: 271.1.1/3198 - Release Date: 10/14/10

23:34:00

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 9.0.862 / Virus Database: 271.1.1/3198 - Release Date: 10/14/10 23:34:00